

Avoiding Triennial and State Management Review Findings

Agenda

- Most Frequent Triennial and State Management Review Findings
- Cracking the Code
- Procurement – Chapter 9
- Others?

FTA Has Been Very Active!

Oversight Activity	FY22 Total	Reports Issued	Findings Issued
Triennial Review	214	161	881
State Management Review	13	7	56
Combined TR/SMR	3	1	22
Financial Management Review	11	–	–
Procurement System Review	2	–	–
COVID-19 Financial Reviews	69	–	–
<u>Total</u>	<u>312</u>	<u>178</u>	<u>959</u>

...And Findings
are
Approaching
Pre-Covid
Levels

Fiscal Year	Review	Finding	Avg. Finding
2022	214	881	5.47
2021	212	808	3.81
2019	196	1,358	6.93
2018	223	1,529	6.86

The Findings are Familiar

Review Area	Finding	FY22*	FY21	FY19	FY18
Procurement	P11-1 - Missing FTA clauses	✓	✓	✓	✓
Disadvantaged Business Enterprise	DBE5-1 - DBE uniform reports contain inaccuracies and/or are missing required information	✓	✓	✓	✓
Procurement	P10-2 - Lacking required cost/price analysis	✓			
Procurement	P10-1 - Lacking independent cost estimate	✓	✓	✓	✓
Title VI	TVI2-1 - Language Assistance Plan implementation deficiencies	✓	✓	✓	
Procurement	P5-1 - Incomplete written documentation of procurement history	✓	✓		
Technical Capacity – Award Management	TC-AM2-1 - Incorrect FFR reporting	✓	✓	✓	
Procurement	P4-1 - Responsibility determination deficiencies	✓	✓		✓
Procurement	P20-3 - Pre-award and/or post-delivery certifications lacking	✓	✓		✓
Financial Management and Capacity	F4-1 - ECHO documentation deficient	✓	✓		

Cracking the Code

- ▶ Contractor's Manual, Fiscal Year 2022
 - ▶ <https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-12/FY22-CORTAP-CONTRACTORS-MANUAL.pdf>
- Grantee Oversight Workshops – none listed but hopefully!
 - <https://www.transit.dot.gov/regulations-and-guidance/program-oversight/grantee-oversight-workshops>
- Other FTA Guidance to Grantees and Auditors
 - Presentation on Top State Management Review Deficiencies (August 2019)
 - <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/safety/133551/fta%E2%80%99s-state-management-review-top-10-findings-workshop.pdf>

The Contractor's Manual

- Be sure to review the 'summary of changes' section
 - FTA's thoughts on evolving concerns are laid out
 - The Guide has been updated to incorporate 2 CFR Part 200.
 - 13 of the 23 areas reflect flexibility and relief related to Covid-19
 - FTA updated its governing directives and web links
- This year saw few changes beyond Covid-19 adjustments but be sure to check every year!

The Contractor's Manual

- Each Review Area (e.g., Procurement) starts with
 - Purpose (was Introduction)
 - Questions
 - Information from Recipient!

Section 9. Procurement

- The Purpose section emphasizes that 4220.1F has not been updated to incorporate 2 CFR 200 and that until “that update is issued, when there is a conflict between guidance contained in Circular 4220.1F and the Uniform Administrative Requirements, the Uniform Administrative Requirements supersede C.4220.1F.”
- The Purpose section once again stresses the most recent updates to micro and small purchase thresholds.
- The introduction stresses that reviewers must report deficiencies that could make a procurement ineligible for federal funding to the regional office
- Not that different from the 2020 version

Section 9. Procurement

- There are 21 listed questions
- Reviewers are directed to obtain a grantee's
 - Current policies and procedures
 - State 'Mini-Brooks Act' statute - NEW
 - Standards of conduct
 - Protest procedures
 - List of FTA-funded procurements over 3-year period between reviews – lots of details this year!
 - Change orders over \$250,000 - NEW
 - Any protests received or decided since last review
 - Any capital leases
 - Any claims received

California's Mini-Brooks Act

- January 1, 1990
- California Government Code, Chapter 10, Sections 4526-4529
- Section 4526
 - architectural
 - landscape architectural
 - engineering
 - environmental
 - land surveying
 - construction project management

What Are They Looking For?

