

# **Procurement Process Program**

of the

# **New River Transit Authority**

Adopted: \*\*/\*\*/\*\*\*\*

# PROCUREMENT PROCESS PROGRAM

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## **1. INTRODUCTION**

### **1.1 Background**

The Urban Mass Transportation Authority Act was enacted by the West Virginia State Legislature in 1969. By means of this Act the Legislature worked to address the absence of and inadequacies in urban mass transportation systems throughout the State. Section 8-27-4 of the Act provides that any municipality or county “may create an urban mass transportation authority” and that such authority is to be created by the governing body of the municipality or county by “ordinance or order.” The authorities created are public corporations and are not instrumentalities of the State of West Virginia, but rather are political subdivisions or departments of a municipal or county government.

The New River Transit Authority (NRTA) was created pursuant to the urbanized designation of the greater Beckley area encompassing portions of both Fayette and Raleigh Counties in 2012 per 2010 U.S. Census Bureau data. Because of the split county designation, a collaborative initiative by the Town of Fayetteville, City of Mount Hope, City of Oak Hill, City of Beckley, Town of Sophia, Fayette and Raleigh County Commission gave birth to the NRTA, created to serve as the recipient of 5307 funds for the urbanized area.

State and Federal regulations regarding procurement of goods and services are complex, detailed and often change to reflect changes in legislation. It is important, however, that local units of municipal and county governments conduct their procurement activities in a manner that is consistent with all pertinent Federal regulations. When a local unit of government contracts for and accepts funds from the Federal government it must also accept responsibility for maintaining oversight of the procurement process and assuring its Federal compliance.

### **1.2 Authority**

On March 11, 2004 the State Legislature amended the procurement authority of urban mass transportation authorities such as NRTA through amendment and reenactment of Section 8-27-23 of the West Virginia Code. This new legislation took effect on June 9, 2004. The full text of the new provision is set forth as Appendix 4.1.

### **1.3 Scope**

NRTA’s goal is that its procurement system will allow it to deliver on a timely basis the best value product or service while maintaining the public’s trust and fulfilling public policy objectives. This Procurement Manual is designed to assist and guide participants through the procurement process. It sets forth the policies and procedures for acquisition of supplies, equipment, services and materials and the construction of facilities by the New River Transit Authority.

This Manual implements the procurement authority granted to NRTA under the Urban Mass Transportation Act and other applicable procurement laws, rules, regulations, orders and policies that direct how NRTA may expend its funds. Guidance may also be found in the FTA Best Practices Procurement Manual, at: <http://www.fta.dot.gov/library/admin/BPPM/toc.html>.

#### **1.4 Organization & Responsibilities**

NRTA is organized as detailed in the organizational chart set forth as Appendix 4.2.

The Board of the NRTA is responsible for procurement procedures and should work together during the acquisition process. The NRTA is organized in a manner that transit services must be provided via third party contracting, as the organization does not anticipate employing more than two positions and does not have any permanent facilities at this time.

Because of the unique structure of the NRTA, management and finance responsibilities of the organization are delegated to a Manager, subject only to the Board of the NRTA. The Manager may delegate duties out to an administrative assistant, but remains the primary caretaker of the organization.

#### **1.5 Manual Contents**

This Manual has been divided into four sections:

Section 1 contains introductory materials.

Section 2 provides an overview of procurement requirements and a general procurement checklist.

Section 3 sets out a detailed explanation of the procurement process and rules. Its structure is based on the general checklist in Section 2.

Section 4 is an Appendix containing various resources referred to in earlier Sections, as well as model forms and contract clauses.

## **2. OVERVIEW OF PROCUREMENT REQUIREMENTS**

### **2.1 Conformance with Federal, State and Local Law**

NRTA's procurement procedures shall reflect applicable State and local laws and regulations, provided that the procedures conform to applicable Federal law. If there is no West Virginia law addressing a particular aspect of procurement, Federal contract law principles will apply.

## **2.2 Efficient and Economic Procurement**

NRTA shall provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. In this regard, NRTA shall consider consolidating or breaking out procurements to obtain a more economical purchase.

## **2.3 Intergovernmental Procurement Agreements**

To foster greater economy and efficiency, NRTA may enter into State and local intergovernmental agreements for procurement or use of common goods and services. When obtaining goods or services in this manner, NRTA shall ensure that all Federal requirements, required clauses, and certifications are properly followed and included.

## **2.4 GSA Schedules and Excess or Surplus Federal Property**

NRTA may acquire a broad range of information technology (IT) products and services by using the Cooperative Purchasing program of the General Services Administration (GSA), under which State and local governments and their “instrumentalities” may purchase such products and services directly from GSA Schedule 70 and numerous Corporate Schedule contracts. NRTA may also use Federal and, if it qualifies, State excess or surplus property in lieu of purchasing new equipment or property, if such use is feasible and reduces costs.

## **2.5 Value Engineering in Construction Contracts**

In order to create opportunities for cost reductions in contracts for larger construction projects, NRTA shall use value-engineering clauses. Value engineering is a systematic and creative analysis of each contract item or task to ensure that it is provided at the overall lowest cost.

## **2.6 Responsible Contractors**

NRTA shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

## **2.7 Written Record of Procurement History**

NRTA shall maintain records detailing the history of a procurement, including:

- 2.9.1 The rationale for the method of procurement;
- 2.9.2 Selection of contract type;
- 2.9.3 Reasons for contractor selection or rejection; and

2.9.4 The basis for the contract price.

## **2.8 Time and Materials Type Contracts**

NRTA shall use time and material type contracts only:

2.10.1 After a determination that no other type of contract is suitable; and

2.10.2 If the contract specifies a ceiling price that the contractor shall not exceed except at its own risk.

## **2.9 Protest Procedures**

NRTA shall use written protest procedures to handle and resolve disputes relating to procurements and in all instances disclose information regarding the protest to FTA. All NRTA protest decisions shall be in writing. A protester must exhaust all administrative remedies with the NRTA before proceeding with a protest in another forum.

## **2.10 Full and Open Competition**

Unless the requirements for sole-source procurement are met, NRTA shall conduct all procurement transactions in a manner providing full and open competition. Situations considered to be restrictive of competition include, but are not limited to:

2.13.1 Unreasonable requirements placed on firms in order for them to qualify to do business;

2.13.2 Unnecessary experience and excessive bonding requirements;

2.13.3 Noncompetitive pricing practices between firms or between affiliated companies;

2.13.4 Noncompetitive awards to any person or firm on retainer contracts;

2.13.5 Organizational conflicts of interest (where, because of other activities, relationships, or contracts, a contractor is actually or potentially unable to render impartial assistance or advice to NRTA, a contractor's objectivity in performing the contract work is or might be otherwise impaired, or a contractor has an unfair competitive advantage);

2.13.6 The specification of only a "brand name" product without listing its salient characteristics and not allowing "an equal" product to be offered; and

2.13.7 Any arbitrary action in the procurement process.

## **2.11 Geographic Preferences**

NRTA shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services if an appropriate number of qualified firms, given the nature and size of the project, compete for the contract.

## **2.12 Written Procurement Selection Procedures**

All NRTA solicitations shall:

- 2.15.1 Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured that does not contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.
- 2.15.2 Avoid detailed product specifications if at all possible.
- 2.15.3 Use a "brand name or equal" description only when an adequate specification or more detailed description cannot be provided and, in such cases, identify the minimum needs and clearly set forth those salient physical and functional characteristics of the brand name product in the solicitation.
- 2.15.4 Identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.

## **2.13 Pre-Qualification Criteria**

NRTA may use lists of prequalified persons, firms, or products that are current and include enough qualified sources to ensure maximum full and open competition. NRTA shall not preclude potential bidders/proposers from qualifying during the solicitation period, which is from issuance of the solicitation to its closing date.

## **2.14 Options**

NRTA may include options in contracts. An option is a unilateral right in a contract by which, for a specified time, NRTA may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract. If NRTA chooses to use options, the requirements below apply:



2.17.1 *Evaluation of Options:* The option quantities or periods contained in the contractor's bid or offer must be evaluated in order to determine contract award. When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement.

2.17.2 *Exercise of Options:* The exercise of an option must be in accordance with the terms and conditions of the option stated in the initial contract awarded. An option may not be exercised unless the grantee has determined that the option price is better than prices available in the market or that the option is the more advantageous overall at the time the option is exercised.

## **2.15 FTA-Required Clauses**

NRTA shall include all FTA required clauses in the procurement process. In the event of a conflict, FTA requirements control.

## **2.16 No Federal Obligation**

The Federal Government is not subject to liability for NRTA-conducted procurement activities.

## **2.17 Suspension & Debarment**

A contractor who has been debarred from Federal government contracts cannot participate in a NRTA procurement.

## **2.18 Bonding Requirements**

For construction contracts over \$100,000, NRTA shall meet FTA-accepted local bonding requirements.

## **2.19 Progress Payments**

Progress payments are not allowed unless NRTA has obtained title or possession of the property or taken alternative steps to protect NRTA's interest.

## **2.20 Testing of Buses**

If NRTA is purchasing a bus, it shall make a determination that the bus has been tested as required prior to the expenditure of FTA funds. If the bus model does not require testing, the NRTA must obtain a certification from the *manufacturer* (not the vehicle dealer) that the bus does not need to be tested.

## 2.21 General Procurement Checklist:

### **INITIATING THE PROCUREMENT PROCESS**

- \_\_\_\_\_ Determine Object and Scope of the Procurement
- \_\_\_\_\_ Identify Who Needs to be Involved
- \_\_\_\_\_ Plan The Procurement Process
- \_\_\_\_\_ Conduct Market Research/Develop Independent Cost Estimate
- \_\_\_\_\_ Decide on the Method of Procurement

### **PREPARING THE PROCUREMENT PACKAGE**

- \_\_\_\_\_ Convene Procurement Committee
- \_\_\_\_\_ Identify Required Procurement Packet Elements
- \_\_\_\_\_ Assemble Procurement Packet Elements
- \_\_\_\_\_ Develop Evaluation Process and Criteria

### **CONDUCTING THE PROCUREMENT**

- \_\_\_\_\_ Finalize Draft of Procurement Packet
- \_\_\_\_\_ Advertise And Notify Potential Bidders/Proposers
- \_\_\_\_\_ Conduct Pre-Bid or Pre-Proposal Conference (Optional)
- \_\_\_\_\_ Set Bid/Proposal Deadline and Acceptance

### **PRE-AWARD REVIEW AND SELECTION PROCESS**

- \_\_\_\_\_ Re-Convene Procurement Committee
- \_\_\_\_\_ Review Evaluation Process and Criteria
- \_\_\_\_\_ Evaluate Bids/Proposals/Conduct Cost or Price Analysis
- \_\_\_\_\_ Comply with Documentation Requirements
- \_\_\_\_\_ Notify Successful and Unsuccessful Bidders/Proposers
- \_\_\_\_\_ Conduct Debriefings (If Applicable)
- \_\_\_\_\_ Handle Protests (If Applicable)

### **ALTERNATIVE PROCUREMENT PROCEDURES**

- \_\_\_\_\_ Blanket Purchase Agreements
- \_\_\_\_\_ Cooperative Purchasing through GSA Schedules
- \_\_\_\_\_ Federal Excess Personal Property
- \_\_\_\_\_ Sole Source or Limited Procurement

### **POST-AWARD AND POST-DELIVERY ACTIVITIES**

- \_\_\_\_\_ Monitor Contractor Activities (If Applicable)
- \_\_\_\_\_ Post-Delivery Inspection of Capital Equipment Purchases
- \_\_\_\_\_ Conduct Post-Delivery Audit of Capital Equipment

### **3. PROCUREMENT PROCESS DETAILS**

#### **3.1. Initiating the Procurement Process**

##### **3.1.1 Determine Object and Scope of the Procurement**

The first step of the procurement process is determining the scope of the procurement. Clearly Stated goals will allow effective decision-making regarding the scope of the procurement and what and how much to purchase. Once the goals of the procurement are clear, detailed specifications and a Procurement Packet can be developed.

##### **3.1.2 Identify Who Needs to be Involved**

3.1.2.1 *Internal Agency Involvement:* It is important to identify who will be involved as early as possible in the procurement process. Attention to this issue will facilitate the overall process and save time in the long term. Depending on the type of procurement being considered, it may be reasonable that the members of the Board of the organization handle the process internally.

3.1.2.2 *External Resources:* Outside help may be required. This could include legal or other technical assistance in writing specifications and/or assuring bidder compliance with State, Federal or local regulations.

##### **3.1.3 Plan the Procurement Process**

The Board should meet to plan the steps in the procurement process. In this meeting, they should:

3.1.3.1 Assign specific responsibilities to each Board member;

3.1.3.2 Review advertising policies for solicitation or publication of notices;

3.1.3.3 Review local, State and Federal government requirements;

3.1.3.4 Establish a communication and reporting process for the working group; and

3.1.3.5 Decide on the method of procurement. See Selection of Procurement Type Flowchart set forth as Appendix 4.3.

##### **3.1.4 Conduct Market Research**

In order to help determine the method of procurement best suited to a given procurement, NRTA must conduct market research appropriate to the circumstances of the acquisition

and use the results to determine whether and to what extent sources capable of satisfying the requirements exist. Techniques for conducting market research may include any or all of the following:

- 3.1.4.1 Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements;
- 3.1.4.2 Reviewing the results of recent market research undertaken in connection with similar or identical requirements;
- 3.1.4.3 Publishing formal requests for information in appropriate business or industry publications;
- 3.1.4.4 Participating in interactive, on-line communication among industry, acquisition personnel, and customers;
- 3.1.4.5 Obtaining source lists of similar items from other contracting activities or agencies, trade associations, or other sources;
- 3.1.4.6 Reviewing catalogs and other generally available product literature published by manufacturers, distributors and dealers, or available on-line; and
- 3.1.4.7 Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

### **3.1.5 Decide on the Method of Procurement**

One of the most important initial considerations is the type of procurement method to be used. The initial consideration relates to the size of the anticipated procurement. Purchases under \$2,500 may be handled using micro-purchase procedures. Somewhat more competitive small purchase procedures apply to contract between \$2,500 and \$25,000.00. All contracts over \$25,000.00 are subject to formal competitive procedures. The two basic methods of formal competitive procurement are the Invitation for Bid (IFB) and the Request for Proposal (RFP). Two-Step Sealed Bidding (TSSB) and a relatively recent procedural innovation, the Request for Information (RFI) / Reverse Auction, share characteristics with both methods. Alternative procurement methods are available for certain types of procurements. Repetitive needs or services may be fulfilled using blanket purchase agreements (BPAs). If the acquisition involves commercial IT products or services, you may want to consider using the GSA's Cooperative Purchasing program. Federal excess or surplus property may also be an appropriate option. In certain limited circumstances, sole source or limited procurement may be considered.

- 3.1.5.1 *Micro-Purchases*: Purchases under \$2,500 may be made without soliciting competitive quotations if:

- 3.1.5.1.1 NRTA's Manager determines that the price to be paid is reasonable and documents his decision in writing;
  - 3.1.5.1.2 To the extent practicable, such purchases are distributed equitably among qualified suppliers;
  - 3.1.5.1.3 There is no subdivision of purchasing to reach the micro-purchase threshold; and
  - 3.1.5.1.4 If BPAs, GSA's cooperative purchasing program, or Surplus Property sources are used, all applicable requirements are met. These requirements and related procedures are set forth herein.
- 3.1.5.2 *Small Purchases:* For purchases between \$2,500 and \$10,000, competitive quotations or offers should be solicited from at least three offerors and evaluated pursuant to the following procedures:
- 3.1.5.2.1 Soliciting quotations or offers
    - 3.1.5.2.1.1 The Board of the NRTA should consider the following matters before requesting quotations or offers.
      - 3.1.5.2.1.1.1 The nature of the article or service to be purchased and how competitively it may be purchased;
      - 3.1.5.2.1.1.2 Information obtained during recent purchases of similar articles or services;
      - 3.1.5.2.1.1.3 The urgency of the proposed purchase;
      - 3.1.5.2.1.1.4 The expected dollar value of the article or services;
      - 3.1.5.2.1.1.5 Past experience concerning specific suppliers' prices.
    - 3.1.5.2.1.2 A quotation or offer may be solicited from a single source if NRTA's Manager determines that the circumstances of the procurement render only one source reasonably available.
    - 3.1.5.2.1.3 When soliciting quotations or offers, NRTA's Manager notify potential suppliers of the basis on which the award decision will be made (*i.e.* price alone or price and other factors).

3.1.5.2.1.4 Quotations or offers may be solicited orally if NRTA's Manager determines that doing so is more efficient than available electronic methods.

3.1.5.2.1.5 Quotations or offers must be evaluated:

3.1.5.2.1.5.1 Impartially; and

3.1.5.2.1.5.2 On the basis Stated in the solicitation.

3.1.5.2.1.6 Before making an award, NRTA's Manager must determine that the price to be paid is fair and reasonable based on:

3.1.5.2.1.6.1 Competitive quotations or offers; or

3.1.5.2.1.6.2 If only one response was received,

3.1.5.2.1.6.2.1 Market research;

3.1.5.2.1.6.2.2 Past experience purchasing similar articles or services;

3.1.5.2.1.6.2.3 Current price lists, catalogs, or advertisements; or

3.1.5.2.1.6.2.4 The personal knowledge of NRTA employees concerning the articles or services to be purchased.

3.1.5.2.1.7 NRTA's Manager must document all determinations made in connection with small purchases and document in writing all quotations and offers received.

3.1.5.2.1.8 If BPAs, GSA's cooperative purchasing program, or Surplus Property sources are used, all applicable requirements are met. These requirements and related procedures are set forth herein.

3.1.5.3 *Invitation for Bid (IFB)*: IFBs are the most common method used in the public sector to obtain specific goods or services. This method, which involves the request for and consideration of sealed bids, is typically used when complete specifications or purchase descriptions are available or could be easily developed. The IFB process requires two or more bidders. The award is given to the lowest priced responsive and responsible bidder meeting the technical requirements.

The specifications for goods and/or services to be procured under an IFB are not subject to negotiation. Bids that deviate from the specifications are deemed unresponsive and thus rejected. Typically, the IFB includes two parts: technical and pricing. Bidder responses to each part are evaluated separately.

3.1.5.4 *Request for Proposal (RFP)*: The RFP is a competitive procurement method used when a general, rather than specific, description of goods and/or services is used. This method, also known as competitive negotiation or negotiated procurement, allows for the procurement of goods and/or services without detailed design specifications and frequently uses performance specifications. The contract is typically awarded on the basis of the best value to the government, taking into account price and other factors. Equitable communication with proposers (such as interviews, presentations, and negotiations) may be used to reach an optimal contractual agreement in which various factors are used in the contractor selection. For example, in addition to price, the technical expertise and the experience of the proposer may be evaluated. When using an RFP method, offerors typically submit a Technical Proposal and a separate Cost Proposal. The Evaluation criteria must be clearly Stated and closely followed.

3.1.5.5 *Two-Step Sealed Bidding (TSSB)*: Two-step sealed bidding combines procurement methods to obtain the benefits of sealed bidding in situations where adequate specifications are not available. The objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of NRTA's requirements so that subsequent procurements can be conducted using conventional sealed bidding. The TSSB method is especially useful in situations requiring technical proposals, particularly those for complex items. The first step consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in the first step. This approach should only be used if:

3.1.5.5.1 Available specifications or purchase requirements are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to ensure mutual understanding between each source and NRTA;

3.1.5.5.2 Definite criteria exists for evaluating technical proposals;

3.1.5.5.3 More than one technically qualified source is expected to be available;

3.1.5.5.4 Sufficient time will be available to use the two-step method;  
and

3.1.5.5.5 A firm fixed-price contract or fixed-price contract with  
economic price adjustment will be used.

3.1.5.6 *Request for Information (RFI) / Reverse Auction*: Reverse auctions are live, online auctions in which the roles of buyer and seller are “reversed” so that sellers bid for the right to sell to the buyer and the buyer agrees to buy for the price established by the auction process. Under this method, the goods or services to be obtained are carefully described so that the potential suppliers are bidding to provide a requirement that is clear to everyone. Once the requirement is published, suppliers interested in bidding are identified, pre-qualified, and informed about the technology and procedures to be used. In order to participate, they must agree to allow their bids to be shared with other bidders. During the actual auction, bidders (whose identities are kept confidential) post prices online. Since they can see their competitors’ bids, bidders are able to immediately reevaluate and adjust their bids. Reverse auctions may be used as a stand-alone process or as the pricing component of an RFP procurement. This approach should only be used if:

3.1.5.6.1 The object of the procurement can be adequately described;

3.1.5.6.2 A sufficient number of suppliers are willing to participate in a  
reverse auction to ensure adequate competition;

3.1.5.6.3 Suppliers’ profit margins on the object of the procurement are  
adequate to foster meaningful competition;

3.1.5.6.4 The quantities to be procured are sufficiently large to be  
attractive to potential suppliers;

3.1.5.6.5 Sufficient time is available to conduct the procurement using a  
reverse auction;

3.1.5.6.6 A reverse auction will either promote or not result in an unduly  
adverse impact on NRTA’s socio-economic interests; and

3.1.5.6.7 A reverse auction will not result in an unduly adverse impact  
on NRTA’s strategic partnerships and/or incumbent suppliers.

3.1.5.7 *Blanket Purchase Agreements (BPAs)*: A blanket purchase agreement  
(BPA) is a simplified method of filling anticipated repetitive needs for



supplies or services by establishing “charge accounts” with qualified sources. BPAs are useful where you generally purchase a wide variety of items in a broad class of supplies and services, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably. They may be established with more than one supplier of the same supplies and services to provide maximum practicable competition. Depending on the terms of the applicable schedule contract, BPAs may be used in conjunction with the GSA’s cooperative purchasing program.

3.1.5.8 *Cooperative Purchasing Through GSA Schedules:* The Federal Supply Schedule (FSS) program is directed and managed by the GSA and provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Pursuant to Section 211 of the E-Government Act of 2002, GSA now provides States and localities – and their instrumentalities -- access to certain IT items offered through its Schedule 70 and Corporate Schedule contracts.

3.1.5.9 *Federal and State Surplus Personal Property:* Depending on the object of the procurement, you may wish to consider fulfilling NRTA’s requirements with Federal and/or State surplus personal property. Such property can often be obtained for less than the cost of buying comparable items new. The property that may be acquired using this method is personal property that has been determined to be excess to the corresponding government’s needs. NRTA may obtain surplus personal property as an eligible public agency and/or bid on such property at public sales. The former method requires the acceptance of certain terms and conditions, but the acquisition costs are generally lower.

3.1.5.10 *Sole Source/Limited Procurement:* In certain, limited circumstances, you may conduct a procurement of goods or services using other than competitive procedures. You may use other than competitive procedures only when the following requirements are met:

3.1.5.10.1 The property or services needed are available only from one responsible source and no other type of property or service will satisfy NRTA's needs;

3.1.5.10.2 NRTA's need for the property or service is urgent, unusual and compelling because the authority would be seriously injured unless the authority is permitted to limit the number of sources from which it solicits;

3.1.5.10.3 It is necessary to award a contract to a particular source or sources in order to maintain a facility, producer, manufacturer or other supplier in case of emergency; or

3.1.5.10.4 It is necessary to establish or maintain an alternative source or sources of supply for the property or service to increase or maintain competition.

## 3.2 Preparing Procurement Packet

If the procurement method selected is IFB, RFP, TSSB, or RFI, the next step is to create a Procurement Packet containing the essential information to be conveyed to potential offerors.

*3.2.1 Convene a Procurement Committee:* Depending on the complexity and type of procurement process that is undertaken, a procurement committee may be convened to provide guidance and direction in the development of the Procurement Packet. At a later stage in the procurement process, this committee may be utilized to evaluate bids or proposals. The composition of the committee would include some or all of the Board members as stated in paragraph 3.1.2.1 above. The committee should review bids or proposals, arrange for negotiations with the bidders/proposers, if necessary, and are responsible for the selection of the final contractor. The committee shall be chaired by NRTA's Manager.

*3.2.2 Identify Required Procurement Packet Elements:* After you have made a decision regarding the object of the procurement and the method to be used, you must develop the relevant elements to be included in the procurement packet. Most elements are common to both IFB and RFP procurements and must be included in the procurement packets for both, but certain elements are specific to IFB or RFP procurements, optional, or both.

### 3.2.2.1 Common Elements

3.2.2.1.1 Procurement Document (Solicitation / Offer / Award);

3.2.2.1.2 Description and Checklist of Required Representations and Certifications;

3.2.2.1.3 Contract Schedule

3.2.2.1.4 General Procurement Instructions and Conditions;

3.2.2.1.5 Standard Contract Clauses;

3.2.2.1.6 Special Contract Clauses;

- 3.2.2.1.7 Representations and Certifications; and
- 3.2.2.1.8 Technical Specifications or Statement of Work.
- 3.2.2.2 Additional IFB Elements -- In addition to the common elements, an IFB procurement packet should include:
  - 3.2.2.2.1 Statement in the procurement document setting forth the date, time, and place bids or proposals are to be opened;
  - 3.2.2.2.2 Statement in the general procurement instructions and conditions that bidders must allow a minimum period for which NRTA can accept their bid after its submission and that bids offering a lesser period than the minimum will be rejected as nonresponsive.
- 3.2.2.3 Additional RFP Elements -- In addition to the common elements, an RFP procurement packet must include:
  - 3.2.2.3.1 Request for separate technical and cost proposals – These two proposals shall be evaluated separately. The technical proposal shall be evaluated first, without knowledge of costs, so that an objective and impartial evaluation can be made.
  - 3.2.2.3.2 Description of evaluation factors -- The RFP evaluation process shall be designed to identify the responsible offeror whose proposal offers NRTA the best value based on Stated evaluation factors and significant subfactors tailored to the acquisition.
  - 3.2.2.3.3 Statement of procedural details relating to information exchanges concerning proposals – All offerors shall be given notice of the relevant procedures and guidelines governing the availability and conduct of information exchanges in connection with the RFP.
- 3.2.2.4 Alternative Elements for First Step of TSSB – Instead of the common elements listed herein, the procurement packet issued in the first step of the TSSB procurement must include:
  - 3.2.2.4.1 General Procurement Instructions and Conditions;
  - 3.2.2.4.2 Description of the supplies or services required;
  - 3.2.2.4.3 Statement of intent to use the two-step sealed bidding method;

- 3.2.2.4.4 Requirements of the technical proposal;
- 3.2.2.4.5 Description of Evaluation Factors;
- 3.2.2.4.6 Statement that the technical proposals shall not include prices or pricing information;
- 3.2.2.4.7 Statement that (1) in the second step, only bids based upon technical proposals determined to be acceptable, either initially or as the result of discussions, will be considered for awards; and (2) each bid in the second step must be based on the bidder's own technical proposals;
- 3.2.2.4.8 Statement that (1) offerors should submit proposals that are acceptable without additional explanation; (2) NRTA may make a final determination regarding a proposal's acceptability solely on the basis of the proposal as submitted; and (3) NRTA may proceed with the second step without requesting further information from any offeror and may instead request additional information from offerors of proposals that it considers reasonably susceptible of being made acceptable and may discuss proposals with offerors.
- 3.2.2.4.9 Statement of procedural details relating to information exchanges concerning proposals – All offerors shall be given notice of the relevant procedures and guidelines governing the availability and conduct of information exchanges in connection with the RFP.
- 3.2.2.4.10 Statement that a notice of unacceptability shall be forwarded to appropriate offerors upon completion of the proposal evaluation and final determination of unacceptability;
- 3.2.2.4.11 Statement either that only one technical proposal or that multiple technical proposals may be submitted (if specifications permit different technical approaches, it will generally be in NRTA's interest to authorize multiple proposals); and
- 3.2.2.4.12 If NRTA determines that providing it is appropriate, information on delivery or performance requirements that may be of assistance to bidders in determining whether or not to submit a proposal (if such information is included, the procurement packet shall clearly indicate that it is not binding on NRTA and that the actual delivery and performance

requirements will be included in the invitation issued during step two.

