

# *The ABCs of RFPs*

# Who is Out There?

- ▶ Years in transit procurement
- ▶ Experience in non-transit procurement
- ▶ Role in your organization
- ▶ Familiarity with FTA Circular 4220.1F

Basics

# From Where Does This Come?

- ▶ Statutory
  - ▶ Federal Transit Act codified in Title 49 of the United States Code at Chapter 53
- ▶ Regulatory
  - ▶ Primary source: Code of Federal Regulations (CFR)
  - ▶ Title 49 of the CFR contains the DOT regulations
  - ▶ 2 CFR Part 200: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
  - ▶ Obsolete – the Common Grant Rule, 49 CFR Part 18

# And Then?

- ▶ Administrative Guidance
  - ▶ FTA Circulars
    - ▶ Most important – 4220.1F, Third Party Contracting Guidance
    - ▶ Also, 5010.1E – Award Management Requirements
  - ▶ Master Agreement
    - ▶ Similar to general contract provisions and attached to all grants; procurement-related requirements are addressed
  - ▶ Grant Agreement
    - ▶ Agreement between FTA and grantee
  - ▶ Annual List of Certifications and Assurances

# What is a Contract?

- ▶ A mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them
- ▶ An agreement, enforceable by law, between two or more competent parties, to do or not do something not prohibited by law, for a legal consideration

# Procurement Planning

# Where to Start – Specifications!

- ▶ We have to know what we are going to buy before we can
  - ▶ Calculate what it is likely to cost – the Independent Cost Estimate
  - ▶ Determine how best to buy it
    - ▶ State or local schedule
    - ▶ Joint procurement
    - ▶ Sealed bidding
    - ▶ Request for Proposals



# Where to Start – Specifications!

- ▶ We have to know what we are going to buy before we can
  - ▶ Determine what type of contract to use
    - ▶ Definite or indefinite delivery
    - ▶ Base and options
  - ▶ Determine how we want to pay for it
    - ▶ Firm fixed price
    - ▶ Cost reimbursement

# Specifications

- ▶ Clear and unambiguous!
  - ▶ Defines success
  - ▶ Assigns responsibilities
  - ▶ Sets internal expectations
  - ▶ Encourages potential contractors
  - ▶ Ensures you get what you want – or at least ask for

# Specification Types

- ▶ Design specifications
  - ▶ Precise direction
  - ▶ Highly detailed
  - ▶ Agency takes the risk of being wrong
- ▶ Performance specifications
  - ▶ What should the product do?
  - ▶ Functions, essential characteristics, performance indicators
- ▶ Which is likely to lead to an RFP?

# Ambiguity

- ▶ Not the *Whad'Ya Know* quiz!
- ▶ The enemy of sound contracting
- ▶ Allows the contractor to adopt a reasonable interpretation that may be different from yours
- ▶ Leads to claims, change orders, and extra costs
- ▶ Watch out for
  - ▶ Either, and/or, etc.
  - ▶ Similar, about, should
  - ▶ As necessary, as required, as applicable

# More to Consider

- ▶ Unduly restrictive specifications
- ▶ Should I publish draft specifications and ask for industry comment?

# Another Word on Competition

- ▶ “Full and open competition”
- ▶ Prequalification
- ▶ Reasonably anticipated needs – in our statement of work
- ▶ Brand name or equal – in our statement of work
- ▶ Excessive qualifications, experience
- ▶ Excessive bonding requirements
- ▶ Local geographic restrictions

# Independent Cost Estimate

- ▶ 2 CFR 200.323(a) – requires an ICE above the simplified acquisition threshold
- ▶ 4220.1F, chapter VI, paragraph 6 – requires an ICE for all procurements
  - ▶ <https://www.transit.dot.gov/funding/procurement/third-party-procurement/independent-cost-estimate>
- ▶ FTA guidance says the ICE “can range from a simple budgetary estimate to a complex estimate” based on the project
- ▶ Price or cost basis

# Independent Cost Estimate

- ▶ Where does price information come from?
  - ▶ Market surveys
  - ▶ Prior purchases
  - ▶ Advertised pricing
- ▶ Where does cost information come from?
  - ▶ Bottom up estimating
  - ▶ Skill levels and hours required
  - ▶ Materials and other direct costs
  - ▶ Profit!



