

PROCUREMENT POLICY

Grantee Name:
Buckeye Hills Regional Council

Policy Date:
04/01/2023

Governing Board/Body Name: BHRC Executive Committee

Type of Entity: Council of Governments

Title of Procurement Officer: Fiscal Director

Legal Counsel Title/Department: Theisen & Brock LPA

Title of Person Who Signs the Contracts: Executive Director

Title of Person in Charge of Daily Operations: Planning Director

Title of Person in Charge at Next Level: Executive Director

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1. INTRODUCTION

1.1. Purpose

This policy establishes guidelines and minimum standards that BHRC will use in the management of its third-party contracts. This manual is intended to ensure that BHRC complies with Federal Transit Administration (FTA) and the Ohio Department of Transportation's standards to ensure full and open competition and equitable treatment of all potential sources for all purchases made with funding derived from the Federal, state, and local governments. In all purchasing activity, the goal of BHRC is to ensure maximum open and free competition consistent with:

- FTA Circular 4220.1F "Third Party Contracting Guidance" or latest version thereof;
- 2 CFR § 200.317 – 200.326
- ODOT State Management Plan.

1.2. Applicability

This manual applies to all procurements undertaken and financed, in whole or in part, with FTA financial assistance provided to BHRC to support **open market procurements**. An open market solicitation is used to purchase a good or service by soliciting from any available source. Most grantee procurement activity will be undertaken on the open market. Open market procurements exclude:

- Employment Contracts;
- Real Estate Contracts; and
- Intergovernmental Agreements.

The goal of this procurement policy is to provide an atmosphere in which all procurement transactions will be conducted in a manner providing full and open competition. BHRC will avoid the following situations considered to be restrictive of competition:

- Application of unreasonable requirements placed on firms in order for them to qualify to do business;
- Imposition of geographic preference standards in the selection of vendors;
- Imposition of unnecessary experience and excessive bonding requirements;
- Use of noncompetitive pricing practices between firms or between affiliated companies;
- Employment of noncompetitive awards to any person or firm on retainer contracts;
- Failure to recognize organizational conflicts of interest, which means that because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a contractor has an unfair competitive advantage;
- Use of "brand name" specifications without listing its salient characteristics and not allowing "an equal" product to be offered; and
- Any arbitrary action in the procurement process.

BHRC will conduct procurements in a manner that does not give in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. This does not pre-empt Ohio licensing laws from being considered in those disciplines that are regulated by the State of Ohio. Geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services if an appropriate number of qualified firms, given the nature and size of the project, are able to compete for the contract.

1.3. Third Party Contracting Capacity

FTA regulations (2 CFR § 200.319(c) and FTA Circular 4220.1F, Chapter III, § 3a) requires BHRC to have written procurement procedures. This policy is designed to meet FTA and ODOT's requirements in this regard.

1.4. Relationship to Other Council of Government Policies

The purpose of these purchasing policies and procedures are two-fold. First, the Council of Government has established these policies and procedures to conform to the provisions of Federal procurement regulations that govern the Council of Government's use of FTA and ODOT funds. Second, these policies and procedures assure that materials, supplies, services and equipment required for efficient and effective operation of the transit program are procured with regard to an analysis of price, quality, quantity, terms and delivery specifications. These policies and procedures pertain only to the Council of Government's purchases made with FTA funds for the transit program; purchases with local funds and for purposes other than transit should follow the applicable Ohio Revised Code.

These policies may not answer all questions related to purchasing; if any employee of BHRC has a question regarding these procedures, ODOT should be contacted for clarification and guidance.

When BHRC undertakes any purchase utilizing FTA funds, this policy shall supersede any existing purchasing policy promulgated by the Council of Government. When any conflict exists between this policy and the existing policies of the Council of Government, the procedures in this policy shall prevail. If any employee of BHRC determines that a conflict exists between these policies and state and local law, BHRC shall contact ODOT and communicate the conflict.

2. CODE OF ETHICS AND CONFLICT OF INTEREST POLICY

2.1. Purpose

Federal grant management rules (2 CFR § 200.318(c)(1)) require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. This policy must address:

- Personal conflicts of interest
- Gifts; and
- Violations.

2.2. Definition of Key Terms

As used herein, the following definitions apply:

Conflict of Interest – A situation in which an employee, BHRC EXECUTIVE COMMITTEE member, officer, or agent has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties. A conflict of interest represents a divergence between a person covered by this policy and their private interests and their professional obligations to the BHRC such that an independent observer might reasonably question whether the individual’s professional actions or decisions are determined by considerations of personal gain, financial or otherwise.

Financial Interest – An officer, agent, BHRC EXECUTIVE COMMITTEE member, his or her partner, employee, or their immediate family, is considered as having a financial interest in a company if: they receive more than \$10,000 in consulting income, salaries, or equity in the company; they have more than 5 percent equity in the company; they have intellectual property rights in or receive royalties from the company; or they serve as a director, officer, partner, trustee, manager or employee of the company.

Immediate Family – Immediate family includes an employee’s spouse, grandparent, parent, brother, sister, child or grandchild, his or her partner.

2.3. Applicability

No employee, elected official, agent, or other individual under an employment contract with BHRC, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved.

Such a conflict would arise when any of those previously listed individuals has a financial or other interest in the firm selected for award.

2.4. Gifts

Any contractor, subcontractor, or supplier who has a contract with the Council of Government; has performed under such a contract within the past year; or anticipates bidding on such a contract in the future shall be prohibited from making gifts or to providing favors to any individual defined in Section 2.2. who is charged with the duty of:

- Preparing plans, specifications, or estimates for public contract; or
- Awarding or administering public contracts; or
- Inspecting or supervising construction.

BHRC also prohibits all covered individuals defined in Section 2.2. who perform the functions listed above from receiving or accepting any such gift or favor.

2.5. Employee Conflicts of Interest

2.5.1. Conflicts of Interest

It shall be a breach of ethical standards for any BHRC employee to participate directly or indirectly in a procurement when the employee knows:

- The employee or any member of the employee's immediate family, BHRC EXECUTIVE COMMITTEE member, officer, agent, his or her partner, has a financial interest pertaining to the procurement;
- A business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or
- Any other person, business or organization with whom the employee or any member of employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

2.5.2. Discovery of Actual or Potential Conflict of Interest (Disqualification and Waiver)

Upon discovery of an actual or potential conflict of interest, an employee participating directly or indirectly in a procurement shall:

- Promptly file a written statement of disqualification with the Executive Director; and
- Withdraw from further participation in the procurement.

The employee may, at the same time, request from the Executive Director, an advisory opinion as to what further participation, if any, the employee may have in the procurement. It shall be at the sole discretion of the Executive Director to determine if the employee may have any further participation in the procurement and, if so, the extent to which the employee may participate. Any employee who fails to comply with the provisions of this paragraph may be subject to disciplinary action.

2.5.3. Employee Disclosure Requirements

A BHRC employee, who has reason to believe that he/she or his/her immediate family have an interest that may be affected by his/her official acts or actions as a BHRC employee or by the official acts or actions of BHRC shall disclose the precise nature and value of such interest in a written disclosure statement to the Executive Director. The employee's disclosure statement will be reviewed by the Executive Director and the Executive Director will respond to the employee in writing with an opinion as to the propriety of said interest.

In the event that the Executive Director has reason to believe that he/she or his/her immediate family has an interest that may be affected by his/her official acts or actions as a BHRC employee or by the official acts or actions of BHRC, he/she shall disclose the precise nature and value of such interest in a written disclosure statement to the BHRC Executive Committee.

2.5.4. Confidential Information

A BHRC employee may not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, confidential information acquired by virtue of their position or employment with BHRC.

2.5.5. Solicitation Provision

BHRC shall insert the following provisions in all formal competitive solicitation documents for products and services:

These policies shall apply to BHRC employees involved in procurement. It is a breach of ethical standards for any BHRC employee to participate directly or indirectly in a procurement when the employee knows:

- *The employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;*
- *A business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or*
- *Any other person, business or organization with whom the employee or any member of employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.*

In addition, any persons acting as members of an evaluation committee for any procurement shall, for the purposes of the procurement, be bound by conditions of this Section. Throughout the bid/proposal evaluation process and subsequent contract negotiations, offerors shall not discuss or seek specific information about this procurement, including but not limited to, the contents of submissions, the evaluation process or the contract negotiations, with members of any evaluation committee, the BHRC EXECUTIVE COMMITTEE, or other BHRC employees other than the designated procurement officer.

2.6. Organizational Conflicts of Interest

The procurement officer and technical personnel are encouraged to work closely with Theisen & Brock Lpa to review all situations that appear to have the potential for an organizational conflict of interest.