3.2.2.5 Additional RFI Elements -- In addition to the common elements and those additional elements listed herein, an RFI procurement packet must include:

3.2.2.5.1 A provision that States: “NRTA intends to use reverse auction procedures for this procurement. A reverse auction is a competitive, anonymous, on-line auction in which participants will compete for an award for this requirement through a series of quotes/bids/offers that descend in price during a specified period of time.”

3.2.2.5.2 General Statement of when, how, and by whom the reverse auction shall be conducted.

3.2.2.5.3 Statement of procedural details relating to reverse auctions, including:

3.2.2.5.3.1 Minimum computer system requirements for participating in Internet-based reverse auction;

3.2.2.5.3.2 Description of elements that must be included in the quoted price (i.e. taxes, shipping, costs, packaging costs, all discounts, etc.) and the format to be used for responses during the auction;

3.2.2.5.3.3 Information disclosure plan describing what information will be disclosed during the reverse auction and to whom; and

3.2.2.5.3.4 Statement of anticipated date of reverse auction, length of bidding period, minimum bidding increments, and bidding period extension parameters;

3.2.2.5.3.4.1 Rather than identify a date certain for the reverse auction, NRTA may provide a range of dates on which the reverse auction will occur so long as the procedures ensure the provision of actual notice to all qualified offerors at least twenty-four hours prior to the date and time of the reverse auction.

3.2.2.5.3.4.2 In order to maximize the competitiveness of the reverse auction, the bidding period should be extended by a set amount if a bid is received

sufficiently near the end of the period. For example, if a bid is received within one minute of bid closing time, the period might be extended for one minute. This prevents offerors from attempting to underbid their competitors just before the end of the bidding period by allowing competitors the opportunity to respond to such bids.

3.2.2.5.4 Requirement that responding suppliers agree to the sharing of their bid information in accordance with the RFI's information disclosure plan.

3.2.2.5.5 Provision reserving to NRTA the right to

3.2.2.5.5.1 Reject any nonresponsive quotes; and

3.2.2.5.5.2 Cancel or stop the reverse auction and award the contract on some other basis.

3.2.2.5.6 Provision that reads: "The apparent winning quote is not final until the quote and the suppliers' responsibility is verified by NRTA. No award of any contract is given or implied to any auction participant at this time. NRTA will announce its decision to award contract(s) through written notification at a later date."

3.2.3 *Assemble Procurement Packet Elements:* Some elements consist of standard language that may be used in whole or in part, according to the particulars of the procurement. Other elements will have to be created with those particulars in mind.

3.2.3.1 Complete Procurement Document (Solicitation / Offer /Award) --  
When signed by the bidder or proposer, this document comprises an offer that results in a binding contract if accepted by NRTA. A copy of the form is set forth as Appendix 4.4. This document identifies:

3.2.3.1.1 A procurement number and date of issuance for reference;

3.2.3.1.2 NRTA's name and address;

3.2.3.1.3 A point of contact at NRTA for all questions and communications;

3.2.3.1.4 Where and when any pre-bid or pre-proposal conference will be held and the due date and submission instructions for any pre-conference written questions, if required;

- 3.2.3.1.5 The date, time, and place bids or proposals are to be received and the manner in which bids or proposals are to be submitted;
  - 3.2.3.1.6 What additional documents are included in the procurement packet and what documents will be included in the contract;
  - 3.2.3.1.7 Space for the price (offer) to be included;
  - 3.2.3.1.8 Space where amendments to the procurement can be acknowledged;
  - 3.2.3.1.9 Space where the contracting firm can be identified;
  - 3.2.3.1.10 Space for the firm official to sign and date the bid or proposal; and
  - 3.2.3.1.11 Space for the contract number, contract amount, line items (if applicable), and a place for the NRTA official to sign and date the contract if the offer is accepted.
- 3.2.3.2 Develop Contract Schedule – The contract schedule sets forth important contract details relating to the following issues, if applicable:
- 3.2.3.2.1 Brief general description of the supplies and/or services being procured, including quantities, and room for corresponding line item price(s) to be inserted by offeror;
  - 3.2.3.2.2 Discussion of any packaging, packing, preserving, and/or marking requirements;
  - 3.2.3.2.3 Discussion of any inspection, acceptance, quality assurance, and/or reliability requirements beyond those addressed in the Inspection and Warranties clauses set forth as Appendices 4.7.1.4 and 4.7.1.22;
  - 3.2.3.2.4 Statement of time, place, and method of delivery and/or performance required;
  - 3.2.3.2.5 Discussion of any accounting or contract administration issues or procedures to be followed other than those addressed in the Payment clause set forth as Appendix 4.7.1, 4.7.1.5; and
  - 3.2.3.2.6 Any other special contract information not included in standard or special contract clauses.

3.2.3.3 Develop General Procurement Instructions and Conditions -- The general procurement instructions and conditions provide a general description of the procurement process to be used and specific information relating to that procedure. For each procurement type, they should address all the matters as detailed herein not covered by other elements. Sample instructions and conditions that may be used as a starting point are set forth as Appendix 4.5. They include:

- 3.2.3.3.1 Instructions relating to offer preparation and submission, including deadline;
- 3.2.3.3.2 Instructions relating to acknowledging amendments to the procurement;
- 3.2.3.3.3 Rules relating to late submissions;
- 3.2.3.3.4 Rules relating to modification and withdrawal of offers;
- 3.2.3.3.5 Instructions relating to the DBE participation goals and program;
- 3.2.3.3.6 Instructions relating to how the contract will be awarded;
- 3.2.3.3.7 Description of NRTA and FTA protest procedures;
- 3.2.3.3.8 Advice concerning NRTA's ability to cancel the procurement; and
- 3.2.3.3.9 Description of order of precedence to be used to resolve any inconsistencies between procurement provisions.

3.2.3.4 Include Appropriate Standard Contract Clauses -- NRTA's standard contract provisions must be included in the procurement packet. Form standard contract clauses are set forth as Appendix 4.7.1. Appropriate clauses may be identified using the Contract Clause Matrix attached as Appendix 4.9.

3.2.3.5 Include / Develop Appropriate Special Contract Clauses -- Depending on the particular procurement, you may need to include additional contract clauses, either to comply with Federal requirements or to better promote or protect NRTA's interests in the procurement. Model Special Contract Clauses are set forth as Appendix 4.7.2. Appropriate clauses may be identified using the Contract Clause Matrix attached as Appendix 4.9.



3.2.3.6 Complete Checklist of and Include Required Representations and Certifications -- Prospective offerors should be made aware of all required representations and certifications by providing each and including a checklist to be signed and returned with the bid or proposal. A copy of the Checklist is set forth as Appendix 4.6. Required representations and certifications should be indicated by checking the corresponding boxes. Depending on the procurement, other representations and certifications may need to be added to the Checklist. The list and all items listed should be attached as part of the Procurement Packet and signed and returned by the offeror. The required representations and certifications, which are set forth in Appendix 4.8, may include:

- 3.2.3.6.1 A representation as to the type of business the offeror is (*e.g.* sole proprietorship, partnership, corporation, etc);
- 3.2.3.6.2 A representation as to the offeror's DBE status;
- 3.2.3.6.3 A representation that no gratuities have been offered or given with a view toward securing the contract;
- 3.2.3.6.4 A certification of independent price determination (prices in offer have been arrived at independently without any communications for the purposes of restricting competition);
- 3.2.3.6.5 A certification regarding compliance with the DBE provisions of the contract;
- 3.2.3.6.6 A certification of restrictions on lobbying;
- 3.2.3.6.7 A certification regarding debarment, suspension, ineligibility, and voluntary exclusion;
- 3.2.3.6.8 A certification regarding compliance or non-compliance with the Buy America provisions of the Federal Transit Act and 49 CFR Part 661; and
- 3.2.3.6.9 Pre-Award Certification and break-down of proposed components and subcomponents from vendors and the locations of the final assembly. Detailed information concerning such certifications is set forth in the document at: [http://www.fta.dot.gov/legislation\\_law/12921\\_5423.html](http://www.fta.dot.gov/legislation_law/12921_5423.html).

3.2.3.7 Develop Technical Specifications and/or Scope of Work: Each Procurement Package must include a clear and accurate description of the products and/or services to be acquired. In competitive

procurements, this description must not contain features that unduly restrict competition. The description may include a Statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible.

3.2.3.7.1 Technical Specifications -- Specifications may be very detailed in describing the product or work to be done, or may simply require an end result, or may combine the two approaches. The different types involve different levels of risk and responsibility.

3.2.3.7.1.1 Design Specifications detail the manner or method of performance, setting forth precise measurements, tolerances, materials, in process and finished product testing, quality control, inspection requirements, drawings, and other specific information. The use of design specifications places more responsibility on NRTA for design and related omissions, errors, and deficiencies in the specifications and drawings, since there is an implied warranty that the detailed designs or processes will result in an end item that functions as required.

3.2.3.7.1.2 Performance Specifications dictate the performance of the end product rather than how the contractor will work to create that product. They give the contractor discretion in how to achieve the end result called for by the contract. They also place the highest degree of responsibility on the contractor and represent the lowest degree of legal risk (but not necessarily program risk) for NRTA. As a general rule, when performance-type specifications are used, NRTA will not be liable for a contractor's increased costs in performing the contract unless the performance specification embodies requirements that are impossible to attain. Simply specifying a minimum requirement for a product component or aspect of performance does not change a performance specification into a design specification.

3.2.3.7.1.3 Brand Name or Equal specifications require a particular manufacturer's product, part number, or model. Such specifications may be used when it is otherwise impracticable or uneconomical to make a clear and accurate description of the technical requirements. They must

include, in addition to the brand name, a general description of the salient physical, functional, or performance characteristics of the brand name item that an “equal” item must meet to be acceptable for award. When this type of specification is used, NRTA assumes the responsibility for proper performance (assuming the contractor used the product in the proper way). If the contractor opts to manufacture an equal product in-house, he will be responsible for ensuring the product performs equally as well as the specified brand named product.

#### 3.2.3.7.1.4 FTA Matters

- 3.2.3.7.1.4.1 NRTA must allow FTA review and approve technical specifications and requirements to the extent FTA believes necessary.
- 3.2.3.7.1.4.2 Apart from inconsistent requirements imposed by Federal statutes or regulations, NRTA must comply with the requirements of 49 U.S.C. § 5323(h)(2) by refraining from using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.
- 3.2.3.7.1.4.3 NRTA may use functional specifications to acquire bus seats in accordance with the requirements of 49 U.S.C. § 5323(e).
- 3.2.3.7.1.4.4 When NRTA is using Federal financial assistance to procure reports of information to be distributed to, among others, FTA. NRTA must include in its specifications a requirement that the reports or information will be prepared using electronic or information technology capable of assuring that, when provided to FTA, the reports of information will meet the applicable accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d, and U.S. ATBCB regulations, “Electronic and Information Technology Accessibility Standards, “36 CFR Part 1194.”

- 3.2.3.7.2 Statement of Work -- A Statement of work, rather than technical specifications, is used for services contracts. A Statement of work defines the work required of a contractor, either to design the equipment to be procured or to provide

services, which are not related to the procurement of hardware. A Statement of work should contain the following elements:

- 3.2.3.7.2.1 Statement of all tasks the contractor must perform, including coordination requirements;
- 3.2.3.7.2.2 Description of all standards the contractor must fulfill, including Federal, State, and local standards that are applicable to the project;
- 3.2.3.7.2.3 Description of the data that must be submitted for approval and definition of any schedules for initial submission and the review/approval time required for each;
- 3.2.3.7.2.4 If applicable, a detailed list of all data, property and services which will be provided to the contractor by NRTA for his use in performing the contract; and
- 3.2.3.7.2.5 When buying services on a "level-of-effort" basis (i.e., when specifying the number of labor hours to be furnished by the contractor), definition of the labor categories and hours, the minimum years of experience, and licensing requirements (CPA, PE, etc.) for each.

3.2.4 *Develop Evaluation Process and Criteria:* The process and criteria to be used in a given situation will depend on the object and scope of the procurement and the type of procurement. The details of the specific evaluation process to be used must be determined before the procurement packet can be finalized.

3.2.4.1 Invitation for Bids – IFB Method: The IFB evaluation process seeks to identify the responsible bidder that submitted the lowest responsive bid. See Invitation for Bids Flowchart and Checklist set forth as Appendix 4.3.1. The contract must be awarded to that bidder unless there is a compelling reason to reject all bids and cancel the IFB altogether. The evaluation process should include the following:

3.2.4.1.1 General Procedure for assessing bids:

- 3.2.4.1.1.1 Determine which bid is lowest;
- 3.2.4.1.1.2 Determine whether the lowest bid is responsive;
- 3.2.4.1.1.3 Determine whether lowest bidder is responsible;
- 3.2.4.1.1.4 Determine whether lowest bid is reasonable; and

3.2.4.1.1.5 Determine whether there exists a compelling reason to reject all bids and cancel the IFB.

3.2.4.1.2 Identifying lowest bid

3.2.4.1.2.1 If provided for in the IFB, factors such as discounts, transportation costs, and life cycle costs must be considered in determining which bid is lowest.

3.2.4.1.2.2 Payment discounts may only be considered when determining the low bid if prior experience indicates that NRTA usually takes advantage of such discounts.

3.2.4.1.3 Assessing responsiveness of lowest bid

3.2.4.1.3.1 A bid is considered nonresponsive if it:

3.2.4.1.3.1.1 Fails to conform to the essential requirements of the IFB;

3.2.4.1.3.1.2 Does not conform to the applicable specifications, unless the IFB authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the IFB;

3.2.4.1.3.1.3 Fails to conform to the delivery schedule or permissible alternates Stated in the IFB;

3.2.4.1.3.1.4 Is received from any person or concern that is suspended, debarred, proposed for debarment, or declared ineligible as of the bid opening date, unless NRTA determines that there is a compelling reason not to reject the bid;

3.2.4.1.3.1.5 Is received from a person or concern determined to be nonresponsive;

3.2.4.1.3.1.6 Is received from a bidder that fails to furnish a bid guarantee required by the IFB;

3.2.4.1.3.1.7 Imposes conditions that would modify requirements of the IFB or limit the bidder's liability to NRTA. For example, bids shall be rejected if the bidder:

- 3.2.4.1.3.1.7.1 Protects against future changes in conditions, such as increased costs, if total possible costs to NRTA cannot be determined;
  - 3.2.4.1.3.1.7.2 Fails to State a price and indicates that price shall be price in effect at the time of delivery;
  - 3.2.4.1.3.1.7.3 States a price but qualifies it as being subject to price in effect at time of delivery;
  - 3.2.4.1.3.1.7.4 Without authorization by the IFB, conditions or qualifies a bid by stipulating that it is to be considered only if, before award, the bidder receives (or does not receive) award under a separate procurement;
  - 3.2.4.1.3.1.7.5 Requires NRTA to determine the bidder's product meets applicable specifications; or
  - 3.2.4.1.3.1.7.6 Limits NRTA's rights under any contract clause.
- 3.2.4.1.3.2 Any bid may be rejected for nonresponsiveness if
- 3.2.4.1.3.2.1 NRTA determines in writing that it is unreasonable as to price, either with respect to the total price of the bid or the prices for individual line items; or
  - 3.2.4.1.3.2.2 The prices for any line items or subline items are materially unbalanced.
- 3.2.4.1.3.3 A low bidder may be requested to delete objectionable conditions from a bid provided the conditions do not go to the substance, as opposed to the form, of the bid, or work an injustice on other bidders. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.
- 3.2.4.1.3.4 The originals of all rejected bids, and any written findings with respect to such rejections, shall be placed in the procurement file.
- 3.2.4.1.4 Assessing responsibility of lowest bidder
- 3.2.4.1.4.1 In order to be determined responsible, a prospective contractor must:

- 3.2.4.1.4.1.1 Have adequate financial resources to perform the contract, or the ability to obtain them;
  - 3.2.4.1.4.1.2 Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
  - 3.2.4.1.4.1.3 Have a satisfactory performance record;
  - 3.2.4.1.4.1.4 Have a satisfactory record of integrity and business ethics;
  - 3.2.4.1.4.1.5 Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor);
  - 3.2.4.1.4.1.6 Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
  - 3.2.4.1.4.1.7 Be otherwise qualified and eligible to receive an award under applicable laws and regulations.
- 3.2.4.1.4.2 Before making a determination of responsibility, NRTA must possess or obtain information sufficient to be satisfied that the prospective contractor meets all of the requirements as set forth herein.
- 3.2.4.1.4.2.1 Acceptable evidence of the contractor's ability to obtain needed resources normally consists of a commitment or explicit arrangement that will be in existence at the time of contract award to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel.
  - 3.2.4.1.4.2.2 The following sources of information may be used in connection with the responsibility determination:

3.2.4.1.4.2.2.1 The list of parties excluded from Federal procurement and nonprocurement programs available at [www.sam.gov](http://www.sam.gov).

3.2.4.1.4.2.2.2 Records and experience data, including verifiable knowledge of personnel within NRTA;

3.2.4.1.4.2.2.3 The prospective contractor, including bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information:

3.2.4.1.4.2.2.4 Commercial sources of supplier information of a type offered to buyers in the private sector;

3.2.4.1.4.2.2.5 Other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade organizations.

3.2.4.1.4.3 Signing a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. If an offer on which an award would otherwise have been made is rejected because the prospective contractor is found to be nonresponsible, a signed memorandum stating the basis for the determination must be placed in the procurement file. Documents and reports supporting a determination of responsibility or nonresponsibility must also be placed in the procurement file.

3.2.4.1.5 Assessing reasonableness of lowest bid

3.2.4.1.5.1 Cost or price analyses must be performed in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances of the particular procurement, but independent estimates must always be made before receiving bids or proposals.

3.2.4.1.5.2 Cost Analysis

3.2.4.1.5.2.1 A cost analysis entails the review and evaluation of the separate cost elements and the proposed profit of an offeror's cost and pricing data and the



judgmental factors applied in estimating the costs. A cost analysis is generally conducted in order to form an opinion on the degree to which the proposed cost, including profit, represents what the performance of the contract should cost, assuming reasonable economy and efficiency.

3.2.4.1.5.2.2 A cost analysis must be performed:

3.2.4.1.5.2.2.1 When the offeror is required to submit the elements of the estimated cost (*e.g.* labor hours, overhead, materials, etc.) and

3.2.4.1.5.2.2.2 When adequate price competition is lacking and for sole source or limited procurements, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.

3.2.4.1.5.3 Price Analysis

3.2.4.1.5.3.1 A price analysis involves examining and evaluating a proposed price without evaluating its separate cost and profit elements. Price analysis is based essentially on data that is verifiable independently from the offeror's data.

3.2.4.1.5.3.2 A price analysis should be used to determine the reasonableness of the proposed price in all circumstances in which a cost analysis is not used.

3.2.4.1.5.3.3 The accepted methods of price analysis, each which is discussed more fully in The Pricing Guide for FTA Grantees and includes:

3.2.4.1.5.3.3.1 Adequate price competition;

3.2.4.1.5.3.3.2 Prices set by law or regulation;

3.2.4.1.5.3.3.3 Established catalog prices and market prices;

3.2.4.1.5.3.3.4 Comparison to previous purchases;

3.2.4.1.5.3.3.5 Comparison to a valid NRTA independent estimate; and

3.2.4.1.5.3.3.6 Value analysis.

3.2.4.1.6 Rejecting all bids and canceling IFB -- Certain circumstances may justify rejection of all bids and cancellation of an IFB after bids are opened.

3.2.4.1.6.1 The IFB may be cancelled and all bids rejected before award if NRTA determines in writing that:

3.2.4.1.6.1.1 Inadequate or ambiguous specifications were cited in the IFB;

3.2.4.1.6.1.2 Specifications have been revised;

3.2.4.1.6.1.3 The supplies or services being contracted for are no longer required;

3.2.4.1.6.1.4 The IFB did not provide for consideration of all factors of cost to NRTA;

3.2.4.1.6.1.5 Bids received indicate that NRTA's needs can be satisfied by a less expensive article differing from that for which bids were invited;

3.2.4.1.6.1.6 All otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the reasonableness of the bid price cannot be determined;

3.2.4.1.6.1.7 The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;

3.2.4.1.6.1.8 No responsive bid has been received from a responsible bidder; or

3.2.4.1.6.1.9 For other reasons, cancellation of the IFB is clearly in NRTA's interest.

3.2.4.1.6.2 In general, after the opening of bids, an IFB should not be cancelled and resolicited due solely to increased requirements for the items being acquired. Awards should

be made on the initial IFB and the additional quantity should be treated as a new acquisition.

3.2.4.1.6.3 Every effort should be made to anticipate changes in a requirement before the bid opening date and to notify all prospective bidders of any resulting modification or cancellation. This will permit bidders to change their bids and prevent unnecessary exposure of bid prices.

3.2.4.1.6.4 If NRTA determines that the IFB should be cancelled and that the use of competitive negotiation is in its interest, you may engage in competitive negotiations (in accordance with the RFP procedures set forth herein, as appropriate) and award a contract without resoliciting if:

3.2.4.1.6.4.1 Each responsible bidder in the sealed bid acquisition has been given notice that negotiations will be conducted and has been given the opportunity to participate in negotiations; and

3.2.4.1.6.4.2 The award is made to the lowest negotiated price.

3.2.4.1.7 Inadequate competition -- If only one bid is received in response to a solicitation that was issued to multiple sources, you must determine whether there was adequate competition. Receiving only one bid does not, in and of itself, mean that competition was inadequate. In order to make the determination, you should ask firms that opted not to bid to explain to you the basis of their decision.

3.2.4.1.7.1 If the reason is a restrictive specification or a delivery requirement that only one bidder could meet, you have inadequate competition and you must either process the procurement with internal agency justifications and approvals (see Section 3.5.3.2) or cancel the procurement, change the problematic elements of the IFB, and reissue it.

3.2.4.1.7.2 If the reasons given by the non-bidders are unrelated to the specifications or other IFB terms, then you may presume that competition was adequate and proceed with the award as a competitive one.

3.2.4.1.7.3 In either event, a memorandum documenting your discussions with non-bidders and explaining your determination should be placed in the procurement file.

### 3.2.4.1.8 Bid mistakes

3.2.4.1.8.1 After opening, all bids must be examined for mistakes. If NRTA has reason to believe that a bid mistake has been made or if the bidder alleges a mistake, the matter shall be handled in accordance with this Section 3.2.4.1.8. Such actions shall be taken before award. Different types of mistake require procedures for their resolution.

3.2.4.1.8.2 Minor informality or irregularity in bid discovered prior to contract award.

#### 3.2.4.1.8.2.1 Characteristics:

3.2.4.1.8.2.1.1 A mistake that is merely a matter of form and not of substance; or

3.2.4.1.8.2.1.2 An immaterial defect in a bid that can be corrected or waived without prejudicing other bidders. A defect is immaterial when its effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the requirement being procured.

#### 3.2.4.1.8.2.2 Examples:

3.2.4.1.8.2.2.1 Failure to return number of signed copies of bid required by IFB;

3.2.4.1.8.2.2.2 Failure to furnish information concerning the number of its employees;

3.2.4.1.8.2.2.3 Failure to sign the bid, but only if the bid is accompanied by other material indicating the bidder's intent to be bound, such as a bid guarantee or a signed letter clearly referencing the bid itself;

3.2.4.1.8.2.2.4 Failure to acknowledge receipt of an IFB amendment, but only if the bid makes clear that the bidder received the amendment and intended to be bound by its terms or the amendment in question had no (or a negligible) effect of price, quantity, quality, or delivery.

3.2.4.1.8.2.3 Remedial Procedure: NRTA shall give the bidder an opportunity to cure any deficiency or waive it, whichever is in the best interests of NRTA.

3.2.4.1.8.3 Obvious or apparent clerical mistakes discovered prior to contract award

3.2.4.1.8.3.1 Characteristics:

3.2.4.1.8.3.1.1 Mistake must be obvious or apparent on the face of the bid.

3.2.4.1.8.3.1.2 This is type of mistake may be discovered upon bid opening or by the bidder itself, who will then bring it your attention.

3.2.4.1.8.3.2 Examples:

3.2.4.1.8.3.2.1 Obvious misplacement of a decimal point;

3.2.4.1.8.3.2.2 Obvious reversal of the price f.o.b. destination and the price f.o.b. origin;

3.2.4.1.8.3.2.3 Obvious mistake in designation of units;

3.2.4.1.8.3.2.4 Typographical, transpositional, and arithmetical errors.

3.2.4.1.8.3.3 Remedial Procedure:

3.2.4.1.8.3.3.1 Request a verification of the bid from the bidder, calling attention to the suggested mistake. This will result in the bidder's either confirming the original bid or acknowledging the mistake.

3.2.4.1.8.3.3.2 If the bidder verifies its original bid, it may be considered as originally submitted.

3.2.4.1.8.3.3.3 If the bidder alleges a mistake, you should advise the bidder to make a written request to withdraw or modify its bid, advise the bidder to support its request with any and all evidence supporting its position, and provide definite timelines for the submission of the request.

3.2.4.1.8.3.3.4 If you verify the mistake, you may correct an apparent or obvious mistake. You must attach the verification to the original bid and reflect the correction in the award document. In either event, you must place a memorandum in the procurement file explaining why you took the action you did.

3.2.4.1.8.3.3.4.1 You must not allow the correction of a bid that would make a nonresponsive bid into a responsive bid.

3.2.4.1.8.3.3.4.2 If the correction would displace one or more lower bids, you must not allow correction unless the evidence of the mistake and bid actually intended are ascertainable substantially from the invitation and bid itself as opposed to evidence submitted by the bidder in response to your request for verification.

