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## CHAPTER VII

### **PROTESTS, CHANGES AND MODIFICATIONS, DISPUTES, CLAIMS, LITIGATION, AND SETTLEMENTS**

The Common Grant Rules assign responsibility to the recipient for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, including protests of awards, disputes, and claims using good administrative practices and sound business judgment. The Federal Transit Administration (FTA) also encourages the recipient to use appropriate alternative dispute resolution procedures. Neither FTA nor the Common Grant Rules relieves the recipient of any responsibility under its contracts to resolve disagreements that may arise in the course of contract formation or contract administration.

FTA is not a party to its recipients' third party contracts, and does not have any obligation to any participant in its recipients' third party contracts. In general, FTA will not substitute its judgment for that of the recipient or subrecipient unless the matter is primarily a Federal concern. Examples of "Federal concerns" include, but are not limited to, situations "where a special Federal interest is declared because of program management concerns, possible mismanagement, impropriety, waste, or fraud." Nevertheless, FTA can become involved in the recipient's administrative decisions when a recipient's protest decision is appealed to FTA, or when the recipient seeks to use FTA assistance to support the costs of settlements or other resolutions of protests, disputes, claims, or litigation.

#### 1. PROTESTS.

- a. The Recipient's Role and Responsibilities. The Common Grant Rules charges the recipient with the initial responsibility to resolve protests of third party contract awards.
  - (1) Protest Procedures. Apart from other methods the recipient may have to resolve third party contract issues, such as mediation or arbitration, the Common Grant Rule for governmental recipients requires the recipient to have protest procedures. While the Common Grant Rule for non-governmental recipients does not impose a similar requirement on a non-governmental recipient, FTA expects each recipient to have appropriate written protest procedures, as part of its requirement to maintain or acquire adequate technical capacity to implement the project.
  - (2) Responsibilities to FTA. The recipient's minimum responsibilities to FTA consist of the following:
    - (a) Notify FTA Expeditiously. The Common Grant Rule for governmental recipients requires a governmental recipient to notify FTA when it receives a third party contract protest to which this circular applies, and to keep FTA

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informed about the status of the protest. A non-governmental recipient involved in a protest is similarly expected to notify FTA when it receives a third party contract protest to which the circular applies, and to similarly keep FTA informed about the status of the protest. The recipient is expected to provide the following information:

- 1 Subjects. A list of protests involving third party contracts and potential third party contracts that:
  - a Have a value exceeding \$100,000, or
  - b Involve a controversial matter, irrespective of amount, or
  - c Involve a highly publicized matter, irrespective of amount.
- 2 Details. The following information about each protest:
  - a A brief description of the protest,
  - b The basis of disagreement, and
  - c If open, how far the protest has proceeded, or
  - d If resolved, the agreement or decision reached, and
  - e Whether an appeal has been taken or is likely to be taken.
- 3 When and Where. The recipient should provide this information:
  - a In its next quarterly Milestone Progress Report, and
  - b At its next Project Management Oversight review, if any.

Small recipients may report less frequently if no protests are outstanding.

- 4 FTA Officials to Notify. When a recipient denies a bid protest, and especially if an appeal to FTA is likely to occur, FTA expects the recipient to inform the FTA Regional Administrator for the region administering a regional project, or the FTA Associate Administrator for the program office administering a headquarters project directly. FTA also encourages the recipient to keep its FTA project manager informed about protests with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.

