

INDOT Office of Transit Procurement Policies/Procedures - Supplement

This is a supplement to Indiana Department of Transportation (INDOT) procurement manuals for Professional Services, Supplies/non-professional services, and vehicle procurement handled through the Indiana Department of Administration.

Written Protest Procedures

For Federal Transit Administration (FTA) assisted procurements, The INDOT Office of Transit Section Manager will notify FTA expeditiously when it receives a third party contract protest to which FTA Circular FTA C 4220.1F applies, and to keep FTA informed about the status of the protest.

“Third Party Contract” refers to INDOT’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.

The INDOT Office of Transit will provide the following information to FTA per FTA Circular C 4220.1F, ¶ VII, 1, a,(2)(a)1,2,3:

Subjects. A list of protests involving third party contracts and potential third party contracts that:

- a) Have a value exceeding \$100,000, or
- b) Involve a controversial matter, irrespective of amount, or
- c) Involve a highly publicized matter, irrespective of amount.

Details. The following information about each protest:

- a) A brief description of the protest,
- b) The basis of disagreement, and
- c) If open, how far the protest has proceeded, or
- d) If resolved, the agreement or decision reached, and
- e) Whether an appeal has been taken or is likely to be taken.

When and Where. INDOT will provide this information:

- a) In its next quarterly Milestone Progress Report, and
- b) At its next Project Management Oversight review, if any.

Award to Responsible Contractors - FTA Circular C 4220.1F, ¶ VI, 8, b.

For FTA assisted procurements, INDOT will only award to “responsible” contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract (49 U.S.C. 5325).

The INDOT Office of Transit Section Manager will document the contract award file that it has made an affirmative determination of contractor responsibility. Consideration will be given to the contractor's:

1. Integrity and Ethics - the contractor will have a satisfactory record of integrity and business ethics, in compliance with 49 U.S.C. Section 5325(j)(2)(A);
2. Debarment and Suspension – the contractor is neither debarred nor suspended from Federal programs under DOT regulations “Nonprocurement Suspension and Debarment,” 2 CFR Parts 180 and 1200, or under the FAR at 48 CFR Chapter 1, Part 9.4, or <https://www.epls.gov>;
3. Affirmative Action and DBE – the contractor will be in compliance with Common Grant Rules’ affirmative action and FTA Disadvantaged Business Enterprise requirements;
4. The contract will be in compliance with public policies of the Federal Government as required by 49 U.S.C. Section 5325(j)(2)(B);
5. Administrative and Technical Capacity – the contractor will have the necessary organization, experience, accounting and operation skills, and technical skills (or the ability to obtain them), in compliance with 49 U.S.C. (j)(2)(D);
6. Licensing and Taxes – the contractor will be in compliance with applicable licensing and tax laws and regulations;
7. Financial Resources – the contractor will have, or can obtain sufficient financial resources to perform the contract, as required by 49 U.S.C. (j)(2)(D);
8. Production Capability – the contractor will have or can obtain, sufficient financial resources to perform the contractor, and technical equipment and facilities;
9. Timeliness – the contractor will be able to comply with the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
10. Performance Record – the contractor will be able to provide:
 - a. Current performance – a satisfactory current performance record,
 - b. Past performance – a satisfactory past performance in view of long-time performance or performance with a predecessor entity, including:
 - i. Sufficient resources – key personnel with adequate experience, a parent firm with adequate resources and experience, and key subcontractors with adequate experience and past performance;

- ii. Adequate Past Experience – past experience in carrying out similar work with particular attention to management approach, staffing, timeliness, technical success, budgetary controls, and other specialized considerations as described in INDOT’s solicitation, and

- iii. Past Deficiencies Not the Fault of the Bidder or Offeror - A prospective bidder or offeror that is or recently has been seriously deficient in contract performance is presumed to be nonresponsible, unless the recipient determines that the circumstances were properly beyond the bidder or offeror’s control, or unless the bidder or offeror has taken appropriate corrective action. Past failure to apply sufficient tenacity, perseverance, and effort to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of a contract is a significant factor to consider in determining satisfactory performance. FTA expects the recipient to consider the number of the bidder or offeror’s contracts involved and the extent of deficient performance in each contract when making this determination.

