
# Legal Aspects Relevant to Outsourcing Transit Functions Not Traditionally Outsourced



## DETAILS

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# Legal Research Digest 38

## LEGAL ASPECTS RELEVANT TO OUTSOURCING TRANSIT FUNCTIONS NOT TRADITIONALLY OUTSOURCED

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Daniel Duff, Jane Sutter Starke, and G. Kent Woodman, Thompson Coburn LLP. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

### The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

### Applications

Outsourcing involves the transfer of the management and/or day-to-day performance of a business function to an outside service provider. In most instances, services from an outside organization are procured as a substitute for in-house employee labor, except in the case of independent audits. The substitution is usually made because the skills offered by the outside organization are needed for only a short period of time or are better than internally available skills. Thus significant outsourcing in the U.S. transit industry already exists—often for paratransit operations or, in some cases, all transit operational activities, or for more limited professional and technical services.

There are many occasions when a function to be outsourced will include assets that were purchased with federal funds. As part of this analysis, questions about how to deal with assets that were purchased with federal funds, including any provisions the Federal Transit Administration mandates its grantees incorporate in any prospective outsourcing arrangement, will be considered.

The purpose of this digest is to focus on the legal aspects relevant to outsourcing transit functions not traditionally outsourced. Presumably revenue operations and paratransit services are considered "traditional" outsourced transit functions. "Nontraditional" then may be seen to cover all other activities, from outsourcing maintenance services, architectural and engineering work, custodial services, security services, human resources, IT, call center services, and marketing and advertising, to a variety of others.

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# LEGAL ASPECTS RELEVANT TO OUTSOURCING TRANSIT FUNCTIONS NOT TRADITIONALLY OUTSOURCED

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## INTRODUCTION

"Outsourcing" involves the transfer of the management and/or day-to-day performance of a business function to an outside service provider. It is common in the commercial world where business entities seek to save costs or focus on core functions by contracting out certain functions to others.

Outsourcing is increasingly popular among public transport entities in Britain, Europe, and Asia. As for transit systems in the United States, outsourcing is quite common and is likely to be undertaken more often as transit systems continue to face very difficult budgetary environments. In the transportation sector, "…budgetary pressures have made public officials more receptive to private sector participation in transportation, while the long-term effects of the recession have intensified officials' interest in private sector innovations in transportation and other areas of the economy that could spur the nation's growth."[1] Indeed, according to the most recently available data from the Federal Transit Administration's (FTA) National Transit Database (NTD), transit systems spent some $2.3 billion in 2008 on "Services"; the NTD defines "Services" as

> [t]he labor and other work provided by outside organizations for fees and related expenses. In most instances, services from an outside organization are procured as a substitute for in-house employee labor, except in the case of independent audits, which could not be performed by employees in the first place. The substitution is usually made because the skills offered by the outside organization are needed for only a short period of time or are better than internally available skills. The charge for these services is usually based on the labor hours invested in performing the service. *Services include management service fees, advertising fees, professional and technical services, temporary help, contract maintenance services, custodial services and security services.*[2] (Emphasis supplied.)

There thus already is significant outsourcing in the U.S. transit industry—often for paratransit operations or, in some cases, all transit operational activities, or for more limited professional and technical services. This is likely to increase. A 2009 article in the *Wall Street Journal* notes that a number of transit systems outsource nearly every aspect of their operations.

> Across the country, the traditional revenue streams that transit agencies rely on are declining, but interest in bus and rail service is growing. Faced with a budget crunch, an increasing number of cities may join New Orleans in seeking to curb costs by turning operations over to private companies that can potentially run systems more efficiently.[3]

The purpose of this digest is to focus on the legal aspects relevant to outsourcing transit functions that are not traditionally outsourced. Presumably revenue operations and paratransit services are considered "traditionally" outsourced transit functions. "Nontraditional," then, may be seen to cover all other activities, from outsourcing maintenance services, architectural and engineering work, custodial services, security services, human resources, information technology, call center services, and marketing and advertising, to a variety of others.

Before any decision to outsource is made, a U.S. public transit system should review applicable collective bargaining agreements or federal transit law labor protection provisions to determine what labor obligations may or may not apply and to assess how the agency should position itself in the event of disputes. Section I addresses those issues.

Once a decision to outsource is made, designing and drafting procurement documents is important, and Section II discusses procurement methods and related considerations in that regard.

A number of legal considerations come into play as well once a decision to outsource has been made. We presume that a public transit agency involved in outsourcing is a recipient of federal funds from the FTA, in which case any outsourcing contract must include terms and conditions that protect the federal interest in the matters outsourced. Section III discusses those issues.

Of course, an outsourcing must do more than include terms and conditions protecting the federal interest, and Section IV covers a range of key terms and conditions that should be considered for inclusion in any outsourcing agreement.

[1] CLIFFORD WINSTON, LAST EXIT: PRIVATIZATION AND DEREGULATION OF THE U.S. TRANSPORTATION INDUSTRY 15 (Brookings Institution Press 2010).

[2] FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., NATIONAL TRANSIT DATABASE, NTD Glossary, 2010, available at http://www.ntdprogram.gov/ntdprogram/Glossary.htm.

[3] Christopher Conkey, *Strapped Cities Outsource Transit Lines*, WALL ST. J. Online, July 13, 2009, available at http://online.wsj.com/article/SB124743906572829605.html.

## SECTION I. KEY EARLY CONSIDERATIONS: LABOR PROTECTION ISSUES

Two key issues in any consideration of outsourcing or contracting out work are 1) whether there are any restrictions on contracting out work that is performed by public employees of the agency under existing collective bargaining agreements, and 2) what issues may be raised under the labor protection provisions of Section 13(c) of the Federal Transit Act.

### A. Collective Bargaining Restrictions

A key question that must be addressed at the outset is whether, under a collective bargaining agreement, a public agency has the ability to outsource or contract out work.[4] A review of an agency's existing collective bargaining agreements will reveal whether there are any restrictions on contracting out work. If a restriction exists, the contracting action would be governed by the specific provision in the labor contract. Challenges to contracting could be contested through the filing of grievances under the terms of the collective bargaining agreement.

Some collective bargaining agreements are silent on the issue of contracting, and there is no specific provision restricting contracting out work. In such cases, contracting actions have been contested and, if the parties were unable to resolve a dispute, arbitrated. In the absence of express language, the right of management to contract functions has been examined and upheld in many arbitration decisions.[5] The standard has been articulated as follows:

> In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. The general right to contract out may be expanded or restricted by specific contractual language.[6]

When a collective bargaining agreement is silent on subcontracting, arbitrators balance the interest of management against the interest of the union in actions involving outsourcing. As a policy matter, management has argued it has a justifiable interest in the efficient operation of its enterprise, while the union takes the position it has a legitimate interest in job security and bargaining unit stability. In general, if the subcontracting has little or no impact on the collective bargaining unit, it is likely to be upheld in arbitration.[7] This may not be the case if the subcontracting would replace current workers or not use workers previously laid off. The factors to be considered under this balancing test as articulated in *How Arbitration Works* are as follows:[8]

> Past practice. Has the company subcontracted work in the past?
>
> Justification. Is the subcontracting being done for basic business reasons arising from the economy, or for safety and security measures, emergencies, or other sound business reasons?
>
> Effect on the bargaining unit. Does the subcontracting substantially prejudice the status and integrity of the bargaining unit, or is it being used to discriminate against it?
>
> Effect on unit employees. Are members of the bargaining unit being discriminated against, displaced or deprived of jobs previously available to them, or being laid off because of the outsourcing?
>
> Type of work involved. Is the work involved usually done by unit employees or has it been subject to subcontracting in the past? Moreover, work that is incidental to the entity's main business focus may more readily be permitted to be outsourced.
>
> Availability of properly qualified employees. Are the skills of the current employees sufficient to perform the required work?
>
> Availability of equipment and facilities. Another question is whether the entity has the necessary equipment and facilities to perform the required work, or can purchase them cost-effectively.
>
> Regularity of subcontracting. This factor looks at whether the work is often or infrequently subcontracted.
>
> Duration of subcontracted work. Work performed on a more limited basis would generally be easier to justify that that done in a longer timeframe.
>
> Unusual circumstances involved. An emergency may justify subcontracting, as would a time limit for the work to be done.
>
> History of negotiations on the right to subcontract. If a union has been unsuccessful in negotiating restrictions on subcontracting, that could be considered in arbitration.

Prior notification to the union requesting discussions on the issue can be given when a collective bargaining agreement is silent as to subcontracting. However, some arbitrators have held that no notice is required.[9] Additionally, a careful review of the entity's practices should be undertaken before proceeding with an outsourcing. The issues referenced above as part of the balancing inquiry should be included as part of that review.

### B. Section 13(c) Considerations

As a condition to the receipt of federal funds from the FTA, public transit agencies are required by federal

[4] Of course, if an outsourcing were to involve nonunionized workers not party to a collective bargaining agreement, this would not be an issue.

[5] ALAN MILES RUBEN, HOW ARBITRATION WORKS 743–44 (6th ed., BNA 2003).

[6] *Id*. at 746 (quoting *Shenango Valley Water Co*., 53 LA 741, 744–45 (McDermott, 1969)).

[7] *Id*.

[8] *Id*. at 748–52.

[9] *Id*. at 755.

statute[10] to provide "fair and equitable" labor protection for transit employees who may be affected by such assistance. The outsourcing and contracting of transit services can become quite controversial among employees, unions, and the public agency, and thus can be a potential source of 13(c) claims and disputes.

Whether the service or work being outsourced has been previously contracted out or consists of nontraditional functions that are being contracted out by the public entity for the first time, the 13(c) considerations should be the same. The key 13(c) issues that typically arise in an outsourcing effort center on the impact to the employees then performing the work, and on the 13(c) obligations the transit agency has in the applicable 13(c) protections. Section 13(c) by statute does not prohibit the contracting of work, but efforts can be made to contest or block the agency's action through the filing of 13(c) claims seeking 13(c) monetary benefits, job rights with the contractor, and other remedial relief. The following discussion reviews the key 13(c) issues that may arise in the event that a transit agency implements a plan to procure a private contractor and outsource work.

### *1. Statutory Requirements*

Section 13(c) generally requires, as a precondition to a grant of federal assistance by the FTA, that fair and equitable protective arrangements must be in place to protect employees affected by such assistance. The statute requires the following to be included in such protective arrangements:

i. The preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise.[11] This provision requires that rights under existing collective bargaining agreements must be preserved and continued. However, it is recognized that these rights may change through the collective bargaining process.[12]

ii. The continuation of collective bargaining rights.[13] This provision requires that the collective bargaining process be preserved and continued. At the time of enactment of 13(c), much congressional debate focused on the issue of collective bargaining by public employees since many private transit companies were in poor financial condition and federal grants could be utilized by public entities to purchase those failing carriers. Thus, 13(c) sought to ensure that employees who had collective bargaining rights would continue to have such rights. This did not mean that such rights had to be established, only that existing rights be preserved. Nor did Congress extend a right to strike where no such right previously existed.[14]

iii. The protection of individual employees against a worsening of their positions related to employment.[15] The legislative history of 13(c) indicates that there was concern that technology and automation would lead to a loss of employment. Thus, section 13(c) provides transit employees 13(c) benefits that are no less than those provided under railroad labor protection[16] if the employees' positions have been "worsened" as a result of federal assistance. Such protection includes monetary benefits for employees in the event that the employees' terms and conditions of employment have been adversely affected as a result of a federal grant.

iv. Assurances of employment to employees of acquired public transportation systems.[17] If a federally-funded acquisition of a transit system occurs, employees of the acquired entity are entitled to an assurance of employment.

v. Assurances of priority of reemployment to employees whose employment is ended or who are laid off.[18] Section 13(c) protections require that employees dismissed as a result of a federal project are provided priority of reemployment rights.

vi. Paid training or retraining programs.[19] In specific circumstances, the employer is required to provide training or retraining of dismissed employees.

The statutory language of 13(c) requires "[a]s a condition of financial assistance…, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable."[20] As a result, most capital and operating grants made by FTA must be reviewed and certified by the U.S. Department of Labor (DOL) to assure that fair and equitable arrangements are in place. The DOL certifies FTA grants and requires that the 13(c) protections are incorporated in the FTA grant agreement with the public agency. This DOL process thus certifies 13(c) terms that could be relevant to an outsourcing.[21]

### *2. Scope of 13(c) Protection*

Section 13(c) protection covers employees of the grantee, those of any contractors of the grantee providing transit services, and those of other mass transit providers in the service area. Section 13(c) protection applies to both unionized and nonunionized employees. Therefore, the determination of whether an individual is entitled to 13(c) protection is dependent on 1) whether the employee performs mass transportation services; and 2) whether the employee is the type of employee that is entitled to 13(c) protection.[22]

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[10] Section 13(c) of the Federal Transit Act is codified at 49 U.S.C. § 5333(b).