Organizational conflicts of interest may result in bias and potentially provide an unfair competitive advantage to a potential offeror. An organizational conflict of interest occurs due to the type of work to be performed under a third-party contract, or because of other activities or relationships such as:

- A contractor is unable, or potentially unable, to render impartial assistance or advice to the Council of Government;
- A contractor's objectivity in performing contract work is or might otherwise be impaired; or
- A contractor has an unfair competitive advantage.

Bias arises when a contractor is placed in a situation where there may be an incentive to distort advice or decisions. Whenever a contract is awarded that involves the rendering of advice, the question must always be asked as to whether the potential for a conflict of interest exists for the contractor rendering the advice. BHRC will utilize a "Conflict of Interest Disclosure Statement," in its solicitation when contracting for services of this nature.

3. BHRC RESPONSIBILITIES UNDER FEDERAL LAW

3.1. Third Party Contracting Capacity

BHRC must maintain adequate technical capacity to carry out its FTA assisted projects and comply with Federal rules. BHRC third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, state, and local requirements.

3.2. Contract Administration System

BHRC must maintain a contract administration system to ensure that it and its third-party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, state, and local requirements.

3.2.1. Written Procurement Procedures

BHRC must maintain and follow written procurement procedures that address:

- (a) Solicitations – Requirements for BHRC solicitations are addressed in Section 5.
- (b) Necessity – Requirements related to BHRC’s need for products or services are addressed in Section 3.2.2.
- (c) Lease Versus Purchase – Requirements related to the use of lease or purchase alternatives to achieve an economical and practical procurement are addressed in Section 3.2.2
- (d) Metric Usage – Requirements related to the acceptance of products and services dimensioned in the metric system of measurement are addressed in Section 3.5.2.
- (e) Environmental and Energy Efficiency Preferences – Requirements related to preference for products and services that conserve natural resources, protect the environment, and are energy efficient are addressed in Sections 3.4.3 and 3.4.4.
- (f) Procurement Methods – Descriptions of the procurement methods that BHRC may use are included in Section 5.
- (g) Legal Restrictions – Descriptions of Federal and state restrictions on BHRC’s acquisitions are included in Section 5.
- (h) Third Party Contract Provisions – Specific third party contract provisions required for each third party contract and flow down requirements to subcontracts are included in Section 3.1 through 3.7.
 - (1) Sources – Descriptions of the availability and use of various sources of products and services are addressed in Section 4.

- (2) Resolution of Third Party Contracting Issues – Procedures related to the resolution of third party contracting issues are included in Section 6.8.

3.2.2. Adequate Third Party Contract Provisions

BHRC must include provisions in all of its third-party contracts that are adequate to form a sound and complete agreement.

3.2.3. Industry Contracts

BHRC shall not use an industry developed contract or a contract that is provided by a bidder or offeror unless it has first evaluated the benefits of the contract. BHRC shall ensure that such contracts include all required Federal provisions but do not include terms and conditions that may be unfavorable to BHRC.

3.2.4. Revenue Contracts

BHRC may enter into a revenue contract with a third party to generate revenues in connection with a transit related activity, or to create business opportunities utilizing an FTA funded asset. Any such said contract opportunity will follow a competitive selection procedures and principles outlined herein.

3.2.5. Record Keeping

BHRC must prepare and maintain adequate and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project implementation. BHRC must maintain these records for five (5) years after BHRC and its subrecipients, if any, have made final payment and all other pending matters are closed. Specific record keeping requirements include:

- (a) Written Record of Procurement History – BHRC must maintain and make available to ODOT and FTA written records detailing the history of each procurement. For all procurements above the micro-purchase level BHRC must maintain records relating to:
- (1) Procurement Method – BHRC must provide its rationale for the method of procurement it used for each contract, including a sole source justification for any acquisition that does not qualify as competitive;
 - (2) Contract Type – BHRC must state the reasons for selecting the contract type it used;
 - (3) Contractor Selection – BHRC must state its reasons for contractor selection or rejection;
 - (4) Contractor Responsibility – BHRC must provide a written determination of responsibility for the successful contractor;
 - (5) Cost or Price – BHRC must evaluate and state its justification for the contract cost or price; and
 - (6) Reasonable Documentation – BHRC must retain documentation commensurate with the size and complexity of the procurement.

- (7) Vendor Verification – BHRC must include verification of acceptance with a selected vendor/supplier/manufacturer through the Federal System of Award Management (SAM) for each project and associated project file.
- (b) Access to Records – BHRC must provide FTA and ODOT officials, the Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance.
- (c) Use of Technology/Electronic Commerce – BHRC may use an electronic commerce system to conduct third party procurements. If BHRC uses an electronic commerce system, then the following requirements apply:
 - (1) Sufficient System Capacity – BHRC’s system must have sufficient system capacity necessary to accommodate all Federal requirements for full and open competition.
 - (2) Written Procedures – Before any solicitation takes place, BHRC must establish adequate written procedures to ensure that all information FTA/ODOT requires for project administration is entered into the system and can be made readily available to ODOT as needed.

3.3. Determination of Needs

BHRC must maintain and follow adequate procedures for determining the types and amounts of products and services it needs to acquire. BHRC shall comply with the following requirements when determining the types and amounts of products and services it needs to acquire.

3.4. Eligibility

All products and services to be acquired with FTA funds must be eligible under the Federal law authorizing the FTA assistance award and any regulations thereunder. All products and services to be acquired with FTA funds must also be eligible for support within the scope of the underlying grant or cooperative agreement from which the FTA assistance to be used is derived.

3.5. Necessity

BHRC shall adhere to the following standards for avoiding the purchase of duplicative and/or unnecessary products and services it does not need.

3.5.1. Unnecessary Reserves

BHRC shall limit the acquisition of Federally-assisted property and services to the amount it needs to support its operations.

3.5.2. Acquisition for Assignment Purposes

BHRC shall contract only for its current and reasonably expected public transportation needs and shall not add quantities or options to third party contracts solely to permit assignment to another party at a later date. These limits on assignments, however, do not preclude joint procurements that are entered into simultaneously by two or more parties to obtain advantages unavailable for smaller procurements.

- (a) General Prohibition – BHRC may contract only for its current and reasonably expected public transportation needs and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date.
- (b) Changes in the Recipient’s Needs – ODOT and FTA recognize that the quantity of property or services a recipient reasonably believes it may need at the time of contract award may change. BHRC later needs might decrease due to changed circumstances or honest mistakes. In those situations, BHRC may assign its unneeded contract authority to another entity that would like to acquire the property or services.
- (c) Exceptions – These limits on assignments, however, do not preclude:
 - (1) Joint Procurements – BHRC and one or more other FTA recipients may enter into a single procurement at the same time to obtain advantages unavailable for smaller procurements.
 - (2) Participation in ODOT Sponsored Vehicle Procurements – BHRC may enter into contracts developed by the State of Ohio to acquire vehicles.
- (d) Procurement Size – For every procurement, BHRC shall consider whether to consolidate or break out the procurement to obtain the most economical purchase. Absent efforts to foster greater opportunities for Disadvantaged Business Enterprises (DBEs), small and minority firms and women’s business enterprises, BHRC shall not split a larger procurement merely to gain the advantage of micro-purchase or small purchase procedures.
- (e) Options – BHRC shall justify, as needed, all option quantities included in every solicitation and contract. An option is a unilateral right in a contract by which, for a specified time, BHRC may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract.
- (f) Lease Versus Purchase – BHRC shall review lease versus purchase alternatives for acquiring property and shall prepare or obtain an analysis to determine the most economical alternative. If BHRC chooses to lease an asset, then it must prepare a written comparison of the cost of leasing the asset compared with the cost of purchasing or constructing the asset.

- (g) Specifications –BHRC’s procurement specifications shall clearly describe the products or services to be procured and shall state how the proposals will be evaluated. BHRC’s procurement specifications shall not be exclusionary, discriminatory, unreasonably restrictive or otherwise in violation of Federal or Ohio laws or regulations.

3.6. Contractor Responsibilities

BHRC, in awarding contracts, financed in whole or in part, with FTA financial assistance, shall follow guidance in this section to evaluate contractor capabilities to perform the contract.

In addition to the Federal rules (2 CFR § 200.318(h)) that require contract awards be made only to responsible contractors, Federal transit law at 49 U.S.C. § 5325(j) limits third party contractor awards to those contractors capable of successfully performing under the terms and conditions of the proposed contract. Before selecting a contractor for award, BHRC must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

3.6.1. Debarment and Suspension

Debarment and suspension regulations and guidance include the following provisions.