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- (b) Access to Information. FTA expects the recipient to disclose information about any third party procurement protest to FTA upon request. FTA reserves the right to require the recipient to provide copies of a particular protest or all protests, and any or all related supporting documents as FTA may determine necessary.
- b. FTA's Role and Responsibilities. FTA has developed an appeals process for reviewing protests of a recipient's procurement decisions.
- (1) Requirements for the Protester. The protester must:
- (a) Qualify as an "Interested Party." Only an "interested party" qualifies for FTA review of its appeal. An "interested party" is a party that is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the third party contract at issue.
- 1 Subcontractors. A subcontractor does not qualify as an "interested party" because it does not have a direct economic interest in the results of the procurement.
- 2 Consortia/Joint Ventures/Partnerships/Teams. An established consortium, joint venture, partnership, or team that is an actual bidder or offeror and is acting in its entirety, would qualify as an "interested party" because it has a direct economic interest in the results of the procurement. An individual member of a consortium, joint venture, partnership, or team, acting solely in its individual capacity, does not qualify as an "interested party" because it does not have a direct economic interest in the results of the procurement.
- 3 Associations or Organizations. An association or organization that does not perform contracts does not qualify as an "interested party," because it does not have a direct economic interest in the results of the procurement.
- (b) Exhaust Administrative Remedies. The protester must exhaust its administrative remedies by pursuing the recipient's protest procedures to completion before appealing the recipient's decision to FTA.
- (c) Appeal Within Five Days. The protester must deliver its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has received actual or constructive notice of the recipient's final decision. Likewise, the protester must provide its appeal to the FTA Regional Administrator for the region

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administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has identified other grounds for appeal to FTA. For example, other grounds for appeal include the recipient's failure to have or failure to comply with its protest procedures or failure to review the protest.

- (2) Extent of FTA Review. As provided in the Common Grant Rule for governmental recipients, FTA will limit its review of third party contract protests as follows:
- (a) The Recipient's Procedural Failures. FTA will consider a protest if the recipient:
- 1 Does not have protest procedures, or
  - 2 Has not complied with its protest procedures, or
  - 3 Has not reviewed the protest when presented an opportunity to do so.
- (b) Violations of Federal Law or Regulations. FTA will not consider every appeal filed by a protestor of an FTA recipient's protest decision merely because a Federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those appeals involving issues important to FTA's overall public transportation program. FTA will refer violations of Federal law for which it does not have primary jurisdiction to the Federal authority having proper jurisdiction.
- (c) Violations of State or Local Law or Regulations. FTA will refer violations of State or local law to the State or local authority having proper jurisdiction.
- (3) FTA Determinations to Decline Protest Reviews. FTA's determination to decline jurisdiction over a protest does not mean that FTA approves of or agrees with the recipient's decision or that FTA has determined the contract is eligible for Federal participation. FTA's determination means only that FTA does not consider the issues presented to be sufficiently important to FTA's overall program that FTA considers a review to be required.

## 2. CHANGES AND MODIFICATIONS.

- a. The Recipient's Role and Responsibilities. The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue. The recipient is also responsible for evaluating and making the necessary decisions involving any claim of a constructive change. In general, FTA expects each recipient to comply with the following procedures:

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- (1) Approval Requirements. FTA expects the recipient to have cost justifications supporting each change order it may issue. FTA also expects the recipient's authorized official to approve any proposed change order before it is issued.
- (2) Cost Restrictions. To be eligible for FTA assistance under the recipient's grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope.

A more extensive discussion on Changes and Modifications can be found in FTA's Best Practices Procurement Manual (BPPM).

- b. FTA's Role and Responsibilities. FTA does not participate in the recipient's decisions involving change orders, constructive changes, or modifications, but reserves the right to review the recipient's supporting documentation as necessary to determine the extent of FTA assistance that may be used to support those costs.

### 3. DISPUTES.

- a. The Recipient's Role and Responsibilities. The Common Grant Rules charges the recipient with responsibility for evaluating and resolving third party contract disputes. If the recipient intends to request FTA's permission to use Federal assistance to support payments to a third party contractor to settle a dispute, or intends to request increased Federal assistance for that purpose, the recipient's responsibilities are as follows:

- (1) Notify FTA. FTA expects the recipient to provide the following information in connection with third party contract disputes in which it is involved:

- (a) Subjects. A list of disputes involving third party contracts and potential third party contracts that:

- 1 Have a value exceeding \$100,000,
- 2 Involve a controversial matter, irrespective of amount, or
- 3 Involve a highly publicized matter, irrespective of amount.