Time and Materials – Restricted, per FTA Circular C 4220.1F, ¶ VI.2.c.(2)(b)

For FTA assisted contracts, INDOT will only use time/material contracts only:

- a) After determining that no other contract type is suitable; and
- b) If the contract specifies a ceiling price that the contractor may not exceed except at its own risk.

Contract Term Limitations – per FTA Circular C 4220.1F, ¶ IV.2.e(10)

For FTA assisted procurements involving rolling stock and replacement parts, INDOT will not allow the contract term to exceed five (5) years.

For other types of contracts, INDOT will provide documentation that the contract term is based upon sound business judgment.

Tag-Ons – per FTA Circular C 4220.1F, ¶ V.7.b.(2)

For FTA assisted contracts, INDOT will not allow a significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.

Geographic Preferences – per FTA Circular C 4220.1F, ¶ VI.2.a.(4)(g)

For FTA assisted procurements, INDOT will not use statutorily or administratively imposed in-State or local geographic preferences in the evaluation of bids or proposals unless Federal statutes expressly mandate or encourage geographic preference.

For Architectural Engineering (A&E) Services, geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.

Organizational Conflicts of Interest – per FTA Circular C 4220.1F, ¶ VI.2.a.(4)(h)

INDOT will not engage in practices that result in organizational conflicts of interest as prohibited by the Common Grant Rules:

INDOT will analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential conflicts before contract award.

Sealed Bid Procedures – per FTA Circular C 4220.1F, ¶ VI.3.c.

For FTA assisted procurements, INDOT will use the following procedures to conduct Sealed Bids:

- a. Publicity. The invitation for bids is publicly advertised.
- b. Adequate Sources. Bids are solicited from an adequate number (two or more responsible bidders) of known suppliers.
- c. Adequate Specifications. The invitation for bids, including any specifications and pertinent attachments, describes the property or services sought in sufficient detail that a prospective bidder will be able to submit a proper bid.
- d. Sufficient Time. Bidders are allowed sufficient time to prepare bids before the date of bid opening.
- e. Public Opening. All bids are publicly opened at the time and place prescribed in the invitation for bids.
- f. Fixed Price Contract. A firm fixed price contract is usually awarded in writing to the lowest responsive and responsible bidder, but a fixed price incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate. When specified in the bidding documents, factors such as transportation costs and life cycle costs affect the

determination of the lowest bid; payment discounts are used to determine the low bid only when prior experience indicates that such discounts are typically taken.

- g. Rejection of Bids. Any or all bids may be rejected if there is a sound, documented business reason.

Professional Services – per FTA Circular C 4220.1F, ¶ VI.3.d.(2)(a-e)

For FTA assisted procurements for professional services, INDOT will follow the guidelines per ¶ VI.3.d.(2)(a-e):

- a. Publicity. The request for proposals is publicly advertised.
- b. Evaluation Factors. All evaluation factors and their relative importance are specified in the solicitation; but numerical or percentage ratings or weights need not be disclosed.
- c. Adequate Sources. Proposals are solicited from an adequate number of qualified sources.
- d. Evaluation Method. A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.
- e. Price and Other Factors. An award is made to the responsible offeror whose proposal is most advantageous to the INDOT's program with price and other factors considered.

For FTA assisted procurements, INDOT restricts the use of qualifications-based procedures ("Brooks Act") procedures) to A&E and other services that are connected to construction.

Procurement of Design Build – per FTA Circular C 4220.1F, ¶ VI.3.h.

For FTA funded procurements, INDOT will procure design-build services through means of qualifications-based proposal procedures based on the Brooks Act when the preponderance of the work to be performed is considered to be for architectural and engineering (A&E) services. INDOT will not use qualifications-based competitive proposal procedures to procure design-build when the preponderance of the work to be performed is not of an A&E nature unless required by State law adopted before August 10, 2005.

Other than Full and Open Competition – per FTA Circular C 4220.1F, ¶ VI.3.i.