3.6.1.1. DOT Debarment and Suspension Regulations

U.S. Department of Transportation (DOT) regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Part 1200 apply to each third party contract at any tier of \$25,000 or more, to each third party contract at any tier for a federally required audit (irrespective of the contract amount), and to each third party contract at any tier that must be approved by an FTA official irrespective of the contract amount (2 CFR § 1200). BHRC shall apply DOT’s debarment and suspension requirements to itself and each third party contractor at every tier to the extent required by DOT’s regulations that incorporate the requirements of Office of Management and Budget (OMB), “Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)” (2 CFR § 180).

3.6.1.2. System for Award Management

The System for Award Management (SAM) combines Federal procurement systems and the Catalog of Federal Domestic Assistance into one new system. SAM includes the functionality from the following systems:

- Central Contractor Registry (CCR)
- Federal Agency Registration (Fedreg)
- Online Representations and Certifications Application
- Excluded Parties List System (EPLS)

At its discretion, BHRC may collect a debarment and suspension certification from the prospective third party contractor or include a clause in the third party contract requiring disclosure. Additionally, it shall be the policy of BHRC to verify that the prospective third party vendor is not listed as a debarred contractor on SAM.

3.6.2. Lobbying Certification and Disclosure

If a third-party contract will exceed \$100,000, before awarding the contract, BHRC will obtain a lobbying certification, and if applicable, a lobbying disclosure from a prospective third party contractor (see DOT regulations, “New Restrictions on Lobbying,” 49 CFR Part 20, modified as necessary by 31 U.S.C. Section 1352).

3.6.3. Additional Requirements

In addition to the requirements outlined above, there are various requirements that may apply to BHRC’s third-party contracts, depending upon the type of procurement and the anticipated dollar value of said contract. It is the responsibility of BHRC to assess each procurement and determine the applicable FTA third party terms and conditions that should be included in the solicitation and contract documents. FTA Circular 4220.1F, Appendix D, has a matrix stipulating these conditions. These conditions may include:

- Federal Civil Rights Laws and Regulations
 - Federal Equal Employment Opportunity (EEO) Requirements
 - Nondiscrimination on the Basis of Sex
 - Nondiscrimination on the Basis of Age
 - Nondiscrimination in Federal Public Transportation Programs
 - Title VI of the Civil Rights Act
 - Environmental Justice
 - Limited English Proficiency (LEP)
 - Nondiscrimination on the Basis of Disability
- Socio-Economic Development Regulations
 - Disadvantaged Business Enterprises (DBE)
 - Small and Minority Firms and Women’s Business Enterprises
 - Sensitive Security Information
 - Seat Belt Use
- Socio-Economic Requirements for the Acquisition of Property and Services
 - Labor Regulations
 - Wage and Hour Requirements
 - Fair Labor Standards
- Environmental Protections
 - Environmental Mitigation
 - National Environmental Policy Act (NEPA)
 - Protections for Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites
 - Clean Air
 - Clean Water
 - Recycled Products

- Other Federal Environmental Protection Requirements
- Energy Conservation
- Preference for U.S. Property--Buy America
- Shipments of Property--U.S. Flag Requirements
 - Shipments by Ocean Vessel
 - Shipments by Air Carrier
 - Project Travel--Use of U.S. Flag Air Carriers
- Technical Restrictions on the Acquisition of Property and Services
 - Intelligent Transportation Systems (ITS)
 - Metric Measurements
 - Use of \$1 Coins
- Rolling Stock--Special Requirements
 - Accessibility
 - Transit Vehicle Manufacturer Compliance with DBE Requirements
 - Minimum Service Life
 - Spare Ratios
 - Air Pollution and Fuel Economy
 - Pre-award and Post Delivery Review
 - Bus Testing
 - In-State Dealers
 - Basis for Contract Award
 - Five-Year Limitation
- Public Transportation Services—Special Requirements
 - Protections for Public Transportation Employees
 - Drug and Alcohol Testing
 - Accessibility
 - Charter Service Restrictions
 - School Bus Restrictions
- Construction – Special Requirements
 - Bonding
 - Bid Guarantee
 - Performance Bond
 - Payment Bond
 - Anti-Kickback
 - Construction Safety
 - Labor Neutrality
 - Prevailing Wages

3.7. Bonding

Some procurements may require BHRC to require the vendor to submit a bid bond, performance bond, or payment bond (typically construction projects). When bonding is required, the following conditions will apply.

3.7.1. Thresholds

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, ODOT may accept the bonding policy and requirements of the Council of Government provided that ODOT has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

3.7.1.1. Bid Guarantee

A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

3.7.1.2. Performance Bond

A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

3.7.1.3. Payment Bond

A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

3.7.2. Acceptable Sureties

Federal rules for non-governmental recipients requires the non-governmental recipient to obtain construction bonds from companies holding certificates of authority as acceptable sureties under Department of the Treasury regulations, “Surety Companies Doing Business with the United States,” (31 CFR Part 223). For a current list of approved sureties, see Department of the Treasury’s Listing of Approved Sureties (Department Circular 570). As FTA encourages governmental recipient to require similarly acceptable sureties, it shall be the policy of BHRC to such accept sureties.

3.7.3. Reduced Bonding

BHRC recognizes that bonding costs can be expensive. BHRC will accept a local bonding policy that conforms to the minimums described in Section 3.7.1. If bonding levels are sought at levels less than these amounts, BHRC must obtain the prior approval of ODOT/FTA. ODOT/FTA shall approve such requests only if it determines that BHRC’s bonding policy adequately protects the Federal interest in the project.

3.7.4. Excessive Bonding

BHRC will adhere to FTA’s rules on excessive bonding requirements (FTA Circular 4220.1F, Chapter IV, § 2h(1)(f)). However, if BHRC determines it has a material risk of loss because

of a failure of the prospective contractor, bonding requirements may exceed those outlined in Section 3.7.1 only with the prior approval of ODOT/FTA.

3.8. Preference for U.S. Property—Buy America

Any construction contract exceeding \$150,000 entered into by BHRC with FTA assistance shall include provisions that require the third party contractor to provide property produced or manufactured in the United States for use in the construction project that the recipient acquires, unless FTA has granted a waiver authorized by those regulations. FTA cautions that its Buy America regulations are complex and different from the Federal “Buy American Act” regulations in FAR Subparts 25.1 and 25.2.

Property that the contractor acquires to perform its construction activities for the recipient, such as tools, machinery, and other equipment or facilities, is not covered by FTA’s Buy America requirements unless the recipient intends to take possession of that property upon completion of the project. Thus, if a third party contractor is acquiring property for its general inventory of equipment or facilities to conduct its overall business affairs, BHRC may enter the cost of that acquisition into its calculations of overhead amounts applicable to the FTA assisted project irrespective of whether that property would comply with FTA’s Buy America regulations.

3.9. Accessibility

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

4. SOURCES OF ACQUISITIONS

4.1. Force Account

Force account means use of BHRC's own labor forces and equipment to undertake a project (typically construction, renovation, or repair). The use of force account labor is a project management function, rather than a procurement and contract administration function, except in the general sense of the Council of Government's ability to perform work with its own forces rather than contracting with another entity to acquire the property or services it needs, and the cost implications of the recipient's decision. BHRC does not charge force account labor to its FTA grants.

4.2. Joint Procurements

BHRC may participate in joint procurements whereby BHRC and one or more other entities agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of products or services. The following requirements apply to BHRC's participation in joint procurements:

- Solicitation documents may not be drafted for the purpose of accommodating the needs of other parties that may later want to participate in the benefits of the contract.
- BHRC is responsible for ensuring that the joint procurement solicitation and contract complies with all Federal requirements and that the solicitation document and contract includes all required clauses and certifications.

4.3. State or Local Government Purchasing Schedules or Purchasing Contracts

4.3.1. Definition

FTA uses the term "state or local government purchasing schedule" to mean an arrangement that a State or local government has established with several or many vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the General Services Administration's (GSA) Cooperative Purchasing Program available for Federal Government use.

4.3.2. Applicability of Federal Provisions

When obtaining property or services in this manner, BHRC must ensure all Federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the recipient's purchase document. While ODOT will take all precautions to ensure that such provision are in the original solicitation and contract documents, it is ultimately BHRC's responsibility to ensure such documents and certifications are obtained.

If such requirements, clauses, and certifications were not included in the original purchase solicitation and contracts, BHRC may request the vendor to append the required Federal clauses in the purchase order or other document that effects the BHRC's procurement. When this method is used, BHRC shall obtain Buy America certification before entering into the purchase order. This method cannot be used to circumvent FTA's Buy America requirements.