[11] 49 U.S.C. § 5333(b)(2)(A).

[12] Amalgamated Transit Union v. Donovan, 767 F.2d 939, 953 (D.C. Cir. 1985).

[13] 49 U.S.C. § 5333(b)(2)(B).

[14] G. KENT WOODMAN ET AL., TRANSIT LABOR PROTECTION—A GUIDE TO SECTION 13(C) FEDERAL TRANSIT ACT 5 (Transit Cooperative Research Program, Legal Research Digest No. 4, 1995) (hereinafter "TRANSIT LABOR PROTECTION").

[15] 49 U.S.C. § 5333(b)(2)(C).

[16] 49 U.S.C. § 11326(a).

[17] 49 U.S.C. § 5333(b)(2)(D).

[18] 49 U.S.C. § 5333(b)(2)(E).

[19] 49 U.S.C. § 5333(b)(2)(F).

[20] 49 U.S.C. § 5333(b)(1).

[21] See DOL's 13(c) Guidelines at 29 C.F.R. pt. 215.

[22] TRANSIT LABOR PROTECTION, at 15.

As to the first issue, the legislative history indicates that Congress only intended for employees engaged in mass transit operations to be entitled to 13(c) protection.[23] Thus employees of the FTA grantee and mass transit service area providers employed in operations, maintenance, and administrative positions in the provision of mass transit[24] services would typically be covered by 13(c).

As to the second issue regarding the type of employees entitled to 13(c) protection, the term "employee" is not specifically defined in Section 13(c) or in other parts of the Federal Transit Act, and the legislative history indicates that this omission was intentional.[25] The term "employee" has been interpreted in cases involving labor protection for rail employees to mean all but top-level individuals in policy-making positions.[26] This includes making basic policy decisions or having significant influence on management policy. The DOL uses a similar analysis under 13(c), finding that employees who serve in policy-making positions or have a position on the board of directors are not covered by 13(c).[27] Whether an individual is a covered employee is determined on a case-by-case basis, and an individual's job title is not determinative in making such an inquiry.

Nontraditional outsourcings could involve non-unionized employees in certain instances, and it thus is important to note that Section 13(c) protection also applies to nonunionized employees. In some nonunionized situations, DOL uses a "nonunion" certification to provide protection for those employees.[28] Coverage of non-unionized employees is also typically included in DOL certifications for FTA grants. DOL's certification letter routinely provides that non-unionized employees are entitled to "substantially the same levels of" protection to that afforded in the 13(c) protections in the certified arrangement. DOL's language states:

> Employees of mass transportation providers in the service area of the project who are not represented by a union designated above shall be afforded substantially the same levels of protections as are afforded to the employees represented by the union(s) under the above referenced protective arrangements and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project.

### *3. 13(c) Carryover Rights*

When a public transit agency is considering outsourcing or contracting out work, one of the issues that may arise under 13(c) could be a claim for "carryover" protection. The basic issue is whether 13(c) requires, in a transition from public to private employment or from one service provider to another, that the existing employees be given a guarantee or assurance of employment with the contractor and whether that contractor must assume the terms and conditions of the existing collective bargaining agreement.

A review of the applicable 13(c) provisions will provide guidance as to whether the 13(c) protective terms contain carryover rights. Typically, such provisions are included if a federally-funded acquisition occurred. Specifically, 13(c) requires that when a public agency uses federal grant funds to acquire a private mass transportation company and take over its transit operations, the existing employees must be given assurances of employment, in accordance with section 13(c)(4).[29] In direct, federally-funded acquisitions (most of which occurred in the early days of the federal transit program), there was a 13(c) duty to provide employment for the existing workforce and to honor the existing terms and conditions of employment. This right is, however, limited to acquisition situations.

It has also been argued that 13(c)(1) and (2) in essence require this carryover right in a contracting situation and that contractors are bound by 13(c) agreements under the successor clause. However, DOL has ruled that a contractor has no 13(c) carryover obligations to the existing workforce in the absence of a federally-assisted acquisition. In the DOL's Certification for the Regional Transportation Commission (RTC) of Clark County, Nevada, DOL determined that no job right exists unless a federally-assisted acquisition has occurred.[30] The Department stated:

> Section 13(c)(1) and (2), which require the preservation of rights, privileges, and benefits and the continuation of collective bargaining rights, are not, in and of themselves, sufficient to ensure a right to jobs. In other words, no exclusive job right or preference is derived solely from (c)(1) and (2) absent the protections afforded by 13(c)(4) under an acquisition.[31]

Further, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

[23] "The bill, accordingly, contains a specific provision that in communities where projects are to be assisted under the bill, fair and equitable arrangements, as determined by the Administrator, must be made *to protect the interests of affected transit employees.*" H.R. REP. NO. 88-204, 2d Sess., reprinted in 1964 U.S.C.C.A.N. 2584 (emphasis added).

[24] The Federal Transit Act defines mass transportation as "transportation by bus, or rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service on a regular and continuing basis." 49 U.S.C. App. § 1608(c)(6).

[25] TRANSIT LABOR PROTECTION, at 15.

[26] *See* Edwards v. So. Ry. Co., 376 F.2d 665, 668 (4th Cir. 1967) (finding that a stockholder and chief engineer of a railroad were not employees entitled to labor protection because the term "as used in the present context by Congress and the ICC surely does not include the principal managers of a railroad who are ordinarily in a position to protect themselves from the consequences of consolidation").

[27] Barnes v. Tidewater Transp. Comm'n, DEP Case No. 77-13c-31 (1980); King v. Conn. Transit Mgmt., DEP Case No. 78-13c-1 (1978).

[28] 29 C.F.R. § 215.4(a).

[29] Now codified at 49 U.S.C. § 5333(b)(2)(D).

[30] DOL, Sept. 21, 1994, Certification at 4–5.

[31] *Id*.

(SAFETEA-LU)[32] codified the RTC decision. SAFETEA-LU added Section 5333(b)(4), which provides as follows:

> When the Secretary is called upon to issue fair and equitable determinations involving assurances of employment when one private transit bus service contractor replaces another through competitive bidding, such decisions shall be based on the principles set forth in the Department of Labor's decision of September 21, 1994, as clarified by the supplemental ruling of November 7, 1994, with respect to grant NV-90-X021. This paragraph shall not serve as a basis for objections under section 215.3(d) of title 29, Code of Federal Regulations.[33]

This provision in effect confirms that the principles of the RTC decision should be followed when one private contractor is replaced by another through the competitive bidding process.

### *4. 13(c) Protective Benefits*

Section 13(c) labor protection provides benefits for employee dismissals, displacements, and "worsenings" that occur in employment as a result of a federal project. Thus, public transit agencies may be faced with 13(c) claims for layoffs and worsenings in employment that occur in a contracting action.

Section 13(c) protections include standard provisions that provide for dismissal and displacement allowances for employees who are adversely affected as a result of a federal project.[34] Employees who are dismissed as a result of a federal project are entitled to dismissal allowances.[35] Employees who experience a reduction in wages or benefits (or are "displaced") as a result of a federal project may be eligible for a displacement allowance.[36] These 13(c) benefits provide for monthly compensation to be paid to the employee, which in the case of a dismissal is based on the employee's compensation in the year prior to the adverse effect.[37] Displacement allowances similarly provide a monthly compensation, which is based on the difference between the amount of compensation prior to and after the adverse impact.[38] These benefits are generous—both are payable for the employee's "protective period," which is 6 years for an employee who has been employed for 6 years or more or the period of employment for an employee who has been employed for less than 6 years.

These 13(c) benefits are not available in the event of any adverse impact on employment, but rather apply only if the harm in employment is shown to be "as a result of" a federal project. The terms "project" and "as a result of a project" are defined in the 13(c) protections.[39] To prevail on a 13(c) claim for dismissal or displacement benefits, there thus needs to be a showing that the harm in employment was caused by a federal project or grant. If the harm was caused by other factors and not by a federal project, then there should be no 13(c) liability and no entitlement to 13(c) benefits.

This causation principle is based on the specific statutory language of 13(c)[40] and the language of the 13(c) provisions themselves, and requires a showing of causal connection between the employee harm and a federal grant. In ruling on a 13(c) claim, DOL stated that "[i]t is not sufficient for a claimant to merely identify an UMTA [FTA] project and a worsening of position…the claimant must also show that there is a causal connection between the UMTA [FTA] project and a worsening of his employment position."[41]

In a case involving the Massachusetts Bay Transportation Authority (MBTA), 13(c) claims were filed in a change of commuter rail contractors. The claimants were held to not be entitled to 13(c) protection because the loss of particular benefits did not occur "as a result of" a federal project.[42] Specifically, the arbitrator found that "even if the free passage for spouses and dependents of commuter rail employees constituted a 'right' or 'benefit' subject to protection by Section 13(c), the record fails to support any finding that this 'right/benefit' was lost or otherwise adversely affected as a result of a Federal project."[43] The DOL used similar rationale in *ATU Local 1146 v. MBTA*,[44], in which the Department dismissed the union's 13(c) claims in a bus contracting case, and found that the union had "not specified facts that would show an arguable causal relation between the grants and job loss, and therefore has not satisfied its burden of proof."

The outcome of 13(c) claims is somewhat dependent on the particular decision maker's view of the causation

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[32] 109 Pub. L. No. 59, 119 Stat. 1714 (2005).

[33] 49 U.S.C. § 5333(b)(4).

[34] The latest version of the UPA is dated Dec. 23, 2008, http://www.dol.gov/olms/regs/compliance/transit/6_UPA-12-23-08.pdf.

[35] *Id*., para. 7(a).

[36] *Id*., para. 6(a).

[37] *Id*., para. 7(a).

[38] *Id*., para. 6(b).

[39] The UPA defines "Project" as not "…limited to the particular facility, service, or operation assisted by federal funds, but shall include any changes, whether organization, operational, technological, or otherwise, which are a result of the assistance provided." The UPA defines "as a result of the Project" to

> …include events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes of volume and character of employment brought about by causes other than the Project (including any economies or efficiencies unrelated to the Project) are within the purview of this agreement.

*Id*., para. 1.

[40] "The interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable." 49 U.S.C. § 5333(b)(1).

[41] Smith v. Mid Mon Valley Transit Auth., OSP Case No. 91-13c-19 (1922).

[42] Rail Unions v. MBTA, Oct. 17, 2005, H. Fishgold, Arbitrator.

[43] *Id*. at 8.

[44] Amalg. Transit Union, Local 1146 v. MBTA, at 16, Apr. 30, 2001.

issue—is there a connection between a federal project and the harm in employment sufficient to sustain a claim—and the factual circumstances involved.

### 5. Implementing Agreements

In cases in which transit agencies seek to contract out work, the implementing agreement clause can be one of the first 13(c) issues raised. The implementing agreement provision is routinely found in 13(c) protections[45] and is a vestige of railroad labor protection. It requires that advance notice must be given in the event of a proposed change in the organization or operation of the transit system or a rearrangement of the working forces that occurs as a result of a federal project.[46] If the implementing agreement obligation is "triggered," the transit agency must negotiate an implementing agreement with the union. Implementing agreements apply 13(c) protections to the proposed change and can provide for the assignment of employees. A key issue then is whether the proposed change is occurring as a result of a federal grant—if not, no implementing agreement obligation is evoked.

Some 13(c) implementing agreement provisions include a "preconsummation" requirement that prohibits the proposed change from occurring, in circumstances where the impact of the change on employees is significant, until the implementing agreement process is completed, either through agreement of the parties or through arbitration. Arguments have been made that this restriction prohibits the contracting action from going forward until an implementing agreement is completed. One of the issues that public transit agencies are faced with then is whether the purposed action can proceed before an implementing agreement is developed.