INDOT will use noncompetitive proposals only when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals, and at least one of the following circumstances are present:

- a. Competition Adequacy. After soliciting several sources, INDOT will review its specifications to determine if they are unduly restrictive or if changes can be made to encourage submission of more bids or proposals. After INDOT determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, INDOT may determine the competition adequate. A cost analysis must be performed in lieu of a price analysis when this situation occurs.
- b. Sole Source. When INDOT requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its requirements, INDOT may make a sole source award. If INDOT requires an existing contractor to make a change to its contract that is beyond the scope of that contract, INDOT will fully justify the additional work that is required and the selection of the vendor.

Single Bid or Proposal. Upon receiving a single bid or proposal in response to a solicitation, INDOT will determine if competition was adequate. This will include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.

When Prohibited. Less than full and open competition is not justified based on:

- a) Failure to Plan. INDOT's lack of advance planning, or
- b) Limited Availability of Federal Assistance. Concerns about the amount of Federal assistance available to support the procurement (for example, expiration of Federal assistance previously available for award).

Procurement Procedures. When less than full and open competition is available to the INDOT, the Common Grant Rule for governmental recipients directs the recipient to:

- a) Potential Sources. Solicit offers from as many potential sources as is practicable under the circumstances.
- b) Sole Source Justification. If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards this section. FTA expects this sole source justification to be in writing.
- c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.
- d) Preaward Review. The INDOT Office of Transit Section Manager will submit the proposed procurement to FTA for preaward review if FTA so requests.

Options – per FTA Circular C 4220.1F, ¶ V.7.a.(1)

For all FTA assisted procurements, INDOT will use contract options held by another FTA recipient with the following limitations:

- a. Consistency with the Underlying Contract. The terms and conditions of the option INDOT seeks to exercise are substantially similar to the terms and conditions of the option as stated in the original contract at the time it was awarded.
- b. Price. INDOT 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.
- c. Awards Treated as Sole Source Procurements. The following actions constitute sole source awards:
 - i. Failure to Evaluate Options Before Awarding the Underlying Contract. If a contract has one or more options and those options were not evaluated as part of the original contract award, exercising those options after contract award will result in a sole source award.
 - ii. 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.

Independent Cost Estimates – per FTA Circular C 4220.1F, ¶ VI.6.

For FTA assisted procurements, INDOT will perform a cost or price analysis in connection with every procurement action, including contract modifications.

Cost and Price Analysis – per FTA Circular C 4220.1F, ¶ VI.6.

For FTA assisted procurements, INDOT will perform a cost or price analysis in connection with every procurement action, including contract modifications.

For Independent Cost Estimates and Cost/Price Analysis, INDOT will use the following resources as guidance:

- a) FTA's "Best Practices Procurement Manual," Chapter 5,
- b) The National Transit Institute Course, "Cost or Price Analysis and Risk Assessment,"
- c) Pricing Guide for FTA Grantees, FTA Web Site:
http://www.fta.dot.gov/documents/Helpline_Price_Guide.doc.,
- d) FAR Part 31, Contract Cost Principles and Procedures, and
- e) Defense Contract Audit Agency Audit Manual. See, the DCAA Web site: **<http://www.dcaa.mil/>**.

Note, however, that the requirements of FAR Part 31 and the Defense Contract Audit Agency Audit Manual may differ from restrictions applicable to an FTA recipient. Each FTA recipient must comply with those Federal laws and regulations directly applicable to it.

Cost Plus a Percentage of Cost – Prohibited per FTA Circular C 4220.1F, ¶ VI.2.c.(2)(a)

For FTA assisted procurements, INDOT will not use Cost Plus a Percentage of Cost contracts. Nor will INDOT use “Negotiated Labor Rate Multiplier.”

INDOT will only use cost-plus-fixed-fee, firm fixed price, or Time & Material/Labor Hour contracts where the billing rates are negotiated and fixed for the duration of the contract.

Advance Payments – per FTA Circular C 4220.1F, ¶ IV.2.b.(5)(b)

For FTA assisted procurements, INDOT will not make advance payments to contractors unless it receives prior written concurrence from FTA, or as otherwise authorized by FTA Circular 4220.1F, IV.2.b.(5)(b)2 b - Customary Advance Payments

Progress Payments – per FTA Circular C 4220.1F, ¶ IV.2.b.(5)(c)

For FTA assisted procurements, INDOT will only use progress payments provided that INDOT obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested.