4.3.3. Federal Supply Schedules

Purchases by BHRC from Federal Supply Schedules established by the U.S. General Services Administration (GSA) are limited to the purchase of information technology (IT) products and to products and services to facilitate recovery from a major disaster. The following requirements apply to BHRC purchases from GSA schedules:

- BHRC is authorized to use GSA schedules for purchases of products and services to facilitate recovery from a major disaster that is declared by the President of the United States. Upon declaration of a major disaster by the President, BHRC may purchase products and services from GSA schedules both in advance and in the aftermath of the emergency event. BHRC shall be responsible for ensuring that the products and services acquired will only be used for recovery.
- BHRC must ensure that all Federal requirements, required clauses and certifications are properly followed and included, whether in the master intergovernmental contract or BHRC's purchase document.
- BHRC is required to evaluate the reasonableness of prices obtained from GSA schedules. GSA schedule pricing may not be used as a sole or single source for procurement. BHRC may only use GSA schedule pricing as one of multiple pricing sources solicited in accordance with its requirements for small purchases described in Section 5.

4.3.4. Existing Contracts

BHRC may use existing contract rights as an acquisition source. An "existing contract" means a contract that, when formed, was intended to be limited to the original parties thereto.

4.3.4.1. Permissible Actions

Within the conditions set forth below, BHRC may use existing contract rights held by another recipient of FTA assistance:

- (a) Exercise of Options – BHRC may use contract options held by another recipient of FTA assistance with the following limitations:
 - (1) Consistency with the Underlying Contract – BHRC must ensure that the terms and conditions of the option it 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.

- (2) Price – BHRC may not exercise an option unless it has determined that the option price is better than prices available in the open market, or that when it intends to exercise the option, the option is more advantageous.
 - (3) 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 BHRC 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.
- (b) Assignment of Contract Rights (“Piggybacking”) – If BHRC finds that it has inadvertently acquired contract rights in excess of its needs, it may assign those contract rights to another ODOT subrecipient if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. BHRC may use contractual rights through assignment from another recipient of FTA assistance after first determining the contract price remains fair and reasonable, and the contract provisions are adequate for compliance with all Federal requirements. BHRC need not perform a second price analysis if a price analysis was performed for the original contract; however, BHRC must determine whether the contract price or prices originally established are still fair and reasonable before using those rights. BHRC shall be responsible for ensuring the contractor’s compliance with FTA’s Buy America requirements and execution of all the required pre-award and post-delivery Buy America review certifications. Before proceeding with the assignment, however, BHRC shall review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities that BHRC seeks, do not exceed the amounts available under the assigning recipient’s contract.

4.3.4.2. Impermissible Actions

BHRC may not use Federal assistance to finance:

- (a) Improper Contract Expansion – A contract has been improperly expanded when it includes a larger scope, greater quantities, or options beyond the recipient’s reasonably anticipated needs. A contract has also been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity.

- (b) Cardinal Changes – A significant change in contract work 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, is a cardinal change or “tag-on”. A change within the scope of the contract is not a cardinal change or “tag-on”.

4.4. The Open Market

BHRC will acquire most of the property and services it needs through procurements in the open market using procedures described in Section 5 of this Manual.

5. PROCEDURES FOR OPEN MARKET PROCUREMENTS

5.1. Solicitation of Competitive Price Quotes, Bids or Proposals

Compliance with the solicitation procedures described in Section 5.4 below will fulfill FTA requirements for “full and open competition.”

5.2. Receipt and Evaluation of Unsolicited Proposals

BHRC may enter into contracts based on an unsolicited proposal when authorized by applicable State law or regulation. Receipt of an unsolicited proposal does not, by itself, justify contract award without providing for full and open competition. Unless the unsolicited proposal offers a proprietary concept that is essential to contract performance, BHRC must seek competition. To satisfy the requirement for full and open competition, BHRC must take the following actions before entering into a contract resulting from an unsolicited proposal:

- Publicize its receipt of the unsolicited proposal;
- Publicize an adequate description of the products or services offered without improperly disclosing proprietary information or disclosing the originality of thought or innovativeness of the products or services sought;
- Publicize its interest in acquiring the products or services described in the proposal;
- Provide an adequate opportunity for interested parties to comment or submit competing proposals; and
- Publicize its intention to award a contract based on the unsolicited proposal or another proposal submitted in response to the publication.

If it is impossible to describe the products or services offered without revealing proprietary information or disclosing the originality of thought or innovativeness of the products or services sought, BHRC may make a sole source award to the offeror. A sole source award may not be based solely on the unique capability of the offeror to provide the specific products or services proposed.

5.3. Prequalification

BHRC may prequalify bidders, offerors, and products for procurement purposes; however, BHRC is not required to do so. The decision of whether to require prequalification for eligibility to participate in procurement shall be made separately for every procurement and shall be approved by the Fiscal Administrator.

If BHRC opts to prequalify bidders, offerors, and products for procurement purposes, the following conditions apply:

- BHRC must ensure that all prequalification lists it uses are current;
- BHRC must ensure that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition; and

- BHRC must permit potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). BHRC is not required to hold a particular solicitation open to accommodate a potential supplier that submits products for approval before or during that solicitation nor must BHRC expedite or shorten prequalification evaluations of bidders, offerors, or products presented for review during the solicitation period.

5.4. Solicitation Requirements and Restrictions

Every procurement solicitation that BHRC issues above the micro-purchase level (currently established in Federal guidance at \$10,000), must include the following information and be advertised in a manner that ensures adequate and open competition.

5.4.1. Description of the Property or Services

The solicitation and the contract awarded thereunder must include a clear and accurate description of BHRC's technical requirements for the products or services to be acquired in a manner that provides for full and open competition.

5.4.1.1. Descriptive Elements

BHRC will prepare descriptions of property, goods, or service in terms of functions to be performed or level of performance required, including the range of acceptable characteristics or minimum acceptable standards. Detailed product specifications should be avoided if at all possible; however, there is no prohibition against their use when appropriate.

5.4.1.2. Quantities

Additional quantities or options above BHRC's needs at the time of acquisition may not be added to contracts solely to allow assignment of those quantities or options at a later date.

5.4.1.3. Brand Name or Equal

When it is impractical or uneconomical to provide a clear and accurate description of the technical requirements of the property to be acquired, a "brand name or equal" description may be used to define the performance or other salient characteristics of a specific type of property. The salient characteristics of the named brand that bidders or offerors must provide must be identified.

5.4.1.4. Prohibited Practices

Solicitations with requirements that contain features that unduly restrict competition may not be used. BHRC shall not:

- Impose unreasonable business requirements for bidders or offerors.
- Impose unnecessary experience requirements for bidders and offerors.
- Use prequalification procedures that conflict with the prequalification standards described in Section 5.3.
- Make a noncompetitive award to any person or firm on a retainer contract with BHRC if that award is not for the property or services specified for delivery under the retainer contract.
- Impose unreasonable restrictive bonding requirements on bidders and offerors in excess of FTA and state requirements.
- Specify only a “brand name” product without allowing offers of an “equal” product, or allowing an “equal” product without listing the salient characteristics that the “equal” product must meet to be acceptable for award.
- Specify in-state or local geographical preferences, or evaluating bids or proposals in light of in-state or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. The only exception expressly mandated or encouraged by Federal law that may be applicable to BHRC is the procurement of Architectural and Engineering (A&E) Services. Geographic location may be a selection criterion in the procurement of A&E services if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.
- Engage in practices that result in organizational conflicts of interest. An organizational conflict of interest occurs when any of the following circumstances arise:
 - Lack of Impartiality or Impaired Objectivity – When the bidder or offeror is unable, or potentially unable, to provide impartial and objective assistance or advice to BHRC due to other activities, relationships, contracts, or circumstances.
 - Unequal Access to Information – When the bidder or offeror has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
 - Biased Ground Rules – When during the conduct of an earlier procurement, the bidder or offeror has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.
- Support or acquiesce in noncompetitive pricing practices between firms or between affiliated companies.
- Take any arbitrary action in the procurement process.

5.4.2. Evaluation Factors.

All solicitations issued by shall identify all factors to be used in evaluating bids or proposals. At the discretion of Fiscal Administrator, the relative order of importance and/or weights may be communicated to prospective offerors.

5.4.3. Permissible Contract Types

BHRC shall state the type of contract that will be awarded in all solicitation documents. The following types of contracts will typically be executed with the successful vendor:

5.4.3.1. Firm Fixed Price

A firm fixed price contract includes a price that remains fixed irrespective of the contractor's cost experience in performing the contract. A firm fixed price contract may include an economic price adjustment provision, incentives, or both.

5.4.3.2. Cost Reimbursement

A cost-reimbursement contract provides for payment of the contractor's allowable incurred costs, to the extent prescribed in the contract. Allowable costs may include incentives if the recipient believes they can prove helpful. Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed price contract.