- (b) Details. The following information about each dispute:

- 1 A brief description of the dispute,
- 2 The basis of disagreement, and
- 3 If open, how far the dispute has proceeded, or

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- 4 If resolved, the agreement or decision reached, and
- 5 Whether an appeal has been taken or is likely to be taken.

(c) When and Where. The recipient should provide this information:

- 1 In its next quarterly Milestone Progress Report, and
- 2 At its next Project Management Oversight review, if any.

Small recipients may report less frequently if no disputes are outstanding.

(d) FTA Officials to Notify. FTA also encourages the recipient to keep its FTA project manager informed about disputes with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.

(2) Adequate Documentation. FTA expects the recipient to include adequate documentation in its project files of the facts, events, negotiations, applicable laws, and a legal evaluation of the likelihood of success in any potential litigation involving the dispute as may be needed to justify FTA's concurrence in any compromise or settlement, should FTA concurrence become necessary.

(3) Audit. An audit can help the recipient demonstrate that any settlement costs, if incurred, are necessary, reasonable, adequately documented, and appropriate for FTA support. The recipient should consider conducting or obtaining a formal audit to substantiate each part of a large contract dispute before entering into a settlement. The audit should be conducted in accordance with "Generally Accepted Auditing Standards" as defined by the American Institute of Certified Public Accountants. FTA also encourages the recipient to undertake an audit or similar analysis before settlement of a small dispute.

b. FTA's Role and Responsibilities. FTA generally does not become involved in negotiating the resolution of a recipient's disputes. However, FTA does reserve the right to become involved as follows:

(1) Determine Reasonableness. FTA may review the reasonableness of a negotiated settlement to determine the extent of its participation in the costs of the settlement.

(2) Review Documents. When FTA considers necessary, FTA may review the recipient's files and history pertaining to the dispute or experience under a particular grant or cooperative agreement. If the recipient has already disbursed amounts determined to be ineligible through subsequent audit or FTA review, the recipient must return those amounts to FTA, unless FTA determines otherwise.

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FTA reserves the right to defer participation in settlement costs until it receives an adequate audit.

#### 4. CLAIMS AND LITIGATION.

a. The Recipient's Role and Responsibilities. The Common Grant Rules charge the recipient with responsibility for evaluating and resolving third party contract claims and litigation resulting from a contractor's violation, default, or breach of its third party contracts with recipients of Federal assistance. The recipient is also responsible for resolving any claims and litigation the contractor may present against it. Due to FTA's financial interest in the settlement of third party contract claims and litigation, and concerns about matters with significant policy consequences to the Federal Government, FTA expects the recipient to:

(1) Notify FTA. FTA expects the recipient to provide the following information in connection with third party contract claims and litigation with which it is involved.

(a) Subjects. A list of claims and litigation involving third party contracts and potential third party contracts that:

- 1 Have a value exceeding \$100,000,
- 2 Involve a controversial matter, irrespective of amount, or
- 3 Involve a highly publicized matter, irrespective of amount.

(b) Details. The following information about each claim or lawsuit:

- 1 A brief description of the claim or litigation,
- 2 The basis of disagreement, and
- 3 If open, how far the claim or litigation has proceeded, or
- 4 If resolved, the decision or agreement reached, and
- 5 Whether an appeal has been or is likely to be taken.

(c) When and Where. The recipient should provide this information:

- 1 In its next quarterly Milestone Progress Report, and
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Small recipients may report less frequently if no claims or litigation are outstanding.