### 6. Reemployment Rights

Another 13(c) claim for protection that may arise in the event of an outsourcing of services is the statutorily-based requirement[47] for reemployment for dismissed employees. Specifically, an employee who is terminated or laid off "as a result" of a project is entitled to a priority of reemployment to fill vacancies within the jurisdiction and control of the transit agency for which the employee is or, through training or retraining, can become qualified.[48] This right only exists, however, if the employee is determined to be dismissed as a result of a federal project. The scope of this reemployment right has been argued to extend to jobs with contractors to the transit agency, and DOL has in some cases imposed such a requirement.[49] However, since this right only applies to dismissed employees, it requires a showing that the dismissal was caused by a federal grant.

### 7. Sole Provider Clause

DOL has determined that the statutory language of Section 13(c) does not prohibit the contracting out of transit services. Rejecting a proposed provision that would restrict subcontracting, DOL stated, "Section 13(c) of the Act does not dictate whether or not service can be contracted out. Rather, it preserves existing collective bargaining rights during the term of contract without precluding the parties from negotiating subsequent agreements."[50] However, some 13(c) protections may include clauses that limit or affect a transit system's ability to contract out service. One example is the sole provider clause included in the Model 13(c) Agreement. It states:

> The…Recipient…shall be the sole provider of mass transportation services to the Project and such services shall be provided exclusively by employees of the Recipient covered by this agreement, in accordance with this agreement and any applicable collective bargaining agreement. The parties recognize, however, that certain of the recipients signatory hereto, providing urban mass transportation services, have heretofore provided such services through contracts by purchase, leasing, or other arrangements and hereby agree that such practices may continue. Whenever any other employer provides such services through contracts by purchase, leasing, or other arrangements with the Recipient, or on its behalf, the provisions of this agreement shall apply.[51]

Arbitration decisions interpreting the sole provider clause are mixed. The clause has been read as precluding any contracting out by a public transit agency on the basis that services are to be provided "exclusively" by employees of the recipient.[52] However, because the language also states that services must be "in accordance" with applicable collective bargaining agreements, some arbitrators have looked instead at the applicable terms of labor contracts as governing the propriety of the contracting action[53] In addition, the sole provider clause recognizes through its express language that in instances where services have been previously provided through contracting, such practices may be continued and are not restricted by the clause.

When the DOL recently formulated the United Protective Arrangement (UPA), it did not include the sole provider clause.[54] This action is consistent with prior Department precedent that the clause is not legally required as a part of 13(c) protections.[55]

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[45] Para. 5(c)-(d) of the UPA.

[46] Para. 5(c) of the UPA.

[47] 49 U.S.C. § 5333(b)(2)(E).

[48] *See* para. 18 of the UPA.

[49] *In re* L.A. County Metro. Transp. Auth., Aug. 13, 1997, DOL Certification, at 3.

[50] *In re* South Bend Pub. Transp. Corp., Mar. 29, 1993, DOL Certification, at 3.

[51] *See* Model 13(c) Agreement, para. 23, available at http://www.dol.gov/olms/regs/compliance/agreement.htm.

[52] In the Matter of Transp. Mgmt. of Tenn. (TMT) and ATU, Local 1235 (Dec. 31, 1987) (Clarke, Neutral Arb.).

[53] Amalg. Transit Union, Local 1212 and Chattanooga Area Reg'l Transp. Auth. (Oct. 1987).

[54] 73 Fed. Reg. 47046 (Aug. 13, 2008).

[55] In the Matter of L.A. County Metro. Transit Auth., Aug. 13, 1997, DOL Certification, at 11.

### *8. Successor Clauses*

Another issue that has arisen in outsourcings is the successor clause, which is often found in 13(c) agreements.[56] Such clauses provide that the 13(c) agreement is binding on the successors and assigns of the parties. Successor clauses in 13(c) protections also often state that an entity that undertakes the management or operation of a transit system agrees to be bound to the terms of its 13(c) arrangements and requires such an entity to comply with the obligations of the 13(c) protections. The DOL has taken the position that 13(c) protections must include successor clauses to assure the continuity of 13(c) protections, and that such clauses do in fact operate to bind nonsignatory successors.[57] This concept is inconsistent with the basic notion of contract law that a party is not bound by an agreement to which it did not consent.[58] As such, issues regarding the enforceability of a successor clause have arisen. A Massachusetts court held that a contractor was not a signatory to the agreement and had no contractual obligations under it.[59] Some successor clauses can, however, place an affirmative duty on a transit system to bind a contractor to the 13(c) protections. The net effect is to impose an obligation on the grantee to bind certain contractors to the 13(c) protective agreement.[60]

### *9. The Section 13(c) Process and Section 13(c) Disputes*

*i. DOL 13(c) Process.*—DOL has issued 13(c) Guidelines[61] that set forth the process DOL uses to refer FTA grant applications, address objections to the proposed 13(c) protective terms, and certify grants. After FTA sends a grant application to DOL for 13(c) review and certification, DOL refers that application to the transit agency and the unions identified in the grant application. DOL may also refer the application to the unions that represent employees of mass transportation providers in the service area of the project.

Referrals typically contain the existing Section 13(c) protections and propose to use those protections as the basis of certification of the grant. After referral, the parties have 15 days in which to file any objections to the proposed certification terms.[62] If no objection is filed, DOL will certify the grant under the proposed referral terms. For an objection to be found sufficient, it must show that either the "objection raises material issues that may require alternative employee protections under 49 U.S.C. 5333(b)"; or "the objection concerns changes in legal or factual circumstances that may materially affect the rights or interests of employees."[63] DOL will then rule on the "sufficiency" of an objection. If an objection is found sufficient, the parties are expected to begin good faith negotiations over new or amended Section 13(c) terms and conditions.[64]

DOL's 13(c) Guidelines contain a process for setting time limits on negotiations.[65] If, after good faith negotiations the parties reach an impasse, the parties may request DOL assistance.[66] DOL may provide technical assistance on Section 13(c) requirements and process. If the parties still fail to reach agreement, the next step is impasse resolution.[67] DOL will typically require written submissions to be made in the form of briefs and reply briefs. DOL will then rule on the disputed issues and issue a 13(c) certification imposing 13(c) terms.

Disputes over contracting actions can be raised in the 13(c) certification process. When contracting issues have been raised in objections, DOL considers and determines the sufficiency of such objections. Certification disputes no longer lead to delays in the receipt of FTA funds, since DOL can issue interim certifications releasing funds while disputes are pending.[68] However, the Guidelines do provide that "no action may be taken which would result in irreparable harm to employees."[69]

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[56] *See* DOL's UPA, para. (21).

[57] *In the Matter of Mass. Bay Transp. Auth.*, May 29, 1997, DOL Certification, at 3.

[58] It is a general principle of contract law that "a person is not bound by contract to which he did not agree." RICHARD A. LORD, WILLISTON ON CONTRACTS § 3:5 (4th ed., Thomson West 2007).

[59] Transp. Workers Union of Am. v. MBTA, No. SJ-19990051, at 10 (Mass. Dec. 20, 1999).

[60] This language can read as follows:

> Any person, enterprise, body, or agency, whether publicly or privately owned, which shall undertake the management, provision and/or operation of the Project services, or any part or portion thereof, under contractual arrangements of any form with the Public Body, or its successors or assigns, shall agree, and as a condition precedent to such contractual arrangements, the Public Body, its successors or assigns shall require such person, enterprise, body, or agency to agree, to be bound by the terms of this arrangement and accept the responsibility for full performance of these conditions.

[61] 29 C.F.R. pt. 215.

[62] 29 C.F.R. § 215.3(d)(1).

[63] 29 C.F.R. § 215.3(d)(3).

[64] 29 C.F.R. § 215.3(d)(6).

[65] 29 C.F.R. § 215.3(d).

[66] *Id.*

[67] 29 C.F.R. § 215.3(e).

[68] 29 C.F.R. § 215.3(d)(3)(ii)(7).

[69] 29 C.F.R. § 215.3(d)(3)(ii)(8).

*ii. 13(c) Claims and Arbitration.*—If transit employees are laid off or adversely affected by a contracting action, affected employees could file 13(c) claims seeking 13(c) benefits. As noted above, the claims could be for monetary allowances to compensate for the loss of employment or for reductions in wage and benefits. In addition, employees could file for claims arguing that they have job rights with the contractor for the work, as well as the right to carry over the rights and benefits under their existing collective bargaining agreement.

Section 13(c) claims are typically resolved through arbitration, and the terms of 13(c) protections routinely include clauses setting forth an arbitration process.[70] If employees are not represented by a union, such claims are adjudicated by DOL under the terms of the Department's certifications. DOL's certification letters afford service area employees procedural rights and remedies, such as arbitration. While claims of nonunionized employees are adjudicated by DOL, claims of service area unionized employees are subject to binding arbitration. The following provision is found in DOL certification letters:

> Should a dispute remain after exhausting any available remedies under the protective arrangements and absent mutual agreement to utilize any other final and binding resolution procedure, any party to the dispute may submit the controversy to final and binding arbitration. With respect to a dispute involving a union not designated above, if a component of its parent union is already subject to a protective arrangement, the arbitration procedures of that arrangement will be applicable. If no component of its parent union is subject to the arrangements, the Recipient or the union may request the American Arbitration Association to furnish an arbitrator and administer a final and binding resolution of the dispute under its Labor Arbitration Rules. If the employees are not represented by a union for purposes of collective bargaining, the Recipient or employee(s) may request the Secretary of Labor to designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination of the dispute.

Thus, 13(c) claims of service area employees that arise are subject to differing procedures depending on whether the employees are unionized. Alternatively, 13(c) claims and disputes can be litigated in state court.[71] Efforts have been made to enjoin contracting actions and assert 13(c) rights.

Whether the service or work being outsourced has been previously contracted out or consists of nontraditional functions that are being contracted out by the public entity for the first time, the 13(c) considerations should be the same. The key 13(c) issues that typically arise in an outsourcing effort center on the impact to the employees then performing the work, and on the 13(c) obligations the transit agency has in the applicable 13(c) protections. Section 13(c) by statute does not prohibit the contracting of work, but efforts can be made to contest the agency's action through the filing of 13(c) claims seeking 13(c) monetary benefits, job rights with the contractor, and other remedial relief. The discussion above reviews the key 13(c) issues that may arise in the event that a transit agency implements a plan to procure a private contractor and outsource work. An understanding of these issues is critical to any decision to outsource.

## SECTION II. PROCUREMENT METHODS AND RELATED CONSIDERATIONS

### A. Introduction

In carrying out a procurement process for services or work that have not traditionally been outsourced by public transit agencies, the procuring transit agency needs to undertake the same type of thorough procurement planning and analysis that is normally followed in more typical procurement actions. Specifically, the agency needs to determine its specific needs in the procurement, to tailor the procurement process to those needs and the particular services or work being obtained, and to use procurement methods and procedures that comply with applicable state and federal law.

One of the key threshold areas of analysis that should be undertaken is a determination of what is most important to the agency in selecting a firm to perform outsourced work. For example, is the agency looking just for the lowest price (in which case a low-bid procurement would be most appropriate), or are both qualifications and a price important considerations (in which case a competitive proposal method would be most appropriate). Also, as in traditional procurements, the agency should develop a Source Selection Plan for each procurement action, to serve as the "guidebook" for conducting the procurement process, reviewing and evaluating bids/proposals, and selecting the successful bidder/proposer.

The allowable procurement and project delivery methods for nontraditional outsourcing will derive primarily from the laws, policies, and procedures in the state in which the transit agency is located. The transit agency must research and understand its state's applicable public contracting and procurement laws, as an essential factor in determining the type of procurement approach to pursue. In addition, for projects funded by FTA, the project sponsor must follow the procurement regulations and guidance applicable to FTA projects, such as the Common Grant Rule at 49 C.F.R. Part 18 and FTA's Third-Party Contracting Guidelines.[72] For federally-supporting procurements, the agency will

[70] *See* UPA para. (15).

[71] Jackson Transit Auth. v. Local Div. 1285, Amalg. Transit Union, AFL-CIO-CLC, 457 U.S. 15, 29, 102 S. Ct. 2202, 2210, 72 L. Ed. 2d 639, 650 (1982) (holding 13(c) agreements are contracts to be governed by state law and construed by state courts).

[72] FTA Circular 4220.1F, Third Party Contracting Guidance (Nov. 1, 2008), http://www.fta.dot.gov/documents/FTA_Circular_4220_-_Third_Party_Contracting_Guidance_-7-1-10.pdf.

need to assure that all applicable federal requirements (see Section IV) are made applicable to the contractor and the work.

The different procurement and project delivery approaches currently available for outsourcing are identified and described below.