#### 3.2.4.1.8.4 Other mistakes discovered prior to contract award

3.2.4.1.8.4.1 Characteristic: These mistakes are generally raised when a bidder seeks to withdraw its bid.

3.2.4.1.8.4.2 Examples:

3.2.4.1.8.4.2.1 A subcontractor's quote was received by the bidder but not included in the bid;

3.2.4.1.8.4.2.2 Material costs for an element of work were included, but the labor costs to install it were omitted from the bid.

3.2.4.1.8.4.3 Remedial Procedure:

3.2.4.1.8.4.3.1 Follow procedures outlined herein above, paying particular attention to the possibility that the bidder wants out of its bid simply because it made a judgment error in preparing its bid and discovered upon bid opening that it "left too much money on the table."

3.2.4.1.8.4.3.2 You should allow the bidder to withdraw its bid if:

3.2.4.1.8.4.3.2.1 The mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

3.2.4.1.8.4.3.2.2 The bidder submits proof that clearly and convincingly demonstrates that a mistake was made.

3.2.4.1.8.4.3.3 You may make a determination to correct the bid and not allow its withdrawal if:

3.2.4.1.8.4.3.3.1 The bidder requests permission to withdraw the bid rather than to correct it;

3.2.4.1.8.4.3.3.2 The evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended; and

3.2.4.1.8.4.3.3.3 The bid, both as originally submitted and as corrected, is the lowest bid received.

3.2.4.1.8.5 Mistakes discovered after contract award

3.2.4.1.8.5.1 Characteristics: Although much more rare, a contractor may raise the issue of mistake in a bid after award of the contract is made.

3.2.4.1.8.5.2 Remedial Procedure:

3.2.4.1.8.5.2.1 The burden of proving the mistake is high and must be borne by the contractor.

3.2.4.1.8.5.2.2 The mistake may be corrected by contract modification if correcting the mistake would be favorable to NRTA without changing the essential requirements of the specifications.

3.2.4.1.8.5.2.3 Depending on the circumstances, you may also make a determination:

3.2.4.1.8.5.2.3.1 To rescind the contract;

3.2.4.1.8.5.2.3.2 To reform the contract either to delete the items involved in the mistake or to increase the price if the contract price, as corrected, does not exceed the next lowest acceptable bid under the original IFB; or

3.2.4.1.8.5.2.3.3 To make no change to the contract as awarded, if the evidence does not warrant rescission or reformation of the contract.

3.2.4.1.8.5.2.4 You must request that the contractor support the alleged mistake by submission of written Statements and pertinent evidence.

3.2.4.1.8.5.2.5 You must place in the procurement file a memorandum explaining the basis for the determination made and action(s) taken.

3.2.4.2 Request for Proposals – RFP Method: Depending on the scope and object of the procurement, NRTA may be able to obtain the best value by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. Such variations shall be reflected in the evaluation process and criteria established for the procurement. See Request for Proposals Flowchart and Checklist set forth as Appendix 4.3.2.

#### 3.2.4.2.1 Source Selection Approaches

3.2.4.2.1.1 A “best value” or tradeoff process is appropriate when it may be in the best interest of NRTA to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. Such a process permits tradeoffs among cost or price and non-cost factors and allows NRTA to accept other than the lowest priced proposal. The award selection is based upon consideration of a combination of technical and price factors to determine the offer deemed most advantageous and of the greatest value to NRTA. In such a case, the perceived benefits of the higher priced proposal must merit the additional cost, and the rationale for the tradeoff must be documented in the procurement file. FTA Circular 4220.1F expressly permits award to other than the lowest bidder so long as such an award furthers an objective consistent with the purposes of 49 U.S.C. Chapter 53 and any implementing regulations,



directives, circulars, manuals, requirements, or other guidance from FTA.

3.2.4.2.1.2 A lowest price technically acceptable process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price. If this process is used, the RFP must specify that the award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors and proposals are evaluated for acceptability but need not be ranked using the non-cost/price factors.

#### 3.2.4.2.2 Evaluation Process and Criteria

3.2.4.2.2.1 Evaluation factors and significant subfactors must:

3.2.4.2.2.1.1 Represent the key areas of importance and emphasis to be considered in the source selection decision; and

3.2.4.2.2.1.2 Support meaningful comparison and discrimination between and among competing proposals.

3.2.4.2.2.2 The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of the procurement committee, subject to the following requirements:

3.2.4.2.2.2.1 Price or cost to NRTA must always be evaluated;

3.2.4.2.2.2.2 The quality of the product or service to be acquired must always be addressed through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical experience, management capability, personnel qualifications, and prior experience.

3.2.4.2.2.3 All evaluation factors and significant subfactors that will affect contract award and their relative importance must be Stated clearly in the RFP document.

3.2.4.2.2.4 The RFP document shall also State, at a minimum, whether all evaluation factors other than cost or price, when combined, are:

- 3.2.4.2.2.4.1 Significantly more important than cost or price;
  - 3.2.4.2.2.4.2 Approximately equal to cost or price; or
  - 3.2.4.2.2.4.3 Significantly less important than cost or price.
- 3.2.4.2.3 Application of the Process and Criteria -- Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the contract successfully and must be conducted solely on the basis of the factors and subfactors set forth in the RFP. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the procurement file.
- 3.2.4.2.3.1 You should first review the proposals to ensure that the contractor has submitted both a technical proposal and a price proposal (in separate envelopes).
  - 3.2.4.2.3.2 The evaluation factors identified in the Procurement Packet must be applied in the manner described in the packet. Special considerations for certain factors include:
    - 3.2.4.2.3.2.1 Past Performance Evaluation
      - 3.2.4.2.3.2.1.1 Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in the contractor's performance shall be considered.
      - 3.2.4.2.3.2.1.2 The RFP shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past and current contracts (including Federal, State, and local government and private) for efforts similar to NRTA's requirement. The RFP shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror's corrective actions.

NRTA shall consider all this information, as well as information obtained from any other sources.

3.2.4.2.3.2.1.3 The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant.

3.2.4.2.3.2.1.4 In the case of an offeror without a record or relevant past performance or for which information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.

3.2.4.2.3.2.2 Technical Evaluation – If a cost / technical tradeoff is performed, the following must be created and placed in the procurement file:

3.2.4.2.3.2.2.1 An assessment of each offeror’s ability to accomplish the technical requirements; and

3.2.4.2.3.2.2.2 A summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors.

3.2.4.2.4 The responsiveness of the highest rated proposal, the responsibility of the highest rated proposer, and the reasonableness of the corresponding cost or price must be determined in accordance as set forth herein above.

3.2.4.2.5 Rejecting all proposals and canceling RFP -- Certain circumstances may justify rejection of all bids and cancellation of an RFP after proposals are received.

3.2.4.2.5.1 The RFP may be cancelled and all proposals rejected before award if NRTA determines in writing that:

3.2.4.2.5.1.1 Inadequate or ambiguous specifications were cited in the RFP and cannot be corrected through information exchanges;

- 3.2.4.2.5.1.2 Specifications have been revised and cannot be corrected through information exchanges;
  - 3.2.4.2.5.1.3 The supplies or services being contracted for are no longer required;
  - 3.2.4.2.5.1.4 The RFP did not provide for consideration of all factors of cost to NRTA;
  - 3.2.4.2.5.1.5 Proposals received indicate that NRTA's needs can be satisfied by a less expensive article or method than that for which proposals were requested;
  - 3.2.4.2.5.1.6 All otherwise acceptable proposals received are at unreasonable prices, or only one proposal is received and the reasonableness of the proposal price cannot be determined;
  - 3.2.4.2.5.1.7 The proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
  - 3.2.4.2.5.1.8 No responsive proposal has been received from a responsible proposer; or
  - 3.2.4.2.5.1.9 For other reasons, cancellation of the RFP is clearly in NRTA's interest.
- 3.2.4.2.5.2 In general, after the receipt of proposals, an RFP should not be cancelled and resolicited due solely to increased requirements for the items being acquired. Awards should be made on the initial RFP and the additional quantity should be treated as a new acquisition.
- 3.2.4.2.5.3 Every effort should be made to anticipate changes in a requirement before the receipt of proposals and to notify all prospective proposers of any resulting modification or cancellation. This will permit proposers to change their proposals and prevent unnecessary exposure of proposal prices.
- 3.2.4.2.6 Inadequate competition -- If only one proposal is received in response to a solicitation that was issued to multiple sources, you must determine whether there was adequate competition. Receiving only one proposal does not, in and of itself, mean that competition was inadequate. In order to make the

determination, you should ask firms that opted not to submit a proposal to explain to you the basis of their decision.

3.2.4.2.6.1 If the reason is a restrictive specification or a delivery requirement that only one proposer could meet, you have inadequate competition and you must either process the procurement with internal agency justifications and approvals or cancel the procurement, change the problematic elements of the RFP, and reissue it.

3.2.4.2.6.2 If the reasons given by the non-proposers are unrelated to the specifications or other RFP terms, then you may presume that competition was adequate and proceed with the award as a competitive one.

3.2.4.2.6.3 In either event, a memorandum documenting your discussions with non-proposers and explaining your determination should be placed in the procurement file.

#### 3.2.4.2.7 Mistakes

3.2.4.2.7.1 The information exchange procedures inherent in competitive negotiation allow NRTA to address mistakes discovered prior to contract award with the proposer(s) in question.

3.2.4.2.7.2 Mistakes in a proposal discovered after award shall be handled substantially in accordance with the procedures for mistakes as set forth herein.

3.2.4.3 Two-Step Sealed Bidding Method: The TSSB approach seeks first to develop a sufficiently descriptive and not unduly restrictive Statement of NRTA's requirements and identify offerors with acceptable technical proposals and then to conduct conventional sealed bidding among those offerors. See Two-Step Sealed Bidding Flowchart and Checklist set forth as Appendix 4.3.3.

3.2.4.3.1 The evaluation process and criteria applied to offers submitted in response to the initial request in a TSSB shall be generally the same as those applied to proposals submitted in response to an RFP and as set forth herein, except that:

3.2.4.3.1.1 Responsibility of the offeror and reasonableness of price shall not be considered;

3.2.4.3.1.2 Information exchanges with offerors responding to the request shall be governed as set forth herein; and

3.2.4.3.1.3 Rather than being evaluated in an attempt to determine the highest-rated, proposals shall be categorized as:

3.2.4.3.1.3.1 Acceptable;

3.2.4.3.1.3.2 Reasonably susceptible of being made acceptable;  
or

3.2.4.3.1.3.3 Unacceptable.

3.2.4.3.1.4 Any proposal that modifies, or fails to conform to the essential requirements or specifications of the request for technical proposals shall be considered nonresponsive and categorized as unacceptable.

3.2.4.3.2 NRTA may proceed directly to step two if there are sufficient acceptable proposals to ensure adequate price competition under step two and if further time, effort, and delay to make additional proposals acceptable would not be in NRTA's interests. If NRTA does not proceed directly to step two, it shall notify bidders whose proposals are categorized as reasonably susceptible to being made acceptable of: (1) the nature of the deficiencies in their proposals; and/or (2) the nature of the additional information required and request that they submit additional clarifying or supplemental information.

3.2.4.3.2.1 NRTA may also arrange discussions for this purpose pursuant to the provisions set forth herein.

3.2.4.3.2.2 No proposal shall be discussed with any offeror other than its submitter.

3.2.4.3.2.3 In initiating requests for additional information, NRTA shall fix an appropriate time for bidders to conclude discussions, if any, submit all additional information, and incorporate such additional information as part of their proposals submitted. Such time may be extended in the discretion of NRTA.

3.2.4.3.2.4 If additional information is timely incorporated as part of the proposal and establishes that the proposal is acceptable, it shall be so categorized. Otherwise, it shall be categorized as unacceptable.

- 3.2.4.3.3 When a technical proposal is found unacceptable (either initially or after clarification), NRTA shall promptly notify the offeror of the basis of the determination and that a revision of the proposal will not be considered. Debriefings shall be provided to unsuccessful offerors as set forth herein.
- 3.2.4.3.4 If it is necessary to discontinue the TSSB process, NRTA shall place a memorandum describing the facts and circumstances in the procurement file and shall notify each offeror in writing. When step one results in fewer than two acceptable technical proposals, the procurement may be continued by the RFP method or, under appropriate circumstances, by sole source or limited procurement.
- 3.2.4.3.5 In step two, the IFB procedures set forth in this manual shall be followed except that the IFB shall:
  - 3.2.4.3.5.1 Be issued only to those offerors who submitted acceptable technical proposals in step one;
  - 3.2.4.3.5.2 Include a Statement that: (1) the IFB is issued to initiate step two of TSSB; (2) the only bids to be considered for award of a contract are those received from bidders that have submitted acceptable technical proposals in the first step of the procurement; and (3) any bidder that submitted multiple technical proposals may submit a separate bid on each proposal that was determined to be acceptable; and
  - 3.2.4.3.5.3 Prominently State that the bidder shall comply with the specifications and the bidder's technical proposal.
- 3.2.4.4 Reverse Auction / Request for Information (RFI) Method: The RFI approach seeks first to identify interested suppliers that are qualified to participate in a reverse auction and then to conduct the auction and make a contract award in accordance with the established evaluation criteria. See Request for Information Flowchart and Checklist set forth as Appendix 4.3.4.
  - 3.2.4.4.1 The evaluation process and criteria applied to offers submitted in response to an RFI shall be the same as those applied to proposals submitted in response to an RFP and as set forth herein.
    - 3.2.4.4.1.1 Information exchanges with offerors responding to the RFI shall be used to establish a competitive range of qualified

suppliers that may participate in the reverse auction. The procedures for such exchanges are set forth herein.

3.2.4.4.1.2 In order to be included in the competitive range and allowed to participate in a reverse auction, an offeror's price must be determined to be reasonable pursuant to the procedures set forth herein.

3.2.4.4.2 Once the pool of qualified offerors is established, NRTA shall provide those offerors with training on the technical and practical aspects of participating in the reverse auction. Such training may be provided in whole or in part by NRTA's reverse auction service provider and shall address the following general areas:

3.2.4.4.2.1 Reiteration and/or clarification of system requirements;

3.2.4.4.2.2 How to access the reverse auction service provider's website, including the site address and what browsers to use;

3.2.4.4.2.3 Connectivity issues (*e.g.* transmission delays, submit time vs. receive time);

3.2.4.4.2.4 How to interface with the reverse auction service provider's site, including reverse auction Do's and Don'ts;

3.2.4.4.2.5 Refresh issues (*e.g.* server clock vs. local clock, unseen quotes due to refresh delays);

3.2.4.4.2.6 Conducting practice auction with each offeror that opts for one to test connection and/or reverse auction site's functionality;

3.2.4.4.2.7 Point of contact for any potential problems; and

3.2.4.4.2.8 Description of contingent processes to be used if necessary.

### **3.3 Conducting the Procurement**

3.3.1 *Finalize Draft of Procurement Packet:* Your internal working committee should review your draft IFB, RFP, or RFI focusing on the following issues:

3.3.1.1 Whether specifications and scope of procurement accurately reflect requirements;



- 3.3.1.2 Whether the Procurement Packet complies with local, State and Federal government requirements;
  - 3.3.1.3 Whether the Procurement Packet clearly identifies bidder/proposer responsibilities;
  - 3.3.1.4 Whether evaluation criteria will result in the selection of best outcome for NRTA;
  - 3.3.1.5 Whether list of potential bidders or proposers is as complete as practically possible; and
  - 3.3.1.6 Whether publication procedures comply with applicable laws and regulations.
- 3.3.2 *Advertise and Notify Potential Bidders/Proposers:* Appropriate notice of the procurement must be provided to potential bidders/proposers.
- 3.3.2.1 The type of notice required depends on the object and scope of the procurement.
    - 3.3.2.1.1 Bids for the construction of facilities must be obtained by public notice published as a Class I legal advertisement pursuant to W.Va. Code 59-3-1, *et seq.*, at least fourteen days prior to the final date for submitting bids.
    - 3.3.2.1.2 Notice of all other procurements may be provided by publishing an advertisement or directly providing notice to potential bidders previously identified, or a combination of the two. At a minimum, the advertisement or notice should set forth important information regarding the procurement, including the object and scope of the procurement, the date of a pre-bid/pre-proposal conference (if applicable), deadlines for bidder/proposer communications, and the bid, proposal, or response due date. Alternatively, you may send a complete Procurement Packet that includes the solicitation to those bidders/proposers that you reasonably expect to respond. Local newspapers and national trade publications such as *Passenger Transport* or *Urban Transportation Monitor* may be used to advertise for prospective bidders/proposers. Parties who learn of the procurement in this manner could then request a complete Procurement Packet.
- 3.3.3 *Conduct a Pre-Bid or Pre-Proposal Conference (Optional)* - A pre-bid or pre-proposal conference allows bidders/proposers the chance to ask

questions regarding your desired purchase. The date for the Pre-Bid Conference must be Stated on the Procurement Document. It is best to hold the conference soon after the invitations to bid have been sent so that unclear areas may be addressed early on. The Pre-Bid Conference is more effective if prospective bidders/proposers submit written questions for your review in advance. Attendance by prospective bidders/proposers at the conference is usually optional but may be required depending on the particulars of your proposed procurement.

3.3.4 *Bid/Proposal Deadline and Acceptance:* Bids/proposals must be prepared, executed, and submitted in accordance with the instructions in the Procurement Packet.

3.3.4.1 Unless the circumstances of the procurement support alternative procedures, the bid/proposal should be in a sealed envelope and should arrive by the due date and it should be submitted in original form plus the specified number of copies.

3.3.4.2 Modifications and withdrawals

3.3.4.2.1 Bids may be modified or withdrawn by any method authorized by the IFB if notice is received in the office designated in the IFB no later than the exact time set for the opening of the bids. In addition, a bid may be withdrawn by written notice received at any time before the exact time set for opening of bids and in person by a bidder or its authorized representative if, before the exact time set for opening of bids, the identity of the person requesting withdrawal is established and that person signs a receipt for the bid.

3.3.4.2.2 Proposals may be modified or withdrawn by any method authorized by the RFP/RFI if notice is received in the office designated in the RFP/RFI no later than award.

3.3.4.3 If it becomes necessary for the deadline for submittal of bids/proposals to be changed, NRTA must inform all bidders/proposers who have received a copy of the procurement packet by issuing an addendum to the IFB/RFP/RFI.

3.3.4.4 If an emergency or unanticipated event interrupts normal NRTA processes so that bids/proposals cannot be received at the office designated in the Procurement Packet and urgent NRTA requirements prevent the amendment of the operative date(s) in the IFB/RFP/RFI, the time specified for bid/proposal receipt will be deemed to be extended to the same time of day on the first day on which normal NRTA processes resume.

3.3.4.5 Late bids or proposals shall not be accepted by NRTA. You must strictly adhere to its established deadline for receipt of bids or proposals. Acceptance of bids or proposals after the established deadline constitutes a violation of the procurement process and gives the late offeror an unfair advantage over other bidders/proposers who had submitted their bids/proposals on time.

3.3.4.5.1 Any bid/proposal or modification or withdrawal of a bid/proposal received at the designated office after the exact time for receipt thereof is “late” and will not be considered.

3.3.4.5.2 NRTA must promptly notify any offeror if its bid/proposal, modification, or withdrawal was received late and must inform the offeror whether its bid/proposal will be considered for award. Late bids/proposals and modifications that are not considered must be held unopened, unless opened for identification, until after award and then retained with other unsuccessful bids/proposals. However, any bid bond or guaranty must be returned.

3.3.4.5.3 If available, the following must be included in the procurement file for each late bid/proposal, modification, or withdrawal:

3.3.4.5.3.1 The date and hour of receipt;

3.3.4.5.3.2 A Statement, with supporting rationale, regarding whether the bid/proposal was considered for award; and

3.3.4.5.3.3 The envelope, wrapper, or other evidence of the date and hour of receipt.

3.3.4.6 Timely bids/proposals shall be processed in accordance with the procedures established for the procurement.

3.3.4.6.1 Bids received in response to an IFB shall be publicly opened and read aloud at the designated date and time, and further evaluated as necessary to determine responsiveness, responsibility, and any other relevant issues. The lowest cost responsive and responsible bidder is awarded the contract.

3.3.4.6.2 Proposals received in response to an RFP shall be submitted to the review committee for evaluation after any appropriate negotiations. The contract will be awarded based upon the evaluation factors set forth in the Procurement Packet.

3.3.4.7 Conduct Appropriate Information Exchanges Concerning Proposals (RFP & RFI only)

3.3.4.7.1 Clarifications and Awards without Discussions -- If the award is to be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors.

3.3.4.7.1.1 Clarifications are limited exchanges between NRTA and offerors that may occur when award without discussion is contemplated.

3.3.4.7.1.2 Award may be made without discussions if the RFP States that NRTA intends to evaluate proposals and make award without discussions. If the RFP contains such Statement and NRTA decides to conduct discussions, a memorandum stating the rationale for conducting discussions shall be placed in the procurement file.

3.3.4.7.2 Communications with offerors before Establishment of Competitive Range – If a competitive range is to be established, NRTA may exchange information with offerors after its receipt of proposals in order to establish the competitive range. Such communications:

3.3.4.7.2.1 Shall be limited to the offerors as set forth herein and,

3.3.4.7.2.1.1 Shall be held with whose past performance information is the determining factor preventing them from being placed in the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and

3.3.4.7.2.1.2 May only be held with those offerors (other than those under Section 3.3.4.7.2.1.1) whose exclusion from, or inclusion in, the competitive range is uncertain;

3.3.4.7.2.2 May be conducted to enhance NRTA understanding of proposals, allow reasonable interpretation of the proposal, or facilitate NRTA's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Such communications may be

considered in rating proposals for the purpose of establishing the competitive range;

3.3.4.7.2.3 Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal, but may address:

3.3.4.7.2.3.1 Ambiguities in the proposal or other concerns (*e.g.* perceived deficiencies, weaknesses, errors, omissions, or mistakes;

3.3.4.7.2.3.2 Information relating to relevant past performance; and

3.3.4.7.2.3.3 Shall address adverse past performance information to which the offeror has not previously had the opportunity to comment.

3.3.4.7.3 Competitive Range – NRTA shall evaluate all proposals in accordance with Section 3.2.4.2.3 and, if discussions are to be conducted, establish the competitive range.

3.3.4.7.3.1 Based on the ratings of each proposal against all evaluation criteria, the procurement committee shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency as set forth herein.

3.3.4.7.3.1.1 Since professional judgment must be used in establishing the competitive range, the procedures and factors used will vary from procurement to procurement. However, the competitive range should be determined so that it is:

3.3.4.7.3.1.1.1 Not used to unfairly eliminate offerors;

3.3.4.7.3.1.1.2 Based on factors and criteria known to all offerors;

3.3.4.7.3.1.1.3 Applied uniformly to all proposals; and

3.3.4.7.3.1.1.4 Well documented in the procurement file.

- 3.3.4.7.3.1.2 The competitive range should consist of those offerors whose proposals have a reasonable chance of being selected for award, *i.e.*, are acceptable as submitted or can be made acceptable through modification.
- 3.3.4.7.3.2 After evaluating all proposals, the procurement committee may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided that the RFP notifies offerors that the competitive range may be limited for the purposes of efficiency, the procurement committee may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.
- 3.3.4.7.3.3 If the procurement committee decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this determination shall be provided to unsuccessful offerors as set forth herein.
- 3.3.4.7.3.4 Offerors excluded or otherwise eliminated from the competitive range may request a debriefing as set forth herein.
- 3.3.4.7.3.5 If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered.
- 3.3.4.7.4 Exchanges with offerors after Establishment of the Competitive Range – Once the competitive range has been established, NRTA may conduct negotiations with the offerors within that range.
  - 3.3.4.7.4.1 Negotiations are exchanges, in either a competitive or limited procurement environment, between NRTA and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining, which includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place

after establishment of the competitive range and are called discussions.

3.3.4.7.4.2 Discussions are tailored to each offeror's proposal and must be conducted by the procurement committee with each offeror within the competitive range.

3.3.4.7.4.3 The primary objective of discussions is to maximize NRTA's ability to obtain best value, based on the requirement and the evaluation factors set forth in the RFP.

3.3.4.7.4.4 At a minimum, the procurement committee shall indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The procurement committee also is encouraged to discuss other aspects of the offeror's proposal that could, in the committee's opinion, be altered or explained to enhance materially the proposal's potential for award. However, the procurement committee is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of the procurement committee's judgment.

3.3.4.7.4.5 In discussing other aspects of the proposal, NRTA may, in situations where the solicitation Stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and NRTA may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

3.3.4.7.4.6 If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision.

3.3.4.7.5 Proposal Revisions -- The procurement committee may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion

of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision, or best and final offer (BAFO). The Procurement Packet may provide that NRTA may consider an offeror's most recent proposal a BAFO if that offeror does not respond to a request for a BAFO. Requests for BAFOs shall include:

3.3.4.7.5.1 Specific notice that discussions are concluded;

3.3.4.7.5.2 Notice that this is the opportunity for the offeror to submit a BAFO;

3.3.4.7.5.3 Requirement that BAFOs be submitted in writing;

3.3.4.7.5.4 A definite, common cutoff date and time that allows a reasonable opportunity for the preparation and submission of BAFOs; and

3.3.4.7.5.5 Notice that the BAFO must be received at the place designated by the time and date set in the request and is subject to any provisions dealing with late submissions, modifications, and withdrawals set forth in the RFP.

3.3.4.7.6 Limits on Exchanges – NRTA personnel involved in the procurement shall not engage in conduct that:

3.3.4.7.6.1 Favors one offeror over another;

3.3.4.7.6.2 Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;

3.3.4.7.6.3 Reveals an offeror's price without that offeror's permission. However, NRTA may inform an offeror that its price is considered by NRTA to be too high, or too low, and reveal the results of the analysis that supports that conclusion. It is also permissible, at NRTA's discretion, to indicate to all offerors the cost or price that NRTA's price analysis, market research, and other reviews have identified as reasonable.

3.3.4.7.6.4 Reveals the names of individuals providing reference information about an offeror's past performance; or



3.3.4.7.6.5 Knowingly furnishes source selection information to any offeror.

#### 3.3.4.8 Conducting the reverse auction (RFI only)

3.3.4.8.1 The reverse auction shall be conducted at a time announced in accordance with the procedures set forth in the Procurement Packet.

3.3.4.8.2 The reverse auction shall be conducted pursuant to the procedures set forth in the Procurement Packet, except that the bidding period may be changed if necessary to maximize competition based on the actual number of participants. Notice of any such change must be provided to each qualified offeror at least twenty-four hours prior to the date and time of the reverse auction.

### 3.4 Pre-Award Review and Selection Process

3.4.1 *Re-Convene Procurement Committee:* The procurement committee should be re-convened to evaluate the bids or proposals, the qualifications of the bidders/proposers, and to determine the competitiveness of the bids or proposals. In cases where a committee was not utilized earlier, the review committee should be convened to evaluate the bids or proposals. This committee would logically include some or all of the individuals and functional areas represented in your internal working committee. The committee should review bids or proposals, arrange for negotiations with the bidders/proposers, if necessary, and be responsible for the selection of the final contractor.