# Tools of the Trade

- ▶ Means book
  - ▶ [rsmeansonline.com](http://rsmeansonline.com)
- ▶ Davis-Bacon wage rates
  - ▶ [beta.sam.gov](http://beta.sam.gov) (temporarily!)
- ▶ California prevailing wage determinations
  - ▶ [dir.ca.gov/public-works/prevaling-wage](http://dir.ca.gov/public-works/prevaling-wage)
- ▶ Contract Awarded Labor Categories
  - ▶ [calc.gsa.gov](http://calc.gsa.gov)

# Identify Potential Sources

- ▶ Market research
  - ▶ What potential contractors might do this work?
- ▶ Look for potential organizational conflicts of interest
  - ▶ Contributed to the scope of work
  - ▶ Unfair competitive advantage
  - ▶ Careful with design consultants who later serve as construction management consultants
    - ▶ Particularly in change order review
- ▶ Advanced restrictions

# Choosing Your Contracting Method

- ▶ Small or micro-purchase
- ▶ State or local schedule
- ▶ Joint procurement
- ▶ Invitation for bids
- ▶ Request for proposals

# Competitive Proposals

- ▶ Basic elements
  - ▶ Circular lists four (4) requirements that apply if this procurement method is appropriate
    1. Type of specifications
    2. Uncertain number of sources
    3. Price alone not determinative
    4. Discussions expected

# Competitive Proposals

- ▶ Basic elements
  - ▶ Procurement procedures
    - ▶ Circular lists six (6) procedures that are used
      1. Publically advertised
      2. Evaluation factors
      3. Adequate sources
      4. Evaluation method
      5. Price and other factors
      6. Best value

# Choosing Your Contract Type

- ▶ Firm fixed price
  - ▶ May include economic price adjustment
- ▶ Cost reimbursement
- ▶ Never cost plus percentage of cost
- ▶ Delivery and quantity – definite or indefinite?
  - ▶ IDIQ, options, task orders

# Establish an Internal Schedule

- ▶ Be conservative
- ▶ Lots of 'float' time
- ▶ Everything always takes longer than expected
- ▶ Share it with and obtain buy-in from stakeholders

# Identify What is Most Important

- ▶ Think through selection criteria
  - ▶ Price
  - ▶ Technical approach
  - ▶ Personnel
  - ▶ Past performance
  - ▶ Others
- ▶ Another place for stakeholder buy-in



# Who is on the Team?

- ▶ Identify the selection team early
  - ▶ Ensure the members are free of conflicts of interest
  - ▶ Use disclosure forms and confidentiality agreements liberally

# Create a Source Selection Plan

- ▶ Meet your FTA obligation to maintain 'a written history' of the procurement by recording actions, decisions, and reasoning
  - ▶ Method of procurement
  - ▶ Contract type
  - ▶ Acquisition strategy
  - ▶ Evaluation process, methodology
  - ▶ Schedule

# A Helpful Tool

- ▶ APTA PS-PP-RP-007-13
  - ▶ *The Process of Transit Procurement*
  - ▶ AKA 'swim lanes'

# Building the Solicitation

- ▶ We have...
  - ▶ Conducted market research
  - ▶ Determined our procurement method – RFP
  - ▶ Developed our selection criteria and assigned relative importance to them
  - ▶ Prepared our independent cost estimate
- ▶ Now let's start populating the actual solicitation

All of Those  
Clauses...