## B. Basic Procurement Methods

### *1. Architectural and Engineering Services*

The one area where a transit agency has limited flexibility in selecting a procurement method is the procurement of Architectural and Engineering (A&E) services. If the work being outsourced consists of A&E services, there are specific statutory restrictions on the type of procurement method that can be used. Under the FTA statute,[73] the qualifications-based procurement method specified in the Brooks Act[74] must be used to obtain A&E services. (Some states have their own state law versions of the Brooks Act.) In addition to typical engineering work (preliminary engineering and design), FTA applies the Brooks Act requirements to the procurement of program management, construction management, feasibility studies, surveying, mapping, and related services.

The most salient characteristic of a Brooks Act procurement is that the contract selection and award is based on qualifications only, and price is not a factor in evaluation or award. A Brooks Act procurement is usually carried out through a request for qualifications (RFQ), which requests interested firms to provide their specific qualifications for the A&E work being procured. The submittal is normally called a statement of qualifications (SOQ). The factors the agency will use to evaluate SOQs must be specified in the RFQ. These factors are used to determine the highest ranked (or "most qualified") proposer. (The agency's Source Selection Plan should set forth the specifics of how SOQs will be reviewed and evaluated or scored.) In this type of procurement, firms may be required to submit a price for the A&E work being procured, but the price is submitted in a sealed envelope and is only opened if the offeror is selected for negotiations, as described below.

After the evaluation process has been completed, negotiations are first conducted with the firm determined to be the most qualified offeror. If negotiations are successfully concluded, including agreement on price, contract award is made to that firm. If the procuring agency and that offeror are unable to agree on a fair and reasonable price, the agency may conduct negotiations with the next-most-qualified offeror. If necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the public agency determines to be fair and reasonable.

If an agency implements an A&E procurement, the resulting contract must be performed by the contractor in accordance with the cost principles in Federal Acquisition Regulation Part 31 that address allowability of costs and related issues, and the contractor's work is subject to audit under those cost principles.

Another unique aspect of an A&E procurement relates to the use of local geographic restrictions or preferences. Normally, in a federally-funded procurement, a public agency is prohibited from specifying in-state or local geographical preferences or from using such preferences as an evaluation factor. However, in the procurement of A&E services, geographic location may be a selection criteria if an "appropriate number" of qualified firms are eligible to compete for the award.

### *2. All Services and Work Other Than A&E*

If the work being outsourced is something other than A&E services (i.e., custodial work, maintenance, accounting services, advertising, legal services, security, etc.), the transit agency has much more flexibility in terms of the procurement method that it may elect to use. The three most common methods, which are recognized in federal procurement generally and are authorized for FTA-funded projects, are 1) competitive proposals, 2) low bid, and 3) two step. In addition, in those cases where permitted under FTA principles and the Common Grant Rule,[75] a public agency may make a sole source or single bid award.

A discussion of each of these competition methods follows.

1. Competitive Proposals—The competitive proposal procurement method is carried out through issuance of a request for proposals (RFP) seeking technical qualifications and price proposals from interested firms. For a number of work areas not traditionally outsourced, this method will be the most appropriate to use.

In this type of procurement, the public agency should specify in its RFP the specific technical qualifications factors that it intends to evaluate (i.e., past experience, qualification of team members, technical understanding of the work, etc.). The RFP can identify the specific weight to be given to each qualifications factor in the evaluation and scoring of proposals, or it may just list the factors in relative order of importance. In addition, since award is made on the basis of technical qualifications and price, the RFP will normally specify the relative weights of those two basic criteria (i.e., qualifications count 60 percent of the final score; price counts 40 percent). In addition, the agency's Source Selection Plan (an internal document not shared with proposers) should provide specific information on the weights or points to be afforded each of the qualification factors, as well as the relative weights of qualifications and price.

The normal practice in this type of procurement is for the public agency to have the flexibility to either 1) award on the basis of the initial proposals, or 2) establish a "short list" or competitive range, conduct discussion/negotiations with those firms in the competitive range, require best and final offers (BAFOs), and then

[73] 49 U.S.C. § 5325(b)(1).

[74] 40 U.S.C. § 1101–1104.

[75] 49 C.F.R. pt. 18.

award to the highest ranked firm based on the evaluation and scoring of the BAFOs. (BAFOs must be reviewed and evaluated under the same qualifications and price criteria and weights.) It is also permissible for the agency to conduct interviews with the proposers and then decide whether to proceed to evaluation and award or to conduct a BAFO process. In any event, it is important that the RFP specifically describe these alternative paths to contract award, so all proposers will be informed of the steps in the evaluation process.

This procurement method offers a couple of significant advantages to a public agency. First, because award is based on a combination of qualifications and price, the agency can take both of these areas into account, weighted in accordance with the agency's specific needs in that procurement (e.g., in some cases, qualifications may be the most critical factor; in others, price may be of primary importance to the agency). Second, unlike the low-bid method described below, the agency is permitted to have discussions with proposers after proposals are received, the agency can identify deficiencies and issues in the proposals, and proposers may be allowed to submit revised proposals through the BAFO process (which may include changes to the qualifications/technical proposal or to the price proposal, or both). For these reasons, the competitive proposal method may be the most flexible and useful procurement methodology for a wide range of outsourced services (i.e., maintenance, security, etc.).

2. Low Bid—The low-bid method is carried out through the issuance of an invitation for bids (IFB), requesting a firm fixed price for specific work, equipment, or services. In many states, low-bid award is required for construction and equipment acquisition. In this type of procurement, no post-bid discussions may take place with bidders, and bidders do not ordinarily have an opportunity to correct errors or otherwise revise their bids. (A bid with an error or omission in a IFB procurement usually must be rejected as nonresponsive; in contrast, in a procurement by competitive proposals, a proposer may be given the opportunity to correct or revise a deficiency in its proposal.)

In a low-bid procurement, the procuring agency should provide sufficient details and specifications regarding the services or equipment or work being procured so that potential bidders will have adequate information on which to develop and submit a responsive price bid.

This type of procurement is most frequently used for construction work and purchase of equipment/physical assets and may be of less utility in the outsourcing of various types of transit support services. Nonetheless, a low bid could be appropriate for specialized services where there are a known number of qualified firms and where price is of predominant concern to the procuring agency.

3. Two Step—The two-step procurement method includes two distinct phases: a qualifications process, followed by a selection process that is based either on low-bid or on competitive proposals (RFQ–IFB or RFQ–RFP).

The first step is normally carried out through an RFQ. Prospective firms are requested to submit their technical approach to the work being procured and provide their technical qualification to carry out that approach (the SOQ). The agency then reviews those submittals and establishes a "short list" of those offerors that demonstrate a technically satisfactory approach and have satisfactory qualifications. The short-listed firms will then be invited to participate in the second step of the procurement. Again, it is helpful for the agency, in its Source Selection Plan, to establish the criteria or score that will be used as the cut-off for those proposers making the short list.

The second step consists of requesting the short-listed firms to either submit bids, sometimes referred to as "two-step sealed bidding," or to submit competitive proposals consisting of qualifications and price. The process for this second step will be basically the same as that described above for a standard IFB or RFP.

The two-step, low-bid (RFQ–IFB) method is good to use where the agency wants to award on the basis of low price but also wants to be able to pre-screen the market to assure it is obtaining bids from qualified firms, (i.e., to avoid being forced to accept an unqualified firm that "buys" the work by submitting a very low bid). The two-step RFQ–RFP approach is probably of less utility in normal outsourcing of work; it has more application in large projects like design–build procurements where there are multiple potential firms and the agency wants to limit the RFP stage to just the most competitive potential contractors.

4. Noncompetitive Proposals or Sole Source—In limited circumstances, a transit agency may award contracts on a sole-source basis. Essentially, to support a sole source under the FTA procurement principles, the agency would need to be able to demonstrate that the services being procured were available only from a single source. The FTA Circular provides specific examples of when a sole source may be justified, specifically: 1) where the offeror demonstrates a unique or innovative concept not available from another source; 2) where patent or data rights preclude competition; or 3) where a follow-on contract is required to avoid substantial duplication of costs or unacceptable delays in meeting the agency's needs.

The procuring agency should also review state law for any applicable standards governing sole-source awards. In addition, any sole-source award should be accompanied by a written sole-source justification providing support for the procurement action.

## C. Types of Contracts/Pricing Methods

As a general matter, procurement of services for nontraditional transit work or services will be carried out under one of two contract pricing methods. A cost-reimbursement contract establishes a not-to-exceed amount and provides for payment of the contractor's allowable incurred costs, up to that amount. A firm-

fixed-price contract establishes a price that remains fixed without regard to the contractor's actual cost of performing the work. The fixed price could be the total price for the work or could be a fixed rate (i.e., 200 hours of maintenance work per month at $ xx/hour).

Typically, A&E type contracts are structured as cost reimbursable while contracts for work such as operations or maintenance services are firm fixed price or fixed rate. However, there is no ironclad rule here; a range of services could be carried out under cost-reimbursement contracts.

For federally-funded procurements, the Common Grant Rule expressly prohibits the use of the cost plus a percentage of cost and cost plus a percentage of construction cost methods of contracting. (These are contracts in which the fee is expressed as a percentage of cost, and thus the fee increases if and when the cost increases.) In addition, the Common Grant Rule permits the use of time and materials cost contracts only: 1) if the agency determines that no other contract type is suitable; and 2) if the contract specifies a ceiling price that the contractor may not exceed except at its own risk. Time and materials cost is sometimes used as the basis for the payment of change order work, but again a fixed-price or unit-price method is usually preferred.

Overall, the transit agency needs to establish a cost/pricing mechanism in its contracts for outsourced work that will assure that 1) the agency has firm controls on the amount of costs that can be incurred by the contractor; and 2) the contractor is required to comply with applicable cost principles, including recordkeeping to document that compliance.

## SECTION III. PROTECTING THE FEDERAL INTEREST: FEDERAL TERMS AND CONDITIONS TO THIRD-PARTY CONTRACTS

If a public transit system is a recipient of federal transit funds from the FTA and intends to outsource some or all of its activities, it will have to make certain that the outsourcing contract includes specific terms and conditions that identify and protect the federal interest.[76]

### A. Background; FTA Master Agreement

Activities financed in part with federal funds and performed by a third-party contractor and its subcontractors on behalf of a federal grantee must be carried out in accordance with federal requirements. FTA defines "Third Party Contract" as a "…recipient's contract with a vendor or contractor, including procurement by purchase order or purchase by credit card, which is financed with federal assistance awarded by FTA."[77]

FTA recipients are subject to the Common Grant Rule.[78] While authorized to do so under the Common Grant rules, FTA generally does not conduct pre-award reviews of its grantees third-party contracts but rather relies upon the validity of each recipient's annual self-certification that its procurement system complies with FTA requirements; this is usually submitted in the first quarter of each federal fiscal year along with many other certifications of compliance with FTA requirements.[79] Nor does FTA substitute its judgment for that of its recipients by making third-party procurement decisions.

FTA is required to perform a full review of recipients under its urbanized area formula program[80] and performs procurement system reviews for recipients of urbanized area formula funds that self-certify their procurement systems. FTA also provides technical assistance on procurement matters.

It is important to emphasize, as FTA often does, that while a recipient may enter into a third-party contract in which the third-party contractor agrees to provide property or services in support of a federally-funded project, or even carry out project activities normally performed by the recipient, the recipient rather than the third-party contractor is ultimately responsible to FTA for compliance with all applicable federal laws and regulations, in accordance with applicable federal directives, except to the extent that FTA determines otherwise in writing.[81]

The FTA Master Agreement is revised each year to reflect changes in law or policy. Each FTA grantee must agree to the Master Agreement. FTA notes that only entities that are signatories to its grant agreement are parties to that agreement but emphasizes that other entities, including third-party contractors, will be affected by the agreement. FTA thus requires the recipient to take "…appropriate measures to ensure that all Project participants comply with all applicable federal laws and regulations, and follow applicable federal directives affecting Project implementation, except to the extent FTA determines otherwise in writing." [82]

FTA further requires the recipient

> …to use a written document (such as a subagreement, lease, third party contract, or other similar document) including all appropriate clauses stating the entity's (subrecipient, lessee, third party contractor, or other partici-

[76] If a transit system receives only capital assistance from the FTA, it is possible that it could segment its federally-funded activities from nonfederally-funded activities, in which case locally-funded activities, if outsourced, might not be subject to federal terms and conditions. We assume for purposes of this report that federal requirements apply to the activities of the transit recipient of federal transit funds.