Revenue Contracts – per FTA Circular C 4220.1F, ¶ II.2.b.(4)

INDOT, for any FTA assisted revenue contracts, will conduct its revenue contracting as follows:

- a) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then INDOT will use a competitive process to permit interested parties an equal chance to obtain that limited opportunity.
- b) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties.

Notification of Federal Assistance – per FTA Circular C 4220.1F, ¶ III.3.e.

INDOT will include provisions in all RFPs, solicitations, press releases or other publications involving FTA assistance, stating that FTA is or will be providing Federal assistance for the project, the amount of the assistance FTA has provided or expects to provide, and the Catalogue of Federal Domestic Assistance (CFDA) number of the program that authorizes Federal Assistance.

Disadvantaged Business Enterprises

- a) This contract is subject to the requirements of Title 49, Code of Federal Regulations, Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBE) is 10%. The agency's overall goal for DBE participation is __ %. A separate contract goal **[of __ % DBE participation has] [has not]** been established for this procurement.
- b) The contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this DOT-assisted contract. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as **{insert agency name}** deems appropriate. Each subcontract the contractor signs with a subcontractor must include the assurance in this paragraph (see 49 CFR 26.13(b)).
- c) **{if a separate contract goal has been established, use the following}** Bidders/offerors are required to document sufficient DBE participation to meet these goals or, alternatively, document adequate good faith efforts to do so, as provided for in 49 CFR 26.53. Award of this contract is conditioned on submission of the following **[concurrent with and accompanying sealed bid] [concurrent with and accompanying an initial proposal] [prior to award]**:
 1. The names and addresses of DBE firms that will participate in this contract;
 2. A description of the work each DBE will perform;
 3. The dollar amount of the participation of each DBE firm participating;
 4. Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal;
 5. Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
 6. If the contract goal is not met, evidence of good faith efforts to do so.

[Bidders][Offerors] must present the information required above **[as a matter of responsiveness] [with initial proposals] [prior to contract award]** (see 49 CFR 26.53(3)).

Prompt Payment per 49 CFR § 26.29- Prompt Payment Mechanisms

- *INDOT* requires that all subcontractors performing work on DOT-assisted contracts shall be promptly paid for work performed pursuant to their agreements, in accordance with all relevant federal, state, and local law.
- In accordance with 49 CFR § 26.29, the *INDOT* established a contract clause implementing this requirement and requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from the prime contractor's receipt of each payment from the *INDOT*
- *INDOT* ensures prompt and full payment of retainage from the prime contractor to the subcontractor within *[number not to exceed 30]* days after the subcontractor's work is satisfactorily completed. Pursuant to § 26.29, *INDOT* has selected the following method to comply with this requirement:

o *[Insert the **ONE** method selected from the options listed in § 26.29(b)]*

Additionally, for Federal Aviation Administration (FAA) Recipients, include the following:

- To implement this measure, *INDOT* includes the following clause from FAA Advisory Circular 150/5370-10 in each DOT-assisted prime contract:
 - o *[Insert clause from AC-150/5370-10 (Section 90-06) pertaining to method selected. Revise instances of "30 days" to reflect state and local prompt payment/return of retainage requirements, if these are less than the 30 day maximum.]*

Section 26.37 Monitoring Responsibilities

- *INDOT* implements and carries out appropriate mechanisms to ensure compliance with 49 CFR Part 26 program requirements by all program participants, including prompt payment, and describes and set forth these mechanisms in *INDOT's* DBE program.