- 2 CFR 200.320(b)(2)(iv) - The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services
- 49 USC 5325(b)(1) – “program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services”

What Are They Looking For?

- FTA C.4220.1F, Chap. IV, paragraph 2.h
 - “program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services”
 - Imports the statutory language
- FTA will be looking for differences

Compare Those Lists!

California	Federal
architectural	architectural, design
engineering	engineering, preliminary engineering
landscape architectural	
environmental	
land surveying	surveying, mapping
construction project management	construction management, program management
	feasibility study
	related services

Change Orders Over \$250k

- What are they looking for here?
- FTA C.4220.1F, Chap. VI, paragraph 6
 - FTA “requires the recipient to perform a cost analysis or price analysis in connection with every procurement action, including contract modification”
- FTA C.4220.1F, Chap. VII, paragraph 2
 - “FTA expects the recipient to have cost justifications supporting each change order it may issue. FTA also expects the recipient’s authorized official to approve any proposed change order before it is issued.”

Section 9. Procurement

- The manual no longer defines resources
 - Prior, listed 2 CFR 200
- The manual no longer lists potential concerns
 - Any significant deficiencies noted since the last review?
 - Any other audits scheduled for the year?
 - Any problems solving open issues?
 - Any open findings from other reviews?
 - Is there a PSR planned?
 - Anything come out of the Oversight Assessment Tool? (FTA Region report card)

Section 9. Procurement

- More of those earlier “concerns”
 - Appropriate staff and organizational structure?
 - Procurement organization (read as checks and balances)
 - Procurement management organization
 - If decentralized, how do you ensure compliance?
 - How does procurement work with users?
 - Anything else look out of place?

Cracking the Code

- Each Question Section Includes
 - The Question Restated
 - Basic Requirement
 - Applicability
 - Detailed Explanation
 - Indicators of Compliance
 - Instructions
 - Potential Deficiencies
 - Governing Directives

Tracking the 'Missing Clauses' Question

- This is question P11 - Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over \$2,000?
- The requirement – required clauses are... required
- Applicability – all recipients
- Explanation – discusses the Master Agreement, 2 CFR 200.324 and Appendix II, and 4220.1F
 - General rule – no modification to 'federalize' a contract
 - Modification to use a state schedule is allowed

Tracking the 'Missing Clauses' Question

- Indicator of compliance – are the clauses there?
- Instructions for the reviewer
 - Check policies and procedures
 - Check the clauses IN THE CONTRACTOR'S MANUAL TABLE!!!!
 - There are only 11 points on the list – not everything
 - There are some 'gotcha' questions in there

Tracking the 'Missing Clauses' Question

- What's on the reviewer's checklist?
 - Bonding for construction contracts
 - Termination clauses when over \$10,000
 - EEO
 - Davis-Bacon Act when over \$2,000
 - Contract Work Hours when over \$100,000 with mechanics or laborers
 - Clean Air Act when over \$150,000
 - Notifying the DOT IG when over \$25,000

Tracking the 'Missing Clauses' Question

- What else?
 - Solid Waste Disposal Act
 - Must look to 40 CFR 247 for the list of items
 - \$10,000 trigger
 - Buying now
 - Bought last year

40 CFR 247 Examples

- § 247.10 Paper and paper products.
- § 247.11 Vehicular products.
- § 247.12 Construction products.
- § 247.13 Transportation products.
- § 247.14 Park and recreation products.
- § 247.15 Landscaping products.
- § 247.16 Non-paper office products.
- § 247.17 Miscellaneous products.

Tracking the 'Missing Clauses' Question

- What else?
 - Right to Inventions
 - References 37 CFR 401.2
 - Experimental, developmental, or research work
 - Ownership of inventions flowing from the contract

Tracking the 'Missing Clauses' Question

- What else?
 - “Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate” when above the small purchase threshold
 - Huh?
 - Refers to 2 CFR 200, Appendix II – same language, same confusion
 - Terminations, for sure
 - Liquidated damages, if “appropriate”
 - Best advice – have a policy on LDs, even if you do not use them often or at all

Tracking the 'Missing Clauses' Question

- What else?
 - “Prohibition on certain telecommunications and video surveillance services or equipment”
 - NEW REQUIREMENT
 - Cites 2 CFR 200.216

What is “Covered?”