# Federal Requirements

- ▶ FTA Circular 4220.1F requires that all contracts include provisions to define a “sound and complete agreement”
  - ▶ Leaves a lot of discretion to grantee
- ▶ Grantees are responsible for evaluating all statutory and regulatory requirements for relevance and applicability to each procurement
  - ▶ Watch out for changes and additions to the federal clauses

# State Requirements

- ▶ Direct grantee or sub-recipient?
- ▶ States are obligated to oversee and monitor procurement activities to ensure compliance with FTA requirements
- ▶ States use their own processes, but must comply with “contract term limitations for revenue vehicle purchases, competition, prohibitions against geographic preferences, procurement of architectural engineering (A&E) services, and awards to responsible contractors”
- ▶ Sub-recipients not exempt from FTA requirements

# Davis-Bacon Act

- ▶ Construction contracts more than \$2,000
- ▶ Construction = construction, alteration, or repair of public buildings or works
- ▶ Laborers and mechanics to receive no less than prevailing wage rates
- ▶ Wage rates now available online:
  - ▶ [www.wdol.gov/dba.aspx](http://www.wdol.gov/dba.aspx)



# Veterans Hiring Preference

- ▶ Applies to capital projects involving construction
- ▶ Requires contractors to give a hiring preference to veterans, to the extent practicable, who have the requisite skills and abilities to perform the construction work
- ▶ A hiring preference is not required over an equally qualified applicant who is a member of a racial or ethnic minority, female, an individual with a disability, or a former employee

# Cargo Preference Act

- ▶ Applies to all contracts involving equipment, materials, or commodities that may be transported by ocean vessels
- ▶ Requires contractor to use U.S. flag commercial vessels
  - ▶ At least one half of total tonnage
  - ▶ “Fair and reasonable rates”

# Fly America Provisions

- ▶ U.S. Federal Government will not participate in costs of air transportation of any person involved in or property acquired for the project, unless that transportation is provided by U.S. air carriers to the extent service by those carriers is available

# Buy America Provisions

- ▶ 49 CFR Part 661
  - ▶ Offeror must certify whether or not it will comply for:
    - ▶ Construction material primarily of steel or iron
    - ▶ Manufactured products
    - ▶ Rolling stock
  - ▶ Certification of compliance mandatory with receipt of bid/proposal – contracts in excess of \$150,000
  - ▶ Full two-hour session on BA and rolling stock at the CalACT Spring conference!

# Disadvantaged Business Enterprise

- ▶ Applies to all DOT-assisted contracts
- ▶ 49 CFR Part 26
- ▶ Grantee and contractor agree it will take all necessary and reasonable steps required by DOT regulations to ensure eligible DBEs have the maximum feasible opportunity to participate in third party contracts
- ▶ Annual goals for agencies and TVMs
- ▶ Documented analysis of shortfalls

# Prompt Payment to Subcontractors

- ▶ 49 CFR § 26.29 requires a prompt payment to subcontractors clause in all DOT-assisted contracts, including A&E contracts
- ▶ Requires contractors to pay all subcontractors for satisfactory performance of their contract work no later than 30 days from receipt of payment from the Agency. (Individual agencies may require faster payment)
- ▶ Also requires prompt and full payment of retainage within 30 days after the subcontractor's work is satisfactorily completed

# TVM Requirements

- ▶ Grantees must verify that the Transit Vehicle Manufacturer (TVM) has complied with the FTA DBE requirements
  - ▶ Check the FTA Website:  
[www.fta.dot.gov/12326\\_5626.html](http://www.fta.dot.gov/12326_5626.html)
  - ▶ Go to the Eligible TVMs List (on right)
  - ▶ Screen-print the list and put it in your file
  - ▶ IF recommended TVM is NOT listed – contact FTA BEFORE awarding the contract, PO, or option

# More TVM Requirements

- ▶ For each vehicle contract award, Grantees must notify the FTA Office of Civil rights by using the online Transit Vehicle Award Reporting Form
- ▶ Also applies to options exercised in a later fiscal year
- ▶ Notice must be made within 30 days of the award and include the name of the TVM and total dollar value of the contract