[77] FTA, *supra* note 72, at I-60.

[78] 49 C.F.R. pt. 19, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. These USDOT regulations apply to federal grants and cooperatives with governmental recipients of federal assistance, including Indian tribal governments.

[79] FTA, *supra* note 72, at I-8.

[80] 49 U.S.C. § 5307(h).

[81] Fed. Transit Admin., Master Agreement (2009), at 15, http://www.fta.dot.gov/documents/15-Master.pdf.

[82] *Id*. at 15.

pant) responsibilities under applicable Federal law and regulations, in accordance with applicable federal directives, except to the extent that FTA determines otherwise in writing.[83]

Under the FTA Master Agreement, a recipient is required to include in each such written document any necessary provisions requiring the third-party contractor to impose applicable federal requirements and directives on its third-party contractors and other participants in the project "…at the lowest tier necessary…." as well as "…appropriate provisions that would be applicable to the Recipient as set forth in the Grant Agreement or Cooperative Agreement for the Project or this Master Agreement, and extend those provisions to….third party contractors and other Project participants to the lowest tier necessary…."[84]

It thus should be no surprise that FTA also requires a recipient to agree that, absent FTA's express written consent, the federal government shall not be subject to any obligations or liabilities to any subrecipient, lessee, third-party contractor, or any other participant at any tier of the project.

## B. Key FTA Documents: Circular 4220.1F; Best Practices Procurement Manual

In addition to the FTA Master Agreement, FTA Circular 4220.1F, "Third Party Contracting Guidance," is a key document regarding FTA procurements. It provides contracting guidance for recipients of FTA assistance when using those funds to finance their third-party procurements. In addition, the FTA has developed a *Best Practices Procurement Manual* to assist FTA grantees in meeting the standards in Circular 4220.1F. Note that third-party contractors are not directly covered by the Circular, FTA's *Best Practices Procurement Manual*, or by the Common Grant Rule at 49 C.F.R. Part 18 in awarding their subcontracts.[85] Third-party contractors and subcontractors are, however, required to comply with the terms of their third-party contracts or subcontracts, including any federally-required clauses that have been extended to them. Thus Circular 4220.1F, the Common Grant Rule, and the *Best Practices Procurement Manual* do present very critical information about federal requirements to a third-party contractor.

The Circular applies to most federally-funded capital contracts. It does not apply to the procurement of land and buildings and structures, but does apply to FTA-assisted construction of buildings, structures, or appurtenances that were not on the land to be used for the project when the land was acquired or to any alterations or repairs to such elements that were on the land at the time of purchase.

## C. Federal Terms and Conditions—Required Third-Party Contract Provisions

Circular 4220.1F includes as an appendix a list of federally-required third-party contract provisions.[86] These are listed and discussed below.

Another document is FTA's *Best Practices Procurement Manual*, which also includes an appendix with a list of federally-required and other model contract clauses.[87] The Manual's appendix provides a summary of the requirements of each required clause; which contracts it is applicable to; its flow down requirements; and model clause language. Note, however, that the Manual may not always be up-to-date. As FTA notes in Circular 4240.1F:

> [a]lthough the BPPM can be a good resource for the recipient to use in conducting FTA assisted procurements, it is not the source of any FTA or federal requirements and, as such, is not binding on FTA recipients although the underlying federal laws and regulations from which the BPPM's advice and recommendations are derived will apply. As such, the text of the BPPM is not and should not be treated as an official description of any FTA or federal requirement. Moreover, while FTA does revise and update the BPPM periodically, FTA cautions each recipient that relying solely on the BPPM may not ensure compliance with all applicable FTA and federal requirements.[88]

While the drafting of each third-party contract should be considered on its own, it is not uncommon for a third-party contract to have the federal terms and conditions included as a separate appendix to the agreement rather than as part of the terms and conditions of the agreement itself. (Of course, in including the federal terms and conditions as an appendix to an outsourcing contract, it is important to include only those that apply to the particular contract.) This makes it easy to make certain that all of the federal terms and conditions are included in the third-party contract. Because this is often done, we include a discussion below of all of the federally-required third-party contract clauses but point out and underline which ones apply to outsourcing contracts.

We also discuss below which requirements flow down to contractors and subcontractors. To assure compliance with these requirements, a recipient typically will, as part of its procurement process, put contractors on notice of the general terms and conditions, including federally-required clauses, that will be included in the contract that the recipient and contractor will enter into; typically the procurement documents would further note that the transit system reserves the right to mod-

[83] *Id*. at 16.

[84] *Id*. at 16.

[85] FTA, *supra* note 72, at II-3.

[86] FTA, *supra* note 72. Note that App. D is divided into four useful sections: A. Third Party Contract Provisions; B. Applicability of Third Party Contract Provisions; C. Certifications, Reports, and Forms; and D. Other Matters.

[87] FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL (2008), available at www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6037.html.

[88] FTA, *supra* note 72, at I-9.

ify those terms and conditions or to add to or delete them. Separately, note also that bidders may be required to submit certifications as part of the bid process (e.g., lobbying, debarment).

### *1. No Federal Obligation to Third Parties*

As noted above, this is a key term and condition from FTA's perspective. It is included in FTA's Master Agreement at Section 2.f, *The requirement is applicable to all third-party contracts*. In its *Best Practices Procurement Manual*, FTA notes that while it is not required by statute or regulation for either primary contractors or subcontractors, "…this concept should flow down to all levels to clarify, to all parties to the contract, that the federal government does not have contractual liability to third parties, absent specific written consent."[89]

The recipient must agree that under the project the federal government will not be subject to any obligations or liabilities to any third-party contractor or other participant at any tier of the project, or any other entity or person that is not a party to the Grant Agreement. This is true regardless of whether the FTA may have concurred in or approved any third-party contract at any tier. There is no federal obligation to third parties not a party to the Grant Agreement. Period. FTA language makes the point explicit "absent the Federal Government's express written consent."[90]

### *2. False or Fraudulent Statements or Claims—Civil and Criminal Fraud*

This is referenced at Section 3.f of the FTA Master Agreement, and *the requirements are applicable to all third-party contracts*. The requirements flow down to contractors and subcontractors who make, present, or submit covered claims and statements.

A third-party contractor must acknowledge that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended,[91] apply to its actions, as do the related USDOT regulations (Program Fraud Civil Remedies).[92] Essentially the contractor certifies or affirms the truthfulness and accuracy of any statement it makes relating to the FTA-assisted work. The contractor further acknowledges that if it makes a false, fictitious, or fraudulent claim, submission, or certification to the Federal Government under an FTA-funded contract, the Government reserves the right to impose penalties.[93]

### *3. Access to Third-Party Contract Records*

Under Section 15.t of the FTA Master Agreement, the recipient must agree to require its third-party contractors and third-party subcontractors at each tier to provide the U.S. Secretary of Transportation and Comptroller General, or their authorized representatives, access to all third-party contracts as required by 49 U.S.C. § 5325(g), and to provide sufficient access to third-party procurement records as needed for compliance with federal laws and regulations or to assure proper project management as determined by FTA.

*This requirement applies to all third-party contracts*. Note that the *Best Practices Procurement Manual* has a chart showing requirements for access to records and reports by type of contract.[94] It primarily shows how certain public entities, such as states, may not be subject to this requirement. But professional services contracts clearly are covered by the provision.

### *4. Changes to Federal Requirements*

Under Section 2.c(1) of the Master Agreement, FTA notes that to accommodate changing federal requirements, the recipient must agree to include in each third-party agreement and other similar document implementing the project, notice that federal laws, regulations, and directives may change and that the changed provisions will apply to the project except to the extent that FTA determines otherwise in writing.

*This requirement applies to all third-party contracts and flows down to subcontracts*.

### *5. Civil Rights (Title VI, Equal Employment Opportunity, Americans with Disabilities Act)*

Under Section 12 of the Master Agreement, the recipient must agree to comply with all applicable civil rights laws and regulations in accordance with applicable federal directives. *These requirements apply to all third-party contracts and flow down to all third-party contractors and their contracts at every tier (unless otherwise noted).*

The requirements include—

a. Nondiscrimination in federal public transportation programs. The recipient agrees to comply, and assures the compliance of each third-party contractor or other participant at any tier of the project, with 49 U.S.C. § 5322, which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.

b. Nondiscrimination—Title VI of the Civil Rights Act. Under the Master Agreement, the recipient agrees to comply, and assures the compliance of each third-party contractor or other participant at any tier of the project, with all provisions prohibiting discrimination on the basis of race, color, or national origin of Title VI of the Civil Rights Act of 1964, as amended;[95] with USDOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transporta-

[89] FED. TRANSIT ADMIN., *supra* note 87, App. A.1, at 31.

[90] *Id*.

[91] 31 U.S.C. § 3801 *et seq*.

[92] 49 C.F.R. pt. 31.

[93] Penalties could be imposed under 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1).

[94] FED. TRANSIT ADMIN., *supra* note 87, at 16.

[95] 42 U.S.C. § 2000(d) *et seq*.

tion—Effectuation of Title VI of the Civil Rights Act";[96] and with related circulars and directives.

c. Equal Employment Opportunity (EEO). Under the Master Agreement, the recipient agrees to comply, and assures the compliance of each third-party contractor or other participant at any tier of the project, with all EEO provisions of federal transit law;[97] with Title VII of the Civil Rights Act of 1964, as amended;[98] and implementing federal regulations and applicable Federal EEO directives. The Master Agreement provides further requirements for projects deemed to qualify as "construction" by the DOL, namely, that the recipient agrees to comply and assures the compliance of each third-party contractor or other participant at any tier of the project with all applicable equal employment opportunity requirements of DOL regulations.[99]

d. Disadvantaged Business Enterprise (DBE). To the extent authorized by law, the Master Agreement requires the recipient to agree to facilitate participation by DBEs in the project and to assure that each third-party contractor at any tier of the project will also facilitate such participation. The recipient must assure that it will not discriminate on the basis of race, color, sex, or national origin in the award and performance of any third-party contract supported with federal assistance derived from USDOT in the administration of its DBE program and shall comply with relevant requirements.[100] The Master Agreement also requires the recipient to agree that implementation of its approved DBE program is a legal obligation, and that failure to carry out that DBE program shall be treated as a violation of the grant agreement and Master Agreement.

e. Nondiscrimination on the Basis of Sex. The recipient agrees to comply with applicable requirements of Title IX of the Education Amendments of 1972, as amended,[101] and implementing requirements. The Master Agreement does not mention flow-down requirements in this regard.

f. Nondiscrimination on the Basis of Age. The Master Agreement provides that the recipient agrees to comply with applicable requirements of the Age Discrimination Act of 1974, as amended,[102] and The Age Discrimination in Employment Act.[103] The Master Agreement does not mention flow-down requirements in this regard.

g. Access for Individuals with Disabilities. The Master Agreement requires the recipient to agree to comply with the whole range of laws and regulations applicable to individuals with disabilities.[104] The Master Agreement does not mention flow-down requirements with respect to these requirements.

h. Drug or Alcohol Abuse Confidentiality and Other Civil Rights Protections. To the extent applicable, the Master Agreement requires the recipient to comply with the confidentiality and civil rights protections of various relevant laws.[105]

i. Access to Services for Persons with Limited English Proficiency. Under the Master Agreement, the recipient agrees to facilitate compliance with the policies of Executive Order No. 13166, "Improving Access to Services for Persons With Limited English Proficiency," 42 U.S.C. § 2000d-1 note, and follow applicable provisions of USDOT Notice, "DOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficiency (LEP) Persons," 70 *Federal Register* 74087, December 14, 2005, except to the extent that FTA determines otherwise in writing. The Master Agreement does not mention flow-down requirements in this regard.

j. Environmental Justice. The recipient agrees to facilitate compliance with the policies of Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 42 U.S.C. § 4321 note, except to the extent that the Federal Government determines otherwise in writing. (Note that Environmental Justice requirements flow through Title VI requirements.)[106]

k. Other Nondiscrimination Laws. The recipient agrees to comply with applicable provisions of other federal laws and regulations, and follow applicable federal directives prohibiting discrimination, except to the extent the federal government determines otherwise in writing.

### *6. Incorporation of FTA Terms*

Both Circular 4220.1F and the Master Agreement (at Section 15.a) require the recipient to agree to comply with third-party procurement requirements of federal transit law,[107] USDOT third-party procurement regulations,[108] and other applicable federal regulations relating to third-party procurements and any amendments thereto, including FTA Circular 4220.1F, and any later

[96] 49 C.F.R. pt. 21.