3.4.2 *Review Evaluation Process and Criteria:* The review committee should review the established evaluation process and criteria before evaluating the bidders/ proposers submittals. This helps ensure that committee members are using an objective and systematic approach in evaluating the responsiveness of the bids or proposals.

3.4.3 *Evaluate Bids/Proposals:* Timely bids/proposals must be evaluated in accordance with the established evaluation process and criteria.

3.4.3.1 IFB Method -- The IFB evaluation process seeks to identify the responsible bidder that submitted the lowest responsive bid. The contract must be awarded to that bidder unless there is a compelling reason to reject all bids and cancel the IFB altogether.

3.4.3.2 RFP Method -- The RFP evaluation process seeks to identify the responsible offeror that will provide the best value, either by

conducting a trade-off process between cost/price and non-cost factors or by identifying the lowest cost technically acceptable proposal.

3.4.3.3 Reverse Auction / RFI Method -- Like the RFP process, the RFI evaluation process seeks to identify the responsible offeror that will provide the best value, either by conducting a trade-off process between cost/price and non-cost factors or by identifying the lowest cost technically acceptable proposal.

3.4.3.3.1 The information collected through the reverse auction process shall either be considered in accordance with the evaluation criteria set forth in the Procurement Packet.

3.4.3.3.2 Before award, the responsibility of the apparent successful offeror must be determined pursuant to the procedures set forth herein.

3.4.4 *Comply with Documentation Requirements:*

3.4.4.1 NRTA shall maintain records detailing the history of each procurement. A properly documented procurement file provides an audit trail from the initiation of the procurement process to the beginning of the contract. Each procurement file should provide the complete background, including the basis for the decisions at each step in the procurement process. A well-documented file supports actions taken, provides information for reviews and investigations, and furnishes essential facts in the event of litigation or legislative inquiries.

3.4.4.2 At a minimum, each procurement file shall include:

3.4.4.2.1 Rationale for the method of procurement;

3.4.4.2.2 Rationale for the selection of contract type;

3.4.4.2.3 Reasons for contractor selection or rejection; and

3.4.4.2.4 Basis for the contract price.

3.4.4.3 Where appropriate, the procurement file must contain:

3.4.4.3.1 Purchase request, acquisition planning, and other pre-solicitation documents;

3.4.4.3.2 Evidence of availability of funds;

- 3.4.4.3.3 Rationale for the method of procurement (negotiations, formal advertising);
  - 3.4.4.3.4 List of sources solicited;
  - 3.4.4.3.5 Independent cost estimate;
  - 3.4.4.3.6 Statement of work/scope of services;
  - 3.4.4.3.7 Copies of published notices of proposed contract action;
  - 3.4.4.3.8 Copy of the solicitation, all addenda, and all amendments;
  - 3.4.4.3.9 Liquidated damages determination;
  - 3.4.4.3.10 An abstract of each offer or quote;
  - 3.4.4.3.11 Contractor's certifications and representations;
  - 3.4.4.3.12 Source selection documentation;
  - 3.4.4.3.13 Documentation of determination of contractor responsiveness and responsibility;
  - 3.4.4.3.14 Cost or pricing data;
  - 3.4.4.3.15 Determination that price is fair and reasonable, including an analysis of the cost or pricing data and internal approvals;
  - 3.4.4.3.16 Notice of award;
  - 3.4.4.3.17 Notice to unsuccessful offerors and record of any debriefing;
  - 3.4.4.3.18 Record of any protest;
  - 3.4.4.3.19 Bid, performance, payment, or other bond documents, and notices to sureties;
  - 3.4.4.3.20 Required insurance documents, if any;
  - 3.4.4.3.21 Notice to proceed; and
  - 3.4.4.3.22 Buy America certifications and other required documents.
- 3.4.5 *Notify Successful and Unsuccessful Bidders/Proposers:*

- 3.4.5.1 Notification to the successful offeror shall be provided in the form of a Procurement Document (Solicitation / Offer / Acceptance) signed by the Manager.
- 3.4.5.2 Notifications to unsuccessful offerors – Within three days of contract award, the procurement committee shall provide written notification to each offeror that was not selected for award and did not previously receive notice as set forth herein.
  - 3.4.5.2.1 If the unsuccessful offeror had responded to an IFB, the notice shall:
    - 3.4.5.2.1.1 Extend appreciation for the interest the unsuccessful bidder has shown by submitting a bid; and
    - 3.4.5.2.1.2 If the award has been made to other than the low bidder, State the reason for rejection to each of the unsuccessful low bidders.
  - 3.4.5.2.2 If the unsuccessful offeror had responded to an RFP, the notice shall identify:
    - 3.4.5.2.2.1 The number of offerors solicited;
    - 3.4.5.2.2.2 The number of proposals received;
    - 3.4.5.2.2.3 The name and address of each offeror that received an award;
    - 3.4.5.2.2.4 The items, quantities, and any Stated unit prices of each award or, if that is impracticable, the total contract price, in which case the items, quantities, and any Stated unit prices of each award shall be made publicly available upon request; and
    - 3.4.5.2.2.5 In general terms, the reason(s) the offeror's proposal was not accepted, unless the price information provided in accordance with Section 3.4.5.2.2.4 readily reveals the reason. In no case shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.
- 3.4.6 *Conduct Debriefings (If Applicable):* Depending on the circumstances, offerors may receive debriefings before or after contract award.

3.4.6.1 Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a preaward debriefing by submitting a written request to the Manager within three days after receipt of notification of exclusion from the competition.

3.4.6.1.1 At the offeror's request, its debriefing may be delayed until after award, in which event the debriefing shall include all information normally included in a post-award debriefing.

3.4.6.1.2 Absent a request that the debriefing be delayed until after award, NRTA shall make every effort to debrief the unsuccessful offeror as soon as practicable, but it may refuse the debriefing request if it determines, on the basis of compelling reasons, that it is not in the best interests of NRTA to conduct a debriefing at that time.

3.4.6.1.2.1 If the debriefing is delayed, it shall be provided no later than the time for postaward debriefings as set forth herein and the debriefing shall include all information normally included in a postaward debriefing.

3.4.6.1.2.2 A memorandum explaining the rationale for delaying the debriefing shall be placed in the procurement file.

3.4.6.1.3 At a minimum, preaward debriefings shall include:

3.4.6.1.3.1 NRTA's evaluation of significant elements in the offeror's proposal;

3.4.6.1.3.2 A summary of the rationale for eliminating the offeror from the competition; and

3.4.6.1.3.3 Reasonable responses to relevant questions about whether source selection procedures contained in the Procurement Packet and applicable authorities were followed in the process of eliminating the offeror from the competition.

3.4.6.1.4 Preaward debriefings shall not disclose:

3.4.6.1.4.1 The number of offerors;

3.4.6.1.4.2 The identity of other offerors;

3.4.6.1.4.3 The content of other offerors' proposals;

3.4.6.1.4.4 The ranking of other offerors;

3.4.6.1.4.5 The evaluation of other offerors; or

3.4.6.1.4.6 Any of the information as set forth herein.

3.4.6.2 NRTA shall provide an offeror a debriefing and furnish it the basis for the contract award upon written request submitted within three days after that offeror received notification of contract award as set forth herein.

3.4.6.2.1 To the maximum extent possible, post-award debriefings should occur within five days after NRTA's receipt of the written debriefing request. Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed beyond contract award for compelling reasons, should also be debriefed within this period.

3.4.6.2.2 At a minimum, a postaward debriefing shall include:

3.4.6.2.2.1 NRTA's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

3.4.6.2.2.2 The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

3.4.6.2.2.3 The overall ranking of all offerors, when any ranking was developed by NRTA during the evaluation process;

3.4.6.2.2.4 A summary of the rationale for the award; and

3.4.6.2.2.5 Reasonable responses to relevant questions about whether source selection procedures contained in the Procurement Packet and applicable authorities were followed in the process of eliminating the offeror from the competition.

3.4.6.2.3 A postaward debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal:

3.4.6.2.3.1 Trade secrets;

3.4.6.2.3.2 Privileged or confidential manufacturing processes and techniques;

- 3.4.6.2.3.3 Commercial and financial information that is privileged or confidential; or
- 3.4.6.2.3.4 The names of individuals providing reference information about an offeror's past performance.
- 3.4.6.3 Debriefings may be done orally or in writing, but an official summary of each debriefing shall be placed in the procurement file.
- 3.4.6.4 Unless it timely submits a debriefing request, an offeror is not entitled to a debriefing. Untimely debriefing requests may be accommodated, but such accommodation does not automatically extend filing deadlines for protests.
- 3.4.6.5 An offeror may not receive more than one debriefing for each proposal.
- 3.4.7 *Handle Protests (If Applicable)*: If a potential bidder, bidder, or contractor wishes to remedy a wrong in the procurement process, they may file a protest. There are three basic types of protests, based on the time in the procurement process when they occur: pre-bid / pre-solicitation; pre-award; and post-award. While some general protest rules apply to all three types, each is handled using separate protest procedures.
  - 3.4.7.1 General Protest Rules and Procedures
    - 3.4.7.1.1 All protests shall be filed, handled, and resolved in a manner consistent with the requirements of FTA Circular 4220.1F and the procedures set forth herein.
    - 3.4.7.1.2 Protests will only be considered if they are submitted by an interested party: an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.
    - 3.4.7.1.3 All protests shall be filed in writing with the Manager and shall:
      - 3.4.7.1.3.1 Contain the protestor's name, address, and phone number;
      - 3.4.7.1.3.2 Identify the procurement at issue;
      - 3.4.7.1.3.3 State the factual and legal grounds for the protest;
      - 3.4.7.1.3.4 Include copies of any supporting documents; and

- 3.4.7.1.3.5 Describe the relief requested.
- 3.4.7.1.4 The Manager shall document the date and time of receipt of any protest in the procurement file.
- 3.4.7.1.5 NRTA shall give all known potential offerors timely notice of any protest filed and the basis therefore by addendum.
- 3.4.7.1.6 The procurement committee shall respond in detail in writing to each substantive issue raised in the protest.
- 3.4.7.1.7 A protestor may withdraw its protest at any time before NRTA issues a final decision.
- 3.4.7.1.8 All protest decisions shall:
  - 3.4.7.1.8.1 Be made
    - 3.4.7.1.8.1.1 In the case of a pre-bid/pre-proposal or pre-award protest, within fifteen (15) working days of the protest is received by NRTA;
    - 3.4.7.1.8.1.2 In the case of a post-award protest, within twenty-five (25) working days of the date the protest is received by NRTA;
  - 3.4.7.1.8.2 Be made in writing by the Manager;
  - 3.4.7.1.8.3 Clearly State the decision and grounds on which it is based;
  - 3.4.7.1.8.4 Be final.
- 3.4.7.1.9 The protestor may file a request for reconsideration within five (5) working days of the issuance of NRTA's decision, but only if:
  - 3.4.7.1.9.1 New information becomes available that was not previously known; or
  - 3.4.7.1.9.2 There has been an error in law or regulation.
- 3.4.7.1.10 When it receives any protest relating to a contract required to comply with FTA Circular 4220.1F, NRTA shall, at a minimum, informally notify its FTA regional office of that protest and thereafter keep that office apprised of the status of the protest.



- 3.4.7.1.11 NRTA protest procedures must be exhausted before an actual or potential protestor may pursue a protest with FTA.
  - 3.4.7.1.12 A copy of the protest rules and procedures set forth herein shall be included in every Procurement Packet.
- 3.4.7.2 Pre-Bid / Pre-Solicitation Protests are received prior to the bid opening or proposal due date.
- 3.4.7.2.1 Pre-bid / pre-solicitation protests relating to the contents of the Procurement Packet must be filed not less than three (3) working days before the bid opening of proposal due date. Thereafter, all issues relating to the contents of the Procurement Packet are deemed waived by all interested parties. After it is received by NRTA, the pre-bid / pre-solicitation protest shall be handled in accordance with the general protest rules and procedures set forth herein.
  - 3.4.7.2.2 If a pre-bid / pre-solicitation protest is not timely received, the procurement process shall continue in the normal manner unless the procurement committee, upon investigation, finds that remedial action is desirable, in which event such action shall be taken.
  - 3.4.7.2.3 The procurement committee shall respond in writing to each pre-bid / pre-solicitation protest within ten (10) working days of the date it is received by NRTA.
  - 3.4.7.2.4 If a pre-bid / pre-solicitation written protest is received, bids or proposals submitted to NRTA shall not be opened prior to the resolution of the protest unless the procurement committee determines in writing that proceeding to open bids or proposals is justified for urgent and compelling reasons or is in the best interest of NRTA because failure to proceed would otherwise unduly delay delivery or performance or otherwise cause undue harm to NRTA or the State or Federal government. A memorandum documenting any such determination and the reasons therefore must be placed in the procurement file.
- 3.4.7.3 Pre-Award Protests are protests against making an award and are received after the bid opening or proposal due date but before the award of a contract.
- 3.4.7.3.1 The procurement committee shall respond in writing to each pre-award protest within ten (10) working days of the date it is

received by NRTA. After it is received by NRTA, the pre-award protest shall be handled as set forth herein and by the general protest rules and procedures as set forth herein.

3.4.7.3.2 If a pre-award protest is received, NRTA shall not award the contract at issue until five (5) calendar days after the resolution of the protest unless NRTA determines in writing that proceeding to award the contract is justified for urgent and compelling reasons or is in the best interest of NRTA because failure to proceed would otherwise unduly delay delivery or performance or otherwise cause undue harm to NRTA or the State or Federal government. A memorandum documenting any such determination and the reasons therefore must be placed in the procurement file.

3.4.7.3.3 If NRTA withholds the award of the contract at issue pending the resolution of the protest, the offerors whose bids might become eligible for award shall be requested, before expiration of any bid acceptance period, to extend that period (with consent of sureties, if any) to avoid the need for starting the procurement over.

3.4.7.3.4 If NRTA determines that the award of the contract at issue should be made during the pendency of a protest, it shall:

3.4.7.3.4.1 Notify FTA prior to making such award (the FTA reserves the right not to participate in the funding of any contract awarded during the pendency of a protest to FTA); and

3.4.7.3.4.2 Provide written notice of the decision to proceed with the award to the protestor and, as appropriate, to other concerned parties.

3.4.7.4 Post-award protests are received after the award of a contract.

3.4.7.4.1 Post-award protests must be filed within ten (10) working days of contract award. Thereafter, all issues relating to the award of the contract are deemed waived by all interested parties.

3.4.7.4.2 The procurement committee shall respond in writing to each post-award protest within twenty (20) working days of the date it is received by NRTA. After it is received by NRTA, the post-award protest shall be handled as set forth herein and by the general protest rules and procedures as set forth herein.

- 3.4.7.4.3 Upon receipt of a post-award protest, NRTA shall suspend performance of the contract at issue until five (5) calendar days after the resolution of the protest unless NRTA determines in writing that proceeding to award the contract is justified for urgent and compelling reasons or is in the best interest of NRTA because failure to proceed would otherwise unduly delay delivery or performance or otherwise cause undue harm to NRTA or the State or Federal government.
- 3.4.7.4.4 The contractor/awardee shall be notified of the protest and the basis therefore within one working day after its receipt by NRTA.
- 3.4.7.4.5 The contractor/awardee may, at its option, submit a written response to the protest within twenty (20) working days of the date the protest was received by NRTA.
- 3.4.7.4.6 In order to prevent the improper disclosure of confidential business information, unredacted copies of the protest shall be provided solely to attorneys or other appropriate representatives of the contractor/awardee who have signed and are subject to a confidentiality agreement designed to prevent such disclosure.

### 3.4.7.5 Appeals to FTA

- 3.4.7.5.1 FTA reviews of protests are limited to:
  - 3.4.7.5.1.1 NRTA's failure to have or follow its own protest procedures or its failure to review a complaint or protest; or
  - 3.4.7.5.1.2 Violations of Federal law or regulation.
- 3.4.7.5.2 An appeal to FTA must be received by the cognizant FTA regional or headquarters office within five (5) working days of the date that the protestor learned or should have learned of an adverse decision by NRTA or other basis of appeal to FTA.
- 3.4.7.5.3 An appeal to the FTA must be filed in accordance with FTA Circular 4220.1F.
- 3.4.7.5.4

## **3.5 Alternative Procurement Procedures**

### *3.5.1 Blanket Purchasing Agreements (BPAs)*

3.5.1.1 If you determine that a BPA would be advantageous, you must decide to either establish parameters to limit purchases to individual items or commodity groups or classes or permit the supplier to provide unlimited supplies or services. In determining the appropriate supplier(s), you should consider suppliers who offer quality supplies or services at consistently lower prices and whose past performance has shown them to be dependable.

3.5.1.2 Before preparing the BPA, you must contact the suppliers in question to make the necessary arrangements for:

3.5.1.2.1 Securing maximum discounts;

3.5.1.2.2 Documenting individual purchase transactions;

3.5.1.2.3 Periodic billings;

3.5.1.2.4 Incorporating other necessary details; and

3.5.1.2.5 Ensuring agreement on the required terms and conditions.

3.5.1.3 The following terms and conditions must be included in all BPAs:

3.5.1.3.1 Description of Agreement – A Statement that the supplier shall furnish supplies or services, described in general terms, if and when requested by the authorized representative(s) of NRTA during a specified period and within a stipulated aggregate amount, if any.

3.5.1.3.2 Extent of Obligation – A Statement that NRTA is obligated only to the extent of authorized purchases actually made under the BPA.

3.5.1.3.3 Purchase Limitation – A Statement specifying the dollar limitation for each individual purchase under the BPA;

3.5.1.3.4 Individuals Authorized to Purchase – A Statement that a list of individuals authorized to purchase under the BPA, identified either by name or title of position, and the dollar limitation per purchase for each individual shall be furnished to the supplier by NRTA;

3.5.1.3.5 Delivery Tickets – A requirement that all shipments under the BPA be accompanied by delivery tickets or sales slips containing the following minimum information:

3.5.1.3.5.1 Name of supplier;

3.5.1.3.5.2 BPA number;

3.5.1.3.5.3 Date of purchase;

3.5.1.3.5.4 Purchase number;

3.5.1.3.5.5 Itemized list of supplies or services furnished;

3.5.1.3.5.6 Quantity, unit price, and extension of each item; and

3.5.1.3.5.7 Date of delivery or shipment.

3.5.1.3.6 Invoices – A requirement that an itemized invoice be submitted to NRTA at least monthly or upon expiration of the BPA, whichever occurs first, for all deliveries made during the billing period and for which payment has not been received.

3.5.1.4 Limit documentation of purchases to essential information and forms as follows:

3.5.1.4.1 Purchases should generally be made electronically, or orally when it is not economical or practical to use electronic means.

3.5.1.4.2 A paper purchase document may be issued if necessary to ensure agreement between NRTA and the supplier concerning the transaction.

3.5.1.4.3 Unless a paper purchase document is issued, essential elements (*e.g.* date, supplier, supplies or services, price, delivery date) must be recorded in an informal memorandum placed in the BPA file.

3.5.1.5 The Manager must conduct an annual review of a sufficient random sample of the BPA files and/or purchases to ensure that BPA procedures are being followed.

### 3.5.2 *Cooperative Purchasing through GSA Schedules*

3.5.2.1 Supplies available on GSA Schedules are listed at fixed prices. Services offered there are priced either at hourly rates or at a fixed price for performance of a specific task (*e.g.* installation, maintenance, repair). Each schedule contractor publishes an “Authorized Federal Supply Schedule Pricelist” that contains all supplies and services it

offers, in addition to the pricing and terms and conditions for each item. GSA has already determined the Schedule prices for supplies and fixed-price services and the Schedule rates for services offered at hourly rates to be fair and reasonable.

3.5.2.1.1 In order to place an order through a GSA Schedule, you must first determine that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet NRTA's needs.

3.5.2.1.2 Although GSA has already negotiated fair and reasonable pricing, you may seek additional discounts from the vendor before placing an order.

3.5.2.2 Ordering procedures vary depending on what is being acquired how much is to be spent.

3.5.2.2.1 When acquiring products or services listed for a fixed price where a Statement of work is not required, the following procedures apply:

3.5.2.2.1.1 Orders at or below the micro-purchase threshold may be placed with any schedule contractor that can fulfill NRTA's needs. Although not required to solicit a specific number of schedule contractors, you should attempt to distribute orders among contractors to the extent possible.

3.5.2.2.1.1.1 The micro-purchase threshold is \$2,500 for all acquisitions except construction, for which it is \$2,000.

3.5.2.2.1.2 Orders for between the micro-purchase threshold and the maximum order threshold established by the schedule contract must be placed with the schedule contractor that can provide the product or service that represents the best value for NRTA. Before placing an order, you must consider reasonably available information about the product or service by surveying the GSA Advantage! on-line shopping service or by reviewing the catalogs or pricelists of at least three schedule contractors. In addition to price, you may consider other factors, including:

3.5.2.2.1.2.1 Past performance;

- 3.5.2.2.1.2.2 Special features of the product or service required to meet NRTA's needs;
  - 3.5.2.2.1.2.3 Trade-in considerations;
  - 3.5.2.2.1.2.4 Probable life of item selected as compared with that of a comparable item;
  - 3.5.2.2.1.2.5 Warranty considerations;
  - 3.5.2.2.1.2.6 Maintenance availability;
  - 3.5.2.2.1.2.7 Environmental and energy efficiency considerations; and
  - 3.5.2.2.1.2.8 Delivery terms.
- 3.5.2.2.1.3 For orders that exceed the maximum order threshold, you must follow the procedures set forth above and also:
- 3.5.2.2.1.3.1 Review the pricelists of additional schedule contractors;
  - 3.5.2.2.1.3.2 Seek price reductions from the schedule contractor(s) considered to offer the best value based upon the initial evaluation; and
  - 3.5.2.2.1.3.3 After seeking price reductions, place the order with the schedule contractor that provides the best value. If additional price reductions are not offered, an order may still be placed.
- 3.5.2.2.1.4 When acquiring services priced at hourly rates where a Statement of work is required, the following procedures apply:
- 3.5.2.2.1.4.1 Orders at or below the micro-purchase threshold may be placed with any schedule contractor that can fulfill NRTA's needs. Although not required to solicit a specific number of schedule contractors, you should attempt to distribute orders among contractors to the extent possible.
  - 3.5.2.2.1.4.2 For orders for between the micro-purchase threshold and the maximum order threshold established by the schedule contract, you must

develop a Statement of work (SOW) and provide a request for quotes (RFQ) to at least three schedule contractors that offer services that meet NRTA's needs, asking that they submit firm fixed prices to perform the services described in the SOW.

- 3.5.2.2.1.4.2.1 The RFQ must contain the SOW and a Statement of evaluation criteria.
- 3.5.2.2.1.4.2.2 The RFQ may be posted to GSA's electronic RFQ system, e-Buy, which may be accessed at <http://www.ebuy.gsa.gov>.
- 3.5.2.2.1.4.2.3 All SOWs must include the work to be performed, period of performance, deliverable schedule, applicable performance standards, and any special requirements (*e.g.* travel, special knowledge). To the maximum extent practicable, requirements should be expressed in performance-based Statements.
- 3.5.2.2.1.4.3 For orders that exceed the maximum order threshold, you must follow the procedures set forth above and also:
  - 3.5.2.2.1.4.3.1 Provide the RFQ to additional schedule contractors that will meet NRTA's needs. In determining the appropriate number of additional schedule contractors, you should consider, among other factors, the complexity, scope, and estimated value of the requirement and the results of the market research.
  - 3.5.2.2.1.4.3.2 Seek price reductions.
- 3.5.2.2.1.4.4 You should provide the RFQ to any schedule contractor that requests a copy.
- 3.5.2.2.1.4.5 The responses received must be evaluated using the evaluation criteria provided in the RFQ.
- 3.5.2.2.1.4.6 If you determine that the price quoted by the schedule contractor who offers NRTA the best value is reasonable, based on your consideration of the proper level of effort and mix of labor, place the order with that schedule contractor.



- 3.5.2.2.1.4.7 After award, provide timely notification to unsuccessful offerors.
- 3.5.2.2.1.4.8 If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for that award must be provided in writing.

### 3.5.3 *State and Federal Surplus Personal Property*

3.5.3.1 The West Virginia Surplus Property Unit offers eligible organizations the opportunity to obtain good, usable property that is no longer needed by State agencies for a substantially reduced price. Unless exempted by statute, State agencies are required to retire their unneeded property to the Surplus Property Unit, which first makes it available to eligible organizations. If eligible entities do not show an interest in the property, the Unit then makes it available to the public through sealed bid or auction sales.

- 3.5.3.1.1 Retired State property is generally delivered to the Surplus Property Unit offices in Dunbar, West Virginia, where it is inventoried, modified (if the modifications would greatly increase the value of the property), and displayed for inspection. Retired property may also be sold at its existing location.
- 3.5.3.1.2 Property that has been retired by a State agency and processed by the Surplus Property Unit may be acquired by an eligible organization for the fair market value of the property.
- 3.5.3.1.3 Eligibility -- The organizations eligible to participate in the State Surplus Property Program are as follows: State agencies; county commissions; county boards of education; municipalities; public service districts; county building commissions; airport authorities; parks and recreation commissions; nonprofit domestic corporations qualified as exempt under section 501(c)(3) of the Internal Revenue Code of 1986, as amended; and volunteer fire departments in West Virginia, if they have been held exempt from taxation under section 501(c) of the United States Internal Revenue Code.
  - 3.5.3.1.3.1 NRTA may be held to be an instrumentality of one or more county commissions upon submission of a satisfactory written Statement supporting such a finding from the relevant county commission(s).

- 3.5.3.1.3.2 An Application for Eligibility must be completed and signed by the executive officer or authorized representatives and approved prior to purchasing retired property from the State Surplus Property Unit.
  - 3.5.3.1.3.2.1 The Application serves as a source of authority for both the State and Federal Surplus Property Programs.
  - 3.5.3.1.3.2.2 Participants in either program must submit a new application every three years or earlier if there is a change in its administration.
- 3.5.3.1.4 Retention of Property – NRTA must cause ownership and title to the surplus property to be held only in the organization’s official name and (except in cases of unserviceability) ensure that the ownership or title, or both, remains in the organization’s possession and nontransferable for a period of not less than one year from the date of purchase or transfer.
- 3.5.3.1.5 Public Sales – If necessary, NRTA may also acquire property from the State Surplus Property Unit through sealed bid sales or public auctions.
  - 3.5.3.1.5.1 Sealed bid
    - 3.5.3.1.5.1.1 Statewide sealed bid – Property throughout the State may be included on a Statewide bid sheet that lists all items to be sold.
    - 3.5.3.1.5.1.2 Weekly sealed bid – The property sold at weekly sealed bid sales consists only of that located at the Surplus Property Unit’s office in Dunbar, West Virginia.
    - 3.5.3.1.5.1.3 The time, terms, and place of sealed bids are set forth in a Class II legal advertisement published in the County in which the sale is to be conducted. In addition, the Unit maintains a mailing list used to inform potential bidders of Statewide sealed bid sales.
    - 3.5.3.1.5.1.4 Bid forms noting the opening time/date, describing the items, and identifying their location and a contact person are distributed the potential bidders

on the statewide mailing list and are also available upon verbal or written request.