5.4.4. Prohibitive or Restricted Contract Types

The following contract types are prohibited or restricted:

5.4.4.1. Cost Plus Percentage of Cost

Cost plus Percentage of Cost type contracts are prohibited.

5.4.4.2. Time and Materials

Time and Materials type contracts may be used only after a written determination is made that no other contract type is suitable. In addition, the contract between BHRC and the Contractor must specify a ceiling price that the Contractor may not exceed except at its own risk.

5.4.5. Other Federal Requirements Affecting the Property or Services to be Acquired

The solicitation and resulting contract must identify those Federal requirements that will affect contract scope and performance.

5.4.6. Other Federal Requirements Affecting the Bidder or Offeror and the Contractor

The solicitation and resulting contract must identify all Federal requirements that a bidder or offeror must fulfill before and during contract performance.

5.4.7. Reservation of Right to Award to Other Than the Low Bidder or Offeror

The solicitation must specifically reserve BHRC right to award a contract to other than the low bidder or offeror. If the solicitation documents do not specify this right, BHRC will be obligated to award the contract to the low bidder.

5.4.8. Reservation of Right to Reject All Bids or Offers

The solicitation must specifically reserve BHRC right to reject all bids or offers.

5.5. Methods of Procurement

BHRC shall use competitive procedure(s) appropriate for the acquisition undertaken. The procedures used must comply with Ohio and local law as well as with Federal requirements. Federal restrictions vary with the type of procurement method used. The following guidance is based on the requirements of 2 CFR § 200.318 – 200.326, supplemented by FTA policies that address the needs of FTA recipients.

5.5.1. Micro-Purchases

5.5.1.1. Definition

Micro-purchases are those purchases of products and services that cost \$5,000 or less, as defined by 2 CFR §200.67 (or current threshold established by Federal Acquisition Regulations (FAR)); for purposes of this policy, BHRC will use \$5,000 as the threshold for relatively simple purchases as a means to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burden and cost.

5.5.1.2. Approval Authority

Micro-purchases must be approved in writing by the following BHRC employees:

- Planning Director
- Fiscal Director
- Executive Director

5.5.1.3. Competition

BHRC may acquire products and services valued at less than \$5,000 without obtaining competitive quotations. Micro-purchases should be distributed equitably among qualified suppliers.

Micro purchases are exempt from FTA's Buy America requirements. Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding \$2,000, even though the recipient uses micro-purchase procurement procedures.

5.5.1.4. Prohibited Divisions

The size or dollar value of procurements may not be divided or reduced merely to come within the micro purchase limit. The only allowable exception to this restriction is for the express purpose of fostering greater participation of DBEs, small and minority firms and women's business enterprises in BHRC's Federally-assisted procurements.

5.5.1.5. Documentation

Every micro-purchase must be accompanied by a written determination that the price is fair and reasonable and a description of how that determination was made.

5.5.2. Small Purchases

5.5.2.1. Definition

FTA defines small purchases as those purchases of products and services, including construction services, that cost greater than \$5,000 but not more than \$10,000. However, Ohio Revised Code states costs must be less than \$50,000. For purposes of this policy, BHRC will consider a small purchase as those that cost greater than \$5,000 but less than \$10,000.

5.5.2.2. Approval Authority

Small purchases must be approved in writing by the following BHRC employees:

- Planning Director
- Fiscal Director
- Executive Director

5.5.2.3. Required Competition

Price or rate quotations must be obtained from an adequate number of qualified sources. It is the responsibility of BHRC to ensure that an adequate number of quotations, bids, or proposals are received

5.5.2.4. Prohibited Divisions

The size or dollar value of procurements may not be divided or reduced merely to come within the small purchase limit. The only allowable exception to this restriction is for the express purpose of fostering greater participation of DBEs, small and minority firms and women's business enterprises in BHRC Federally assisted procurements

5.5.2.5. Documentation

Every small purchase must be documented in the grantee's written procurement history file. The level of documentation is stipulated in Section 6.6.1.

For small purchases, price quotations may be oral or written.

5.5.2.6. Special Considerations

BHRC may acquire products and services directly from State contract vendors in lieu of competitively procuring such products and services itself through the small purchase method of procurement.

Small purchases are exempt from FTA's Buy America requirements.

BHRC reserves the right to use formal purchase methods, even if small purchase thresholds are met, if the Fiscal Administrator believes it is in the best interests of the BHRC to do so.

5.5.3. Formal Purchases

5.5.3.1. Definition

Formal purchases are those purchases of products and services that cost greater than the current Federal threshold of \$250,000, as defined in 2 CFR § 200.88. Ohio Revised Code requires formal purchases for anything greater than or equal to \$50,000. For purposes of this policy, BHRC will use formal procedures for all purchases greater than or equal to \$10,000.

5.5.3.2. Approval Authority

Large purchases must be approved in writing by the following BHRC employees or officials:

- Planning Director
- Fiscal Director
- Executive Director
- BHRC Executive Committee

No further delegation of approval authority for large purchases may be made.

5.5.3.3. Procurement Methods

There are two primary methods of procurement for large purchases of products and services:

- Sealed Bid method; and
- Competitive Proposal method.

5.5.3.4. Required Competition

Formal bids and competitive proposals must be publicly advertised.

For formal purchases by the sealed bid method of procurement, two or more responsible bidders must be willing and able to compete effectively for the business.

For formal purchases by the competitive proposal method of procurement, two or more offerors must be willing and able to submit an offer or proposal.

5.5.3.5. Required Documentation

Every formal purchase must, at a minimum, be supported by a written independent cost estimate, formal bids or proposals, a written cost or price analysis as appropriate, a written justification and detailed rationale for contractor selection (including application of evaluation criteria) and a written determination of the responsibility of the contractor. Additional documentation requirements are dependent upon the formal procurement method that is utilized to make the purchase.

5.5.3.6. Special Considerations

BHRC may acquire products and services via state contract in lieu of competitively procuring such products and services itself through the sealed bid and competitive proposal methods of procurement.

5.5.3.7. Procedural Methods for Sealed Bids

The sealed bid method of procurement is a formal method in which bids are publicly solicited and a firm fixed price contract is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the Invitation for Bids, is lowest in price. The vehicle through which bids are solicited is an Invitation for Bids (IFB). The IFB document contains technical specifications for the product or service to be purchased, a description of the procedures for submitting a bid, and the forms on which bids must be submitted.

- (a) When Appropriate – The sealed bid method of procurement is the preferred method for acquiring products and services that, including construction services, cost greater than \$50,000. The sealed bid method of procurement may also be used for small purchases if it is determined to be appropriate. The sealed bid method of procurement is appropriate if the following conditions apply:
- (1) Precise Specifications – A complete, adequate, precise, and realistic specification or purchase description is available.
 - (2) Adequate Sources – Two or more responsible bidders are willing and able to compete effectively for the business.
 - (3) Fixed Price Contract – The procurement generally lends itself to a firm fixed price contract.
 - (4) Price Determinative – The successful bidder can be selected on the basis of price and those price-related factors listed in the solicitation including, but not limited to, transportation costs, life cycle costs, and discounts expected to be taken. Apart from responsibility determinations, contractor selection may not be determined on the basis of other factors whose costs cannot be measured at the time of award.
 - (5) Discussions Unnecessary – Discussions with one or more bidders after bids have been submitted are expected to be unnecessary as award of the contract will be made based on price and price-related factors alone.

- (b) Requirements for Sealed Bids – The following requirements apply to the sealed bid method of procurement:
- (1) Publicity – The Invitation for Bids must be publicly advertised.
 - i. The Fiscal Administrator shall ensure that sufficient time is allowed to prepare bids before the date of bid opening.
 - ii. Notice of bidding opportunities may be provided in other ways in addition, but not as a substitute, to a published notice. The methods may include, but not necessarily be limited to:
 - a. Direct notice, based on compiled vendor lists or from pre-qualification list, sent to prospective offerors; or
 - b. Use of advertisement by electronic means.
 - (2) Adequate Sources – Bids must be solicited from an adequate number of known suppliers.
 - (3) Adequate Specifications – The Invitation for Bids, including any specifications and pertinent attachments, must describe the property or services sought in sufficient detail that a prospective bidder will be able to submit a proper bid.
 - (4) Sufficient Time – Bidders must be allowed sufficient time to prepare bids before the date of bid opening.
 - (5) Public Opening – All bids must be publicly opened at the time and place prescribed in the Invitation for Bids.
 - (6) Fixed Price Contract – A firm fixed price contract must be awarded in writing to the lowest responsive and responsible bidder unless the Invitation for Bids specifically allowed for award of a fixed price incentive contract or the inclusion of an economic price adjustment provision.
 - (7) Rejection of Bids – Any or all bids may be rejected if there is a sound, documented business reason.

