CALACT CALIFORNIA ASSOCIATION FOR COORDINATED TRANSPORTATION

U.S. Department of Transportation (DOT)
1200 New Jersey Avenue SE
Docket Operations
West Building Ground Floor, Room W12-40
Washington, DC 20590

RE: FTA Docket 2024-15

To Whom It May Concern:

These comments and recommendations are submitted on behalf of the California Association for Coordinated Transportation (CALACT) concerning the Request for Comments (RFC) from the Federal Transit Administration (FTA) regarding FTA's Draft Circular 4220.1G

CALACT is a Sacramento-based, statewide, professional association of transit managers, planners, and suppliers. Our members include many of the organizations that transport the public, seniors, and persons with disabilities throughout California and the agencies that fund these services. Our members also include non-profit agencies that provide a true safety net of transportation services to seniors and individuals with disabilities.

CALACT, therefore, is a diverse group of transportation providers, managers, planners, and suppliers committed to providing coordinated transportation and meeting the needs of small urban, rural, and specialized transportation systems.

Chapter I

Section 5.g – the definition for CM/GC or CMAR suggests that the Guaranteed Maximum Price (GMP) is negotiated after the Construction Manager assists the owner to bring the design to the 60-90% level. The more common practice, and one that protects the public investment while facilitating competition in selecting the Construction Manager, is to set the GMP before award, achieve the 60-90% design development, then negotiate down from that established GMP. If the Construction Manager completes the project within the established GMP, the owner is free to terminate the contract and solicit sealed bids for the construction.

To facilitate both practices, we recommend the definition be amended as follows:

…after which the recipient and Construction Manager negotiate a ~~maximum~~ <u>final construction</u> price~~, generally called the Guaranteed Maximum Price (GMP), for the Construction phase~~. If

both parties agree on the final construction price ~~GMP~~, they sign a construction contract or contract amendment, at which point the Construction Manager becomes a General Contractor.

Section 5.y – the definition for PDB suggests that a "two phased qualifications-based selection process" is required. To require a "Brooks method" selection, as suggested by this phrase, would run contrary to Chapter IV, section 3.g(2) where FTA repeats its longstanding guidance that the method selected should follow the preponderance of the expected costs.

To avoid this, we suggest the following edit:

PDB ~~uses a two-phased qualification-based selection process, requiring~~ requires the owner agency and PDB Team to progress the design together

This allows for an abbreviated, but still comprehensive, definition, since to fully define PDB would take an exceptionally long entry. We suspect any agency attempting to use a PDB process would first engage FTA in any case to ensure federal participation in the project.

Section 5.gg – state or local purchasing contracts may, where appropriate, select only a single vendor for some product or service. To accommodate this, we suggest the following edit:

…established by a State or local government with ~~multiple~~ one or more vendors.

Chapter II

Section 4 – the draft language would direct grantees to seek FTA guidance any time federal and state requirements were incompatible. Given the number of such incidents (particularly where state practices direct a 'Brooks' procurement for professional services beyond federally-defined A&E services – FTA should simplify this guidance by stating:

Where a recipient can comply with both federal and state requirements (such as prevailing wages where a state might be higher or lower than those required by US DOL), the recipient must comply with both (such as by requiring the higher of the two prevailing wage determinations).

Where one (federal or state) is permissive and the other mandatory, following the mandatory practice satisfies both.

Where federal and state requirements are incompatible (such as one forbids a practice and the other requires it), the recipient must follow the applicable federal requirement or prohibition whenever federal funding is allocated to the project.

Any potential deviation from these practices should be raised with the FTA regional office prior to implementation.

Chapter III

Section 1.c – as written, this provision would apply internal agency standards of conduct to "contractors, subcontractors, or their agents." This phrase should be excised in favor of the phrase "or other covered persons." This makes agency standards applicable to imbedded or

seconded contractor employees without unduly expanding coverage to contractors. Without this change, the language would suggest a contractor could not, for instance, accept a gift from another contractor in the normal course of business if it violated any of its customer agency's policies.

Section 5 – the draft intermingles required audits of agencies with requirements for contractors. As an example, the guidance correctly points out that an agency must be audited annually if they spend more than a minimal amount of federal money. Directly below and subordinate to this language is section 5.a addressing audit of contractors. This is confusing and unnecessary in third-party contracting guidance. We recommend references to audits of the recipient be excised from the guidance. If there is a perception that this information is necessary for third-party contract practitioners, simply state the agency itself is subject to audit and reference Subpart F and separate that statement from all the discussions of auditing third-party contractors.

Additionally, within the discussion of auditing third-party contractors, FTA should remind readers of the Single Audit Act limitations. Recipients cannot be left with the impression that they may independently audit a contractor's overhead rates that have already been accepted.

Chapter IV

Section 1.a – to be accurate, FTA should add as follows:

For example, FTA prohibits, with limited exceptions, the use of capital assistance for the recipient's operations expenses.

Section 1.b – we recommend the following edit:

FTA ~~will~~ may review the recipient's procedures and determinations

Section 1.e(1) – as written, the provision would disallow leasing of "accessories." While such accessories may not be within the contemplation of FAST Act section 3019(c), leasing of such equipment is well within the authority granted under 2 CFR 200.318(d). We recommend FTA clarify as much in the text.

Section 2 – within the general discussion of the effect of federal law and regulations, we suggest FTA substitute "may" for "will."

Section 2.a(1) – to ensure recipients remain cognizant of the full range of federal labor requirements, we suggest the parenthetical referencing the FLSA read see, e.g.