# Anti-Discrimination Clauses

- ▶ Each third party contractor at any tier will comply with the requirements of the Title VI of the Civil Rights Act of 1964, as amended
  - ▶ Will not discriminate on the basis of race, color, creed, sex, disability, age, or national origin
  - ▶ “Flow down”
- ▶ Additional Equal Employment Opportunity (EEO) requirements for construction activities

# Protection of Environment

- ▶ Clean Air Act
- ▶ Clean Water Act
- ▶ Required at \$150,000 threshold (had been \$100,000)

# Termination of Contracts

- ▶ FTA Circular 4220.1F provides requirements for contract clauses that allow for termination for cause and for convenience by the grantee, including the manner by which it will be effected and the basis for settlement
  - ▶ All contracts in excess of \$10,000
- ▶ CalACT webinar on terminations planned for May 12!

# Termination of Contracts

- ▶ No prescribed language
- ▶ For default (for cause)
  - ▶ Notice and opportunity to be heard
  - ▶ Likely to end up in court
- ▶ For convenience
  - ▶ Unilateral right for public owner – not mutual right
- ▶ Payment will be different

# Changes

- ▶ Again, no prescribed language
- ▶ Different clauses for different goods and services
- ▶ Directs the contractor to act – even without agreement on pricing
- ▶ Note – the FTA expects profit to be negotiated separately on all change orders.

# Dispute Resolution

- ▶ FTA requires the grantee to have dispute procedures
- ▶ Typically, disputes and claims come up in change orders or contract interpretation
- ▶ FTA will not substitute its judgment for that of the grantee unless the matter is primarily a federal concern

# Dispute Resolution

- ▶ How and in what forum the dispute is resolved may be a matter of state or local law
- ▶ Consider Alternative Dispute Resolution possibilities, rather than formal proceedings
  - ▶ Mediation
  - ▶ Arbitration
- ▶ Your administrative record will be absolutely critical

# Performance/Payment Bonds

- ▶ Only required for construction contracts
- ▶ 2 CFR 200.325 allows FTA to accept grantee policies
- ▶ Default is 100% performance and 100% payment bonds
- ▶ 4220.1F requires 100% performance but a sliding scale on payment bonds
- ▶ 4220.1F also contemplates accepting grantee policies for reduced bonding
- ▶ What does California require?



# Options

- ▶ Unilateral right
- ▶ Your own or someone else's?
  - ▶ Assignability
- ▶ Exercising any option
  - ▶ Validity
  - ▶ Priced and evaluated within solicitation process
  - ▶ Confirm 'fair and reasonable' pricing
  - ▶ Never negotiate established pricing

# Liquidated Damages

- ▶ Never required
- ▶ Must be supported and reasonable, not a penalty
- ▶ Consider in conjunction with incentives
- ▶ A word on uncapped liquidated damages
- ▶ Coordination with schedule
- ▶ Collecting or compromising

# Payments

- ▶ Must accommodate 49 CFR Part 26 rule and any state rules on prompt payment
- ▶ Likely different for different contracts
  - ▶ 100% on acceptance
  - ▶ Progress payments
  - ▶ Advance payments
- ▶ Be certain prerequisites are met

# Progress Payments

- ▶ Milestones
  - ▶ Percentage of completion
- ▶ Monthly billing
- ▶ Adequate security
- ▶ Adequate documentation – called out by FTA!

# Advance Payments

- ▶ When would you use them?
- ▶ Using FTA money
  - ▶ Generally no, except...
  - ▶ FTA agrees – ‘sound business reasons’
  - ▶ Customary advance payments
  - ▶ Adequate security

# Rights in Data and Copyrights

- ▶ Section 18 of the Master Agreement contains a detailed (and confusing) discussion regarding federal and grantee obligations in rights in data and copyrights
- ▶ Limited to R&D contracts
- ▶ Consider having your own clause to be certain you own your data!