[97] 49 U.S.C. § 5332.

[98] 42 U.S.C. § 2000(e).

[99] 41 C.F.R. pts. 60 *et seq*., which implement Exec. Orders No. 11246 and No. 11375.

[100] 49 C.F.R. pt. 26.

[101] 20 U.S.C. § 1681 *et seq*.

[102] 42 U.S.C. § 6101 *et seq*.

[103] 29 U.S.C. § 621–34.

[104] *See* 49 U.S.C. § 5301(d), regarding federal policy to the effect that elderly individuals and persons with disabilities have the same rights as other persons to use public transportation services and facilities; 29 U.S.C. § 794, prohibiting discrimination on the basis of disability; 42 U.S.C. § 12101 *et seq*., requiring accessible facilities and services to be made available to individuals with disabilities; and 42 U.S.C. § 4151 *et seq*., requiring that buildings and public accommodations be accessible to individuals with disabilities.

[105] The Drug Abuse Office and Treatment Act of 1972, as amended, 21 U.S.C. §§ 1101 *et seq*.; the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, as amended, 42 U.S.C. §§ 4541 *et seq*.; the Public Health Service Act of 1912, as amended, 42 U.S.C. §§ 290dd through 290dd-2; and any amendments thereto.

[106] *See* FTA Circular 4702.1A, ch. IV.

[107] 49 U.S.C. ch. 53.

[108] 49 C.F.R. § 1836 and §§ 19.40–19.48.

revisions. *This requirement applies to all third-party contracts* and flows down to all tiers.

The Master Agreement notes that the recipient must agree that it may not use FTA funds to support its third-party procurements unless there is satisfactory compliance with federal law and regulations. Interestingly, in this section of the Master Agreement, the FTA notes that the FTA *Best Practices Procurement Manual* is focused on procurement processes and examples; FTA then requires the recipient to agree that the Manual "…may omit certain Federal requirements applicable to specific third party contracts," which seems to be an indirect way of stating that the Manual may not legally be relied upon.

### 7. Right of Federal Government to Terminate

Under Section 11 of the Master Agreement, the recipient agrees that the Federal Government may, upon written notice, suspend or terminate all or part of any federal assistance to be provided for the project if the recipient has violated the terms of the grant agreement, or if the Government determines that the purposes of the laws authorizing the project would not adequately be served by the continuation of federal funding for the project.[109] This right of the Government to terminate underlines the importance of a termination-for-convenience provision in a third-party contract.[110]

*This requirement applies to all third-party contracts in excess of $10,000*, and flows down to all contracts in excess of $10,000.

The Master Agreement notes that generally a termination would not invalidate obligations properly incurred by the recipient before the termination date to the extent the obligations cannot be cancelled but further notes the right of the Government, in certain instances, to require the recipient to refund, in whole or part, the federal assistance provided for the project. Notably, expiration of any project time period established for the project does not by itself constitute a termination of the grant agreement for the project.

### 8. Suspension and Debarment

Under Section 11 of the Master Agreement, the recipient agrees to comply for awards exceeding $25,000, and assures the compliance of each third-party contractor or other participant at any tier of the project, with Executive Orders Numbers 12549 and 12689 (Debarment and Suspension)[111] and USDOT regulations (Nonprocurement Suspension and Debarment).[112] *This requirement applies to all third-party contracts at any level expected to equal or exceed $25,000*.

The recipient further agrees to, and assures that its third-party contractors and other participants at any tier of the project will, review the "Excluded Parties Listing System"[113] before entering into any third-party contract or other arrangement in connection with the project.

### 9. Buy America

Under Section 14.a of the Master Agreement, the recipient agrees to comply to the extent applicable—that is, for contracts for acquisition of goods or rolling stock valued at more than $100,000—with Buy America statutory language and implementing regulations.[114] Basically, for awards exceeding the simplified acquisition threshold of $100,000, any steel, iron, or manufactured products used in the FTA-funded project must be produced in the United States.

*For outsourcing contract purposes, note that this provision only applies in the case of contracts for the acquisition of goods or rolling stock valued at more than $100,000*.

The requirements flow down from FTA recipients to first-tier contractors, who are responsible for ensuring that lower-tier contractors are in compliance. Note that there are certification requirements for procurement of steel, iron, or manufactured products or for the procurement of buses, other rolling stock, and associated equipment. A bidder or offeror must submit to the recipient the appropriate Buy America certification.

Unlike two other domestic preferences discussed below, the Federal Buy America provision is specifically applicable only to federal transit and highway grants.

### 10. Cargo Preference—Use of United States Flag Vessels

This is the second of the trio of domestic preference requirements, referenced at Section 14.b of the Master Agreement. To the extent applicable, the recipient agrees to comply with relevant law and U.S. Maritime regulations.[115] Essentially, U.S. flag vessels should be used for any FTA-funded grant should cargo shipment be necessary.

The requirements apply to all subcontracts if such contracts may involve cargo shipment of equipment, material, or commodities.

### 11. Fly America

This is the third and final domestic preference requirement; it is referenced at Section 14.c of the Master Agreement. The recipient must agree that the Federal Government will not participate in the costs of international air transportation of any individuals involved in or property acquired for the project unless that air transport is provided by U.S. flag carriers, if that service is available, and in accordance with applicable law and regulations.[116]

[109] 49 U.S.C. pt. 18.

[110] See the discussion in § IV.T below in this regard.

[111] 31 U.S.C. § 6101, note, and 49 C.F.R. pt. 29.

[112] 2 C.F.R. pt. 1200.

[113] http://epls.gov/.

[114] 49 U.S.C. § 5323(j) and 49 C.F.R. pt. 661.

[115] 46 U.S.C. § 55305 and 46 C.F.R. pt. 381.

[116] 49 U.S.C. § 40118 and 41 C.F.R. §§ 301-10.131 to 301-10.143.

*This provision applies to all contracts involving the transportation of persons or property by air to a place outside the United States*, and it is possible an outsourcing contract could trigger this provision.

The requirements flow down from FTA recipients and subrecipients to first-tier contractors, who are responsible for ensuring that lower-tier contractors are in compliance.

### *12. Resolution of Disputes, Breaches, or Other Litigation*

Under Section 52 of the Master Agreement, the recipient agrees *for all contracts in excess of $100,000* that the Federal Government has a vested interest in the settlement of any dispute, default, or breach involving any federally-assisted third-party contract. The recipient agrees to pursue all legal rights available under any third-party contract involving FTA funds. The Federal Government reserves the right to concur in any compromise or settlement of any claim by the recipient involving any third-party contract.

Accordingly, the recipient agrees to notify FTA in writing of any current or prospective major dispute, breach, default, or litigation that may affect the FTA's interest in the project or its administration of federal laws and regulations. Before naming the Federal Government as a party to litigation, the recipient will first inform FTA in writing before doing so.

These requirements should be reflected in contract provisions or conditions and flow down to all tiers.

### *13. Lobbying*

Under Section 3.d of the Master Agreement, for awards of $100,000 or more, the recipient agrees that it will comply with applicable federal laws and regulations prohibiting the use of federal assistance for activities designed to influence Congress or a state legislature with respect to legislation or appropriations, except through proper, official channels. More to the point for third-party contract purposes, the recipient also agrees that it will comply, and will assure the compliance of each third-party contractor or other participant at any tier of the project, with USDOT regulations on restrictions on lobbying. There are lobbying certification and disclosure requirements for third-party contractors.[117]

*These provisions apply to construction/A&E/acquisition of rolling stock/professional service contract/operational service contract/turnkey contracts. There are also certification requirements for contractors who apply or bid for an award of $100,000 or more under a provision known as the "Byrd Amendment."*[118] Each tier must certify to the tier above that it will not use and has not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, or a member of Congress, or an officer or employee of Congress in connection with obtaining a federal grant, contract, or other award, and each tier must disclose the name of any registrant under the Lobbying Disclosure Act who has made contact on its behalf with nonfederal funds regarding that grant, contract, or award.

### *14. Clean Air (Air Quality)*

Under Section 25.b of the Master Agreement, the recipient agrees to comply with all applicable federal laws, regulations and directives implementing the Clean Air Act, as amended, [119] as well as related transportation planning and U.S. Environmental Protection Agency (EPA) conformity requirements, including any specific air quality mitigation or control measure incorporated into the project to support its requisite air quality conformity finding for the project. EPA also imposes requirements that may apply to public transit operators, particularly those of large public transit bus fleets.[120]

*These requirements apply to all contracts exceeding $100,000*, and flow down to all subcontracts exceeding $100,000.

### *15. Clean Water*

Under Section 25.c of the Master Agreement, the recipient agrees to comply with applicable federal laws, regulations, and directives implementing the Clean Water Act, as amended.[121] The recipient agrees to protect underground sources of drinking water as provided by the Safe Drinking Water Act of 1974, as amended,[122] and to comply with the notice of violating facility provisions of Section 508 of the Clean Water Act and facilitate compliance with Executive Order No. 11738, "Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans."[123]

*The requirements apply to each contract and subcontract in excess of $100,000*, and flow down to every tier.

### *16. Construction Activities*

Under Section 24 of the Master Agreement, *while not applicable to professional services/A&E or operations/management contracts*, there are a number of requirements regarding construction activities, including construction employee protections under the Davis Bacon Act[124] (for contracts exceeding $2,000), the Contract Work Hours and Safety Standards Act[125] (for con-

[117] 49 C.F.R. § 20.110(d).

[118] 31 U.S.C. § 1352, 2 U.S.C. § 1601 *et seq*.

[119] 42 U.S.C. §§ 7401–7671q.

[120] 40 C.F.R. pt. 85, Control of Air Pollution from Mobile Sources; 40 C.F.R. pt. 86, Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Vehicle Engines; and 40 C.F.R. pt. 600, Fuel Economy of Motor Vehicles.

[121] 33 U.S.C. §§ 1251–1377.

[122] 42 U.S.C. §§ 300f–300j-6.

[123] 42 U.S.C. § 7606, note.

[124] 40 U.S.C. § 3141 *et seq*. and 29 C.F.R. pt. 5.

[125] 40 U.S.C. § 3701 *et seq.* and 29 C.F.R. pt. 5, and the safety requirements at 40 U.S.C. § 3704 and 29 C.F.R. pt. 1926.

tracts exceeding $100,000), and the Copeland Anti-Kickback Act.[126] There are also bonding requirements for construction activities exceeding $100,000[127] and seismic safety requirements for construction contracts for new buildings or for existing buildings.[128]

### 17. Transit Employee Protective Arrangements

Under Section 24.d of the Master Agreement, if the project involves transit operations, the recipient agrees to implement the project in accordance with the terms and conditions that the Secretary of Labor has determined to be fair and equitable to protect the interests of any employees affected by the project.[129] Capital projects funded by FTA grants are also subject to 13(c) requirements. The terms and conditions are identified in the DOL's certification of public transportation employee protective arrangements to FTA. The recipient agrees to implement the project in accordance with the conditions in the DOL certification. Note that the requirements are somewhat different if grants are under 49 U.S.C. § 5310(a)(2) (for Elderly Individuals and Individuals with Disabilities) or 49 U.S.C. § 5311 (Nonurbanized Area grants, which are subject to a 13(c) Special Warranty).

The provisions are applicable to all contracts and subcontracts at every tier, and thus contractors may be obligated to 13(c) terms in an outsourcing contract.

### 18. Charter Bus Operations

Also under the transit operations category, Section 28 of the Master Agreement requires a recipient to agree that neither it nor any public transit operator performing work for a transit project financed under federal transit or highway law will engage in charter bus operations except as authorized by law or regulation.[130] *These requirements flow down to first-tier service contractors*.

### 19. School Transportation Operations

Similar to the charter bus requirements, and also under the transit operations category, Section 29 of the Master Agreement requires a recipient to agree that neither it nor any public transportation operator performing work for a transit project financed under federal transit or highway law will engage in school transportation operations for the transportation of students or school personnel exclusively in competition with private school operators, except as authorized by law or regulation.[131] *These requirements flow down to first-tier service contractors*.

### 20. Prohibited Drug Use and Alcohol Misuse and Testing

Under the transit operations category, Section 32.b of the Master Agreement requires the recipient to comply with FTA's drug and alcohol prohibited use law and regulations.[132] *These requirements apply to operational service contracts and to anyone who performs a safety sensitive function for the recipient, subrecipient, operator, or contractor*.