- Public Law 115-232, section 889
- No use of FTA funds for “covered telecommunications equipment or services” from China-based companies
- Enacted August 13, 2018
- Included a two-year grace period
- Effective date was August 13, 2020

What is “Covered?”

- No FTA guidance document or Q&A
- OMB provided 2 CFR 200.216, copying the language in the statute
- Section 889(f) provides definitions
 - Covered foreign country = China
 - Section 889(f)(3) defines the equipment and services
 - Equipment produced by Huawei, ZTE, or a subsidiary
 - For safety and security equipment, equipment produced by Hytera Communications, Hangzhou Hikvision Digital Technology, Dahua Technology, or a subsidiary
 - Services that use any of that equipment

How do we comply?

- Certifications as a means of ensuring compliance
- VENDOR hereby acknowledges that the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115232, § 889 (Aug. 13, 2018) (the Act) prohibits the Agency from procuring certain “covered telecommunications equipment or services,” as defined in the Act, in federally assisted procurements and that the instant procurement is a federally assisted procurement subject to that prohibition. VENDOR represents and warrants that it has performed a due diligence review of its supply chain and that no such “covered telecommunications equipment or services” shall be provided to the Agency that would cause the Agency to be in violation of the prohibition contained in the Act.

Tracking the 'Missing Clauses' Question

- Potential deficiencies – missing required clauses
- Governing directive – 2 CFR 200, Appendix II
- Be careful – the Appendix also discusses
 - Anti-lobbying certification over \$100,000
 - The requirement to check sam.gov
- The discussion sneaks in “Notification to FTA...[if] a current or prospective legal matter that may affect the Federal Government emerges”
 - Add it to the notification to the DOT IG clause?

What About Cost/Price Analysis?

- This is question P10 - Does the recipient develop independent cost estimates and conduct cost and/or price analysis as described in its policies and procedures and for each procurement action above the Simplified Acquisition Threshold?
- The requirement – ICE and cost/price analysis required when in excess of the small purchase limit
 - This accepts 2 CFR 200's requirement rather than the more restrictive requirement in 4220.1F

What About Cost/Price Analysis?

- Applicability – all recipients
- Explanation
 - Simplified Acquisition Threshold = \$250,000
 - Cost analysis for cost contracts, sole source (unless you can do a price analysis), and where 'adequate price competition is lacking'
 - Price analysis for all others
 - ICE before taking bids or proposals

What About Cost/Price Analysis?

- Indicators of Compliance
 - Did you create an ICE?
 - Did you do cost or price analysis?
- Instructions for the reviewer
 - Check policies and procedures
 - Look for ICE and cost/price analysis

What About Cost/Price Analysis?

- Potential deficiencies – lacking ICE or cost/price analysis
- Governing Directive – 2 CFR 200.323 and 4220.1F, Chapter VI, sections 6.a and 6.b
 - Additional things there
 - Negotiate profit separately when there is no price competition or in a cost reimbursement contract
- Instructions for Reviewers
 - Examine the policy and contracts both

Pre-Award and Post-Delivery Certs

- This is question P20 - If the recipient procured rolling stock with FTA funds, did it comply with the requirements of 49 CFR Part 663, including pre-award and post-delivery Buy America audit requirements, resident inspector requirements, and purchaser's certifications?
- The requirement – conduct pre-award and post-delivery audits and verify compliance with
 - BA requirements
 - Purchaser's requirements
 - Resident inspector requirements
 - FMVSS

Pre-Award and Post-Delivery Certs

- Applicability – all recipients
- Explanation - *Revenue service* rolling stock; *recipient* to complete certifications; not necessarily signed (hmmm!)
 - Under \$150,000 – still need purchaser requirements and FMVSS certs
 - Audit each “order” of vehicles
 - Single pre-award (even in a piggyback) generally okay
 - No resident inspector for unmodified vans
 - Resident inspector requirement (10/20 vehicles) not cumulative

Pre-Award and Post-Delivery Certs

- Indicators of compliance
 - Correct requirement in solicitation?
 - Pre-award and post-delivery audits?
 - Documented with required certifications
- Instructions for the reviewer
 - 60/65/70% requirements
 - Check polices and procedures
 - Check documentation for each order

Pre-Award and Post-Delivery Certs

- Potential deficiencies
 - US content deficiency – i.e., audits
 - Audits not performed
 - Certifications lacking
- Governing directive – 49 CFR 663 (multiple sections)

Pre-Award and Post-Delivery Certs

- The detailed explanation – starting at page 9-74 – provides everything your auditor is likely to know about Buy America and explains everything they will examine!