# Patent Rights

- ▶ Section 17 of the Master Agreement contains an equally confusing and detailed discussion regarding federal and grantee obligations in patent rights
- ▶ Also limited to R&D contracts
- ▶ Generally inapplicable unless you have a very exotic grant agreement and contract

# And The 2019 'Gotcha'

- ▶ Recycled products
- ▶ On the triennial list for 2019
- ▶ \$10,000 threshold
- ▶ Must refer to 40 CFR 247 (EPA) to know what products it applies to!



# Handling Clauses

- ▶ Be sure you have them in there but don't just dump everything in
- ▶ Suppliers without a significant transit practice generally have no idea what is in the federal clauses
- ▶ Industry outreach to small and disadvantaged businesses can help coax local businesses to bid or propose on your work

# But What Else Do We Need?

- ▶ Warranty
- ▶ Quality
- ▶ Indemnity
- ▶ Forms and certifications
  - ▶ Acknowledge addenda
  - ▶ Pricing schedule
  - ▶ Non-collusion affidavit

# But What Else Do We Need?

- ▶ FTA forms
  - ▶ Debarment & suspension
  - ▶ Lobbying
  - ▶ Buy America
- ▶ Draft contract
  - ▶ Contract documents
  - ▶ Contract type, amount, payments
  - ▶ Period of performance and deliverables

# Advertising

- ▶ Advertising and publicizing solicitation
  - ▶ FTA Circular 4220.1F, requires that procurements are to be “publicly advertised”
  - ▶ State law frequently addresses manner of advertisement
- ▶ Vendor list

# Pre-Proposal Conference

- ▶ Notice included in solicitation
- ▶ **Advise all participants that nothing said will modify the solicitation – wait for an addendum**
- ▶ Prepare agenda of points to cover
- ▶ Be responsive to questions - furnish a list of all questions and answers in solicitation amendment
- ▶ **Should NOT be mandatory!**

# Amendments/Addenda

- ▶ What's included in the addendum?
  - ▶ Use to correct or update the solicitation
- ▶ Avoid leaving a solicitation “on the streets” you know is defective – make the changes now or you will pay later

# Requested Changes

- ▶ All requested changes should be resolved by sending addenda or denying requests
- ▶ Some requested changes may be deferred to negotiations when seeking proposals
- ▶ Critical as exceptions can render a bid “non-responsive.”
- ▶ Send to all on final solicitation mailing list
- ▶ Require acknowledgment of addenda at time of receipt of bids or proposals

# Pre-Opening Issues

- ▶ Requests to withdraw proposals
- ▶ Handling late proposals
- ▶ The 'cone of silence'
- ▶ Cancelling the solicitation
  - ▶ Reserve to the agency the right to cancel the solicitation, without penalty, at your sole discretion



# Receive Those Proposals

- ▶ Proposal opening
  - ▶ In private, no announcement
- ▶ Check for responsiveness.
  - ▶ A proposal is responsive if it conforms in all material aspects to the requirements of the solicitation at the scheduled time of submission
  - ▶ PDQ Price - Product, Delivery, Quality, Price

# Evaluation

- ▶ Maintain integrity of procurement process
- ▶ Do not discuss outside of meetings of evaluation teams
- ▶ Form for team members to execute acknowledging confidentiality issues
- ▶ Team members should also execute conflict of interest certifications prior to starting evaluations

# Evaluation

- ▶ Follow criteria
- ▶ Evaluate against criteria, not other offers
- ▶ Discussions among members
- ▶ Forms
  - ▶ Insist on narrative support for scores

# Competitive Range

- ▶ Determined on the basis of cost and technical factors stated in the RFP
- ▶ Include all proposals that have a reasonable chance of being selected for award – if in doubt, include
- ▶ Do not pre-determine the competitive range.