5.5.3.8. Competitive Proposals

The competitive proposal method of procurement is a formal method in which written proposals are publicly solicited and a contract is awarded to the responsible offeror whose proposal, taking into consideration price and other factors, is considered to be the most advantageous to BHRC or that is considered to be the “best value” to BHRC. The vehicle through which proposals are solicited is Request for Proposals (RFP). The RFP document contains technical specifications for the product or service to be purchased, a description of the procedures for submitting a proposal and the forms on which proposals must be submitted, if applicable.

- (a) When Appropriate – The competitive proposal method of procurement is appropriate for the acquisition of products and services that cost greater than \$50,000 when the nature of the procurement does not lend itself to sealed bidding and BHRC expects that more than one source will be willing and able to submit a proposal. The competitive proposal method of procurement may also be used for small purchases if it is determined to be appropriate. The competitive proposal method of procurement may not be used for the procurement of construction services. The

competitive proposal method of procurement is appropriate when any of the following circumstances are present:

- (1) Type of Specifications – The products or services to be acquired are described in a performance or functional specification, or if described in detailed technical specifications, other circumstances such as the need for discussions or the importance of basing contract award on factors other than price alone are present.
- (2) Uncertain Number of Sources – Uncertainty about whether more than one bid will be submitted in response to an Invitation for Bids.
- (3) Price Alone Not Determinative – Due to the nature of the procurement, contract award need not be based exclusively on price or price-related factors.
- (4) Discussions Expected – Separate discussions with individual offerors are expected to be necessary after they have submitted their proposals.

(b) Requirements for Competitive Proposals – The following requirements apply to the competitive proposal method of procurement:

- (1) Publicity – The Request for Proposals must be publicly advertised.
- (2) Evaluation Factors – All evaluation factors and their relative importance must be specified in the solicitation, but numerical or percentage ratings or weights need not be disclosed.
- (3) Adequate Sources – Proposals must be solicited from an adequate number of qualified sources.
- (4) Evaluation Method – A specific method must be established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.
- (5) Price and Other Factors – An award must be made to the responsible offeror whose proposal is most advantageous to BHRC or that represents the “best value” to BHRC with price and other factors considered.
- (6) Best Value – BHRC may award a contract to the offeror whose proposal provides the greatest value to BHRC. To do so, the solicitation must inform potential offerors that the award will be made on a “best value” basis and identify what factors will form the basis for award. BHRC must base its determination of which proposal represents the “best value” on an analysis of the tradeoff of qualitative technical factors and price or cost factors.

5.5.3.9. Two-Step Procurements

BHRC may use two-step procurement procedures in both sealed bid and competitive proposal procurements, provided the opportunity for full and open competition is retained.

- (a) Review of Technical Qualifications and Approach – The first step is a review of the prospective contractors’ technical approach to BHRC’s request and their technical qualifications to carry out that approach followed by the establishment of a competitive range consisting of prospective contractors that demonstrate a technically satisfactory approach and have satisfactory qualifications.
- (b) Review of Bids and Proposals Submitted by Qualified Prospective Contractors – The second step consists of soliciting and reviewing complete bids or proposals, including price, submitted by each prospective contractor determined to be qualified. Absent exceptional circumstances, bids or proposals must be solicited from at least three qualified prospective contractors.

5.5.3.10. Architectural and Engineering (A&E) Services and Other Services

FTA’s enabling legislation at 49 U.S.C. § 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the “Brooks Act,” 40 U.S.C. § 1101 through 1104, to acquire A&E services.

- (a) Qualifications-Based Procurement Procedures Required – BHRC must use qualifications-based procurement procedures to acquire architectural and engineering (A&E) services as well as certain other services that are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property. In addition to A&E services, other services that must be procured by qualifications-based procurement procedures include:
- Program management;
 - Construction management;
 - Feasibility studies;
 - Preliminary engineering;
 - Design, architectural, engineering;
 - Surveying, mapping; and
 - Other related services.

The nature of the work to be performed and its relationship to construction, not the nature of the prospective contractor, determine whether qualifications-based procurement procedures may be used.

- (b) Qualifications-Based Procurement Procedures Prohibited – Unless FTA determines otherwise in writing, qualifications-based procurement procedures may not be used to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. Qualifications-based procurement procedures may not be used for actual construction, alteration or repair to real property.
- (c) Qualifications-Based Procurement Procedures – The following procedures apply to qualifications-based procurements:

- (1) Qualifications – Unlike other two-step procurement procedures in which price is an evaluation factor, an offeror’s qualifications are evaluated to determine contract award.
- (2) Price – Price is excluded as an evaluation factor.
- (3) Most Qualified – Price negotiations are first conducted with only the most qualified offeror.
- (4) Next Most Qualified - Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.

5.6. Procurement by Other Than Full and Open Competition

Normally, BHRC must provide for full and open competition when soliciting bids or proposals. Federal regulations at 2 CFR § 200.320(f)(1) – (4), however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.

5.6.1. When Appropriate

Noncompetitive procurement procedures may only be used when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals, and at least one of the following circumstances are present:

5.6.1.1. Competition Adequacy

After soliciting several sources and receiving an inadequate response, BHRC shall review its specifications to determine if they are unduly restrictive or if changes can be made to encourage submission of more price quotes, bids, or proposals. If BHRC determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, BHRC may determine the original competition adequate and complete the purchase from among the sources that submitted a price quote, bid, or proposal. A cost analysis must be performed in lieu of a price analysis when this situation occurs.

5.6.1.2. Sole Source

When BHRC requires products or services available from only one responsible source, and no other products or services will satisfy its requirements, BHRC may make a sole source award. In addition, when BHRC requires an existing contractor to make a change to its contract that is beyond the scope of that contract, BHRC will consider the change a sole source award that must be justified. Sole source awards are only appropriate when one of the following conditions apply:

- (a) Unique Capability or Availability – The products or services are available from only one source if one of the conditions described below is present:
- (1) Unique or Innovative Concept – The offeror demonstrates a unique or innovative concept or capability not available from another source. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to BHRC only from one source and has not in the past been available to BHRC from another source.
 - (2) Patents or Restricted Data Rights – Patent or data rights restrictions preclude competition.
 - (3) Substantial Duplication Costs – In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
 - (4) Unacceptable Delay – In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling BHRC’s needs.
- (b) Single Bid or Proposal – Upon receiving a single bid or proposal in response to a solicitation, BHRC should determine if competition was adequate. This should 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.
- (1) Adequate Competition – Competition is adequate when the reasons for a single response were caused by conditions beyond BHRC’s control.
 - (2) Inadequate Competition – Competition is inadequate when the reasons for a single response were caused by conditions within BHRC’s control.
- (c) Unusual and Compelling Urgency – BHRC may limit the number of sources from which it solicits bids or proposals when BHRC has such an unusual and urgent need for the products or services that BHRC would be seriously injured unless it were permitted to limit the solicitation. BHRC may also limit the solicitation when the public exigency or emergency will not permit a delay resulting from competitive solicitation for the products or services.
- (d) Authorized by ODOT – BHRC may request permission from ODOT to allow it to use noncompetitive proposals for a particular procurement.
- (e) When Prohibited – Less than full and open competition is not justified based on:
- (1) Failure to Plan – BHRC lack of advance planning, resulting in limited competition, is not justification for a sole source or single bid award.

- (2) Limited Availability of Federal Assistance – Concerns about the amount of Federal assistance available to support the procurement.
- (f) Procurement Procedures – The following requirements apply when BHRC completes a procurement utilizing less than full and open competition:
 - (1) Potential Sources – BHRC must solicit offers from as many potential sources as is practicable under the circumstances.
 - (2) Sole Source Justification – BHRC must justify all sole source procurements in writing. Sole source procurement justifications must describe the reasons for why a sole source procurement is appropriate, state which of the authorized justifications listed in Section 5.6.1.2 are applicable, include a cost analysis and be signed by the Fiscal Administrator. If BHRC decides to solicit an offer from only one source, BHRC must justify its decision in writing. The written justification must include the same elements as a sole source justification except that it must state which of the authorized justifications listed in Section 5.6.1.2 are applicable to the sole source purchase.
 - (3) Cost Analysis – BHRC must prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits. A price analysis shall not be adequate to justify a sole source purchase.
- (g) Exception for Procurement Activities Using Non-FTA Funds – When it is determined by the Executive Director to be in the best interest of BHRC, noncompetitive procurement procedures may be utilized to acquire professional or other transportation-related services that do not involve the use of FTA financial assistance. Any such determination must be made in writing and signed by the Executive Director.