Monitoring Payments to DBEs and Non-DBEs

- *INDOT* undertakes ongoing monitoring of prime payments to subcontractors over the course of any covered contract. Such monitoring activities will be accomplished through the following method(s):

*[Detail the **SPECIFIC** methods that will be utilized. Possible examples include,*

but are not limited to:

- *Posting prime contractor payments to a website, database, or other place accessible to subcontractors to alert them to the start of the xx-day clock for payment*
 - *Use of an automated system that requires real time entry of payments to, and receipts by prime contractors and subcontractors and regularly monitoring that system*
 - *Other affirmative steps to monitor prompt payment and retainage requirements (describe specific steps)]*
- *INDOT* requires prime contractors to maintain records and documents of payments to subcontractors, including DBEs, for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the *[Recipient's]* financial assistance agreement, whichever is longer. These records will be made available for inspection upon request by any authorized representative of the *[Recipient]* or DOT. This reporting requirement extends to all subcontractors, both DBE and non-DBE.
 - *[Recipient]* proactively reviews contract payments to subcontractors including DBEs (indicate how often—DOT recommends not less than quarterly to ensure *compliance*). Payment reviews will evaluate whether the actual amount paid to DBE subcontractors is equivalent to the amounts reported to *[Recipient]* by the prime contractor.

Prompt Payment Dispute Resolution

- *[Recipient]* will take the following steps to resolve disputes as to whether work has been satisfactorily completed for purposes of § 26.29.

[Detail steps here (e.g. meetings between prime and sub, with resident project representative and/or project manager presence as appropriate.) It is recommended that any meeting for the purpose of dispute resolution include individuals authorized to bind each interested party, including recipient representative(s) with authority to take enforcement action.]

- *[Recipient] has established, as part of its DBE program, the following mechanism(s) to ensure prompt payment and return of retainage [examples of mechanisms include the following]:*

(1) Alternative dispute resolution (ADR)

- *[Provide the contract clause(s) you will use to require this, and explain how the alternative dispute resolution mechanism will function. If you do not specify the nature of the ADR mechanism, explain how you will determine a proposed mechanism is sufficient (for example, perhaps consider a contract clause that requires the prime contractor to submit a detailed alternative dispute resolution plan for your approval prior to the issuance of any notice to proceed)]*

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

- *[Provide the contract clause(s) that implements this provision. If selecting this option to be an effective enforcement measure, your organization must also include a contract clause requiring prime s to pay subcontractors for completed work prior to requesting payment from the Recipient.]*

(3) Other mechanisms

- *[Detail the mechanisms that will be used and how they will be implemented and enforced. Provide the contract clause(s) that pertain to the mechanisms developed.]*

Prompt Payment Complaints

- Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure. *[Escalation steps should follow prime, Recipient, and Operating Administration (OA) in that order, but specific procedures are to be outlined by the Recipient. Procedures and wording below are basic descriptions, and should not be used verbatim.]*
- If affected subcontractor is not comfortable contracting prime directly regarding payment or unable to resolve payment discrepancies with prime, subcontractor should contact DBELO to initiate complaint.
- If filing a prompt payment complaint with the DBELO does not result in timely and meaningful action by *[Recipient]* to resolve prompt payment disputes, affected subcontractor may contact the responsible *[operating administration]* contact.

Enforcement Actions for Noncompliance of Participants

- *[Recipient]* will provide appropriate means to enforce the requirements of § 26.29. These means include:

*[Detail the **SPECIFIC** means that will be utilized. You **must** identify and actively enforce such means to be regarded by the operating administration as implementing your program in good faith. Possible examples per § 26.13 include, but are not limited to:*

- *In accordance with the contract, assessing liquidated damages against the prime contractor for each day beyond the required time period the prime contractor fails to pay the subcontractor*
- *Advise subcontractors of the availability of the payment and performance bond to assure payment for labor and materials in the execution of the work provided for in the contract*
- *Pay subcontractors directly and deduct this amount from the retainage owed to the prime*
- *Issue a stop-work order until payments are released to subcontractors, specifying in the contract that such orders constitute unauthorized delays for the purposes of calculating liquidated damages if milestones are not met*
- *Other penalties for failure to comply, up to and including contract termination (specify these penalties clearly).*

[These are examples, not recommendations or requirements. Include in your DBE program the samples of the contract language you will use for all means you develop to enforce the requirements of this section.]

- *[Recipient]* will actively implement the enforcement actions detailed above.

State/Federal Guidelines Prevalence

For FTA assisted procurements, should any of the State's Terms and Conditions conflict with the Federal Guidelines, the Federal Guidelines will prevail.

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