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Requirements That Impact the Acquisition of Capital-Intensive Long-Lead Items, Rights of Way, and Land for Transit

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Kevin M. Sheys and Robert L. Gunter. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

Transit agencies purchase or lease capital-intensive assets such as buses, rail cars, railroad right of way, and land. In doing so, transit administrators must comply with an array of federal, state, and local requirements.

Moreover, transit agencies must accumulate sufficient funds prior to awarding a contract for these items. Even after the contract has been awarded, it can take several years for the products to be delivered. Transit officials should understand the myriad of legal requirements and strategies for expediting the procurement process.

This publication should be useful to attorneys, planners, financial and procurement officers, transit administrators and others interested in understanding and improving the procurement process. The objectives are to assist these transit officials to better understand the legal requirements imposed on procurements by statute and regulations, to discuss alternative legal concepts, and to propose alternative procurement and financial solutions.

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I. INTRODUCTION

Public transportation is in a state of rapid and dramatic change. In the midst of increased demand for transit services, public transit systems today must contend with an increased number of mandates. Transit systems are compelled to do more with less. One area in which transit systems are striving to make significant productivity improvements is the acquisition of capital-intensive, long-lead assets, such as buses, rail cars, operating and maintenance facilities, rail rights of way, and land. Transit systems need to acquire and develop these capital assets faster and with less staff time and resources.

Federal and state requirements governing acquisition of capital assets are designed to ensure that transit systems spend federal and state monies on publicly planned and supported projects, use competitive procurement processes, and achieve numerous societal goals. Although the principles underlying federal and state laws that regulate acquisitions of transit capital assets are important, they present several significant obstacles that impede fast and efficient acquisition of capital assets in the public transit industry. In some ways, the challenge to complete a "timely" procurement is like a hurdles race, where state/local and federal barriers are set at different heights and are randomly placed. It requires persistence, adaptability, and a significant commitment of transit agency resources to cross the finish line without a serious fall. Because of their size and sophistication, some transit agencies are more successful than others.

This report identifies federal and state grant requirements that present the greatest obstacles to fast and efficient capital-asset acquisitions. It should help program officials understand federal statutory and regulatory requirements. It also identifies areas where these requirements could be streamlined without jeopardizing the salutary objectives they are intended to foster. Many of the requirements that impede expedient procurement of equipment and real estate arise from statutory requirements; consequently, some streamlining measures discussed herein would require legislation.

The responses to the questionnaire that forms the basis for many of the points discussed in this report are summarized in this first section of the report. Transit procurement is discussed in general in Section II. In Section III, the requirements that affect equipment acquisitions, including Buy America requirements, preaward and postdelivery audits, and several aspects of the third party contracting circular of the Federal Transit Administration (FTA), are covered. In Section IV, the use of creative financing as a means of expediting procurements is reviewed. Section V covers requirements that affect right of way and other real-property acquisitions; it focuses primarily on condemnation/relocation requirements and environmental requirements. Section VI outlines, in general terms, some of the most commonly cited delays resulting from state and local laws or regulations. It also identifies features from successful public involvement programs used to mitigate local permitting and regulatory delays. Obstacles to use of so-called turnkey procurement by transit systems are also discussed. Section VII presents conclusions drawn from the authors' research and the questionnaire responses.

The capital-asset acquisition problems identified and discussed in this report, as well as many of the suggested solutions, are based on responses to a questionnaire prepared by the authors and disseminated with the assistance of the Transportation Research Board (TRB). The questionnaire sought general and specific information on federal and state laws, rules, regulations, and policies applicable to transit systems conducting long-lead equipment and property acquisitions. Approximately 400 questionnaires were sent in January 1995 to transit system managers, legal counsel, planners, procurement specialists, and independent consultants and academics. The authors received responses from sixty transit systems (fourteen among the thirty largest transit systems and forty-six smaller transit systems) and several responses from other companies and institutions involved in the transit industry. Most questionnaire responses contained substantive discussion of several obstacles to fast and efficient capital asset acquisitions.[1] Although the questionnaire was not designed to generate a statistical report, a quantitative summary of the survey responses is included in the notes.[2]

Several topics identified in the questionnaire responses as factors that delay long-lead capital-asset acquisitions were, in fact, requirements that drive project cost alone. Although factors that drive cost are crucial from the standpoint of accomplishing capital-asset acquisitions, cost factors in and of themselves do not impede or delay capital acquisitions and therefore are not addressed in this report. For example, numerous questionnaire respondents identified the Davis-Bacon Act prevailing wage requirements as an impediment to long-lead purchases. On further inquiry, it was confirmed that Davis-Bacon is almost entirely a cost issue. Although Davis-Bacon is a prominent issue for public transit systems, it does not appear to raise significant barriers to fast and efficient capital-asset acquisitions.