Of particular interest in the case of nontraditional outsourcing, note that there are certain exceptions for contracts involving maintenance contracts. Note also that the rules do not apply to maintenance subcontractors. For a variety of reasons, maintenance is an area that often is considered for outsourcing.

Finally, if a recipient outsources its security functions and contractor personnel carry a firearm for security purposes, there is a possibility that such personnel would be subject to the FTA drug and alcohol testing regulation. A "safety-sensitive function" is defined under FTA's "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations" regulation as various duties when performed by recipients or by its contractors, including "carrying a firearm for security purposes."[133]

### 21. Privacy Act

*Note that when a recipient maintains files on drug and alcohol enforcement activities for FTA in such a way that information could be retrieved by personal identification, Privacy Act requirements apply to all contracts.*[134]

The Privacy Act requirements flow down to each third-party contractor and all tiers.

### 22. Bus Testing

Note that only in the instance of the acquisition of rolling stock under a turnkey project would the FTA's bus testing requirements apply. *A third-party contractor under such a turnkey project would have to ensure compliance with FTA's law and regulations on bus testing*.[135] There are specific requirements and certifications that a contractor or manufacturer would have to provide.

### 23. Pre-Award and Post-Delivery Audits

As with bus testing, *these requirements would apply only in the case of acquisition of rolling stock under a turnkey project*. The contractor would agree to comply with the applicable law and regulations[136] on these audits, including certification of compliance with Buy America and Federal Motor Vehicle Safety Standards.

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[126] 18 U.S.C. § 874 and 29 C.F.R. pt. 3.

[127] FTA, *Master Agreement* § 15.

[128] *Id*. § 23.e.

[129] 49 U.S.C. § 53339(b). Before its codification in the U.S. Code, the provision was § 13(c) of the Federal Transit Act, as amended, and is still referred to as "13(c)."

[130] 49 U.S.C. § 5323(d) and 49 C.F.R. pt. 604.

[131] 49 U.S.C. § 5323(f) or (g) and 49 C.F.R. pt. 605.

[132] 49 U.S.C. § 5331 and 49 C.F.R. pt. 655.

[133] 49 C.F.R. § 655.4 (2009).

[134] 5 U.S.C. § 552.

[135] 49 U.S.C. § 5323(c) and 49 C.F.R. pt. 665.

[136] 49 U.S.C. § 5323(l) and 49 C.F.R. pt. 663.

### *24. Patent Rights*

Under the Master Agreement, at Section 17, a recipient is to notify FTA if it or a third-party contractor develops or creates something "patentable." *FTA provides for all contracts* that if any improvement, invention, or discovery of the recipient or any third-party contractor or other participant at any tier of the project is conceived or first actually reduced to practice under the project, and such invention, improvement, or discovery is patentable under U.S. law or the law of a foreign country, the recipient agrees to notify FTA immediately and provide a detailed report.

Further, the recipient is to agree that its rights and responsibilities and those of each subrecipient and third-party contractor relative to that invention, discovery, or improvement will be determined in accordance with applicable federal laws and regulations in that regard.

### *25. Rights in Data/Copyright Requirements*

Both Circular 4220.1F and the *Best Practices Procurement Manual* stress that the Rights in Data/Copyright Requirements *apply only to planning, research, development, and demonstration projects and thus would not apply to outsourcing contracts*.

When data are first produced in the performance of a project, the recipient, other than for its internal use, may not publish or reproduce such data without FTA's written consent unless FTA has previously released such data to the public. Data that are delivered under a project include such things as computer software, standards, specifications, engineering drawings, process sheets, manuals, and technical reports. (This does not apply in the case of a grant agreement with an institution of higher learning.)

Moreover, the recipient agrees to provide to FTA a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or use and authorize others to use for Federal Government purposes such data. Without the copyright owner's consent, FTA may not provide or otherwise extend to other parties the FTA's license to any data developed under the project or under a third-party contract or other arrangement at any tier of the project supported with federal assistance derived from the project, whether or not a copyright has been obtained, and any rights of copyright to which a recipient, third-party contractor, or other participant at any tier of the project purchase ownership with federal assistance. Note that in the case of a research, development, demonstration, or special studies project, the recipient generally must agree that FTA has the right to broadly make available FTA's license in the copyright or a copy of the data.

The recipient agrees to hold harmless and indemnify the Federal Government against any liability resulting from any willful or intentional violation by the recipient of proprietary rights, copyrights, or right of privacy.

### *26. Energy Conservation*

Pursuant to Section 26 of the Master Agreement, the recipient agrees to comply with applicable mandatory energy efficiency standards and policies of applicable state energy conservation plans issued under the Energy Policy and Conservation Act,[137] except to the extent the government determines otherwise in writing. To the extent applicable, the recipient agrees to perform an energy assessment for any building constructed, reconstructed, or modified with FTA assistance as provided for under FTA regulations.[138]

*The* Best Practices Procurement Manual *notes that the Energy Conservation requirements are applicable to all contracts*, and that they extend to all third-party contractors and subcontractors and their contracts at every tier.

### *27. Recycled Products*

Under Section 15.k of the Master Agreement, the recipient agrees, to the extent practicable, to comply with EPA procurement guidelines for products containing recovered materials.[139] The provision is applicable if the purchaser or contractor procures $10,000 or more of these items during the fiscal year using federal funds or did so during the previous fiscal year. Thus the recipient agrees to provide a competitive preference for products and services that conserve natural resources, protect the environment, and are energy efficient, except to the extent the government determines otherwise in writing.

*These requirements flow down to all contractor and subcontractor tiers*.

### *28. Conformance with National Intelligent Transportation Systems Architecture*

Under Section 15.m of the Master Agreement, to the extent applicable, the recipient agrees to conform to the National Intelligent Transportation Systems Architecture and Standards as required by the 2005 transit and highway reauthorization law.[140]

### *29. Americans with Disabilities Act Access*

Under Section 12.g of the Master Agreement, the recipient agrees to comply with the full range of laws and regulations applicable to access for individuals with disabilities.

### *30. Assignability Clause*

Circular 4220.1F at Appendix D lists "Assignability Clause" and references Section 15.a of the Master Agreement. But that section restates the recipient's

[137] 42 U.S.C. § 6321 *et seq*.

[138] 49 C.F.R. pt. 622, subpt. C, Requirements for Energy Assessments.

[139] 40 C.F.R. pt. 247, which implements § 6002 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6962.

[140] 23 U.S.C. § 512, note.

need to comply with applicable third-party procurement requirements and does not specifically mention assignability clauses. When asked about this, FTA legal staff informally emphasized that the FTA recipients' practice of assigning their contract rights has been and continues to be of serious concern to FTA, to the extent that FTA may refrain from participating in the costs of contracts having unfair assignment arrangements. In their view, an assignment clause can arguably be seen as an indication that the recipient is knowingly arranging to acquire an excessive quantity of property and services. This provision does not apply to outsourcing contracts.

## SECTION IV. OUTSOURCING CONTRACT TERMS AND CONDITIONS

In addition to the federal terms and conditions discussed in Section IV that must be in each outsourcing contract to address and protect the federal interest in matters funded with federal financial assistance, there are a significant number of general terms and conditions that should be used in each such contract. This section identifies and discusses key terms and conditions that may be included in outsourcing contracts. Terms and conditions may vary depending on the matter outsourced. Because of this, we include a broad range of terms and conditions to cover as many situations as possible. For example, we include terms covering transit service outsourcings, recognizing that some nontraditional outsourcings may involve contracting out services for a smaller size of a particular service. We first discuss general principles that should guide every outsourcing contract.

In general, terms and conditions should address such fundamental issues as names and addresses of the parties; the nature of the relationship that will be established; statement of consideration; description of the duties and obligations of the parties; the term of the contract; assignability of contract; date of contract; plan and schedule; acceptance and payment; procedures to control changes; disputes resolution; ownership of rights and intellectual property; and termination.[141]

Many agreements begin with a recitation or background provision that establishes the general basis and purpose of the contract. This is often done with "whereas" clauses, which provide, for example, in the case of an outsourcing:

- What services or functions the transit system is seeking.
- That the transit system's personnel needed for such services are not available to provide such services.
- That the contractor is qualified and capable of performing the services.

Immediately after the whereas clauses, it may be useful to note what comprises the complete and exclusive contract or agreement in the matter—the agreement and its attachments (if any)—and that it supersedes any and all prior representations, communications, and understandings. (Such a provision is sometimes placed at the end of a contract.)

### A. Definitions

In many larger contracts, an early section includes definitions of important terms. Depending on the nontraditional outsourcing involved, definitions may not be necessary if the contract is straightforward and essentially focused on a narrow function to be outsourced.

### B. General Obligation of the Parties

Depending on the type of outsourcing involved, this can be a very extensive part of the contract. In general, a clause should require the contractor to perform the services in accordance with the scope of services and to the reasonable satisfaction of the grantee within the terms of the agreement. In an operational outsourcing, it can involve a general overview, a discussion of project management by the contractor, and a very lengthy description of the contractor's responsibilities. Similarly, the responsibilities of the transit system should be detailed, and these can be numerous as well. In a nontraditional outsourcing, the general obligations of the parties are likely to be limited to very specific matters.

### C. Scope of Services

In lieu of a "General Obligation of the Parties" section or in addition to it, a "Scope of Services" provision provides specifically what is to be done under the contract: What does the contract comprise, what is the scope of work it involves, what is included in the project, and what is excluded from it. It generally does not involve the term of the contract or its cost structure. Often it can be expressed in terms of the deliverables expected under the contract. If the scope is lengthy, it is not uncommon to include it as an attachment to the contract.

### D. Contract Type and Amount; Term of Contract; Change Orders; Notices

Early on the type of contract should be specified (cost plus fixed fee, for example), and its amount (which may be repeated in another section). The term establishes the length of the contract, which is the period of time when the contract is in effect. For example, "the term of this Contract is from the date of execution by both parties through December 31, 2005." The section may allow for an extension, usually at the discretion of the grantee for some specified period, for example, 3 years. Provisions often note that time is of the essence for performance of the contract, and the contractor is to provide sufficient resources to perform the services in accordance with the scope of services in a timely manner.

[141] RICHARD A. LORD, 1 A TREATISE ON THE LAW OF CONTRACTS, FORMS § 3F:1 (4th ed., Thomson West 2001).

This may also be the place to address options and change orders and how they will be implemented, as well as notices and communications in connection with the contract, specifying how communications are to be made and to whom. Some contracts include notice provisions separately, and some describe change orders in a separate provision.

### E. Compliance with Laws and Regulations

The contractor should be required to adhere to applicable federal, state, and local laws, regulations, orders, and ordinances applicable to the work under the contract.

### F. Confidentiality

The contractor's employees, agents, or subcontractors may need to have access to confidential data maintained by the transit system to carry out its responsibilities under the contract. This could especially be the case in nontraditional outsourcings involving information technology work or human resources work. If so, the contract should require the contractor to provide a written description of its procedures to safeguard confidential information which, among other things, should designate one individual as the responsible authority over all data collected or used by the contractor in carrying out the contract and assure adequate supervision and training of those who will have access to any confidential data.

Such private or confidential data should remain the property of the transit system.

The contractor may also be required to sign a nondisclosure agreement depending on the sensitivity of the data involved.

A clause should be included to the effect that no confidential data used in connection with the contract may be disseminated except as authorized by law and with the written consent of the transit system during the period of the contract or thereafter. Such confidential data must be returned to the transit system.

If legal process is served upon the contractor for records containing confidential information, the contractor should promptly notify the transit system and cooperate with it in any lawful effort to protect the confidential information.

### G. Transition and Startup

In some outsourcing agreements, there is likely to be provision for a transition and startup period because of the significance of the work to be performed. If security work is outsourced, for example, it may be useful to have a transition and startup period both for the outside contractors to begin to implement their requirements and for the transit agency workforce to understand what the outside contractors will be doing. Training is likely to be involved, and compensation for this transition period may be addressed in this section. If plans are to be submitted during this period, they also should be addressed in this section.

### H. Compensation and Payment

The section on compensation can take many forms, but at its most basic it should involve the following.

1. *Fees or Rates*. If a fixed fee is involved, a contract amount section should specify that the contract amount shall not exceed a stated fixed amount.
2. *Invoices and Payments*. A contract should include a provision on the timely submission of invoices; timely review of them by the grantee; and a process to resolve any disputes.
3. *Final Payment*. Provision is often made for the final payment, by which the transit system may not pay the final amount until the contractor shall have completed all of its obligations under the agreement.
4. *Prompt Payment*. It is important to include a clause requiring the contractor to make prompt payments to its subcontractors, but nothing in this regard shall provide a basis for a subcontractor to bring a claim against the recipient.
5. *Provision for Inspection and Audits*. If a prompt payment provision is included, the transit system also would want to have the right to inspect and audit the contractor's compliance with the provision.