5.7. Evaluation Requirements

The following standards shall apply to all evaluations of bids or proposals conducted by BHRC.

5.7.1. General

When evaluating bids or proposals received in response to a solicitation, BHRC shall consider all evaluation factors specified in the solicitation documents and shall evaluate the bids or offers proposals only on the evaluation factors included in those solicitation documents. BHRC may not modify its evaluation factors after bids or proposals have been received without re-opening the solicitation.

5.7.2. Options

The following standards shall apply when awarding contracts that include options:

5.7.2.1. Evaluation Required

In general, BHRC must evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded.

5.7.2.2. Evaluation Not Required

BHRC need not evaluate bids or offers for any option quantities when BHRC does not intend to exercise those options after the contract is awarded or if it determines that evaluation would not otherwise be in its best interests.

5.7.2.3. Evaluators

In addition to evaluators with experience in technical or public policy matters related to the procurement, other evaluators may also include auditors and financial experts to the extent that the Fiscal Administrator determines would be necessary or helpful. If BHRC lacks qualified personnel within its organization, it may solicit evaluators from other transit organizations or may contract for evaluation services. If it does so, the procurement procedures in this policy will apply to those contracts and to those contractors selected to perform evaluation functions on behalf of the recipient.

5.8. Contract Award Requirements

The following standards shall apply to all contract award decisions made by BHRC:

5.8.1. Award to Other Than the Lowest Bidder or Offeror

BHRC may award a contract to other than the lowest bidder if the award furthers an objective consistent with the purposes of 49 U.S.C. Chapter 53, including improved long-term operating efficiency and lower long-term costs. BHRC may also award a contract to other than the offeror whose price proposal is lowest, when stated in the evaluation factors of the solicitation. In both cases, BHRC must include a statement in its solicitation document reserving the right to award the contract to other than the low bidder or offeror.

5.8.1.1. Award Only to a Responsible Bidder or Offeror

BHRC may only award contracts to responsible contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract and who demonstrate that its proposed subcontractors also qualify as responsible. BHRC must consider such matters as contractor integrity, compliance with public policy, record of past performance and financial and technical resources when making a determination of contractor responsibility. BHRC must also ensure that the contractor is not listed as a debarred or suspended contractor on the System for Award Management (SAM), which is maintained by the General Services Administration (GSA), at the time of contract award. Entities that are listed as debarred or suspended contractors on SAM may not be determined to be responsible contractors by BHRC. For every

procurement action above the micro-purchase level, BHRC must make a written determination of the responsibility of the contractor and include such determination in the applicable contract file (See Section 3.6).

To designate a prospective contractor “responsible” as required by 49 U.S.C. § 5325, BHRC , at a minimum, must determine and ensure that the prospective contractor satisfies the following criteria described herein. In addition to being otherwise qualified and eligible to receive the contract award under applicable laws and regulations, a responsible contractor:

- (a) Integrity and Ethics – Has a satisfactory record of integrity and business ethics, in compliance with 49 U.S.C. Section 5325(j)(2)(A).
- (b) Debarment and Suspension – 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.
- (c) Affirmative Action and DBE – Is in compliance with the Common Grant Rules’ affirmative action and FTA’s Disadvantaged Business Enterprise requirements.
- (d) Public Policy – Is in compliance with the public policies of the Federal Government, as required by 49 U.S.C. § Section 5325(j)(2)(B).
- (e) Administrative and Technical Capacity – Has the necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them, in compliance with 49 U.S.C. Section 5325(j)(2)(D).
- (f) Licensing and Taxes – Is in compliance with applicable licensing and tax laws and regulations.
- (g) Financial Resources – Has, or can obtain, sufficient financial resources to perform the contract, as required by 49 U.S.C. Section 5325(j)(2)(D).
- (h) Production Capability – Has, or can obtain, the necessary production, construction, and technical equipment and facilities.
- (i) Timeliness – Is able to comply with the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.
- (j) Performance Record – Is able to provide a:
 - (1) Current Performance – Satisfactory current performance record; and
 - (2) Past Performance – Satisfactory past performance record in view of its records 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 the recipient's solicitation, and
- iii. Any 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 non-responsible, 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 non-responsibility. Failure to meet the quality requirements of a contract is a significant factor to consider in determining satisfactory performance. ODOT expects BHRC 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.

5.8.1.2. Rejection of Bids and Proposals

BHRC may reject all bids or proposals submitted in response to an Invitation for Bids or Request for Proposals. BHRC must include a statement in its solicitation document reserving the right to reject all bids or proposals.

- (a) Extent and Limits of Contract Award – The selection of a contractor to participate in one aspect of a project does not, by itself, constitute a sole source selection of the contractor's wholly owned affiliates to perform other work in connection with the project.

5.9. Independent Cost Estimate and Cost and Price Analysis

5.9.1. Independent Cost Estimate

For every procurement, BHRC shall make a written independent estimate of cost prior to receiving price quotes, bids or proposals.

5.9.2. Cost or Price Analysis

BHRC shall perform a cost or price analysis in connection with every procurement over \$10,000 and for all contract modifications.

5.9.2.1. Price Analysis

If BHRC determines that competition was adequate, a written price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price.

5.9.2.2. Cost Analysis

BHRC must perform or obtain a cost analysis when:

- (a) A price analysis will not provide sufficient information to determine the reasonableness of the contract cost.
- (b) When the offeror submits elements of the estimated cost.
- (c) When only a sole source is available, even if the procurement is a contract modification.
- (d) In the event of a change order.

5.9.3. Approval of Contracts

All contracts must be signed by the Executive Director.

6. CONTRACT ADMINISTRATION REQUIREMENTS AND CONSIDERATIONS

6.1. BHRC Staff Responsibilities

Prior to execution of third party contracts, BHRC shall designate a Project Manager to serve as BHRC principal contact with the contractor and as the primary administrator of the contract. The designated Project Manager for each contract shall have responsibility for directing and overseeing the work performed by the contractor; reviewing and approving deliverables and invoices from the contractor; determining percentage of contract completion for progress payments (if applicable); making recommendations on the exercise of contract options (if applicable); recommending contract changes; preparing justifications for contract changes; performing independent cost estimates and cost or price analyses for contract changes; making recommendations on approval or rejection of subcontractors; assisting with the resolution of contract disputes; making recommendations on contract termination or other contractor disciplinary actions; maintaining complete contract files; and other contract administration duties that may be necessary.

6.2. Administrative Restrictions on the Acquisition of Property and Services

The following Federal laws and regulations impose administrative requirements, many of which will affect specific third party procurements.

6.2.1. Legal Eligibility

The property or services acquired must be eligible for support under the restrictions accompanying the Federal statute authorizing the Federal assistance to be used.

6.2.2. Scope of the Project

The property or services acquired must be eligible for support within the scope of the underlying grant or cooperative agreement from which the Federal assistance to be used is derived.

6.2.3. Period of Performance

BHRC will use sound business judgment and be judicious in establishing and extending a contract's period of performance.

6.2.3.1. General Standards

The period of performance generally should not exceed the time necessary to accomplish the purpose of the contract. BHRC will also consider competition, pricing, fairness, and public perception. BHRC's procurement files will document its rationale for determining the performance period designated for each contract.

6.2.3.2. Time Extensions

Consistent with the general tone of FTA Circular 4220.1F, contract time extensions shall be considered in light of whether they are permissible changes or impermissible cardinal changes. Once BHRC awards a third party contract, an extension of the contract term length that amounts to a cardinal change will require a sole source justification.

6.2.3.3. Authority to Extend

The Executive Director has the sole authority to approve and execute contract modifications. The Fiscal Administrator for the contract shall recommend all contract time; prior to making a recommendation for a contract time extension. The Fiscal Director shall prepare a written justification and cost analysis (if applicable) for the contract time extension and shall negotiate the appropriate contract modification with the contractor.

6.3. Federal Cost Principles

Federal rules require project costs to conform to applicable Federal cost principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized or not prohibited by Federal law or regulation, and must comply with Federal cost principles applicable to the recipient.

OMB guidance for grants and agreements, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," 2 CFR § 200, applies to project costs incurred BHRC.

6.4. Payment Provisions

BHRC will follow the provisions of this section when using FTA funds to support its third party contracts.

6.4.1. Financial Support for the Project

Costs may only be incurred by BHRC if ODOT has awarded a financial assistance contract to BHRC.

6.4.1.1. Progress Payments

Progress payments are payments for contract work that has not been completed. BHRC may use ODOT assistance to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested.

6.4.1.2. Adequate Security for Progress Payments

Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement

scenarios and factual circumstances. BHRC should always consider the costs associated with providing security (for example, the recipient may need to acquire bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as the consequences of incomplete performance.