# Discussions

- ▶ Pre-negotiation/discussion memorandum
- ▶ Negotiations – discussions and clarifications
  - ▶ If you hold negotiation sessions with one offeror, you must hold a session with all in the competitive range
  - ▶ Do not give a competitive advantage
  - ▶ Identify weaknesses but only against the scoring criteria – not other competitors

# Best and Final

- ▶ Additional submissions or BAFO
  - ▶ Additional information can be requested
  - ▶ Request for revised proposals - BAFO
    - ▶ Technical and/or cost/price

# Final Evaluation

- ▶ Same team, same criteria
- ▶ Evaluate against criteria, not other offers
- ▶ Discussions among members
- ▶ Forms
  - ▶ Insist on narrative support for scores

# Awarding the Contract

- ▶ Determinations of responsiveness and responsibility
- ▶ Price or cost analysis
- ▶ Resolution of protests
- ▶ Notification to unsuccessful bidders/proposers
- ▶ Post-award submissions by contractor
- ▶ Documentation of everything!



# Responsibility

- ▶ What makes a contractor responsible?
  - ▶ Financial resources to perform the work
  - ▶ Appropriate administrative, technical, equipment/facility/production and personnel
  - ▶ Ability to comply with required schedule
  - ▶ Satisfactory past performance record
  - ▶ Record of integrity and ethics
  - ▶ Compliance with license and tax law
- ▶ Don't forget to check [sam.gov](http://sam.gov)

# Cost or Price Analysis

- ▶ When do I need one?
  - ▶ Circular 4220.1F – always
  - ▶ 2 CFR 200 – above the small purchase threshold
- ▶ Which one should I use?
  - ▶ **Price Analysis** is used if it is determined that competition was adequate and price was within the expected range established by the ICE
  - ▶ **Cost Analysis** is used if it is determined that competition is inadequate or price is inconsistent with the expected range established by the ICE

# Protests

- ▶ Three basic types of protests

1. Protest received prior to bid opening or proposal due date
  - ▶ Usually, if a known issue is not protested at this time, it is waived
2. Protest received after bids or proposal received, but prior to award
3. Protest received after award of the contract

# Protests

- ▶ Written procedures should address
  - ▶ Procedures for each type of protest
  - ▶ Who is eligible to protest
  - ▶ Deadlines to file protest
  - ▶ Contents of protest
  - ▶ Identity and location of official to receive protest
  - ▶ Effect on pending actions

# Protests

- ▶ Written procedures should address
  - ▶ Promise to respond
  - ▶ Finality of decision
  - ▶ Reconsideration rights
  - ▶ Administrative appeal rights, if any
  - ▶ Notification of appeal rights to FTA

# Protests

- ▶ Protests to FTA
  - ▶ Basic principle
    - ▶ FTA allows protests under very limited circumstances
    - ▶ Have a policy, follow it, avoid FTA involvement
  - ▶ Provide notice to FTA

# Manner of Award

- ▶ Notice of proposed award
  - ▶ Start the protest clock
  - ▶ Sent to all competitors – watch the timing!
  - ▶ Any Buy America requirements?
- ▶ Award
  - ▶ May be just furnishing a copy of the executed contract

# Post-Award Submissions by Contractor

- ▶ Performance and payment bonds for construction contracts
- ▶ Insurance policies or certificates
- ▶ Licenses, etc.
- ▶ Notice to proceed once everything is complete



# Notification to Unsuccessful Bidders/Proposers

- ▶ Follows that earlier notice of intent to award
- ▶ Let them know the procurement process is over
- ▶ Be prepared to debrief

# Debriefing Unsuccessful Firms

- ▶ Go in with a plan
- ▶ Strengths and weaknesses on the evaluation criteria
- ▶ No grading 'on the curve'
- ▶ Defer until contract award is complete – just in case
- ▶ Record in writing for the files

# Documentation of Everything

- ▶ Close out this part of the procurement process by documenting all actions relating to award
  - ▶ Determination of responsibility
  - ▶ Protests settled or period expired
  - ▶ Award authority
  - ▶ All required submissions received and complete
  - ▶ Contract execution

Questions?