- 3.5.3.1.5.1.5 Statewide sealed bids are opened pursuant to the notice provided. For weekly sealed bids sales, bids are opened every Friday. In the event that Friday is a holiday, all bids received by Thursday at 4:30 p.m. are opened the following Monday at 9:00 a.m.

#### 3.5.3.1.5.2 Public Auction

- 3.5.3.1.5.2.1 The time, terms, and place of sealed bids are set forth in a Class II legal advertisement published in Kanawha County. In addition, public auctions are advertised in classified display advertisements that run in various publications throughout the State. The Unit also maintains a mailing list used to inform potential bidders of the time and date of upcoming auctions and a sampling of the merchandise to be sold.
- 3.5.3.1.5.2.2 Property is displayed for inspection at the Surplus Property Unit's offices in Dunbar, West Virginia.
- 3.5.3.1.5.2.3 Auction participants must register and receive a bidder's number. At the time of registration, potential bidders receive a copy of the Terms and Conditions.
- 3.5.3.1.5.2.4 All public auction sales take place on Saturdays.
- 3.5.3.1.5.2.5 Purchased property must be removed from the Surplus Property Unit's premises no later than 4:30 p.m. on the day after the sale.

3.5.3.2 The Federal Surplus Property Program is also operated by the West Virginia Surplus Property Unit under the jurisdiction of the GSA Property Management Division. Federal government agencies regularly generate property excess to their needs. GSA first makes that property available to other Federal agencies. If there is no need on the Federal level, surplus property is made available for State government screening. The Surplus Property Unit is the authorized agency to obtain Federal surplus property in West Virginia. Federal property allocated to the Surplus Property Unit is then made available to public agencies and certain non-profit organizations in exchange for

service fees that are always less than the actual fair market price of the property.

- 3.5.3.2.1 The Federal property that is available through the Federal Surplus Property Program includes all types and categories of property except real property, certain naval vessels, and the records of the Federal government.
- 3.5.3.2.2 Because it falls within the definition of “public agency” set forth at 40 U.S.C. § 484(j)(5), NRTA may be considered an eligible program participant. However, in order to be declared eligible, NRTA must submit an Application for Eligibility every three years (or earlier if there is a change in administration at NRTA).
- 3.5.3.2.3 Eligible program participants may screen at Federal locations, either with Surplus Property Unit screeners (if written approval is obtained from the Unit) or on their own (with a “screener’s card for which they must apply to the Unit).
- 3.5.3.2.4 The methods used by the Surplus Property Unit to notify eligible organizations of property availability include:
  - 3.5.3.2.4.1 Responses to Want Lists submitted in writing;
  - 3.5.3.2.4.2 Advertisements and property sale notices;
  - 3.5.3.2.4.3 Notifications regarding Remote Property Distribution Sales events
- 3.5.3.2.5 Terms, Conditions, Reservations, and Restrictions -- In the Application for Eligibility, the applicant agrees to the following terms, conditions, reservations, and restrictions:
  - 3.5.3.2.5.1 The property shall be placed in use for the purposes for which they were acquired within one year and then used for that purpose for at least one year from the date the property was placed in use, else title reverts to GSA at its option;
  - 3.5.3.2.5.2 Any special handling and use limitations as are imposed by GSA, else title reverts to GSA at its option;
  - 3.5.3.2.5.3 With respect to items with an acquisition cost of \$5,000 or more and all passenger motor vehicles except vessels fifty feet or more in length and aircraft:

- 3.5.3.2.5.3.1 The property shall be used only for the purpose for which it was acquired and for no other purpose, else title reverts to the State of West Virginia at GSA's option; and
- 3.5.3.2.5.3.2 The property must be used for the purposes for which it was acquired for a period of eighteen months from the date it was placed in use or title reverts to the State of West Virginia at GSA's option.
- 3.5.3.2.5.4 For the periods set forth herein, the Applicant shall not sell, trade, lease, lend, bail, cannibalize, encumber, or otherwise dispose of such property or remove it permanently, for use outside of West Virginia, without permission from GSA for the Surplus Property Unit;
  - 3.5.3.2.5.4.1 If the property is sold, traded, leased, rented, bailed, cannibalized, encumbered or otherwise disposed of with permission, the Applicant will pay any proceeds to GSA or the Surplus Property Unit, as the case may be.
  - 3.5.3.2.5.4.2 If the property is sold, traded, leased, rented, bailed, cannibalized, encumbered or otherwise disposed of without permission, the Applicant shall pay GSA or the Surplus Property Unit, as the case may be, at the option of the GSA or the Surplus Property Unit, either the proceeds of the disposition of the fair market value or the fair rental value of the property, as determined by GSA or the Surplus Property Unit.
  - 3.5.3.2.5.4.3 If at any time during the periods set forth herein, the property is no longer suitable, usable, or further needed by the Applicant for the purpose for which it was acquired, the Applicant shall promptly notify the Surplus Property Unit and do as directed by the Unit;
  - 3.5.3.2.5.4.4 The Applicant shall make reports to the Surplus Property Unit on the location, use, and condition of the property and on other pertinent matter required by the Unit;

- 3.5.3.2.5.5 At the option of the Surplus Property Unit, the Applicant may abrogate the conditions and restrictions set forth herein by payment of an amount determined by the Unit;
  - 3.5.3.2.5.6 The property acquired by the Applicant is on an “as is, where is” basis, without warranty of any kind;
  - 3.5.3.2.5.7 Where an Applicant carried insurance against damages to or loss of property due to fire or other hazards and where loss or damage to the property with unexpired terms, condition, reservations, or restrictions occurs, the Surplus Property Unit will be entitled to reimbursement from Applicant out of the insurance proceeds of an amount equal to the unamortized portion of the fair value of the damaged or destroyed property; and
  - 3.5.3.2.5.8 With respect to aircraft and vessels fifty feet or more in length with an acquisition cost of \$5,000 or more, regardless of the purpose for which they are acquired, the acquisition shall be subject to the terms, conditions, reservations, and restrictions set forth in the Conditional Transfer Document executed by Applicant.
- 3.5.3.2.6 The Surplus Property Unit shall ensure compliance with applicable terms, conditions, reservations, and restrictions as follows:
- 3.5.3.2.6.1 For Federal property with an acquisition cost *under* \$5,000, a compliance review of the terms, conditions, reservations, and restrictions imposed on the Federal property will be made. The review will include a survey to determine that the acquiring entity is complying with the statutory requirement that all items of Federal property acquired by the organization be placed into use within one year of acquisition and used for one year thereafter.
  - 3.5.3.2.6.2 For Federal property with an acquisition cost *over* \$5,000, the Surplus Property Unit may visit organizations receiving Federal property through the Surplus Property Program at least once a year during the period of restriction to ensuring proper use. In the event that a visit is not feasible, the Surplus Property Unit will require written reports on utilization from the acquiring entity’s administrative officer.
  - 3.5.3.2.6.3 In addition to ensuring all the terms and conditions placed on the Federal property are being adhered to, the Unit’s

personnel will be evaluating the general utilization of property; any evidence of stockpiling or over supply; need for other property by the organization; the effectiveness of the surplus property service; and use of items on which the GSA has imposed special handling or use limitations.

3.5.3.2.6.4 A report will be prepared on each compliance visit and submitted to the Surplus Property Unit for approval. Any follow-up action necessary on non-compliance or non-use will be initiated.

3.5.3.3 If for any reason NRTA is unable to fulfill its requirements through the Surplus Property Program, it may still be able to purchase Federal surplus property from GSA, which conducts sealed bid, auction, spot bid, and fixed price sales. Since GSA attempts to maximize sale prices in this context, such purchases will almost certainly involve much higher costs than acquisitions through the Surplus Property Program.

#### *3.5.4 Sole Source / Limited Procurement*

3.5.4.1 Even when using other than competitive procedures, you must solicit offers from as many potential sources as is practicable under the circumstances.

3.5.4.2 In all instances, a separate written justification for using other than competitive procedures must be prepared, approved by the Manager, and placed in the procurement file prior to the commencement of negotiations for a contract resulting from such procedures. Each justification shall contain sufficient facts and rationale to justify the use of other than competitive procedures. At a minimum, each justification shall include the following information:

3.5.4.2.1 Identification of the document as a “Justification for Use Other Than Competitive Procurement Procedures”;

3.5.4.2.2 Nature and/or description of the action being justified;

3.5.4.2.3 Description of goods or services required to meet NRTA’s needs (including the estimated value);

3.5.4.2.4 Demonstration that the proposed contractor’s unique qualifications or the nature of the acquisition requires use of the action being justified;

3.5.4.2.5 Description of efforts made to ensure that offers are solicited from as many potential sources as is practicable;

- 3.5.4.2.6 Determination that the anticipated cost to NRTA will be fair and reasonable;
- 3.5.4.2.7 Description of the market research conducted and the results, along with an explanation of how the results support the action being justified, or a Statement of the reason that market research was not conducted;
- 3.5.4.2.8 Any other facts supporting the use of other than competitive procedures; and
- 3.5.4.2.9 A list of the sources, if any, that expressed in writing an interest in the acquisition.

### **3.6 Post-Award and Post-Delivery Activities**

- 3.6.1 *Monitor Contractor Activities (If Applicable)*: If the contract is for services, vehicles, or facility construction, you must monitor contractor compliance with the contract, purchase order, and technical specifications and or technical proposal. You must also work to ensure that its contractors and subcontractors comply with applicable Federal and State laws and regulations.
- 3.6.2 *Post-Delivery Inspection of Capital Equipment Purchases*: When vehicles or other equipment have been delivered, several activities must take place. Warranty arrangements must be made with the contractor and the post-delivery audit must be conducted. Additionally, after vehicles or other equipment have been placed in service, you must comply with applicable reporting requirements including:
  - 3.6.2.1 Performance reports;
  - 3.6.2.2 Vehicle inspections;
  - 3.6.2.3 Biennial vehicle and equipment inspection/self certifications processes; and
  - 3.6.2.4 In the context of Sections 5307 & 5309, maintenance of records on facilities, vehicles, and equipment. These records must contain a history of the facility, vehicle or equipment starting with construction or delivery and extending through disposal.
- 3.6.3 *Conduct Post-Delivery Audit of Capital Equipment*: After delivery of vehicles or equipment, you must conduct an inspection and ensure compliance with the specifications and with Federal and State regulations,



## Appendix 4.1

### W.Va. Code 8-27-23. Competitive bids; publication of solicitation for sealed bids.

(a) Any contract for the construction of facilities by any authority, when the expenditure required exceeds the sum of ten thousand dollars, shall be based solely on competitive sealed bids.

(b) Except as provided below, the procurement of all supplies, equipment and materials, where the expenditure required exceeds the sum of ten thousand dollars, shall be based on the competitive procedure that is best suited under the circumstances of the procurement.

(c) In determining the competitive bid procedures that is best suited under the circumstances, an authority shall conduct:

(1) Competitive sealed bidding if:

(A) Time permits a competitive bid process to be used;

(B) The award of the bid will be made primarily on price and price-related factors;

(C) It is likely to be unnecessary to conduct discussions with suppliers regarding bids, including discussions regarding price; and

(D) There is a reasonable expectation of receiving more than one sealed bid; or

(2) Competitive negotiation where competitive sealed bidding is not best suited under the circumstances.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section, an authority may provide for the procurement of property or services covered by this section using other than competitive procedures only when:

(1) The property or services needed are available only from one responsible source and no other type of property or service will satisfy the authority's needs;

(2) The authority's need for the property or service is urgent, unusual and compelling because the authority would be seriously injured unless the authority is permitted to limit the number of sources from which it solicits;

(3) It is necessary to award a contract to a particular source or sources in order to maintain a facility, producer, manufacturer or other supplier in case of emergency; or

(4) It is necessary to establish or maintain an alternative source or sources of supply for the property or service to increase or maintain competition.

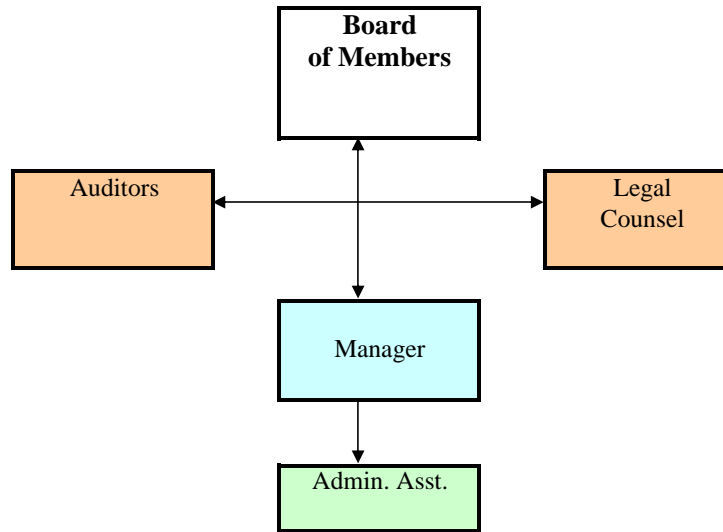
(e) All sealed bids or competitive negotiated proposals received in response to a solicitation or request for bid may be rejected if an authority determines that the action is in the public interest.

(f) Sealed bids shall be opened publicly at the time and place stated in the solicitation and the authority shall evaluate the bids without discussions with bidders and award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the authority, considering only price and other price-related factors included in the solicitation.

(g) The evaluation of competitive proposals may include written or oral discussions conducted with all responsible bidders or suppliers at any time after receipt of the proposals and before the award or may be made without discussions. In either event, the award shall be made to the lowest responsible bidder or supplier.

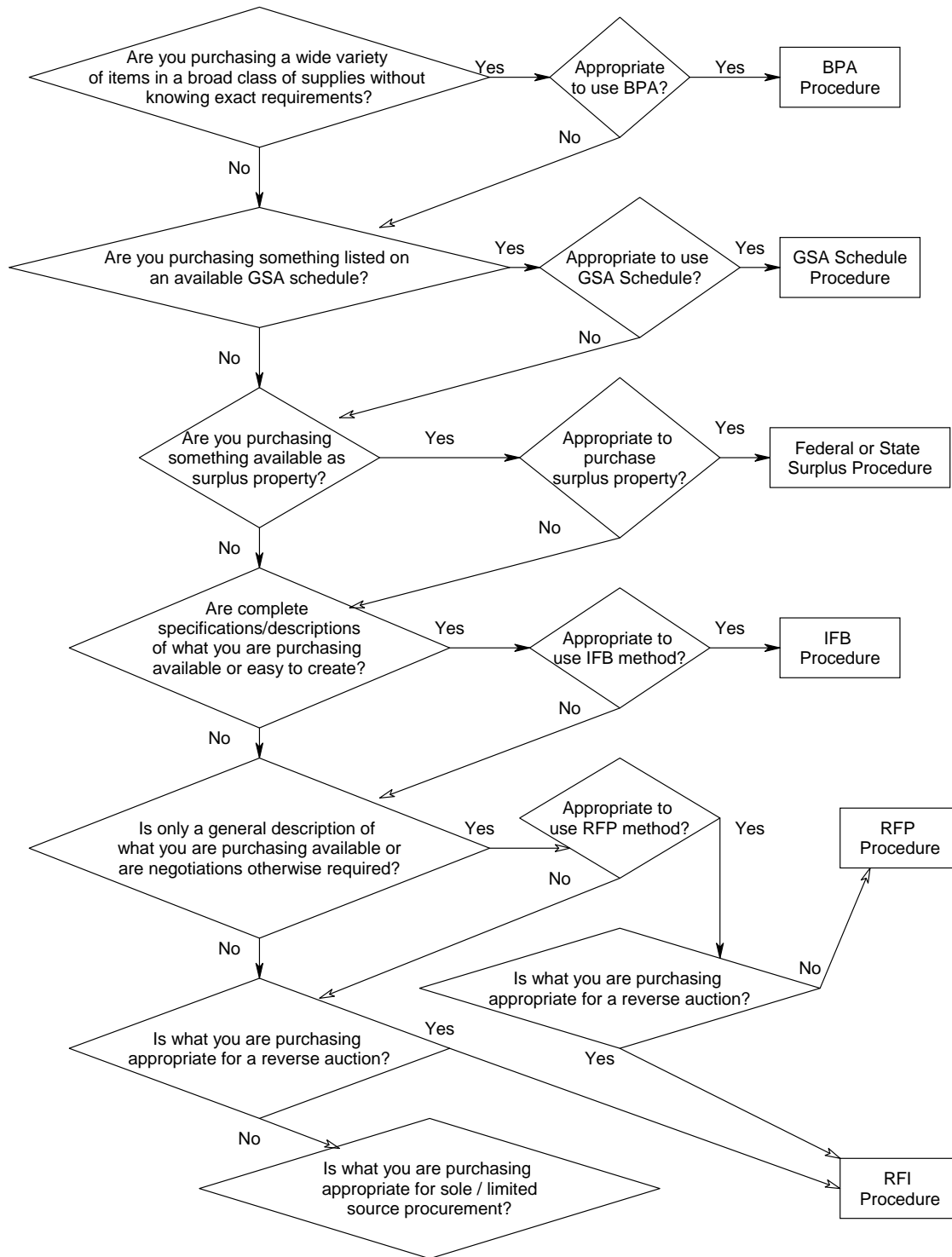
(h) Adequate public notice of the solicitation of bids and proposals shall be given. Public notice shall be given not less than seven days before the date set for bid opening or, in the case of competitive negotiation, not less than seven days before the due date for receipt of proposals: Provided, That bids for the construction of facilities shall be obtained by public notice published as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, with such publication being made at least fourteen days before the final date for March 8, 2005 submitting bids.

**Appendix 4.2  
New River Transit Authority (NRTA) Organizational Chart**



<i>Color Codes</i>	
Policy	
Advisory	
Managerial Staff	8
Support Staff	16
Part Time	5
Union Hourly Pers	132

## Appendix 4.3 -- Selection of Procurement Type



### Appendix 4.3.1 - Invitation for Bid Checklist

- Pre IFB Cost Estimate
- Selection of Procurement
- Assemble Required Procurement Packet Elements
- Issue IFB / Advertise Procurement
- Pre-Bid Conference (Optional)
- Pre-Bid Protest (Potential)
- Receive Bids
- Handle Withdrawals / Modifications (Potential)
- Open Bids
- Confirm Adequacy of Competition
- Confirm No Other Reason to Cancel Procurement
- Evaluate Bids
  - Lowest Price
  - Responsiveness
  - Responsibility
  - Reasonableness
- Handle Pre-Award Mistakes (Potential)
- Select Awardee
- Notify Successful / Unsuccessful Offerors
- Conduct Post-Award Debriefing(s) (Potential)
- Handle Post-Award Mistakes (Potential)
- Handle Post-Award Protest (Potential)

#### Appendix 4.3.2. – Request for Proposal Checklist

- ❑ Assemble Required Procurement Packet Elements
- ❑ Issue RFP / Advertise Procurement
- ❑ Pre-Proposal Conference (Optional)
- ❑ Pre-Proposal Protest (Potential)
- ❑ Receive Proposals
- ❑ Handle Withdrawals / Modifications (Potential)
- ❑ Review Proposals
- ❑ Confirm Adequacy of Competition
- ❑ Confirm No Other Reason to Cancel Procurement
- ❑ Evaluate Proposals
  - Both Technical & Price
  - Responsiveness
  - Responsibility
  - Reasonableness
- ❑ Conduct Information Exchange(s) (Optional)
  - Clarifications & Award without Discussion
  - Pre-Competitive Range Communications
  - Establishing Competitive Range
  - Negotiations
- ❑ Select Awardee
- ❑ Notify Successful / Unsuccessful Offerors
- ❑ Conduct Post-Award Debriefing(s) (Potential)
- ❑ Handle Post-Award Mistakes (Potential)
- ❑ Handle Post-Award Protest (Potential)

### Appendix 4.3.3 – Two-Step Sealed Bidding Checklist

- ❑ Assemble Required Procurement Packet Elements
- ❑ Issue Initial TSSB Request / Advertise Procurement
- ❑ Pre-Proposal Conference (Optional)
- ❑ Pre- Proposal Protest (Potential)
- ❑ Receive Technical Proposals
- ❑ Handle Withdrawals / Modifications (Potential)
- ❑ Review Proposals
- ❑ Confirm Adequacy of Competition
- ❑ Confirm No Other Reason to Cancel Procurement
- ❑ Evaluate Proposals
  - Responsiveness
  - Categorize re: Acceptability
- ❑ Conduct Information Exchange(s) (Optional)
  - Discussions
- ❑ Notify Successful / Unsuccessful Offerors
- ❑ Conduct Post-Award Debriefing(s) (Potential)
- ❑ Apply IFB Procedures with Minor Modifications (See Appendix 4.5.2)

#### Appendix 4.3.4 - Request for Information Checklist

- ❑ Assemble Required Procurement Packet Elements
- ❑ Issue RFI / Advertise Procurement
- ❑ Pre-Proposal Conference (Optional)
- ❑ Pre-Proposal Protest (Potential)
- ❑ Receive Proposals
- ❑ Handle Withdrawals / Modifications (Potential)
- ❑ Review Proposals
- ❑ Confirm Adequacy of Competition
- ❑ Confirm No Other Reason to Cancel Procurement
- ❑ Evaluate Proposals
  - Both Technical & Price
  - Responsiveness
  - Reasonableness
- ❑ Conduct Information Exchange(s) (Optional)
  - Pre-Competitive Range Communications
  - Establishing Competitive Range
- ❑ Train Qualified Offerors
- ❑ Conduct Reverse Auction
- ❑ Determine Responsibility of Highest-Rated Offeror
- ❑ Notify Successful / Unsuccessful Offerors
- ❑ Conduct Post-Award Debriefing(s) (Potential)
- ❑ Handle Post-Award Mistakes (Potential)
- ❑ Handle Post-Award Protest (Potential)

## 4.4 - Solicitation, Offer and Award

### New River Transit Authority

**116 1/2 North Heber Street, Beckley, WV 25801**

Procurement No. \_\_\_\_\_

Issue Date: \_\_\_\_\_

For information contact: \_\_\_\_\_

There \_\_\_ will / \_\_\_ will not be a pre-bid / pre-proposal conference at \_\_:\_\_\_.m. on \_\_\_\_\_ at the NRTA office, 116 1/2 North Heber Street, Beckley, West Virginia. Pre-conference written questions must be submitted to NRTA by \_\_:\_\_\_.m. on \_\_\_\_\_.

An original and \_\_\_ copies of the offer must be submitted to the Manager, NRTA, 116 1/2 North Heber Street Beckley, WV 25801 by mail or hand delivery on or before \_\_:\_\_\_.m. on \_\_\_\_\_.

Contents of Procurement Packet (P)/ Contract (C):

Section	P	C
Solicitation, Offer and Award		
Contract Schedule		
General Procurement Instructions		
Standard Contract Clauses		
Special Contract Clauses		
Technical Specifications		
Scope of Work		
Representations / Certifications Checklist		
Representations / Certifications		

#### Acknowledgement of Amendments

(The Offeror acknowledges receipt of amendments to the Solicitation and related documents numbered and dated.)

Amendment No.	Date	Amendment No.	Date

Offeror Name, Address and Telephone Number: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Name & Title of Person Authorized to Sign for Offeror: \_\_\_\_\_  
 \_\_\_\_\_

By execution below, Offeror hereby offers to furnish the equipment and/or services described in this Procurement for the price(s) noted in its bid/proposal. Offeror also certifies that, if selected, it will execute all forms required in connection with federal regulation compliance, pre-award audit, and post-delivery audit issues.

Offeror Signature: \_\_\_\_\_

NRTA Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Contract No. \_\_\_\_\_

Contract Amount: \_\_\_\_\_

See additional sheet for line items / options



## **Appendix 4.5 - General Procurement Instructions and Conditions**

All bids/proposals submitted in response to this procurement must comply with these General Procurement Instructions and Conditions.

### Offer Preparation and Submission

The bid/proposal shall be submitted in the following format: *(Insert description of required format and contents of response to procurement, including number and subject of separate volumes, page and font size limitations, and required media.)*

The bid/proposal must be delivered in a sealed envelope to NRTA's Manager in accordance with the instructions in the Procurement Document.

If it becomes necessary for the deadline for submittal of bids/proposals to be changed, NRTA will inform all offerors who have received a copy of the Procurement Packet by issuing an addendum to the IFB/RFP/RFI.

If an emergency or unanticipated event interrupts normal NRTA processes so that bids/proposals cannot be received at the office designated in the Procurement Packet and urgent NRTA requirements prevent the amendment of the operative date(s) in the IFB/RFP/RFI, the time specified for bid/proposal receipt will be deemed to be extended to the same time of day on the first day on which normal NRTA processes resume.

### Acknowledging Amendments

Offerors must use the space provided on the Procurement Document and additional sheets as necessary to acknowledge all amendments to this Solicitation. Such acknowledgement must include the number and date of the amendment and the initials of the authorized signatory identified in the Procurement Document.

### Late Submissions

NRTA shall not accept late bids or proposals. You must strictly adhere to its established deadline for receipt of bids or proposals. Acceptance of bids or proposals after the established deadline constitutes a violation of the procurement process and gives the late offeror an unfair advantage over other offerors who had submitted their bids/proposals on time.

Any bid/proposal or modification or withdrawal of a bid/proposal received at the designated office after the exact time for receipt thereof is "late" and will not be considered. However, a late modification of an otherwise successful bid/proposal that makes its terms more favorable to the government will be considered at any time and may be accepted.

NRTA shall promptly notify any offeror if its bid/proposal, modification, or withdrawal was received late and shall inform the offeror whether its bid/proposal will be considered for award. Late bids/proposals and modifications that are not considered shall be held unopened, unless opened for identification, until after award and then retained with other unsuccessful bids/proposals. However, any bid bond or guaranty shall be returned.

#### Modification and Withdrawal of Offers

Bids may be modified or withdrawn by any method authorized by the IFB if notice is received in the office designated in the IFB no later than the exact time set for the opening of the bids. In addition, a bid may be withdrawn by written notice received at any time before the exact time set for receipt of bids and in person by a bidder or its authorized representative if, before the exact time set for opening of bids, the identity of the person requesting withdrawal is established and that person signs a receipt for the bid.

Proposals may be modified or withdrawn by any method authorized by the RFP/RFI if notice is received in the office designated in the RFP/RFI no later than award.