### I. General Requirements for Contractor Personnel

The contractor generally would be expected to provide qualified personnel capable of carrying out all of the contractor's responsibilities and requirements under the contract—in short, the contractor shall provide the personnel necessary to provide the services.

Generally there is a concern about the specific personnel used, particularly "key personnel," and it is common to provide that the contractor may not substitute key personnel without the prior written consent of the transit system. Provision can be made for events such as termination or temporary unavailability of key personnel.

Similarly, subletting, assignment, and transfer of responsibilities by other than the contractor should be prohibited without the express prior written approval of the transit agency.

This may be a useful place in the contract to stress that the contractor and its personnel operate in an independent contractor relationship with the transit system, and that the contractor's work shall be under the contractor's exclusive direction and control. Further, consistent with the independent contractor relationship, it is useful to state that the contractor's workers are its employees and not employees of the transit system.

### J. Vehicles/Facilities/Equipment/Handback

In the case of an outsourcing involving transit services—and paratransit services are outsourced frequently by transit systems—the contract should address in detail the specifics of the services provided, including the items noted below. Even nontraditional outsourcings may involve vehicles and other assets in

the case of outsourcing a specific and limited type of service. Provisions should address, for example:

1. Operators/Personnel—Screening and selection of, training, personnel standards, performers of safety sensitive functions subject to drug and alcohol testing (see Section III.C at item 20).
2. Proper Maintenance of Vehicles.
3. Cleaning and Appearance of Vehicles.
4. Proper Maintenance of Facilities and Equipment.

Equipment to be used should also be addressed in detail, and an inventory should be included. Fares, fare collection, and security of such resources need to be addressed in operations outsourcing.

5. Handback Requirements.

Equally important to ensuring that the assets are properly used and maintained during the course of the contract is the condition they are in when handed back to the transit agency at the end of the contract. Handback provisions should require vehicles or assets to be turned back in good condition subject to routine wear and tear with any environmental issues resolved to the satisfaction of the transit agency. Thus contract provisions should require audit of the condition of vehicles, equipment, and assets at the beginning of the contract; proper maintenance during the term of the contract with liquidated damages for failure to do so; audit at the end or termination of the contract to assess the condition of the assets with provision for the contractor's liability for failure to return assets in good handback condition.

## K. System Security and Emergency Preparedness

System security and emergency preparedness are key issues, particularly for operational contracts and for other outsourcing contracts as well. Indeed, in the case of outsourcing security work, it is important to make certain that the outsourced work is meshed and coordinated with the transit system's overall system security and emergency preparedness.

## L. Reports/Accident Reporting

Accident reporting is a key issue to be discussed for operational contracts.

## M. Performance Standards; Professional Standards

Regardless of what is being outsourced, it is useful to develop performance standards in the contract that the contractor is to comply with. Standards are the criteria against which performance is judged. In operational contracts, the standards cover such things as on-time performance, trip completions, adherence to schedules, and the like. In general, standards should be attainable, specific, meaningful, and measurable.

In the case of nontraditional outsourcings involving professional services, there may be industry standards or certifications that would be useful to reference in this section. For example, in the case of outsourcing human resource functions, the Society for Human Resource Management has a certification program, best practices information, and a comprehensive program on ethics and sustainability.[142] Some of these may be useful to reference for compliance purposes, or a provision could be drafted more broadly stating that the professional services work performed shall be completed in accordance with appropriate professional practice standards.

## N. Liquidated Damages and Performance Incentives

Liquidated damages are monetary damages that the parties identify during the negotiation of the contract and that the injured party may collect in the case of a specific breach. They are not typically used in professional services contracts but are used rather in operational outsourcings. A contract will often include performance standards and identify the liquidated damages that will be assessed for the contractor's failure to meet those standards. It is common in operational contracts to include a process for the assessment of liquidated damages on a monthly or other basis with provisions for response by the contractor. Specific liquidated damages can be established for a variety of activities—for example, incomplete or missed trips, failure to provide acceptable customer service, Americans with Disabilities Act (ADA) compliance, vehicle maintenance, failure to report mechanical breakdowns, improper vehicle appearance, failure to enforce fare policies, and failure to meet security requirements. These could be used as well in a nontraditional outsourcing.

Note, moreover, the longstanding public policy against liquidated damages provisions that are intended to punish. Damages agreed upon in the contract can be designed to compensate the nonbreaching party for the other party's failure to perform;

> [o]n the other hand, a liquidated damages provision will be held to violate public policy, and hence will not be enforced, when it is intended to punish, or has the effect of punishing, a party for breaching the contract, or when there is a large disparity between the amount payable under the provision and the actual damages likely to be caused by a breach, so that it in effect seeks to coerce performance of the underlying agreement by penalizing nonperformance and making a breach prohibitively and unreasonably costly.[143]

To address this issue, a contract may include a clause in which the contractor agrees that amounts payable as liquidated damages are not a penalty but rather are deemed reasonable in light of the actual or anticipated harm incurred and the difficulties of proof of actual loss.

[142] *See* the Society's Web site at http://www.shrm.org/Pages/default.aspx.

[143] RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, 24 § 65.1 (4th ed., Thomson West 2002).

### O. Risk of Loss or Damage

This clause deals with who is responsible in the event of loss or damage of items covered under the contract. Typically, liability is transferred to the contractor.

### P. Insurance

The contractor is expected to carry insurance, and this section specifies the policies and requirements, usually both with respect to the transit system and the contractor. Insurance could cover, on the part of the transit system, bodily injury and property damage liability and property insurance; and on the part of the contractor, required insurance policies, including workers' compensation and employers' liability insurance, automobile liability insurance, and the like.

### Q. Indemnification

Subject to negotiation, the transit system should want to have a clause in which the contractor agrees to indemnify and hold it harmless against any and all liabilities of any kind arising out of the contract, whether or not it is alleged the contractor was negligent. Moreover, the contractor might be expected to bear all the costs relating to any such claims.

### R. Disclaimer of Liability

Conversely, as a public entity, a transit system may be unable under local or state law to hold harmless or indemnify the contractor in any regard, but this is an issue to be addressed on the basis of local law and practice.

### S. Disputes

It is important to have a disputes resolution section; see the discussion in Section III of the recipient's requirement to notify FTA in writing of any current or prospective dispute that may affect the FTA's interest in the project or its administration of federal law and regulations. Generally it is wise to provide a process first for informal resolution. If informal resolution fails, it is possible to provide a method for the contractor to appeal decisions within the governing structure of the transit system to try to avoid litigation. If that process is not successful, the dispute could be brought either to arbitration or to court. Applicable law and jurisdiction—presumably the grantee's place of business—should be cited here, as well as a provision relating to the payment of attorneys' fees.

### T. Cancellation

In some instances a provision distinct from termination (see below) is included, allowing for the transit system to cancel the contract in the case of misrepresentation by the contractor or in the event the contract was obtained by fraud or unlawful means or the contract conflicts with state or federal law or regulation.

### U. Termination

#### *1. For Convenience*

This provision allows a transit system to terminate when it is in its best interest, usually with some requirement of advance written notice. As public bodies, transit systems are subject to a range of public policies and requirements, as well as the continuing availability of federal and local funds in a tight budgetary environment, and should have a termination for convenience clause as a matter of course regardless of what the contract is for. Typically such a clause provides that the contractor shall be paid its allowable costs incurred to the date of termination, and any other allowable costs the transit system determines are reasonably necessary to complete the termination.

Note that the Federal Government requires the inclusion of a right to terminate (see Section III.C.7) in third-party contracts, so it is useful for a grantee to have a termination for convenience clause (if not a separate clause regarding the right of the Federal Government to terminate) for that and other reasons.

#### *2. By Mutual Agreement*

The contract may be terminated by mutual agreement of the parties. Similar provision may be made for the payment of allowable costs incurred to the date of termination as under the Termination for Convenience provision.

#### *3. By Default*

The contract may be terminated if the transit system determines that the contractor has failed to meet the terms of the contract, has acted in bad faith, has abandoned the agreement, or has failed to correct work that has been rejected. Generally an opportunity to cure is provided, or the contractor may not be liable if it can show that the failure to perform was due to factors beyond its control (acts of God, fire, war, floods, for example) and without the fault or negligence of the contractor.

#### *4. Termination Requirements*

Provision should be made for the contractor, in the event termination occurs under the contract, to surrender work products and documents relating to the services being performed under the agreement.

### V. Intellectual Property Rights

Intellectual property rights are an important area of consideration, particularly in nontraditional outsourcings that involve information technology work as well as in professional services contracts for A & E work. All contracts that require data to be produced or furnished in meeting contract requirements should contain terms that set forth the respective rights and obligations of the parties regarding the use, duplication, and disclosure of that data.

Note, moreover, that in the case of professional service and A &E contracts, the transit system is required by FTA to include provisions relating to FTA's interests.[144]

### *1. Trademarks*

The contractor should not use the transit entity's name, trade name, trademarks, or service marks in any context without the prior written consent of the transit entity.

### *2. Patent Rights; Copyrights*

First, note the discussion in Section III (at C.24) of the FTA's interest in patent rights.

Generally a transit system would want to retain ownership of materials and documents generated in connection with the contract, although the contractor should be granted rights or a license to retain copies and use such deliverables. The parties should agree that all copyrightable material to be delivered to the transit system is "works made for hire" under the federal copyright laws. Moreover, the transit system's rights generally should be limited to the intended use for which any deliverables are provided under the agreement. The transit system should have the right, at its cost, to obtain and hold in its own name patents, copyrights, or such other appropriate protection for any inventions that become the property of the transit system. Also as a general matter, the contractor may be allowed to retain ownership of its intellectual property, including the methods and processes used by the contractor in connection with the deliverables. It is useful to have the contractor grant the transit entity a nonexclusive, irrevocable, perpetual, fully-paid-for license to use works based on materials owned and independently developed by the contractor before it proposed to provide services to the transit entity.

### *3. Infringement/Indemnity*

It is important to have a provision whereby the contractor warrants that the materials it uses to perform the contract do not infringe or misappropriate any patent, copyright, or trade secret or other intellectual property of a third party. The contractor should at its own expense indemnify and hold harmless the transit system from and against all claims of infringement in that regard.

## W. Licensing, Permits, and Taxes

The consultant and its subconsultants are required to be appropriately licensed for the professional services required under the terms of the contract. The cost for any required licenses is generally the responsibility of the consultant. The contractor should be liable for any and all taxes due as a result of the contract.

## X. Successors and Assigns

It is important to include a clause prohibiting the contractor from assigning in whole or part any part of the contract without the express written consent of the grantee.

## Y. Security Requirements

Finally, it is also important to include a clause requiring a contractor to comply with any security requirements imposed by the transit system, including conducting background investigations of contractor personnel (who meet certain specified criteria), participating in security training, wearing appropriate identification, and otherwise complying with the transit system's security policies and requirements.

## Z. Force Majeure

Many contracts include a provision under which the contractor would not be liable for any failure to perform if acceptable evidence is submitted that failure to perform the contract was due to causes beyond the control and without the fault or negligence of the contractor. Examples of such causes include acts of God, civil disturbances, fire, war, or floods; note that some clauses specifically exclude labor-related incidents, such as strikes or work stoppages.

## AA. Additional Clauses

Consideration should be given to having provisions on severability, which regulate what happens to the rest of the contract if one or more provisions are or become ineffective or infeasible; on amendment, which spell out how the contract can be amended; on interpretation, jurisdiction, and venue; on how the contract is to be interpreted and in what jurisdiction; and on waiver of terms and conditions, which spells out a process for that.

## CONCLUSION

Every indication is that the recent worldwide economic downturn's impact on state and local government budgets will be long lasting and will require efforts on the part of public entities to cut costs. The use of outsourcing is thus likely to be considered more frequently among public transit systems. This digest explains how recipients of federal transit assistance from the FTA interested in considering outsourcing certain activities must first make a careful analysis of the potential outsourcing's impact from a labor perspective, discusses typical contractual terms as well as those required by the FTA to protect the federal interest, and offers guidance on how the procurement documents should be designed.

[144] See § III.C.24 above.

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