Section 2.b(5)(a)(a) – requiring FTA concurrence for all customary advance payments over $100,000 may prove unwieldy, particularly where rent or insurance may be involved.

Section 2.b(9)(d) – delay or weight limitations may lead to liquidated damages, but other failures on the part of a contractor may be addressed through LDs as well. We recommend the following edit:

or if ~~weight~~ other key requirements are ~~exceeded~~ violated

Also, later in that section is a typo, reading "Under FTA's Master Agreement § 39(c) (May 2, 2024), any the recipient may return…" (emphasis added).

Section 2.c(1)(a) – this provision discusses the Contract Work and Hours and Safety Standards Act, and the Fair Labor Standards Act. We recommend adding reference to the Davis-Bacon Act here as well for completeness.

Section 2.c(2)(j) – this provision incorrectly cites "the most current version of the Web Content Accessibility Guidelines (WCAG)." The most current version is 2.2 and version 3.0 is in development. To date, 508 compliance is predicated on WCAG 2.0.

Sections 2.c(3)(b)(f) and 2.c(3)(c) – these provisions would encourage recipients to adopt practices under 2 CFR 200.321. Recipients and their contractors are bound by 49 CFR Part 26, to the exclusion of other programs. US DOT policy would suggest as much, since even use of state programs setting goals for protected groups such as MBE, WBE, and disabled veterans are forbidden on US DOT-assisted projects.

We recommend these provisions be deleted.

Section 2.c(4)(b)(b) – given the recent ruling by the DC Circuit Court of Appeals that CEQ is not authorized to issue binding regulations, we recommend this section be deleted.

Section 2.e(2) – this section should note that if no project-specific goal for a ferry purchase is contemplated, there is no requirement for FTA approval under 49 CFR 26.49(f).

Section 2.h(4) – the provision, as drafted, would suggest the use of overhead ceilings. We suggest the following edit:

…the recipient must use those indirect cost rates for contract estimates, negotiation, administration, reporting, and payments, ~~with~~ and shall not be limited by administrative or de facto ceilings ~~limitations~~.

This will bring the language into compliance with 49 USC 5325(b)(2)(C).

Section 2.i(3) – the provision suggests that value engineering precedes construction and is complete prior to grant approval. This misstates the concept, as VE is encouraged – and required by grant condition – throughout a project to encourage savings. The provision should be corrected to read that FTA will not ordinarily approve a grant unless value engineering is included.

Section 2.k – as with Chapter III, section 5, this section restates and further confuses the reader on requirements for audits of the grantee with audits of grantee contractors. Again, reference to audits of the agency should be excised for clarity. Moreover, the guidance should be in a single location within the circular to avoid unnecessary duplication and confusion.

Chapter V

Sections 4.c and 8.d – FTA should note that only a Buy America certification of compliance will allow the grantee to move forward in these circumstances.

Sections 4.d and 5.b – FTA should affirmatively explain interstate purchasing schedules are allowed and which are 'restricted.' What criteria must be applied to satisfy the statutory requirements?

Moreover, FTA should explain why a recipient might not be able to take advantage of a state or local purchasing schedule or contract, properly competed and awarded, for equipment other than rolling stock. This proposal would introduce a new limitation on grantee flexibility to make efficient purchases. State-wide purchasing schedules are a common, efficient tool for transit agencies and are commonly used.

We also recommend that FTA affirmatively acknowledge that a local government schedule, otherwise conforming to the requirements of a joint procurement, operated in cooperation with a state transit association, with minimum and maximum amounts set using a reasonable process in coordination with participating agencies, may be made available to all transit agencies in a state, even if they are not current participants in the procurement.

Chapter VI

Section 2.e(6) – FTA should acknowledge that adequate security may be obtained in ways other than bonds by editing this provision as follows:

…and this circular for construction, and ~~to~~ when necessary to establish adequate security for ~~secure~~ advance or progress payments made to a contractor.

Section 2.e(9)(b)2 – FTA should note that simply being an incumbent does not lead to an unfair competitive advantage.

Section 5(c) – In light of OMB's April 22, 2024, final rule ("OMB disagrees with the commenter asking OMB to reinstate the provision requiring recipients to negotiate profit as a separate element of the price for each contract in which there is no price competition. While this practice is no longer expressly required by the guidance, this does not prohibit a recipient from taking such action if deemed necessary in instances when there is no price competition."), FTA should similarly state that this provision encourages but does not require separate negotiations of profit.

While we note the provision is couched in terms of 'should' rather than 'must,' fuller clarity is needed since this represents a change from prior editions of the circular.

Section 6.b – we disagree that a recipient should ever fail to evaluate option pricing. If there was certainty that no funding was forthcoming, the requirement should not be in a solicitation. If an option is not evaluated, then later funded, and exercised, the grantee would be in the

precarious situation of exercising an option never properly evaluated and receiving an adverse finding on a triennial review.

Instead, FTA should note that where there are options which may but are not likely to be exercised, or options that allow an either/or decision later (e.g., a surface parking lot or a garage), the grantee may evaluate those option prices in a manner that lessens their impact on the overall decision. This could be by counting only a percentage of an option price to avoid skewing the analysis.

CALACT appreciates the opportunity to provide input and comments to FTA's draft proposed Circular 4220.1G. If you have any questions regarding these comments, please do not hesitate to contact me at jacklyn@calact.org. Thank you for considering our perspectives and suggestions.

Sincerely,

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