6.4.1.3. Adequate Documentation

Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made.

6.4.1.4. Percentage of Completion Method

Federal rules require that any progress payments for construction contracts be made on a percentage of completion method described therein. BHRC, however, may not make progress payments for other than construction contracts based on this percentage method.

6.5. Protections Against Performance Difficulties

BHRC shall include provisions in its third party contracts that will reduce potential problems that might occur during contract performance, as follows:

6.5.1. Changes

BHRC shall include provisions that address changes and changed conditions in all third party contracts except for routine supply contracts.

6.5.2. Remedies

BHRC shall include provisions that address remedies in its third party contracts. Provisions related to remedies may include provisions for:

6.5.2.1. Liquidated Damages

BHRC may use liquidated damages if BHRC reasonably expects to suffer damages through delayed contract completion, or if weight requirements are exceeded, and the extent or amount of such damages are uncertain and would be difficult or impossible to determine. Rate and measurement standards must be calculated to reasonably reflect BHRC's costs should the standards not be met, and must be specified in the solicitation and contract. The assessment for damages may be established at a specific rate per day for each day beyond the contract's delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. The contract file must include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account.

6.5.2.2. Violation or Breach

Third party contracts exceeding \$100,000 must include administrative, contractual, or legal remedies for violations or breach of the contract by the third party contractor.

6.5.2.3. Suspension of Work

BHRC may include provisions pertaining to suspension of work in its third party contracts.

6.5.2.4. Termination

Termination for cause and termination for convenience provisions must be included in third party contracts exceeding \$10,000.

6.6. Contents of Complete Contract Files

The following documents shall comprise the contents of a complete contract file for procurements above the micro-purchase level:

6.6.1. Written Record of Procurement History

BHRC shall maintain written records detailing the history of the procurement, including records relating to:

6.6.1.1. Procurement Method

BHRC must provide its rationale for the method of procurement it used for each contract, including a sole source justification for any acquisition that does not qualify as competitive.

6.6.1.2. Contract Type

BHRC must state the reasons for selecting the contract type it used.

6.6.1.3. Contractor Selection

BHRC must state its reasons for contractor selection or rejection, including written justification and evaluation documents.

6.6.1.4. Contractor Responsibility

BHRC must provide a written determination of responsibility for the successful contractor.

6.6.1.5. Cost or Price

BHRC must evaluate and state its justification for the contract cost or price, including the independent cost estimate and cost or price analysis.

6.6.1.6. Reasonable Documentation

BHRC must retain documentation commensurate with the size and complexity of the procurement, including documents related to solicitation, receipt and evaluation of offers, and contract award, negotiation and execution.

6.7. Access to Records

Federal rules (49 U.S.C. § 5325(g)) provide FTA and ODOT officials, the Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance authorized by 49 U.S.C. Chapter 53.

6.8. Contract Administration and Close-Out Documents

BHRC shall maintain written records detailing the performance and close-out of the contract, including records relating to:

6.8.1. Contractor Performance

BHRC must maintain documents related to contractor adherence to budget and schedule, compliance with contract terms and conditions, DBE participation, progress reports, disputes, and disciplinary actions.

6.8.2. Contract Deliverables

BHRC must maintain copies of all contract deliverables and records relating to approval, rejection and requested modifications of contract deliverables.

6.8.3. Contract Changes

BHRC must maintain copies of all contract modifications, including documentation related to the determination of need, written justification and rationale, cost analysis, negotiation and execution.

6.8.4. Contract Payments

BHRC must retain documentation of invoices, approval of payments, requests for modifications to invoices, determination of percentage of contract completion for partial payments (if applicable), and ownership of title to partial work products.

6.8.5. Contract Close-Out

BHRC must retain documentation related to contractor performance and evaluation, approval of final deliverables and payments, transfer of title to complete work products to BHRC, and contract audit and final reconciliation.

6.9. Protest Procedures

6.9.1. Statement of Policy

BHRC is responsible for resolving all contractual and administrative issues, including protests of evaluations and contract awards, arising out of its third party procurements using good administrative practices and sound business judgment.

In general, ODOT will not substitute its judgment for that of BHRC unless the matter is primarily a Federal concern. Nevertheless, ODOT and FTA can become involved in BHRC administrative decisions when a BHRC protest decision is appealed to ODOT.

BHRC shall give timely notification to ODOT when it receives a third party procurement protest and will keep FTA informed about the status of any such protest. BHRC shall disclose all information about any third party procurement protest to ODOT upon request.

BHRC's procedure for addressing third party procurement protests is described in Paragraph 6.9.2 below. BHRC shall insert its protest procedure in all solicitation documents for products and services having an estimated value of \$100,000 or greater.

6.9.2. BHRC Staff Responsibilities

The following staff responsibilities shall be assigned in all protests:

- Fiscal Administrator – Responsibilities include: ensuring that the BHRC Protest Procedure is included in all solicitation documents; and providing information to and assisting the Executive Director and Theisen & Brock Lpa with the resolution of protests.
- Theisen & Brock Lpa – Responsibilities include: reviewing all procurement protests; and advising and assisting the BHRC as needed with the resolution of all procurement protests.

6.9.3. Solicitation Provision

BHRC shall insert the following provision in all solicitation documents:

6.9.3.1. Pre-Proposal Protests

All protests concerning solicitation specifications, criteria and/or procedures shall be submitted in writing (defined as being sent or received via letter or facsimile on official firm/agency letterhead or by electronic mail) to the Fiscal Administrator as specified below not later than ten (10) business days prior to the deadline for submission of bids/proposals.

The Fiscal Administrator may, within his or her discretion, postpone the deadline for submission of bids/proposals, but in any case, shall provide a written response to all protests not later than five (5) business days prior to the deadline for submission of bids/proposals. If the deadline for submission of bids/proposals is postponed by the Fiscal Administrator as the result of a protest the postponement will be announced through an addendum to the solicitation.

The decision by the Fiscal Administrator shall be the final agency decision on the matter but shall be subject to judicial review as set forth by FTA below.

6.9.3.2. Pre-Award Protests

With respect to protests made after the deadline for submission of bids/proposals but before contract award by BHRC, protests shall be limited to those protests alleging a violation of Federal or State law, a challenge to the bids/proposals evaluation and award process, BHRC's failure to have or follow its protest procedures or its failure to review a complaint or protest. Such protests shall be submitted in writing (defined as being sent or received via letter or facsimile on official firm/agency letterhead or by electronic mail) to the Fiscal Administrator as specified below not later than five (5) business days after the Recommendation for Contract Award announcement by BHRC.

The Fiscal Administrator may, within his or her discretion, postpone the award of the contract, but in any case, shall provide a written response to all protests not later than three (3) business days prior to the date that BHRC shall announce the contract award.

The decision by the Fiscal Administrator shall be the final agency decision on the matter but shall be subject to judicial review as set forth or review by ODOT as specified below.

6.9.4. Requirements for Protests

All protests must be submitted to BHRC in writing (defined as being sent or received via letter or facsimile on official firm/agency letterhead or by electronic mail), with sufficient documentation, evidence, and legal authority to demonstrate that the Protestor is entitled to the relief requested. The protest must be certified as being true and correct to the best knowledge and information of the Protestor and be signed by the Protestor. The protest must also include a mailing address to which a response should be sent.

Protests received after the deadlines for receipt of protests specified above are subject to denial without any requirement for review or action by BHRC.

All protests must be directed in writing (defined as being sent or received via letter or facsimile on official firm/agency letterhead or by electronic mail) to the Fiscal Administrator at the address shown in the solicitation documents.

6.9.5. Protest Response

The Fiscal Administrator shall issue written responses to all protests received by the required protest response dates. All protest responses shall be transmitted by first-class U.S. Postal Service to the address indicated in the protest letter.

For convenience, BHRC will also send a copy of the response to a protest to the Protester by facsimile and/or electronic mail if a facsimile number and/or electronic mail address are indicated in the protest letter. The protest response transmitted by U.S. Postal Service shall be the official BHRC response to the protest and BHRC will not be responsible for the failure of the Protester to receive the protest response by either facsimile or electronic mail.

6.9.6. Review of Protests by ODOT

All protests involving contracts financed with Federal assistance shall be disclosed to ODOT. Protesters shall exhaust all administrative remedies with BHRC prior to pursuing protests with ODOT. ODOT limits its reviews of protests to: a grantee's failure to have or follow its protest procedures; a grantee's failure to review a complaint or protest when presented an opportunity to do so; or violations of Federal law or regulation. Appeals to ODOT must be received within five (5) working days of the date the Protester has received actual or constructive notice of BHRC final decision or within five (5) working days of the date the Protester has identified other grounds for appeal to ODOT.