

3.2.15 **Buy America** – For any FTA assisted project, the steel, iron, and manufactured products acquired for use in the construction project must be produced in the United States, unless FTA has granted a waiver. See 49 U.S.C. § 5323(j); 49 C.F.R. part 661. FTA cautions that its Buy America regulations are complex and different from the Federal “Buy American Act” regulations in the Federal Acquisition Regulation (FAR) at 48 C.F.R. chapter 1, subchapter D, part 25, subparts 25.1 and 25.2. Recipients can obtain detailed information on FTA’s Buy America regulation at [the Federal Transit Administration’s Buy America website](#).

3.2.16 **Accessibility** – Facilities to be used in public transportation service must comply with the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 C.F.R. part 37; and Joint Access Board/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 C.F.R. part 1192 and 49 C.F.R. part 38. Notably, DOT incorporated by reference into Appendix A of its regulations at 49 C.F.R. part 37 the Access Board’s “Americans with Disabilities Act Accessibility Guidelines” (ADAAG), revised July 2004, which include accessibility guidelines for buildings and facilities. DOT also added specific provisions to Appendix A of 49 C.F.R. part 37 modifying the ADAAG with the result that buildings and facilities must comply with both the ADAAG and the DOT amendments.

3.3 Rolling Stock Contracts

The term “rolling stock” applies to vehicles used to transport passengers and includes buses, vans, sedans, railcars, locomotives, trolley cars, ferryboats, and other vehicles used for guideways and inclined planes. Light duty vehicles such as vans, sedans, and pick-up trucks used for administrative and maintenance purposes are considered equipment. Light duty vehicles used to transport passengers are considered rolling stock.

FTA recipients are permitted to use all of the following procurement methods as permitted by state and local laws for acquiring rolling stock.

- 3.3.1 *Solicitation or Invitation for Bids or Proposals* – Most recipients likely will acquire their rolling stock through procurements in the open market that involve the typical standard bidding and proposal procedures. Recipients may contract only for their current and reasonably expected public transportation needs and may not add quantities or options to third party rolling stock contracts solely for the purpose of permitting assignment to another party at a later date.
- 3.3.2 *Joint Procurements* – The Uniform Guidance (2 C.F.R. Section 200.318(e)) states that recipients are “encouraged to enter into state and local

intergovernmental agreements or inter-entity agreements, where appropriate, for procurement or use of common or shared goods and services.” FTA refers to such procurements as “joint procurements.” FTA encourages joint procurements in which two or more grantees issue a single solicitation document and enter into a single contract with a vendor or vendors for rolling stock in a fixed quantity, which may be expressed with both a total minimum and total maximum. Unlike a State or nonprofit cooperative procurement contract (discussed below), a joint procurement does not permit non-parties to participate in the contract except through the assignment of options. Joint procurements offer the advantage of obtaining goods and services that better meet the needs of each participating recipient than those goods and services likely to be available through an assignment of another recipient’s contract rights.

Like all solicitations, joint procurements must be tailored to the specific quantities that participants anticipate needing, and are cautioned to not inflate the maximum quantity of vehicles so that other recipients may “piggyback” on the contract later. At a minimum, the maximum quantity available under the contract should bare a reasonable relationship to the recipients’ number of peak service vehicles. For example, a joint procurement with a maximum quantity of 600 buses likely would not be reasonable if the combined number of vehicles in peak service of the participants in the joint procurement is only 75 buses. The parties to a joint procurement can agree to share responsibility for different portions of the process, e.g., one recipient may prepare the technical specification and another prepares and conducts the solicitation process. As stated in FTA Circular 4220.1F, “Participation in a joint procurement, however, does not relieve any participating recipient from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in an entity other than in itself. All elements of the procurement should be subject to the review and approval of all participants. Each participant should have the right to take part in the evaluation and selection process.”

Notwithstanding the single contract award nature of a joint procurement, purchasers in a joint procurement may award individual contracts for their particular needs as long as those contracts reflect the terms and conditions in the joint procurement competitive solicitation and the proposal that was submitted by the winning contractor. One approach that has been used for joint bus procurements is for the lead agency to award the basic contract with

pricing, specifications, terms and conditions, etc., and then to have the participating agencies issue individual purchase orders against the basic contract as funding becomes available to the agencies during the life of the contract. The purchase orders would reflect the basic contract unit prices and reference the basic contract for other terms and conditions.