#### Disadvantaged Business Enterprise Goals and Program

NRTA has developed a DBE program in accordance with the Department of Transportation regulations at 49 CFR Part 26. A copy of the DBE Program is available upon request from NRTA's Manager, who also serves as the DBE Liaison Officer.

*(If a DBE goal has been established for the specific contract in question, include the following text.)*

A DBE goal of \_\_\_% has been established for this procurement. Please submit the following information as part of your bid/proposal:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation is being submitted to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
6. If the contract goal has not been met, evidence of good faith efforts.

#### Contract Award

Timely bids/proposals shall be processed in accordance with the procedures established for the procurement.

*(Include appropriate text.)*

Bids received in response to an IFB shall be publicly opened and read aloud at the designated date and time, and further evaluated as necessary to determine responsiveness, responsibility, and any other relevant issues. NRTA will award the contract to the lowest cost responsive and responsible bidder.

*or*

Proposals received in response to an RFP/RFI shall be submitted to the review committee for evaluation after any appropriate negotiations. The contract will be awarded based upon the following evaluation factors: *(Insert detailed description of evaluation factors – e.g. price, technical evaluation, past performance, management proposal, risk -- and any weighting to be applied to them in the evaluation.)*

*(If information exchanges are to be used – RFP/RFI only -- include appropriate section(s) of text below.)*

*Award without Discussions* – NRTA intends to award this contract without discussions. If necessary, offerors will be given the opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors.

*Communications Prior to Establishing Competitive Range* – NRTA intends to establish the competitive range as part of its overall evaluation of offers before awarding this contract. To this end, NRTA may exchange information with offerors after its receipt of proposals in order to establish the competitive range. Such communications shall be held with offerors whose past performance information is the determining factor preventing them from being placed in the competitive range. In such case, the communications will address adverse past performance information to which an offeror has not had a prior opportunity to respond. Communications may also be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain.

Communications prior to establishing the competitive range may be conducted to enhance NRTA's understanding of proposals, allow reasonable interpretation of the proposal, or facilitate NRTA's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. They may be considered in rating proposals for the purpose of establishing the competitive range – in particular, addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal, but may address: (1) ambiguities in the proposal or other concerns (*e.g.* perceived deficiencies, weaknesses, errors, omissions, or mistakes; and (2) information relating to relevant past performance; and

*Establishing the competitive range* -- NRTA shall evaluate all proposals in accordance with the evaluation factors stated herein and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the procurement committee shall establish a competitive range comprised of all

of the most highly rated proposals, unless the range is further reduced for purposes of efficiency as provided herein. The competitive range will consist of those offerors whose proposals have a reasonable chance of being selected for award, *i.e.*, are acceptable as submitted or can be made acceptable through modification.

After evaluating all proposals, the procurement committee may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. If this occurs, the procurement committee may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

If the procurement committee decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this determination shall be provided to unsuccessful offerors. Offerors excluded or otherwise eliminated from the competitive range may request a debriefing by submitting a written request to NRTA's Manager within three days of receiving notice of the determination. If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered.

Once the competitive range has been established, NRTA may conduct negotiations with the offerors within that range. In this context, such negotiations are called discussions. Their purpose is to allow the offeror to revise its proposal. Discussions may include bargaining, which includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. Discussions tailored to each offeror's proposal will be conducted by the procurement committee with each offeror within the competitive range. At a minimum, the procurement committee shall, subject to the limitations on exchanges set forth in the NRTA Procurement Manual, indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The procurement committee may also discuss other aspects of the offeror's proposal that could, in the committee's opinion, be altered or explained to enhance materially the proposal's potential for award. However, the procurement committee is not required to discuss every area where the proposal could be improved.

If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision.

*Proposal Revisions* -- The procurement committee may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion of discussions, each offeror still in the competitive range shall be given an

opportunity to submit a final proposal revision, or best and final offer (BAFO). NRTA will consider an offeror's most recent proposal a BAFO if that offeror does not respond to a request for a BAFO.

*Reverse Auction* – This procurement will take the form of a reverse auction. First, the competitive range of interested qualified suppliers will be identified as follows: *(Insert appropriate portions of RFP/RFI text from above to describe first step of process.)*. NRTA will then conduct a reverse auction in which those within the competitive range will participate after receiving relevant training concerning the reverse auction procedure.

### Protest Procedures

#### A. In General

1. All protests shall be filed, handled, and resolved in a manner consistent with the requirements of FTA Circular 4220.1E and the procedures set forth in Section 3.4.7 of NRTA's Procurement Manual and reproduced below.
2. Protests will only be considered if they are submitted by an interested party: an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.
3. All protests shall be filed in writing with the Manager and shall:
  - a. Contain the protestor's name, address, and phone number;
  - b. Identify the procurement at issue;
  - c. State the factual and legal grounds for the protest;
  - d. Include copies of any supporting documents; and
  - e. Describe the relief requested.
4. The office of the Manager shall document the date and time of receipt of any protest in the procurement file.
5. NRTA shall give all known potential offerors timely notice of any protest filed and the basis therefore by addendum.
6. The procurement committee shall respond in detail in writing to each substantive issue raised in the protest.
7. A protestor may withdraw its protest at any time before NRTA issues a final decision.
8. All protest decisions shall:
  - a. Be made within fifteen (15) working days of the date the protest is received by NRTA;
  - b. Be made in writing by the Manager;
  - c. Clearly state the decision and grounds on which it is based;
  - d. Be final.
9. The protestor may file a request for reconsideration within five (5) working days of the issuance of NRTA's decision, but only if:
  - a. New information becomes available that was not previously known; or

- b. There has been an error in law or regulation.
  - c. When it receives any protest relating to a contract required to comply with FTA Circular 4220.1E, NRTA shall, at a minimum, informally notify its FTA regional office of that protest and thereafter keep that office apprised of the status of the protest.
- 10. NRTA protest procedures must be exhausted before an actual or potential protestor may pursue a protest with FTA.
- 11. A copy of the protest rules and procedures shall be included in every Procurement Packet.

**B. Pre-Bid / Pre-Solicitation Protests**

- 1. Pre-Bid / Pre-Solicitation Protests are received prior to the bid opening or proposal due date.
- 2. Pre-bid / pre-solicitation protests relating to the contents of the Procurement Packet must be filed not less than three (3) working days before the bid opening of proposal due date. Thereafter, all issues relating to the contents of the Procurement Packet are deemed waived by all interested parties. After it is received by NRTA, the pre-bid / pre-solicitation protest shall be handled in accordance with this Section B and the general protest rules and procedures set forth in Section A above.
- 3. If a pre-bid / pre-solicitation protest is not timely received, the procurement process shall continue in the normal manner unless the procurement committee, upon investigation, finds that remedial action is desirable, in which event such action shall be taken.
- 4. The procurement committee shall respond in writing to each pre-bid / pre-solicitation protest within ten (10) working days of the date it is received by NRTA.
- 5. If a pre-bid / pre-solicitation written protest is received, bids or proposals submitted to NRTA shall not be opened prior to the resolution of the protest unless the procurement committee determines in writing that proceeding to open bids or proposals is justified for urgent and compelling reasons or is in the best interest of NRTA because failure to proceed would otherwise unduly delay delivery or performance or otherwise cause undue harm to NRTA or the State or Federal government. A memorandum documenting any such determination and the reasons therefore must be placed in the procurement file.

**C. Pre-Award Protests**

- 1. Pre-Award Protests are protests against making an award and are received after the bid opening or proposal due date but before the award of a contract.
- 2. The procurement committee shall respond in writing to each pre-award protest within ten (10) working days of the date it is received by NRTA. After it is received by NRTA, the pre-award protest shall be handled in

accordance with this Section C and the general protest rules and procedures set forth in Section A above.

3. If a pre-award protest is received, NRTA shall not award the contract at issue until five (5) calendar days after the resolution of the protest unless NRTA determines in writing that proceeding to award the contract is justified for urgent and compelling reasons or is in the best interest of NRTA because failure to proceed would otherwise unduly delay delivery or performance or otherwise cause undue harm to NRTA or the State or Federal government. A memorandum documenting any such determination and the reasons therefore must be placed in the procurement file.
4. If NRTA withholds the award of the contract at issue pending the resolution of the protest, the offerors whose bids might become eligible for award shall be requested, before expiration of any bid acceptance period, to extend that period (with consent of sureties, if any) to avoid the need for starting the procurement over.
5. If NRTA determines that the award of the contract at issue should be made during the pendency of a protest, it shall:
  - a. Notify FTA prior to making such award (the FTA reserves the right not to participate in the funding of any contract awarded during the pendency of a protest to FTA); and
  - b. Provide written notice of the decision to proceed with the award to the protestor and, as appropriate, to other concerned parties.

#### D. Post-Award Protests

1. Post-award protests are received after the award of a contract.
2. Post-award protests must be filed within ten (10) working days of contract award. Thereafter, all issues relating to the award of the contract are deemed waived by all interested parties.
3. The procurement committee shall respond in writing to each post-award protest within twenty (20) working days of the date it is received by NRTA. After it is received by NRTA, the post-award protest shall be handled in accordance with this Section D and the general protest rules and procedures set forth in Section A above.
4. Upon receipt of a post-award protest, NRTA shall suspend performance of the contract at issue until five (5) calendar days after the resolution of the protest unless NRTA determines in writing that proceeding to award the contract is justified for urgent and compelling reasons or is in the best interest of NRTA because failure to proceed would otherwise unduly delay delivery or performance or otherwise cause undue harm to NRTA or the State or Federal government.
5. The contractor/awardee shall be notified of the protest and the basis therefore within one working day after its receipt by NRTA.

6. The contractor/awardee may, at its option, submit a written response to the protest within twenty (20) working days of the date the protest was received by NRTA
  7. In order to prevent the improper disclosure of confidential business information, unredacted copies of the protest shall be provided solely to attorneys or other appropriate representatives of the contractor/awardee who have signed and are subject to a confidentiality agreement designed to prevent such disclosure.
- E. Appeals to FTA
1. FTA reviews of protests are limited to:
    - a. NRTA's failure to have or follow its own protest procedures or its failure to review a complaint or protest; or
    - b. Violations of Federal law or regulation.
  2. An appeal to FTA must be received by the cognizant FTA regional or headquarters office within five (5) working days of the date that the protestor learned or should have learned of an adverse decision by NRTA or other basis of appeal to FTA.
  3. An appeal to the FTA must be filed in accordance with FTA Circular 4220.1E, a copy of which is available upon request from NRTA.

#### Cancellation of Procurement

All bids/proposals received in response to the Solicitation may be rejected and the procurement cancelled if NRTA determines that doing so is in the public interest.



## Appendix 4.6 - Representations and Certifications Checklist

Procurement No. \_\_\_\_\_

Representations and Certifications checked below apply to this Procurement.  
They are included in the Procurement Packet and must be completed and returned with the Offer.

- Representation Concerning Offeror's Business Form
- Representation Concerning Offeror's DBE status
- Certification Concerning Overall Federal Regulatory Compliance
- Certification Concerning Compliance with Specifications
- Procurement Integrity Certification
- Lobbying Certification
- Certification Regarding Debarment, Suspension, and Other Responsibility Matters
- Certification of Compliance with Bus Testing Requirements
- Buy America Certification for Buses, Other Rolling Stock, and Associated Equipment
- Buy America Certification for Steel, Iron, or Manufactured Products
- Federal Motor Vehicle Safety Standards Certification
- Air Pollution Certification
- \_\_\_\_\_
- \_\_\_\_\_

(use additional sheets if necessary)

Acknowledged:

\_\_\_\_\_  
Offeror Representative Signature

\_\_\_\_\_  
Offeror Representative Name and Title

\_\_\_\_\_  
Offeror Company

\_\_\_\_\_  
Date

## **Appendix 4.7.1 -- Standard Contract Provisions**

4.7.1.1	Assignment of Claims
4.7.1.2	Changes
4.7.1.3	Impact of Taxes
4.7.1.4	Inspection
4.7.1.5	Payment
4.7.1.6	Termination
4.7.1.7	Order of Precedence
4.7.1.8	Incorporation of FTA Terms
4.7.1.9	Notice of Federal Requirements
4.7.1.10	Federal Changes
4.7.1.11	Access to Records
4.7.1.12	Disputes
4.7.1.13	Civil Rights Requirements
4.7.1.14	Disadvantaged Business Enterprise
4.7.1.15	Debarment and Suspension
4.7.1.16	Energy Conservation
4.7.1.17	Geographic Restrictions
4.7.1.18	Lobbying Restrictions
4.7.1.19	No Government Obligations to Third Parties
4.7.1.20	Program Fraud and False or Fraudulent Statements Act
4.7.1.21	Excusable Delays
4.7.1.22	Warranties

#### **4.7.1.1 Assignment of Claims**

*(Include if assignment of claims is to be allowed.)*

(a) The Contractor, upon written approval from NRTA, may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence.

(b) Any assignment or reassignment authorized under the Act and this clause shall cover all unpaid amounts payable under this contract, and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract.

(c) The Contractor shall not furnish or disclose to any assignee under this contract any classified document (including this contract) or information related to work under this contract unless and until NRTA authorizes such action in writing.

*(Include if assignment of claims is to be prohibited.)*

The Contractor may not assign its rights to be paid amounts due or to become due under this contract.

#### **4.7.1.2 Changes**

*(Include in fixed-price contract for goods.)*

(a) NRTA may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, NRTA shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, NRTA shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

*(In fixed-price contract for services, substitute the following section.)*

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (*i.e.*, hours of the day, days of the week, etc.).
- (3) Place of performance of the services.

*(In fixed-price contract for goods and services, substitute the following section.)*

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (*i.e.*, hours of the day, days of the week, etc.).
- (3) Place of performance of the services.
- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government, in accordance with the drawings, designs, or specifications.
- (5) Method of shipment or packing of supplies.
- (6) Place of delivery.

*(Include in cost-reimbursement contract for goods.)*

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
- (2) Method of shipment or packing.
- (3) Place of delivery.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the-

- (1) Estimated cost, delivery or completion schedule, or both;
- (2) Amount of any fixed fee; and
- (3) Other affected terms and shall modify the contract accordingly.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides

that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) of this clause, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Limitation of Cost or Limitation of Funds clause of this contract.

*(In cost-reimbursement contract for services, substitute the following section.)*

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (*i.e.*, hours of the day, days of the week, etc.).
- (3) Place of performance of the services.

*(In cost-reimbursement contract for goods and services, substitute the following section.)*

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (*i.e.*, hours of the day, days of the week, etc.).
- (3) Place of performance of the services.
- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
- (5) Method of shipment or packing of supplies.
- (6) Place of delivery.

#### **4.7.1.3 Impact of Taxes**

(a) As used in this clause-  
"After-imposed Federal tax" means any new or increased Federal excise tax or duty, or tax that was exempted or excluded on the contract date but whose exemption was later revoked or reduced during the contract period, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date. It does not include social security tax or other employment taxes.

"After-relieved Federal tax" means any amount of Federal excise tax or duty, except social security or other employment taxes, that would otherwise have been payable on the transactions or property covered by this contract, but which the Contractor is not required to pay or bear, or for which the Contractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the contract date.

"All applicable Federal, State, and local taxes and duties" means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

"Contract date" means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.

"Local taxes" includes taxes imposed by a possession or territory of the United States, Puerto Rico, or the Northern Mariana Islands, if the contract is performed wholly or partly in any of those areas.

(b) The contract price includes all applicable Federal, State, and local taxes and duties.

(c) The contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise.

(d) The contract price shall be decreased by the amount of any after-relieved Federal tax.

(e) The contract price shall be decreased by the amount of any Federal excise tax or duty, except social security or other employment taxes, that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(f) No adjustment shall be made in the contract price under this clause unless the amount of the adjustment exceeds \$250.

(g) The Contractor shall promptly notify the Contracting Officer of all matters relating to any Federal excise tax or duty that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs.

(h) The Government shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Contractor requests such evidence and a reasonable basis exists to sustain the exemption.

#### **4.7.1.4 Inspection**

*(Include in fixed-price contract for supplies.)*

(a) *Definition.* "Supplies," as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(b) The Contractor shall provide and maintain an inspection system acceptable to NRTA covering supplies under this contract and shall tender to NRTA for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to NRTA during contract performance and for as long afterwards as the contract requires.

NRTA may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.

(c) NRTA has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. NRTA shall perform inspections and tests in a manner that will not unduly delay the work. NRTA assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(d) If NRTA performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, NRTA shall bear the expense of NRTA inspections or tests made at other than the Contractor's or subcontractor's premises; provided, that in case of rejection, NRTA shall not be liable for any reduction in the value of inspection or test samples.

(e)(1) When supplies are not ready at the time specified by the Contractor for inspection or test, the Contracting Officer may charge to the Contractor the additional cost of inspection or test.

(2) NRTA may also charge the Contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(f) NRTA has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. NRTA may reject nonconforming supplies with or without disposition instructions.

(g) NRTA shall remove supplies rejected or required to be corrected. However, NRTA may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, NRTA may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, NRTA may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

(i)(1) If this contract provides for the performance of NRTA quality assurance at source, and if requested by NRTA, the Contractor shall furnish advance notification of the time-

(i) When Contractor inspection or tests will be performed in accordance with the terms and conditions of the contract; and

(ii) When the supplies will be ready for NRTA inspection.

(2) NRTA's request shall specify the period and method of the advance notification and the NRTA representative to whom it shall be furnished. Requests shall not require more than 2 workdays of advance notification if the NRTA representative is in residence in the Contractor's plant, nor more than 7 workdays in other instances.

(j) NRTA shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. NRTA failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on NRTA, for nonconforming supplies.

(k) Inspections and tests by NRTA do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, NRTA, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at NRTA's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and NRTA; provided, that NRTA may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if NRTA elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in paragraph (l)(1) or (l)(2) of this clause and does not cure such failure within a period of 10 days (or such longer period as NRTA may authorize in writing) after receipt of notice from NRTA specifying such failure, NRTA shall have the right by contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned NRTA thereby.

*(Include in a cost-reimbursement contract for supplies.)*

(a) *Definitions.* As used in this clause-

"Contractor's managerial personnel" means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at a plant or separate location where the contract is being performed; or

(3) A separate and complete major industrial operation connected with performing this contract.

"Supplies" includes but is not limited to raw materials, components, intermediate assemblies, end products, lots of supplies, and data.

(b) The Contractor shall provide and maintain an inspection system acceptable to NRTA covering the supplies, fabricating methods, and special tooling under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to NRTA during contract performance and for as long afterwards as the contract requires.



(c) NRTA has the right to inspect and test the contract supplies, to the extent practicable at all places and times, including the period of manufacture, and in any event before acceptance. NRTA may also inspect the plant or plants of the Contractor or any subcontractor engaged in the contract performance. NRTA shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If NRTA performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise specified in the contract, NRTA shall accept supplies as promptly as practicable after delivery, and supplies shall be deemed accepted 60 days after delivery, unless accepted earlier.

(f) At any time during contract performance, but no later than 6 months (or such other time as may be specified in the contract) after acceptance of the supplies to be delivered under the contract, NRTA may require the Contractor to replace or correct any supplies that are nonconforming at time of delivery. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. Except as otherwise provided in paragraph (h) of this clause, the cost of replacement or correction shall be included in allowable cost, but no additional fee shall be paid. The Contractor shall not tender for acceptance supplies required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g)(1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, NRTA may-

(i) By contract or otherwise, perform the replacement or correction and charge to the Contractor any increased cost or make an equitable reduction in any fixed fee paid or payable under the contract;

(ii) Require delivery of undelivered supplies at an equitable reduction in any fixed fee paid or payable under the contract; or

(iii) Terminate the contract for default.

(2) Failure to agree on the amount of increased cost to be charged to the Contractor or to the reduction in the fixed fee shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) of this clause, NRTA may at any time require the Contractor to correct or replace, without cost to NRTA, nonconforming supplies, if the nonconformances are due to-

(1) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(2) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause applies in the same manner to corrected or replacement supplies as to supplies originally delivered.

(j) The Contractor shall have no obligation or liability under this contract to replace supplies that were nonconforming at the time of delivery, except as provided in this clause or as may be otherwise provided in the contract.

*(Include in fixed-price contract for services.)*

- (a) *Definition.* "Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.
- (b) The Contractor shall provide and maintain an inspection system acceptable to NRTA covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to NRTA during contract performance and for as long afterwards as the contract requires.
- (c) NRTA has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. NRTA shall perform inspections and tests in a manner that will not unduly delay the work.
- (d) If NRTA performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.
- (e) If any of the services do not conform with contract requirements, NRTA may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, NRTA may-
  - (1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and
  - (2) Reduce the contract price to reflect the reduced value of the services performed.
- (f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, NRTA may-
  - (1) By contract or otherwise, perform the services and charge to the Contractor any cost incurred by NRTA that is directly related to the performance of such service; or
  - (2) Terminate the contract for default.

*(Include in cost-reimbursement contract for services.)*

- (a) *Definition.* "Services," as used in this clause, includes services performed, workmanship, and material furnished or used in performing services.
- (b) The Contractor shall provide and maintain an inspection system acceptable to NRTA covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to NRTA during contract performance and for as long afterwards as the contract requires.
- (c) NRTA has the right to inspect and test all services called for by the contract, to the extent practicable at all places and times during the term of the contract. NRTA shall perform inspections and tests in a manner that will not unduly delay the work.
- (d) If any of the services performed do not conform with contract requirements, NRTA may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, NRTA may-

- (1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and
  - (2) Reduce any fee payable under the contract to reflect the reduced value of the services performed.
- (e) If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, NRTA may-
- (1) By contract or otherwise, perform the services and reduce any fee payable by an amount that is equitable under the circumstances; or
  - (2) Terminate the contract for default.

#### **4.7.1.5 Payment**

*(Include in fixed price-contract.)*

NRTA shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by NRTA if-

- (a) The amount due on the deliveries warrants it; or
- (b) The Contractor requests it and the amount due on the deliveries is at least \$1,000 or 50 percent of the total contract price.

*(Include in cost-reimbursement contract.)*

(a) *Invoicing.*

(1) NRTA will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by NRTA in accordance with the terms of this contract. The Contractor may submit to an authorized representative of NRTA, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

(2) The designated payment office will make interim payments for contract financing on the \_\_\_\_\_ *[Insert day of month]* day after the designated billing office receives a proper payment request. In the event that NRTA requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date.

(b) *Reimbursing costs.*

(1) For the purpose of reimbursing allowable costs (except as provided in paragraph (b)(2) of this clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only-

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

- (ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for-
  - (A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made-
    - (1) In accordance with the terms and conditions of a subcontract or invoice; and
    - (2) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;
  - (B) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;
  - (C) Direct labor;
  - (D) Direct travel;
  - (E) Other direct in-house costs; and
  - (F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and
- (iii) The amount of financing payments that have been paid by cash, check, or other forms of payment to subcontractors.
  - (2) Accrued costs of Contractor contributions under employee pension plans shall be excluded until actually paid unless-
    - (i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and
    - (ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's indirect costs for payment purposes).
  - (3) Notwithstanding the audit and adjustment of invoices or vouchers under paragraph (g) of this clause, allowable indirect costs under this contract shall be obtained by applying indirect cost rates established in accordance with paragraph (d) of this clause.
  - (4) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to NRTA shall be disregarded for purposes of cost-reimbursement under this clause.
- (c) *Small business concerns.* A small business concern may receive more frequent payments than every 2 weeks.
- (d) *Final indirect cost rates.*
  - (1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with Subpart 42.7 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.
  - (2)(i) The Contractor shall submit an adequate final indirect cost rate proposal to NRTA and auditor within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by NRTA. The Contractor shall support its proposal with adequate supporting data.
  - (ii) The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate NRTA representative and the Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.
  - (3) The Contractor and the appropriate NRTA representative shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify

(i) the agreed-upon final annual indirect cost rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, (iv) any specific indirect cost items treated as direct costs in the settlement, and (v) the affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates. The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The understanding is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(5) Within 120 days (or longer period if approved in writing by NRTA) after settlement of the final annual indirect cost rates for all years of a physically complete contract, the Contractor shall submit a completion invoice or voucher to reflect the settled amounts and rates.

(6)(i) If the Contractor fails to submit a completion invoice or voucher within the time specified in paragraph (d)(5) of this clause, NRTA may-

(A) Determine the amounts due to the Contractor under the contract; and

(B) Record this determination in a unilateral modification to the contract.

(ii) This determination constitutes the final decision of NRTA in accordance with the Disputes clause.

(e) *Billing rates.* Until final annual indirect cost rates are established for any period, NRTA shall reimburse the Contractor at billing rates established by NRTA or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates-

(1) Shall be the anticipated final rates; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

(f) *Audit.* At any time or times before final payment, NRTA may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be-

(1) Reduced by amounts found by the Contracting Officer not to constitute allowable costs; or

(2) Adjusted for prior overpayments or underpayments.

(g) *Final payment.*

(1) Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (d)(5) of this clause, and upon the Contractor's compliance with all terms of this contract, NRTA shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(2) The Contractor shall pay to NRTA any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by NRTA. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. Before final payment under this contract, the Contractor and each assignee whose assignment is in effect at the time of final payment shall execute and deliver-

(i) An assignment to NRTA, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly

allocable to costs for which the Contractor has been reimbursed by NRTA under this contract; and

(ii) A release discharging NRTA, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, except-

(A) Specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known; and

(B) Claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided, that the claims are not known to the Contractor on the date of the execution of the release, and that the Contractor gives notice of the claims in writing to NRTA within 6 years following the release date or notice of final payment date, whichever is earlier.

#### **4.7.1.6 Termination**

*(Include in fixed-price contracts for goods and/or services.)*

(a) *Termination for Convenience* NRTA may terminate this contract, in whole or in part, at any time if NRTA determines doing so is in its best interest. Termination shall be effected by serving the Contractor with a notice of termination for convenience stating the extent of the termination.

(1) The Contractor shall be paid its costs, including contract close-out costs, and profit on accepted goods and/or work performed up to the date of termination notice. The settlement of the Contractor's termination claim shall be governed by the cost principles set forth in Part 49 of the Federal Acquisition Regulations. The Contractor shall promptly submit its termination claim to NRTA to be paid the Contractor.

(b) *Termination for Default* If the Contractor does not deliver supplies in accordance with the contract delivery schedule, or, if the contract is for services, the Contractor fails to perform in the manner called for in the contract, or if the Contractor fails to comply with any other provisions of the contract, NRTA may terminate this contract for default. Termination shall be effected by serving a notice of termination on the Contractor setting forth the manner in which the Contractor is in breach or default. The Contractor will only be paid the contract price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the contract prior to the date of the termination notice.

(1) The Contractor and its sureties shall be liable for any damage to NRTA resulting from the Contractor's default, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any procurement costs incurred by NRTA.