- (d) FTA Officials to Notify. FTA also encourages the recipient to keep its FTA project manager informed about claims and litigation with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.
  - (2) Legal Rights and Remedies. In resolving third party contract claims, FTA expects the recipient to take reasonable measures to pursue its rights and remedies available under law, including settlement, particularly if failure to do so would jeopardize the Federal interest in the project or cause the recipient to seek additional Federal assistance.
- b. FTA's Role and Responsibilities. In support of its financial interest in the settlement of claims and litigation involving any federally assisted third party contracts, FTA has retained its discretion to assert the following rights:
- (1) Proceeds Recovered. FTA retains a right to a share of any net proceeds recovered through a third party contract claim or litigation, in proportion to the amount FTA has committed to the project, unless FTA permits other uses of the proceeds recovered.
  - (2) Liquidated Damages. If the third party contract includes a liquidated damages provision, FTA expects the recipient to credit any liquidated damages recovered to the project, unless FTA permits other uses of the liquidated damages. For example, in negotiating the terms of a claim or litigation settlement, it may be reasonable for the recipient to exchange some or all liquidated damages that may be due the recipient for additional property or services.
5. FTA PARTICIPATION IN SETTLEMENTS, ARBITRATION AWARDS, AND COURT AWARDS.
- a. The Recipient's Responsibilities.
    - (1) Settlement Arrangements Must Be Reasonable. FTA recognizes that a settlement may require the recipient to relinquish its rights to amounts it would otherwise be due, including amounts for liquidated damages and other matters, were it to prevail on all matters at issue. Still, FTA expects the recipient to enter into a settlement only if the recipient can justify its terms as reasonable. Reasonable settlement arrangements can take many forms. In certain situations, an agreement by the contractor to provide extra property or services in lieu of payments or reduced payments for damages, including liquidated damages, may be reasonable.



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- (2) Maintain Sufficient Records. To justify FTA's participation in settlements, arbitration awards, or court awards, the recipient's records must be sufficient to demonstrate that the recipient has taken reasonable and prudent measures to prevent or offset the actions or circumstances resulting in the underlying protest, dispute, claim, or litigation.
  - (3) Obtain FTA Concurrence. When the recipient incurs costs due to binding arbitration or court decision, FTA expects the recipient to secure FTA review and its written concurrence in a proposed or final settlement involving a dispute, claim, or litigation before using Federal assistance to support its costs if one of the following circumstances is present:
    - (a) Exceeds \$100,000. When the settlement exceeds \$100,000.
    - (b) Insufficient Funds. When the approved project lacks sufficient funds to cover the settlement costs.
    - (c) Special Federal Interest or Federal Concern. When a special Federal interest or Federal concern is declared due to program management concerns, possible mismanagement, impropriety, waste, or fraud.
- b. FTA's Prerogatives.
- (1) Review Supporting Documentation. FTA reserves the right to review the recipient's supporting documentation.
  - (2) Provide Federal Assistance. If FTA assistance is available, FTA may provide a prorated share of any eligible costs resulting from protests, disputes, claims, litigation, or settlements that were not caused by the recipient's mismanagement or are attributable to the contractor, and were otherwise properly incurred.
  - (3) Deny Federal Assistance. Protests, disputes, claims, litigation, or settlements that result from the recipient's negligence or error are usually ineligible for FTA participation. FTA reserves the right to determine the extent to which FTA assistance may be used for any dispute, claim, litigation, or settlement caused in whole or part by the recipient's negligence or error. Examples of situations that might be caused by a recipient's negligence or error include, but are not limited to, the following:
    - (a) Right-of-Way. Failure to ensure clear access to all needed right-of-way prior to award of the construction contract.
    - (b) Utility Agreements. Failure to execute all required utility agreements in time to assure uninterrupted construction progress.

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- (c) Planning and Scheduling. Failure to undertake comprehensive project planning and scheduling to achieve proper coordination among contractors.
- (d) Subsurface Conditions. Failure to inform potential contractors of all available geo-technical information on subsurface conditions.
- (e) Materials Compatibility. Failure to ensure that all materials provided by the recipient are compatible with contractor project facilities or equipment or both and available when needed.
- (f) Pre-Construction Surveys and Engineering. Failure to complete all pre-construction surveys and engineering prior to issuing the contractor a Notice to Proceed.
- (g) Public Authority Approvals. Failure to complete the necessary approvals and agreements from all other public authorities affected by the project before contract award.
- (h) Drawing Approvals. Failure by the recipient to approve and provide all design and shop drawings to the contractor promptly as needed.