3.3.3 *Exercise of Options* – A recipient may use its own contract options with the following limitations:

- *Consistency with the Underlying Contract* – The terms and conditions of the option must be substantially similar to the terms and conditions of the option as stated in the original contract at the time it was awarded.
- *Price* – The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous than what can be obtained in the open market.
- *Awards Treated as Sole Source Procurements* – The following actions constitute sole source awards and recipients must be able to justify the use of a non-competitive award, i.e., a sole source procurement, before it enters into a contract.
 - *Failure to Evaluate Options before Awarding the Underlying Contract* – If a contract has one or more options and those options were not evaluated in determining the low bid for the original contract award, exercising those options after contract award will result in a sole source award. This means that the original contract award must be made on the total price of all items, both base and option, even if the base items' prices being offered by the overall low bidder are higher than those offered by another bidder.
 - *Negotiating a Lower Option Price* – Exercising an option after the recipient has negotiated a lower or higher price will also result in a sole source award unless that price can be reasonably determined from the terms of the original contract, or that price results from Federal actions that can be reliably measured, such as changes in Federal prevailing labor rates, for example.

3.3.4 *Acquisition Through Assigned Contract Rights/Piggybacking* – Recipients may find it useful to acquire contract options through assignment by another recipient. This practice also is known as “piggybacking.” A recipient that obtains contractual rights through assignment may use these rights after determining: (1) that the original contract price remains fair and reasonable; (2) that the original contract provisions comply with all applicable Federal requirements; and (3) that the assigning recipient originally procured quantities necessary for their needs (i.e., they did not procure unreasonably large quantities). Before proceeding with the assignment, the recipient seeking the assignment must review the original

contract to be sure that the quantities the assigning recipient acquired, together with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract. Recipients do not need to perform a second price analysis if one was performed for the original contract. FTA does, however, expect the recipient to determine whether the contract price or prices that were established under the original agreement are still fair and reasonable. Also, recipients using assigned contract rights are separately responsible for ensuring that the contractor complies with FTA's Buy America requirements for the assigned quantities. Finally, recipients should be mindful that piggybacking on contracts with the pre- FAST Act domestic content requirement of more than 60 percent may be restricted as well. For further information on Buy America and piggybacking, please consult FTA's website's Buy America page.

- 3.3.5 *State Cooperative Purchasing Contracts* – Under Section 3019 of the FAST Act, grantees may purchase rolling stock and related equipment from a State cooperative procurement contract. A “cooperative procurement contract” means a contract entered into between a State government or eligible nonprofit entities and 1 or more vendors under which the vendors agree to provide an option to purchase rolling stock and related equipment to multiple participants. The contract term for a cooperative procurement contract may be for an initial term of not more than two years and may include three optional extensions of one year each. A lead procurement agency or lead nonprofit entity in such a procurement may charge participants in the contract no more than 1 percent of the total value of the contract.

Under prior law, FTA referred to these types of State contracts as “State purchasing schedules” and, as such, were only available to recipients within that State. Under the FAST Act, a grantee may purchase rolling stock and related equipment from any State's cooperative procurement contract or schedule.

State cooperative purchasing contracts or state schedules are subject to federal requirements, including, but not limited to, full and open competition, no geographic preferences, Buy America, and bus testing, and must include all FTA required clauses and certifications with its purchase orders issued under the State contract. Pursuant to Section 3019 of the FAST Act, recipients may purchase from another State's schedule.

- 3.3.6 *Capital Lease* – Federal funds may be used to lease instead of buy rolling stock, and leases are considered third party contracts. Notably, Buy America requirements apply to capital leases. The FAST Act made

several changes to Federal transit law as it relates to capital leases; recipients should reach out to their FTA regional office for assistance if contemplating a capital lease of rolling stock.

3.3.7 *Special Contract Provisions for Rolling Stock Contracts* – The following requirements may affect rolling stock procurements:

- *Accessibility* – Rolling stock must comply with the accessibility requirements of DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 C.F.R. part 37, and Joint Access Board/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 C.F.R. part 1192 and 49 C.F.R. part 38.
- *Transit Vehicle Manufacturer Compliance with DBE Requirements* – Before a transit vehicle manufacturer (TVM) may submit a bid or proposal to provide vehicles to be financed with FTA assistance, 49 C.F.R. § 26.49 requires the TVM to submit a certification that it has complied with FTA’s DBE requirements. FTA’s website contains a list of current certified TVMs and it is a best practice to confirm a TVM’s certification with this list. If a TVM is not on the FTA list, recipients should contact the civil rights officer in their region before awarding the contract.
- *Minimum Useful Life* – FTA requires each recipient to maintain satisfactory continuing control of FTA assisted property. For buses and certain other vehicles, FTA has established minimum service life policies that may affect the quantity of vehicles that the recipient may acquire. See the most recent version of FTA Circular 5010.1, “Grant Management Requirements,” which address minimum useful life for vehicles.
- *Spare Ratios* – All FTA assistance for third party procurements must be limited to property and services the recipient will use in the near future. Generally, FTA will not approve acquisition of an excessive number of spare vehicles not regularly used in public transportation service. See the most recent version of FTA Circular 5010.1, “Grant Management Requirements,” for additional information.
- *Air Pollution and Fuel Economy* – Each third party contract to acquire rolling stock must include provisions to ensure compliance with applicable Federal air pollution control and fuel economy regulations, such as EPA regulations, “Control of Air Pollution from Mobile Sources,” 40 C.F.R. part 85; EPA regulations, “Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines,” 40 C.F.R. part 86; and EPA regulations, “Fuel Economy of Motor Vehicles,” 40 C.F.R. part 600.
- *Bus Testing* – Each third party contract to acquire a new bus model or a bus with significant alterations to an existing model must include provisions to assure compliance with applicable requirements of 49