(2) If it is later determined by NRTA that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of the Contractor, NRTA, after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

(3) NRTA, in its sole discretion may, in the case of a termination for default, allow the Contractor a short period of time in which to cure the defect. In such case, the notice of termination will state the time period in which cure is permitted and other appropriate conditions. If Contractor fails to remedy to NRTA 's satisfaction the breach or default of

any of the terms, covenants, or conditions of this Contract within the stated amount of time after receipt by Contractor of written notice from NRTA setting forth the nature of said breach or default, NRTA shall have the right to terminate the Contract without any further obligation to Contractor. Any such termination for default shall not in any way operate to preclude NRTA from also pursuing all available remedies against Contractor and its sureties for said breach or default.

(c) *Post-Termination Obligations* After receipt of a notice of termination, and except as directed by NRTA, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to NRTA, as directed by NRTA, all right, title, and interest of the Contractor under the subcontracts terminated, in which case NRTA shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by NRTA, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by NRTA, transfer title and deliver to NRTA (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to NRTA.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that NRTA may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which NRTA has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by NRTA, any property of the types referred to in subparagraph (b)(6) of this clause; provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, NRTA. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by NRTA under this contract, credited to the price or cost of the work, or paid in any other manner directed by NRTA.

(d) *Waiver of Remedies for any Breach* In the event that NRTA elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this Contract, such waiver by NRTA shall not limit NRTA's remedies for any succeeding breach of that or of any other term, covenant, or condition of this Contract.

*(In cost-reimbursement contract for goods and/or services, substitute the following section for sections (a) and (b) and renumber the remaining sections)*

(a) *Termination for Convenience or Default* NRTA may terminate this contract, or any portion of it, by serving a notice of termination on the Contractor. The notice shall state whether the termination is for convenience of NRTA or for the default of the Contractor and shall identify its effective date.

(1) If the termination is for default, the notice shall state the manner in which the contractor has failed to perform the requirements of the contract. The Contractor shall account for any property in its possession paid for from funds received from NRTA, or property supplied to the Contractor by NRTA. If the termination is for default, NRTA may fix the fee, if the contract provides for a fee, to be paid the Contractor in proportion to the value, if any, of work performed up to the time of termination. The Contractor shall promptly submit its termination claim to NRTA and the parties shall negotiate the termination settlement to be paid the Contractor.

(2) If the termination is for the convenience of NRTA, the Contractor shall be paid its contract close-out costs, and a fee, if the contract provided for payment of a fee, in proportion to the work performed up to the time of termination.

(3) If, after serving a notice of termination for default, NRTA determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the contractor, NRTA, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

#### **4.7.1.7 Order of Precedence**

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) Procurement document and contract schedule;
- (b) General instructions and conditions, representations, and certifications;
- (c) Contract clauses;
- (d) Other documents, exhibits, and attachments; and
- (e) Technical specifications or statement of work.

#### **4.7.1.8 Incorporation of FTA Terms**

The clauses in this contract include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1E, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any NRTA requests, which would cause NRTA to be in violation of the FTA terms and conditions.

#### **4.7.1.9 Notice of Federal Requirements**

Pursuant to Federal, State, and Local Law, in the performance of its obligations pursuant to this contract, the contractor agrees to comply with all applicable clauses and provisions



of Federal, State, and Local Laws, Regulations, and FTA directives. The contractor understands and agrees that Federal Laws, Regulations, Policies, and related administrative practices in force and made applicable to this contract on the date of execution may be modified from time to time, and that the most recent of such clauses and provisions will govern administration of this contract at any particular time, except if there is sufficient evidence in the contract of a contrary intent. Such contrary intent might be evidenced by express language in the notification of Grant or Assistance Approval between FTA and the Purchaser, which language modifies or otherwise conditions the language of a particular provision of contract. Likewise, new federal laws, regulations, policies and administrative practices may be established after the date of execution and thereafter be applied to this contract, as may necessary to achieve compliance with these requirements, the contractor shall include notice of such requirement in all contracts, subcontracts, and other sub assistance agreements financed with FTA assistance. All limits or standards set forth in this contract to be observed in the performance of the project are minimum requirements. If there is a conflict between federal and state-or local requirements, the purchaser shall inform the FTA in order that an appropriate resolution may be arranged Contractor's failure to so comply shall constitute a material breach of this contract.

#### **4.7.1.10 Federal Changes**

Contractor shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Agreement (Form FTA MA(13) dated October, 2006) between Purchaser and FTA, as they may be amended or promulgated from time to time during the term of this contract. Contractor's failure to so comply shall constitute a material breach of this contract.

#### **4.7.1.11 Access to Records**

The following access to records requirements apply to this Contract:

(a) The Contractor agrees to provide the Purchaser, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives access to any books, documents, papers and records of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 C.F.R. 633.17 to provide the FTA Administrator or his authorized representatives including any PMO Contractor access to Contractor's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. 5302(a)1, which is receiving federal financial assistance through the programs described at 49 U.S.C. 5307, 5309 or 5311.

(b) The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

(c) The Contractor agrees to maintain all books, records, accounts and reports required under this contract for a period of not less than three years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case Contractor agrees to maintain same

until the Purchaser, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. Reference 49 CFR 18.39(i)(11).

#### **4.7.1.12 Disputes**

(a) *Disputes* - Disputes arising in the performance of this Contract that are not resolved by agreement of the parties shall be decided in writing by NRTA's Manager. This decision shall be final and conclusive unless within [ten (10)] days from the date of receipt of its copy of the decision, the Contractor mails or otherwise furnishes a written appeal to NRTA's Manager. The appeal shall be decided by NRTA's Board of Directors. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of NRTA's board of directors shall be binding upon the Contractor and the Contractor shall abide by the decision.

(b) *Performance During Dispute* - Unless otherwise directed by NRTA, Contractor shall continue performance under this Contract while matters in dispute are being resolved.

(c) *Claims for Damages* - Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the other party or of any of its employees, agents or others for whose acts it is legally liable, a claim for damages therefor shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

(d) *Remedies* - Unless this contract provides otherwise, all claims, counterclaims, disputes and other matters in question between NRTA and the Contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State of West Virginia.

(e) *Rights and Remedies* - The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by NRTA or the Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

#### **4.7.1.13 Civil Rights Requirements**

The following requirements apply to this contract:

(a) *Nondiscrimination* - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

(b) *Equal Employment Opportunity* - The following equal employment opportunity

requirements apply to the underlying contract:

(1) Race, Color, Creed, National Origin, Sex - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, and Federal transit laws at 49 U.S.C. § 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. Parts 60 et seq., (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(2) Age - In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 623 and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(3) Disabilities - In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(c) The Contractor agrees to include these requirements in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.

#### **4.7.1.14 Disadvantaged Business Enterprise**

(a) *Policy.* It is the policy of the Department of Transportation (DOT) and NRTA that Disadvantaged Business Enterprises as defined in 49 CFR Part 26 shall have the maximum opportunity to participate in the performance of contracts financed in whole or part with federal funds under this contract. Consequently the DBE requirement of 49 CFR Part 26 applies to this contract.

(b) The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the recipient deems appropriate.

(c) *Prompt payment:* The prime contractor agrees to pay each subcontractor under this

prime contract for satisfactory performance of its contract no later than 10 days from the receipt of each payment the prime contractor receives from NRTA. The prime contractor agrees further to return retainage payments to each subcontractor within 10 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the NRTA. This clause applies to both DBE and non-DBE subcontractors.

(d) *DBE/WBE Obligation.* The contractor or its subcontractors agrees to ensure that Disadvantaged Business Enterprises as defined in 49 CFR Part 26 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided under this contract. In this regard all contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 26 to ensure that Disadvantaged Business Enterprises have the maximum opportunity to compete for and perform under this contract. Contractors shall not discriminate on the basis of race, creed, color, age, sex or national origin in the award and performance of DOT-assisted contracts.

(e) Disadvantaged Business Enterprises will be encouraged and afforded full opportunity to actively solicit information concerning this project and to submit bids and/or proposals. Information on and applications for our DBE Program can be obtained from the Purchasing Department and the DBE Liaison.

#### **4.7.1.15 Debarment and Suspension**

(a) This contract is a covered transaction for purposes of 49 CFR Part 29. As such, the contractor is required to verify that neither the contractor, any of its principals, as defined at 49 CFR 29.105, or any of its affiliates, as defined at 49 CFR 29.105, are presently debarred, suspended, proposed for debarment, or voluntarily excluded by any Federal or State department or agency.

(b) The contractor is required to comply with 49 CFR 29, Subpart C and must include the requirement to comply with 49 CFR 29, Subpart C in any lower tier covered transaction it enters into.

(c) The certification required by this clause is a material representation of fact relied upon by NRTA. If it is later determined that the contractor knowingly rendered an erroneous certification, in addition to remedies available to NRTA, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The contractor agrees to comply with the requirements of 49 CFR 29, Subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The contractor further agrees to include a provision requiring such compliance in its lower tier covered transactions.

#### **4.7.1.16 Energy Conservation**

The contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act and to insert this provision in every subcontract.

#### **4.7.1.17 Geographic Restrictions**

The contractor agrees to refrain from using State or local geographic preferences, except those expressly mandated or encouraged by Federal statute, and as permitted by FTA.

#### **4.7.1.18 Lobbying Restrictions**

(a) This contract is subject to the lobbying restrictions set forth under Federal law. As such, the Offeror is required to verify that no Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement or, if any such payments have been made, that the Offeror has made all required disclosures.

(b) The certification required by this clause is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

#### **4.7.1.19 No Government obligations to Third Parties**

(a) NRTA and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this contract and shall not be subject to any obligations or liabilities to the NRTA, Contractor, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.

(b) The Contractor agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

#### **4.7.1.20 Program Fraud and False or Fraudulent Statements and Related Act**

The Contractor:

(a) Acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 *et seq.* and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions pertaining to this Project. Upon

execution of the underlying contract, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.

(b) Acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. § 5307, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

(c) Agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

#### **4.7.1.21 Excusable Delays**

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless-

- (1) The subcontracted supplies or services were obtainable from other sources;
- (2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and
- (3) The Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.

#### 4.7.2.22 Warranties

*(Include in contract for supplies.)*

(a) *Definitions.* As used in this clause-

"Acceptance" means the act of an authorized representative of NRTA by which NRTA assumes for itself, or as an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract.

"Supplies" means the end items furnished by the Contractor and related services required under this contract. The word does not include "data."

(b) *Contractor's obligations.*

(1) Notwithstanding inspection and acceptance by NRTA of supplies furnished under this contract, or any condition of this contract concerning the conclusiveness thereof, the Contractor warrants that for \_\_\_\_\_ *[Insert specific period of time after delivery, or the specified event whose occurrence will terminate the warranty period; e.g., the number of miles or hours of use, or combinations of any applicable events or periods of time]*-

(i) All supplies furnished under this contract will be free from defects in material or workmanship and will conform with all requirements of this contract; and

(ii) The preservation, packaging, packing, and marking, and the preparation for, and method of, shipment of such supplies will conform with the requirements of this contract.

(2) When return, correction, or replacement is required, transportation charges and responsibility for the supplies while in transit shall be borne by the Contractor. However, the Contractor's liability for the transportation charges shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in this contract and the Contractor's plant, and return.

(3) Any supplies or parts thereof, corrected or furnished in replacement under this clause, shall also be subject to the terms of this clause to the same extent as supplies initially delivered. The warranty, with respect to supplies or parts thereof, shall be equal in duration to that in paragraph (b)(1) of this clause and shall run from the date of delivery of the corrected or replaced supplies.

(4) All implied warranties of merchantability and "fitness for a particular purpose" are excluded from any obligation contained in this contract.

(c) *Remedies available to NRTA.*

(1) NRTA shall give written notice to the Contractor of any breach of warranties in paragraph (b)(1) of this clause within \_\_\_\_\_ *[Insert specific period of time; e.g., "45 days of the last delivery under this contract," or "45 days after discovery of the defect"]*.

(2) Within a reasonable time after the notice, NRTA may either-

(i) Require, by written notice, the prompt correction or replacement of any supplies or parts thereof (including preservation, packaging, packing, and marking) that do not conform with the requirements of this contract within the meaning of paragraph (b)(1) of this clause; or

(ii) Retain such supplies and reduce the contract price by an amount equitable under the circumstances.

(3)(i) If the contract provides for inspection of supplies by sampling procedures, conformance of supplies or components subject to warranty action shall be determined by the applicable sampling procedures in the contract. NRTA -

(A) May, for sampling purposes, group any supplies delivered under this contract;  
(B) Shall require the size of the sample to be that required by sampling procedures specified in the contract for the quantity of supplies on which warranty action is proposed;  
(C) May project warranty sampling results over supplies in the same shipment or other supplies contained in other shipments even though all of such supplies are not present at the point of reinspection; provided, that the supplies remaining are reasonably representative of the quantity on which warranty action is proposed; and  
(D) Need not use the same lot size as on original inspection or reconstitute the original inspection lots.

(ii) Within a reasonable time after notice of any breach of the warranties specified in paragraph (b)(1) of this clause, NRTA may exercise one or more of the following options:

(A) Require an equitable adjustment in the contract price for any group of supplies.

(B) Screen the supplies grouped for warranty action under this clause at the Contractor's expense and return all nonconforming supplies to the Contractor for correction or replacement.

(C) Require the Contractor to screen the supplies at locations designated by the NRTA within the contiguous United States and to correct or replace all nonconforming supplies.

(D) Return the supplies grouped for warranty action under this clause to the Contractor (irrespective of the f.o.b. point or the point of acceptance) for screening and correction or replacement.

(4)(i) The Contracting Officer may, by contract or otherwise, correct or replace the nonconforming supplies with similar supplies from another source and charge to the Contractor the cost occasioned to NRTA thereby if the Contractor-

(A) Fails to make redelivery of the corrected or replaced supplies within the time established for their return; or

(B) Fails either to accept return of the nonconforming supplies or fails to make progress after their return to correct or replace them so as to endanger performance of the delivery schedule, and in either of these circumstances does not cure such failure within a period of 10 days (or such longer period as NRTA may authorize in writing) after receipt of notice from NRTA specifying such failure.

(ii) Instead of correction or replacement by NRTA, NRTA may require an equitable adjustment of the contract price. In addition, if the Contractor fails to furnish timely disposition instructions, NRTA may dispose of the nonconforming supplies for the Contractor's account in a reasonable manner. NRTA is entitled to reimbursement from the Contractor, or from the proceeds of such disposal, for the reasonable expenses of the care and disposition of the nonconforming supplies, as well as for excess costs incurred or to be incurred.

(5) The rights and remedies of NRTA provided in this clause are in addition to and do not limit any rights afforded to NRTA by any other clause of this contract.

*(If the supplies cannot be obtained from another source, substitute a paragraph substantially the same as the following paragraph (c)(4) for paragraph (c)(4) of the basic clause.)*



(4) If the Contractor does not agree as to responsibility to correct or replace the supplies delivered, the Contractor shall nevertheless proceed in accordance with the written request issued by the Contracting Officer under paragraph (c)(2) of this clause to correct or replace the defective or nonconforming supplies. In the event it is later determined that the supplies were not defective or nonconforming within the terms and conditions of this clause, the contract price will be equitably adjusted.

*(Include in contract for services.)*

(a) *Definition.* "Acceptance," as used in this clause, means the act of an authorized representative of NRTA by which NRTA assumes for itself, or as an agent of another, ownership of existing and identified supplies, or approves specific services, as partial or complete performance of the contract.

(b) Notwithstanding inspection and acceptance by NRTA or any provision concerning the conclusiveness thereof, the Contractor warrants that all services performed under this contract will, at the time of acceptance, be free from defects in workmanship and conform to the requirements of this contract. NRTA shall give written notice of any defect or nonconformance to the Contractor \_\_\_\_\_ *[Insert the specific period of time in which notice shall be given to the Contractor; e.g., "within 30 days from the date of acceptance by NRTA,"; within 1000 hours of use by NRTA;" or other specified event whose occurrence will terminate the period of notice, or combination of any applicable events or period of time].* This notice shall state either-

(1) That the Contractor shall correct or reperform any defective or nonconforming services; or

(2) That NRTA does not require correction or reperformance.

(c) If the Contractor is required to correct or reperform, it shall be at no cost to NRTA, and any services corrected or reperformed by the Contractor shall be subject to this clause to the same extent as work initially performed. If the Contractor fails or refuses to correct or reperform, NRTA may, by contract or otherwise, correct or replace with similar services and charge to the Contractor the cost occasioned to NRTA thereby, or make an equitable adjustment in the contract price.

(d) If NRTA does not require correction or reperformance, the Contracting Officer shall make an equitable adjustment in the contract price.

## **Appendix 4.7.2 -- Special Contract Provisions**

- 4.7.2.1 Fly America
- 4.7.2.2 Buy America
- 4.7.2.3 Charter Services
- 4.7.2.4 School Bus Services
- 4.7.2.5 Cargo Preference
- 4.7.2.6 Seismic Activity
- 4.7.2.7 Clean Water
- 4.7.2.8 Bus-Testing
- 4.7.2.9 Pre-Award / Post-Delivery Audits
- 4.7.2.10 Bonding
- 4.7.2.11 Clean Air Act
- 4.7.2.12 Recycled Products
- 4.7.2.13 Davis-Bacon / Anti-Kickback Acts
- 4.7.2.14 Work Hours and Safety Standards Act
- 4.7.2.15 Federal Privacy Act
- 4.7.2.16 Patent and Rights in Data
- 4.7.2.17 Transit Employee Protective Agreements
- 4.7.2.18 Drug & Alcohol Testing
- 4.7.2.19 Liquidated Damages
- 4.7.2.20 Options

#### **4.7.2.1 Fly America**

The Contractor agrees to comply with 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. Flag air carriers for U.S Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Contractor agrees to include the requirements of this section in all subcontracts that may involve international air transportation.

#### **4.7.2.2 Buy America**

The contractor agrees to comply with 49 U.S.C. 5323(j) and 49 C.F.R. Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 C.F.R. 661.7, and include final assembly in the United States for 15 passenger vans and 15 passenger wagons produced by Chrysler Corporation, and microcomputer equipment and software. Separate requirements for rolling stock are set out at 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11. Rolling stock must be assembled in the United States and have a 60 percent domestic content.

A bidder or offeror must submit to the FTA recipient the appropriate Buy America certification (below) with all bids or offers on FTA-funded contracts, except those subject to a general waiver. Bids or offers that are not accompanied by a completed Buy America certification must be rejected as nonresponsive. This requirement does not apply to lower tier subcontractors.

#### **4.7.2.3 Charter Services**

The contractor agrees to comply with 49 U.S.C. 5323(d) and 49 CFR Part 604, which provides that recipients and subrecipients of FTA assistance are prohibited from providing charter service using federally funded equipment or facilities if there is at least one private charter operator willing and able to provide the service, except under one of the exceptions at 49 CFR 604.9. Any charter service provided under one of the exceptions must be "incidental," i.e., it must not interfere with or detract from the provision of mass transportation.

#### **4.7.2.4 School Bus Services**

Pursuant to 69 U.S.C. 5323(f) and 49 CFR Part 605, recipients and subrecipients of FTA assistance may not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators unless qualified under specified exemptions. When operating exclusive school bus service under an allowable exemption, recipients and subrecipients may not use federally funded equipment, vehicles, or facilities.

#### **4.7.2.5 Cargo Preference**

The contractor agrees:

- (a) To use privately owned United States-Flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the underlying contract to the extent such vessels are available at fair and reasonable rates for United States-Flag commercial vessels;
- (b) To furnish within 20 working days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described in the preceding paragraph to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the FTA recipient (through the contractor in the case of a subcontractor's bill-of-lading.)
- (c) To include these requirements in all subcontracts issued pursuant to this contract when the subcontract may involve the transport of equipment, material, or commodities by ocean vessel.

#### **4.7.2.6 Seismic Safety**

The contractor agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in Department of Transportation Seismic Safety Regulations 49 CFR Part 41 and will certify to compliance to the extent required by the regulation. The contractor also agrees to ensure that all work performed under this contract including work performed by a subcontractor is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the project.

#### **4.7.2.7 Clean Water**

The contractor agrees:

- (a) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.* The Contractor agrees to report each violation to the Purchaser and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

(b) To include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

#### **4.7.2.8 Bus Testing**

The Contractor [Manufacturer] agrees to comply with 49 U.S.C. A 5323(c) and FTA's implementing regulation at 49 CFR Part 665 and shall perform the following:

(a) A manufacturer of a new bus model or a bus produced with a major change in components or configuration shall provide a copy of the final test report to the recipient at a point in the procurement process specified by the recipient which will be prior to the recipient's final acceptance of the first vehicle.

(b) A manufacturer who releases a report under Paragraph A above shall provide notice to the operator of the testing facility that the report is available to the public.

(c) If the manufacturer represents that the vehicle was previously tested, the vehicle being sold should have the identical configuration and major components as the vehicle in the test report, which must be provided to the recipient prior to recipient's final acceptance of the first vehicle. If the configuration or components are not identical, the manufacturer shall provide a description of the change and the manufacturer's basis for concluding that it is not a major change requiring additional testing.

(d) If the manufacturer represents that the vehicle is "grandfathered" (has been used in mass transit service in the United States before October 1, 1988, and is currently being produced without a major change in configuration or components), the manufacturer shall provide the name and address of the recipient of such a vehicle and the details of that vehicle's configuration and major components.

(e) Certify that the vehicle offered in this procurement complies with 49 U.S.C.A 5323(c) and FTA's implementing regulation at 49 CFR Part 665.

#### **4.7.2.9 Pre-Award / Post-Delivery Audits**

The Contractor agrees to comply with 49 U.S.C. § 5323(l) and FTA's implementing regulation at 49 C.F.R. Part 663 and to submit the following:

(a) Buy America Requirements: The Contractor shall complete and submit a declaration certifying either compliance or noncompliance with Buy America. If the Bidder/Offeree certifies compliance with Buy America, it shall submit documentation which lists 1) component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and 2) the location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

(b) Solicitation Specification Requirements: The Contractor shall submit evidence that it will be capable of meeting the bid specifications.

(c) Federal Motor Vehicle Safety Standards (FMVSS): The Contractor shall submit 1) manufacturer's FMVSS self-certification sticker information that the vehicle complies with relevant FMVSS or 2) manufacturer's certified statement that the contracted buses will not be subject to FMVSS regulations.

*(See Appendix 4.8.1.9 for Buy America Certificate referenced in Paragraph A.)*

#### **4.7.2.10 Bonding**

*(Include in non-construction contract if performance and payment bonding is appropriate.)*

The Contractor may be required to obtain performance and payment bonds when necessary to protect NRTA's interest.

(a) The following situations may warrant a performance bond:

(1) NRTA property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

(2) A contractor sells assets to or merges with another concern, and the NRTA, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

(3) Substantial progress payments are made before delivery of end items starts.

(4) Contracts are for dismantling, demolition, or removal of improvements.

(b) When it is determined that a performance bond is required, the Contractor shall be required to obtain performance bonds as follows:

(1) The penal amount of performance bonds shall be 100 percent of the original contract price, unless NRTA determines that a lesser amount would be adequate for the protection of NRTA.

(2) NRTA may require additional performance bond protection when a contract price is increased. The increase in protection shall generally equal 100 percent of the increase in contract price. NRTA may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(c) A payment bond is required only when a performance bond is required, and if the use of payment bond is in NRTA interest.

(d) When it is determined that a payment bond is required, the Contractor shall be required to obtain payment bonds as follows:

(1) The penal amount of payment bonds shall equal:

(i) Fifty percent of the contract price if the contract price is not more than \$1 million;

(ii) Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million; or

(iii) Two and one half million if the contract price is increased.

*(Include in construction contract if performance and payment bonding is appropriate.)*

The Contractor shall be required to obtain performance and payment bonds as follows:

(a) *Performance bonds.*

(1) The penal amount of performance bonds shall be 100 percent of the original contract price, unless NRTA determines that a lesser amount would be adequate for the protection of NRTA.

(2) NRTA may require additional performance bond protection when a contract price is increased. The increase in protection shall generally equal 100 percent of the increase in contract price. NRTA may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(b) *Payment bonds.*

(1) The penal amount of the payment bonds shall equal:

- (i) Fifty percent of the contract price if the contract price is not more than \$1 million.
- (ii) Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million; or
- (iii) Two and one half million if the contract price is more than \$5 million.

(2) If the original contract price is \$5 million or less, the NRTA may require additional protection as required by subparagraph 1 if the contract price is increased.

*(Include in construction contract if bid bonding is appropriate.)*

(a) *Bid Security.*

A Bid Bond must be issued by a fully qualified surety company acceptable to NRTA and listed as a company currently authorized under 31 CFR, Part 223 as possessing a Certificate of Authority as described thereunder.

(b) *Rights Reserved.*

(1) In submitting this Bid, it is understood and agreed by bidder that the right is reserved by NRTA to reject any and all bids, or part of any bid, and it is agreed that the Bid may not be withdrawn for a period of [ninety (90)] days subsequent to the opening of bids, without the written consent of NRTA.

(2) It is also understood and agreed that if the undersigned bidder should withdraw any part or all of his bid within [ninety (90)] days after the bid opening without the written consent of NRTA, shall refuse or be unable to enter into this Contract, as provided above, or refuse or be unable to furnish adequate and acceptable Performance Bonds and Labor and Material Payments Bonds, as provided above, or refuse or be unable to furnish adequate and acceptable insurance, as provided above, he shall forfeit his bid security to the extent of NRTA's damages occasioned by such withdrawal, or refusal, or inability to enter into an agreement, or provide adequate security therefor.

(3) It is further understood and agreed that to the extent the defaulting bidder's Bid Bond, Certified Check, Cashier's Check, Treasurer's Check, and/or Official Bank Check (excluding any income generated thereby which has been retained by NRTA as provided in [Item x "Bid Security" of the Instructions to Bidders]) shall prove inadequate to fully recompense NRTA for the damages occasioned by default, then the undersigned bidder agrees to indemnify NRTA and pay over to NRTA the difference between the bid security and NRTA 's total damages, so as to make NRTA whole.

(4) The undersigned understands that any material alteration of any of the above or any of the material contained on this form, other than that requested, will render the bid unresponsive.

*(Include in contract if advance payment bonding is appropriate; may be combined with other bonding provisions and numbered as necessary.)*

The Contractor may be required to obtain an advance payment bond if the contract contains an advance payment provision and a performance bond is not furnished. NRTA shall determine the amount of the advance payment bond necessary to protect NRTA.

*(Include in contract if patent infringement / indemnity bonding is appropriate; may be combined with other bonding provisions and numbered as necessary.)*

The Contractor may be required to obtain a patent indemnity bond if a performance bond is not furnished and the financial responsibility of the Contractor is unknown or doubtful. NRTA shall determine the amount of the patent indemnity to protect the NRTA.