One More Buy America Note

- The IIJA requires – by May 14, 2022 – that all grants ensure “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, **and construction materials** used in the project are produced in the United States.”
- OMB provided preliminary guidance on April 18
- DOT deferred application until November 10 (180 days after May 14)
- No guidance yet!

One More Buy America Note

- This will be applied – most likely – at the grant level
- Contracts under grants issued pre-guidance are likely to rely on the existing standards – but there are no guarantees
- Meanwhile, construction projects should follow the Bob Hope Airport and Second Avenue Subway decisions issued by the FTA Chief Counsel
- Be sure project personnel understand and are applying the current standard
 - The new changes will make more sense if you understand the current regime and speak the language of Buy America

Responsibility Determinations

- This is part of question P₄ - Does the recipient make awards only to responsible contractors as described in its policies and procedures and in compliance with the requirements of 49 U.S.C. 5325(j) and 2 CFR 200.318(k)?
- The requirement – only contract with responsible firms
- Applicability – All recipients
- Explanation – looks to contractor's integrity, compliance with public policy, past performance, and financial/technical resources

Responsibility Determinations

- More Explanation
 - Must verify contractors are not suspended or debarred. Sam.gov is the best practice, recoding check or printing screen
 - The concept of a 'principal' – officer, director, owner, partner, etc.
- Indicators of compliance
 - Documented responsibility determinations?
 - Documented sam.gov check?
 - Was there a *contract extension* after suspension or debarment?

Responsibility Determinations

- Instructions for the reviewer
 - Review policies and procedures
 - In contracts, look for ...
 - Integrity
 - Compliance with public policy
 - Past performance
 - Financial/technical resources
 - Have a checklist!

Responsibility Determinations

- Instructions for the reviewer
 - Review policies and procedures
 - Look for sam.gov checks
 - Ask if the grantee encountered a contractor suspended or debarred after award
- Potential deficiencies
 - Lack of a documented determination
 - Lack of documented sam.gov check
 - Extended relationship after finding suspension or debarment

Responsibility Determinations

- Governing directive
 - 2 CFR 180.300 – sam.gov requirement
 - 2 CFR 180.310 – actions if a contractor is suspended or debarred during your contract
 - 4220.1F, chapter III, section 3.d.(1)(c)

Record Keeping

- This is question P5 – “Does the recipient maintain records sufficient to detail the history of each procurement as described in its policies and procedures and in compliance with 2 CFR Part 200?”
- What are they looking for?
 - Rationale for the method of contracting
 - Selection of contract type
 - Reason for contractor selection
 - Basis for the contract price
- It really is that simple!

Record Keeping

- For small purchases, even though under \$250,000

I hereby determine the price to be fair and reasonable based on at least one of the following:

Found reasonable on recent purchase

Obtained from current price list

Obtained from current catalog

Commercial market sales price from internet search

Other _____

Signed _____ Date _____

But There Is More!

- Be sure to check other areas – others implicate procurement!
- TC-PrgM5 – Debarment checks in sam.gov – they get you twice!
- DBE – goal setting, achievement, and reporting
- ADA – vehicle specifications
- “Procurement” shows up at least 621 times in the manual!

And... Finally

- FTA allowed 'flexibility' to essentially federalize contracts and make other changes based on the pandemic
 - "Under the authority of the Emergency Relief program to set the necessary terms and conditions of an award (49 USC 5324 (d)(1), FTA permits funds to be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. The procurement of any new contracts would need to follow all Federal requirements."
 - "Recipients may modify a third-party contract to require the payment of administrative leave as administrative leave is an eligible expense for operations and maintenance personnel whether those personnel are in-house or employed by contractors. In addition, recipients may modify contracts to pay for eligible operating/maintenance expenses required to retain readiness or eligible fixed operations/maintenance expenses such as rent, even if service is reduced."

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