U.S.C. § 5318, and FTA regulations, “Bus Testing,” 49 C.F.R. part 665. Buses must achieve a passing score on eight performance measures in order to be eligible for FTA funding.

- *In-State Dealers* – The recipient may not limit its third party bus procurements to its in-State dealers, 49 U.S.C. § 5325(i). Although FTA respects State licensing requirements, FTA is prohibited by law from providing assistance to support bus procurements that have the result of limiting competition to entities that have been able to obtain a State license.
- *Basis for Contract Award* – As permitted by 49 U.S.C. § 5325(f), the recipient may award a third party contract for rolling stock based on initial capital costs, or based on performance, standardization, life cycle costs, and other factors, or by selection through a competitive procurement process.
- *Time Limits for Options on Rolling Stock Contracts* – Under 49 U.S.C. § 5325(e)(1)(A), a recipient may enter into a multiyear contract to acquire buses or replacement parts with options not exceeding a total of five (5) years to buy additional buses or replacement parts. Under 49 U.S.C. § 5325(e)(1)(B), a recipient may enter into a multiyear contract to acquire railcars or replacement parts with options not exceeding a total of seven (7) years to buy additional railcars or replacement parts provided that such option does not allow for significant changes or alterations to the rolling stock. FTA interprets these five and seven year periods as covering the recipient’s “material requirements” for rolling stock and replacement needs from the first day when the contract becomes effective to its “material requirements” at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient’s “material requirements” for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient’s material requirements for the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means only that FTA limits a contract to purchasing no more than the recipient’s material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract. However, rolling stock options must be exercised within the original contract term.
- *Buy America* – When procuring rolling stock, recipients must ensure that the cost of the components and subcomponents produced in the United States meets the following threshold requirements: (i) for fiscal years 2016 and 2017, more than 60 percent of the cost of all components of the rolling stock; (ii) for fiscal years 2018 and 2019,

more than 65 percent of the cost of all components of the rolling stock; and (iii) for fiscal year 2020 and each fiscal year thereafter, more than 70 percent of the cost of all components of the rolling stock. Additionally, final assembly of the rolling stock must occur in the United States. See 49 U.S.C. § 5323(j) (2) (C). For further information about implementation of this requirement, see FTA's *Federal Register* Notice of Policy on the Implementation of the Phased Increase in Domestic Content under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, Sept. 1, 2016. Please click here for a link to [the Federal Register notice](#).

- *Pre-Award and Post Delivery Reviews for Rolling Stock* – FTA requires that recipients purchasing revenue passenger rolling stock undertake reviews of the rolling stock before award of the bid, during manufacture, and following delivery of the rolling stock. Applicants seeking to acquire rolling stock must certify that they will comply with FTA's pre-award and post-delivery review requirements. See 49 U.S.C. § 5323(m) and FTA regulation, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. part 663.

Recipients can obtain detailed information on FTA's Buy America regulation at the [FTA website's Buy America Page](#).

3.4 Procurement Methods

Recipients may choose from the following procurement methods, provided they comply with the recipient's State and local laws and regulations. Micro and small purchase thresholds may vary by State and local governments. If a recipient has the legal authority under State law to implement a micro-purchase and small purchase program, they must comply with their State and local requirements. If a State has lower threshold requirements than FTA has established, the recipient must comply with those State levels. However, the FTA threshold is a ceiling, and procurements using FTA funds that exceed the FTA threshold will not be considered micro-purchase or small purchases, even if the State threshold is higher.

There is no Federal requirement that a recipient use the sealed bid or competitive proposal method for any of its federally funded procurements. There is a mixture of history and tradition behind the use of sealed bidding in the public sector that is frequently embodied in legislative requirements at both the Federal and State levels. Although Federal legislative requirements mandating the use of this method have been relaxed in recent years, many States still require its use for many commodities or services being procured and it is still the "preferred" method for the acquisition of construction services in the public sector, including by FTA. Sealed bidding is perceived to be a faster, more objective method of