*(Include in contract if warranty / maintenance bonding is appropriate; may be combined with other bonding provisions and renumbered as necessary.)*

(a) The Contractor warrants to NRTA that all materials and equipment furnished under this Contract will be of highest quality and new unless otherwise specified by NRTA, and free from faults and defects and in conformance with the Contract Documents. All work not so conforming to these standards shall be considered defective. If required by NRTA, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

(b) The Work furnished must be of first quality and the workmanship must be the best obtainable in the various trades. The Work must be of safe, substantial and durable construction in all respects. The Contractor hereby guarantees the Work against defective materials or faulty workmanship for a minimum period of one (1) year after Final Payment by NRTA and shall replace or repair any defective materials or equipment or faulty workmanship during the period of the guarantee at no cost to NRTA. As additional security for these guarantees, the Contractor shall, prior to the release of Final Payment, furnish separate Maintenance (or Guarantee) Bonds in a form acceptable to NRTA written by the same corporate surety that provides the Performance Bond and Labor and Material Payment Bond for this Contract. These bonds shall secure the Contractor's obligation to replace or repair defective materials and faulty workmanship for a minimum period of one (1) year after Final Payment and shall be written in an amount equal to one hundred percent (100%) of the contract price, as adjusted (if at all).

#### **4.7.2.11 Clean Air**

The Contractor agrees:

(a) To comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. The Contractor agrees to report each violation to the Purchaser and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

(b) To include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

#### **4.7.2.12 Recycled Products**

The contractor agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6962), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive



Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 CFR Part 247.

#### **4.7.2.13 Davis-Bacon / Anti-Kickback Acts**

(1) *Minimum wages* - (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR Part 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of

the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding* - NRTA shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, NRTA may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records* - (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of

three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the NRTA for transmission to the Federal Transit Administration. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR part 5. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

- (1) That the payroll for the payroll period contains the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR part 5 and that such information is correct and complete;
- (2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;
- (3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or

subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the Federal Transit Administration or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) *Apprentices and trainees* - (i) Apprentices - Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division of the U.S. Department of Labor determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees - Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity - The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(5) *Compliance with Copeland Act requirements* - The contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

(6) *Subcontracts* - The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the Federal Transit Administration may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) *Contract termination: debarment* - A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) *Compliance with Davis-Bacon and Related Act requirements* - All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) *Disputes concerning labor standards* - Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and

the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) *Certification of eligibility* - (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

#### **4.2.7.14 Work Hours and Safety Standards Act**

(a) *Compliance with Act* - The Contractor agrees to comply with 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. section 333, and applicable DOL regulations, "Safety and Health Regulations for Construction" 29 CFR Part 1926. Among other things, the Contractor agrees that it will not require any laborer or mechanic to work in unsanitary, hazardous, or dangerous surroundings or working conditions.

(b) *Overtime requirements* - No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(c) *Violation; liability for unpaid wages; liquidated damages* - In the event of any violation of the clause set forth in paragraph (1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.

(d) *Withholding for unpaid wages and liquidated damages* - NRTA shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this section.

(e) *Subcontracts* - The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraphs (1) through (4) of this section and also a clause requiring

the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1) through (4) of this section.

(f) *Definition* - The term “subcontract” under this section is considered to refer to a person who agrees to perform any part of the labor or material requirements of a contract for construction, alteration or repair. A person who undertakes to perform a portion of a contract involving the furnishing of supplies or materials will be considered a “subcontractor” under this section if the work in question involves the performance of construction work and is to be performed: (1) directly on or near the construction site, or (2) by the employer for the specific project on a customized basis. Thus, a supplier of materials which will become an integral part of the construction is a “subcontractor” if the supplier fabricates or assembles the goods or materials in question specifically for the construction project and the work involved may be said to be construction activity. If the goods or materials in question are ordinarily sold to other customers from regular inventory, the supplier is not a “subcontractor.” The requirements of this section do not apply to contracts or subcontracts for the purchase of supplies or material or articles normally available on the open market.

#### **4.7.2.15 Federal Privacy Act**

(a) The Contractor agrees to comply with, and assures the compliance of its employees with, the information restrictions and other applicable requirements of the Privacy Act of 1974, 5 U.S.C. § 552a. Among other things, the Contractor agrees to obtain the express consent of the Federal Government before the Contractor or its employees operate a system of records on behalf of the Federal Government. The Contractor understands that the requirements of the Privacy Act, including the civil and criminal penalties for violation of that Act, apply to those individuals involved, and that failure to comply with the terms of the Privacy Act may result in termination of the underlying contract.

(b) The Contractor also agrees to include these requirements in each subcontract to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by FTA.

#### **4.7.3.16 Patent & Rights in Data**

(a) *Rights in Data* - The following requirements apply to each contract involving experimental, developmental or research work:

(1) The term "subject data" used in this clause means recorded information, whether or not copyrighted, that is delivered or specified to be delivered under the contract. The term includes graphic or pictorial delineation in media such as drawings or photographs; text in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term "subject data" does not include financial reports, cost analyses, and similar information incidental to contract administration.

(2) The following restrictions apply to all subject data first produced in the performance of the contract to which this Attachment has been added:

(A) Except for its own internal use, the Purchaser or Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may the Purchaser or Contractor authorize others to do so, without the written consent of the Federal Government, until such time as the Federal Government may have either released or approved the release of such data to the public; this restriction on publication, however, does not apply to any contract with an academic institution.

(B) In accordance with 49 C.F.R. § 18.34 and 49 C.F.R. § 19.36, the Federal Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for "Federal Government purposes," any subject data or copyright described in subsections (2)(B)(i) and (2)(B)(ii) of this clause below. As used in the previous sentence, "for Federal Government purposes," means use only for the direct purposes of the Federal Government. Without the copyright owner's consent, the Federal Government may not extend its Federal license to any other party.

(i) Any subject data developed under that contract, whether or not a copyright has been obtained; and

(ii) Any rights of copyright purchased by the Purchaser or Contractor using Federal assistance in whole or in part provided by FTA.

(C) When FTA awards Federal assistance for experimental, developmental, or research work, it is FTA's general intention to increase transportation knowledge available to the public, rather than to restrict the benefits resulting from the work to participants in that work. Therefore, unless FTA determines otherwise, the Purchaser and the Contractor performing experimental, developmental, or research work required by the underlying contract to which this Attachment is added agrees to permit FTA to make available to the public, either FTA's license in the copyright to any subject data developed in the course of that contract, or a copy of the subject data first produced under the contract for which a copyright has not been obtained. If the experimental, developmental, or research work, which is the subject of the underlying contract, is not completed for any reason whatsoever, all data developed under that contract shall become subject data as defined in subsection (a)(1) of this clause and shall be delivered as the Federal Government may direct. This subsection (C), however, does not apply to adaptations of automatic data processing equipment or programs for the Purchaser or Contractor's use whose costs are financed in whole or in part with Federal assistance provided by FTA for transportation capital projects.

(D) Unless prohibited by state law, upon request by the Federal Government, the Purchaser and the Contractor agree to indemnify, save, and hold harmless the Federal Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Purchaser or Contractor of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under that contract. Neither the Purchaser nor the Contractor shall be required to indemnify the Federal Government for any such liability arising out of the wrongful act of any employee, official, or agents of the Federal Government.

(E) Nothing contained in this clause on rights in data shall imply a license to the Federal



Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Federal Government under any patent.

(F) Data developed by the Purchaser or Contractor and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying contract to which this Attachment has been added is exempt from the requirements of subsections (b), (c), and (d) of this clause, provided that the Purchaser or Contractor identifies that data in writing at the time of delivery of the contract work.

(G) Unless FTA determines otherwise, the Contractor agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

(3) Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (*i.e.*, a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual, etc.), the Purchaser and the Contractor agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government as described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

(4) The Contractor also agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

(b) *Patent Rights* - The following requirements apply to each contract involving experimental, developmental, or research work:

(1) General - If any invention, improvement, or discovery is conceived or first actually reduced to practice in the course of or under the contract to which this Attachment has been added, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the Purchaser and Contractor agree to take actions necessary to provide immediate notice and a detailed report to the party at a higher tier until FTA is ultimately notified.

(2) Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual), the Purchaser and the Contractor agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government as described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

(3) The Contractor also agrees to include the requirements of this clause in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

#### **4.7.2.17 Transit Employee Protective Agreements**

The Contractor agrees to comply with applicable transit employee protective requirements as follows:

(a) General Transit Employee Protective Requirements - To the extent that FTA determines that transit operations are involved, the Contractor agrees to carry out the transit operations work on the underlying contract in compliance with terms and conditions determined by the U.S. Secretary of Labor to be fair and equitable to protect the interests of employees employed under this contract and to meet the employee protective requirements of 49 U.S.C. A 5333(b), and U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the letter of certification from the U.S. DOL to FTA applicable to the FTA Recipient's project from which Federal assistance is provided to support work on the underlying contract. The Contractor agrees to carry out that work in compliance with the conditions stated in that U.S. DOL letter. The requirements of this subsection (1), however, do not apply to any contract financed with Federal assistance provided by FTA either for projects for elderly individuals and individuals with disabilities authorized by 49 U.S.C. § 5310(a)(2), or for projects for nonurbanized areas authorized by 49 U.S.C. § 5311. Alternate provisions for those projects are set forth in subsections (b) and (c) of this clause.

(b) Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5310(a)(2) for Elderly Individuals and Individuals with Disabilities - If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5310(a)(2), and if the U.S. Secretary of Transportation has determined or determines in the future that the employee protective requirements of 49 U.S.C. § 5333(b) are necessary or appropriate for the state and the public body subrecipient for which work is performed on the underlying contract, the Contractor agrees to carry out the Project in compliance with the terms and conditions determined by the U.S. Secretary of Labor to meet the requirements of 49 U.S.C. § 5333(b), U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the U.S. DOL's letter of certification to FTA, the date of which is set forth Grant Agreement or Cooperative Agreement with the state. The Contractor agrees to perform transit operations in connection with the underlying contract in compliance with the conditions stated in that U.S. DOL letter.

(c) Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5311 in Nonurbanized Areas - If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5311, the Contractor agrees to comply with the terms and conditions of the Special Warranty for the Nonurbanized Area Program agreed to by the U.S. Secretaries of Transportation and Labor, dated May 31, 1979, and the procedures implemented by U.S. DOL or any revision thereto.

(d) The Contractor also agrees to include the any applicable requirements in each subcontract involving transit operations financed in whole or in part with Federal assistance provided by FTA.

#### **4.7.2.18 Drug and Alcohol Testing**

The contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 CFR Parts 653 and 654, produce any documentation necessary to establish its compliance with Parts 653 and 654, and permit any authorized representative

of the United States Department of Transportation or its operating administrations, the State Oversight Agency of West Virginia, or NRTA, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 CFR Parts 653 and 654 and review the testing process. The contractor agrees further to certify annually its compliance with Parts 653 and 654 before (insert date) and to submit the Management Information System (MIS) reports before (insert date before March 15) to (insert title and address of person responsible for receiving information). To certify compliance the contractor shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the Federal Register.

#### **4.7.2.19 Liquidated Damages**

Contractor acknowledges that liquidated damages requirements are appropriate because NRTA may reasonably expect to incur damages in the form of increased costs resulting from the late completion of the contract and the extent or amount of such damages would be difficult or impossible to determine after the delay has occurred. Accordingly, Contractor agrees that it will pay liquidated damages in the amount of \$\_\_\_\_\_ (insert dollar amount) per day for every day of overrun in contract performance time.

#### **4.7.2.20 Options**

The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

## **Appendix 4.8 – Representations and Certifications**

- 4.8.1 Representation Concerning Offeror’s Business Form
- 4.8.2 Representation Concerning Offeror’s and Subcontractor’s DBE Status and Notice of Intent
- 4.8.3 Certification Concerning Overall Federal Regulatory Compliance
- 4.8.4 Certification Concerning Compliance With Specifications
- 4.8.5 Procurement Integrity Certification
- 4.8.6 Lobbying Certification
- 4.8.7 Certification Concerning Debarment, Suspension, and Other Responsibility Matters
- 4.8.8 Certification Of Compliance with Bus Testing Requirements
- 4.8.9 Buy America Certification for Buses, Other Rolling Stock, and Associated Equipment
- 4.8.10 Buy America Certification for Steel, Iron, or Manufactured Products
- 4.8.11 Federal Motor Vehicle Safety Standards Certification
- 4.8.12 Air Pollution Certification

**Appendix 4.8.1 -- Representation Concerning Offeror's Business Form**

The Offeror is a:

- Corporation
- Partnership
- Limited Liability Company
- Sole Proprietorship
- Other: \_\_\_\_\_

organized and existing under the laws of \_\_\_\_\_.

\_\_\_\_\_  
Offeror Representative Signature

\_\_\_\_\_  
Offeror Representative Name and Title

\_\_\_\_\_  
Offeror Company

\_\_\_\_\_  
Date

**Appendix 4.8.2 – Letter of Intent**

**Name of primary firm:** \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-Mail: \_\_\_\_\_

Is the prime contractor certified as a DBE by the West Virginia Department of Transportation?  
\_\_\_\_\_

Prime contracting firm's date of establishment: \_\_\_\_\_

Most recent annual gross receipts for prime contracting firm (check one):

\_\_\_\_\_ less than \$500,000 \_\_\_\_\_ \$500,000 – 1 million \_\_\_\_\_ \$1-2 million \_\_\_\_\_ \$2 – 5 million  
\_\_\_\_\_ \$5-10 million \_\_\_\_\_ \$10 – 25 million \_\_\_\_\_ over \$25 million

**Name of subcontracting firm:** \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-Mail: \_\_\_\_\_

Is the subcontractor certified as a DBE by the West Virginia Department of Transportation?  
\_\_\_\_\_

Subcontracting firm's date of establishment: \_\_\_\_\_

Most recent annual gross receipts for subcontracting firm (check one):

\_\_\_\_\_ less than \$500,000 \_\_\_\_\_ \$500,000 – 1 million \_\_\_\_\_ \$1-2 million \_\_\_\_\_ \$2 – 5 million  
\_\_\_\_\_ \$5-10 million \_\_\_\_\_ \$10 – 25 million \_\_\_\_\_ over \$25 million

**Attach a description of work to be performed by the subcontracting firm.**

The bidder or proposer is committed to utilizing the above-named subcontracting firm for the work described above.

The estimated dollar value of this work is \$\_\_\_\_\_.

**Affirmation**

If the bidder or proposer does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

The above-named subcontracting firm asserts that it will perform the portion of the contract for the estimated dollar value as stated above.

By \_\_\_\_\_(Signature & Title)

(Submit this page for each subcontractor and provide gross receipts regarding this contract as they are available.)

**If the bidder or proposer does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.**

**Appendix 4.8.3. -- Certification Concerning Overall Federal Regulatory Compliance**

All contractual provisions required by USDOT, as set forth in the FTA Circular 4220.1 E, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any NRTA requests, which would cause NRTA to be in violation of the FTA grant terms and conditions.

---

Offeror Representative Signature

---

Offeror Representative Name and Title

---

Offeror Company

---

Date



**Appendix 4.8.4 -- Certification Concerning Compliance With Specifications**

The Offeror hereby certifies that it will comply with the technical specifications issued by NRTA. **The Offeror warrants and certifies that of the following three paragraphs, paragraph A or B or C is true** (*√ check one*):

- A. \_\_\_\_\_ The Offeror hereby states that it will comply with the specifications in all areas. (This means that there are no exceptions to the technical specifications, no matter how minor.)
  
- B. \_\_\_\_\_ The Offeror hereby states that it will comply with the specifications in all areas except those where requests for clarification were approved prior to bid submission.
  
- C. \_\_\_\_\_ The Offeror hereby states that it will comply with the specifications in all areas except those noted on the attached page. The Offeror understands that those exceptions to the specifications may be considered non-responsive, and may be rejected.

\_\_\_\_\_  
Offeror Representative Signature

\_\_\_\_\_  
Offeror Representative Name and Title

\_\_\_\_\_  
Offeror Company

\_\_\_\_\_  
Date

**Appendix 4.8.5 -- Procurement Integrity Certification**

1. If the Offeror is not the parent company, insert below the name and main office address of the parent company. (A parent company is one that owns at least a majority, fifty-one (51%) percent of the voting rights and/or assets in that company.)

I, \_\_\_\_\_, \_\_\_\_\_ of  
Authorized Official Title Company  
\_\_\_\_\_, the Offeror, attest to the authority of the  
executing agent, \_\_\_\_\_ to submit this bid/proposal on behalf  
of Offeror and the parent company if other than the Offeror.

\_\_\_\_\_  
Authorized Official Signature

2. By the submission of this bid/proposal, the Offeror and each person signing on its behalf certifies, and in the case of a joint bid, each party certifies as to its own organization, under penalty of perjury, that to the best of knowledge and behalf:
- a. The prices in this bid proposal have been arrived at independently without collusion, consultation, communication or agreement with any other competitor.
  - b. Unless otherwise required by law, the Offeror prior to any competitor has not knowingly disclosed the prices that have been quoted in this bid.
  - c. No attempt has been made or will be made by the Offeror to induce any other person, partnership or corporation to submit or not to submit a bid proposal for the purpose of restricting competition.

\_\_\_\_\_  
Offeror Representative Signature

\_\_\_\_\_  
Offeror Representative Name and Title

\_\_\_\_\_  
Offeror Company

State of \_\_\_\_\_, County of \_\_\_\_\_

Taken, subscribed and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_.

\_\_\_\_\_  
Notary

My Commission Expires:

## Appendix 4.8.6 -- Lobbying Certification

The Offeror certifies, to the best of its knowledge and belief, that:

- A. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- B. If any funds other than Federal appropriated funds have been paid or will be paid to any person for making lobbying contacts to an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form--LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions [as amended by "Government wide Guidance for New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96). Note: Language in Paragraph B herein has been modified in accordance with Section 10 of the Lobbying Disclosure Act of 1995 (P.L. 104-65, to be codified at 2 U.S.C. 1601, *et seq.*)]
- C. The Offeror shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

[Note: Pursuant to 31 U.S.C. § 1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such expenditure or failure.]

The Offeror certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Offeror understands and agrees that the provisions of 31 U.S.C.A. 3801, *et seq.*, apply to this certification and disclosure, if any.

---

Offeror Representative Signature

---

Offeror Representative Name and Title

---

Offeror Company

---

Date

**Appendix 4.8.7 --Certification Concerning  
Debarment, Suspension, and Other Responsibility Matters**

1. The Offeror certifies to the best of its knowledge and belief, that it and its principals:
  - (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal or State department or agency;
  - (b) Have not within a three-year period preceding this bid/proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or Local) transaction or contract under a public transaction; or violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
  - (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or Local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
  - (d) Have not within a three-year period preceding this bid/proposal had one or more public transaction (Federal, State, or Local) terminated for cause of default.
2. If the Offeror is unable to certify to any of the statements in this certification, it must attach an explanation to this certification.
3. The Offeror certifies or affirms the truthfulness and accuracy of the contents of the statements submitted on or with this certification and understands that the provisions of 31 U.S.C. Sections 3801 *et seq.* are applicable thereto.

---

Offeror Representative Signature

---

Offeror Representative Name and Title

---

Offeror Company

---

Date

**Appendix 4.8.8 -- Certification Of Compliance with Bus Testing Requirements**  
*(Offeror obtains certification from Manufacturer)*

The undersigned certifies that the vehicle offered in this procurement complies and will, when delivered, comply with 49 U.S.C. § 5323(c) and FTA's implementing regulation at 49 CFR Part 665 according to the alternative identified below.

*(mark one and only one of the three blank spaces, with an "x")*

1.     \_\_\_\_\_ The buses offered herewith have been tested in accordance with 49 CFR Part 665 on \_\_\_\_\_ (date). The vehicles being sold should have the identical configuration and components as the vehicle in the test report, which must be submitted with this Offer. If the configuration or components are not identical, the manufacturer shall provide with its offer a description of the change and the manufacturer's basis for concluding that it is not a major change requiring additional testing.
  
2.     \_\_\_\_\_ The manufacturer represents that the vehicle is "grandfathered" (has been used in mass transit service in the United States before October 1, 1988, and is currently being produced without a major change in configuration or components), and submits with this Offer the name and address of the recipient of such a vehicle and the details of that vehicle's configuration and major components.
  
3.     \_\_\_\_\_ The vehicle is a new model, or a bus produced with a change in components or configuration, and will be tested and the results will be submitted to the Procuring Agency prior to acceptance of the first bus.

The undersigned understands that misrepresenting the testing status of a vehicle acquired with Federal financial assistance may subject the undersigned to civil penalties as outlined in the Department of Transportation's regulation on Program Fraud Civil Remedies, 49 CFR Part 31. In addition, the undersigned understands that FTA may suspend or debar a manufacturer under the procedures in 49 CFR Part 29.

\_\_\_\_\_  
Offeror Representative Signature

\_\_\_\_\_  
Offeror Representative Name and Title

\_\_\_\_\_  
Offeror Company

\_\_\_\_\_  
Date

**Appendix 4.8.9 -- Buy America Certification for  
Buses, Other Rolling Stock, and Associated Equipment**

**Certificate of Compliance**

The Offeror/Manufacturer hereby certifies that it will comply with the requirements of 49 U.S.C. Section 5323(j)(2)(C), Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, and the regulations at 49 C.F.R. 661.11:

\_\_\_\_\_  
Offeror/Manufacturer Representative Signature

\_\_\_\_\_  
Offeror/Manufacturer Representative Name and Title

\_\_\_\_\_  
Offeror/Manufacturer Company

\_\_\_\_\_  
Date

**Certificate of Non-Compliance**

The Offeror/Manufacturer hereby certifies that it cannot comply with the requirements of 49 U.S.C. Section 5323(j)(2)(C) and Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirements consistent with 49 U.S.C. Sections 5323(j)(2)(B) or (j)(2)(D), Sections 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and regulations in 49 C.F.R. 661.7.

\_\_\_\_\_  
Offeror/Manufacturer Representative Signature

\_\_\_\_\_  
Offeror/Manufacturer Representative Name and Title

\_\_\_\_\_  
Offeror/Manufacturer Company

\_\_\_\_\_  
Date

Describe the nature of the exception: \_\_\_\_\_

**Appendix 4.8.10 -- Buy America Certification  
for Steel, Iron, or Manufactured Products**

**Certificate of Compliance**

The Offeror/Manufacturer hereby certifies that it will meet the requirements of 49 U.S.C. Section 5323(j)(1) and the applicable regulations of 49 C.F.R. 661:

\_\_\_\_\_  
Offeror/Manufacturer Representative Signature

\_\_\_\_\_  
Offeror/Manufacturer Representative Name and Title

\_\_\_\_\_  
Offeror/Manufacturer Company

\_\_\_\_\_  
Date

**Certificate of Non-Compliance**

The Offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. Section 5323(j)(1), but may qualify for an exception pursuant to 49 U.S.C. Sections 5323(j)(2)(B) or (j)(2)(D) and the regulations in 49 C.F.R. 661.7.

\_\_\_\_\_  
Offeror/Manufacturer Representative Signature

\_\_\_\_\_  
Offeror/Manufacturer Representative Name and Title

\_\_\_\_\_  
Offeror/Manufacturer Company

\_\_\_\_\_  
Date

Describe the nature of the exception: \_\_\_\_\_



**Appendix 4.8.11 -- Federal Motor Vehicle Safety Standards Certification**

The Offeror hereby certifies that it shall submit, as required by Title 49 of CFR part 663—Subpart D, its self-certification information stating that the vehicle(s) will comply with the relevant Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in 49 CFR Part 571.

\_\_\_\_\_  
Offeror Representative Signature

\_\_\_\_\_  
Offeror Representative Name and Title

\_\_\_\_\_  
Offeror Company

\_\_\_\_\_  
Date

#### 4.9 -- Contract Clause Matrix

Clause	General	Vehicles	> \$100k	Constr.	Special	Notes / Special Conditions	Appendix Cite
Access to Records	x	x	x	x			4.7.1.11
Assignment of Claims	x	x	x	x		Choose appropriate clause based on preference	4.7.1.1
Bonding			x	x		Include if contract involves construction <b>or</b> > \$100,000	4.7.2.10
Bus-Testing		x	x				4.7.2.8
Buy America			x				4.7.2.2
Cargo Preference					*	Include if contract involves ocean transport	4.7.2.5
Changes	x	x	x	x		Choose appropriate clause based on contract type	4.7.1.2
Charter Services					*	Include in operational service contracts	4.7.2.3
Civil Rights Requirements	x	x	x	x			4.7.1.13
Clean Air Act			x				4.7.2.11
Clean Water			x				4.7.2.7
Davis-Bacon / Anti-Kickback Acts				*		Include if contract > \$2,000, including painting & decorating	4.7.2.13
Debarment and Suspension	x	x	x	x			4.7.1.15
Disadvantaged Business Enterprise	x	x	x	x			4.7.1.14
Disputes	x	x	x	x			4.7.1.12
Drug & Alcohol Testing					*	Include in operational service contracts (choose version)	4.7.2.18
Energy Conservation	x	x	x	x			4.7.1.16
Excusable Delays	x	x	x	x			4.7.2.21
Federal Changes	x	x	x	x			4.7.1.10
Federal Privacy Act					*	Include if contract involves employee record system	4.7.2.15
Fly America					*	Include if contract involves international air travel/transport	4.7.2.1
Geographic Restrictions	x	x	x	x			4.7.1.17
Impact of Taxes	x	x	x	x			4.7.1.3
Incorporation of FTA Terms	x	x	x	x			4.7.1.8
Inspection	x	x	x	x		Choose appropriate clause based on contract type	4.7.1.4
Liquidated Damages					*	Include if liquidated damages are appropriate	4.7.2.19
Lobbying Restrictions	x	x	x	x			4.7.1.18
No Gov. Obligations to 3d Parties	x	x	x	x			4.7.1.19
Notice of Federal Requirements	x	x	x	x			4.7.1.9
Options					*	Include if contract involves options	4.7.2.20
Order of Precedence	x	x	x	x			4.7.1.7
Patent & Rights in Data					*	Include if contract relates to R&D project	4.7.2.16
Payment	x	x	x	x		Choose appropriate clause based on contract type	4.7.1.5
Pre-Award / Post Delivery Audits		x	x				4.7.2.9
Program Fraud / False Statements	x	x	x	x			4.7.1.20
Recycled Products					*	Include if EPA-designated items > \$10,000	4.7.2.12
School Bus Services					*	Include in operational service contracts	4.7.2.4
Seismic Safety				x			4.7.2.6
Termination	x	x	x	x		Choose appropriate clause based on contract type	4.7.1.6
Transit Employee Protective Agmts					*	Include if contractor is FTA-recognized transit operator	4.7.2.17
Warranties	x	x	x	x			4.7.2.22
Work Hours & Safety Standards Act			*	x		Do not include in contracts for commercial supplies/materials	4.7.2.14