Two other topics identified in the questionnaire responses as factors that delay long-lead capital-asset acquisitions are not discussed at length in this report--namely, problems of acquisition of railroad rights of way and labor protections under Section 13(c). Although these issues relate to actual delay and not merely project costs, they have been addressed in other TRB reports and are therefore not addressed here.[3]

II. PROCUREMENT OVERSIGHT IN GENERAL

There is little doubt that federal funding for transit brings with it some of the most detailed regulations in federal government contracting. Congressionally enacted laws that establish transit requirements are implemented through the terms of the master grant agreement, federal transit grant regulations, FTA program guidance circulars, and until recently, FTA procurement alerts. Mandatory clauses to be included in procurement agreements for projects funded by FTA are intended to ensure a competitive process in capital acquisitions, implement various economic and social policies, and ensure integrity in local procurement practices. Federal transit grantees are required to file annually a list of certifications[4] and assurances that touch on everything from the structure of the grantee's procurement system to how it deals with its elderly and disabled communities and its lobbyists.[5] As noted by various questionnaire respondents, federal transit regulations and guidelines have tended to micromanage the local

procurement process, regardless of the protections already built into a grantee's procurement system by state laws or local agency rules and regulations.

Nonetheless, there is significant evidence that FTA is making a serious effort to reduce the administrative burdens on its grantees. FTA took action in April 1994 to rescind rules requiring local transit agencies that receive federal funds to certify every 3 years that they could operate their systems more efficiently than private enterprises. FTA concluded that:

> [T]he weight of the documentary evidence in its records, including responses of grantees to complaints by private operations, protests from labor unions representing transit workers, and documented failures of specific privatization programs to realize cost savings or improvements in service quality, strongly indicates that the policy has imposed significant administrative and financial burdens on recipients, while conferring little measurable benefit on public transit providers and users.[6]

Although a grantee still must consider the option of private-sector operations in its planning, the mandatory 3-year review of service routes and formulas prescribed for allocating costs has been dropped, and local political and labor union constraints can be considered.

In September 1994, FTA sought information on issues and obstacles to innovative transit finance and on local projects that demonstrated or tested innovative financing mechanisms.[7] In another effort to streamline the grant process, FTA published notice in October 1994 of a new opportunity for a grant applicant and its attorney to execute a single signature page to confirm compliance with FTA's normal requirements and certifications, as well as a new on-line grantee option to allow grantees to electronically certify compliance with all certifications and assurances. Selected grantees now may be approved to apply for grants electronically.[8]

In April 1995, the Department of Transportation raised the small-purchase threshold in the Common Grant Rule from $25,000 to $100,000. This was done to mitigate the disproportionate amount of time and resources required to satisfy federal regulators that procurements for less than $100,000 in goods or services, many of which are regulated under state law, were properly conducted.[9]

In September 1995, FTA issued a revised edition of *Grant Management Guidelines, Circular 5010.1B,* to guide grantees in implementing metropolitan planning grants, capital program grants, and urbanized area formula grants. The circular deleted some administrative requirements and incorporated some of the more innovative FTA initiatives.

In October 1995, FTA published its revised *Circular 4220.1C, Third Party Contracting Requirements,* which replaced *Circular 4220.1B* and all 11 previously issued procurement alerts. Responding to more than 50 comments on the draft provisions, including 35 from transit systems, FTA drastically reduced its interpretive regulations to the minimum requirements of the Common Grant Rule, related Executive Orders and statutes, and certain essential statements of FTA policy. The FTA Administrator announced the development of a separate "best practices" manual, with interpretive information that would include "recommended but not required practices."[10] As summarized by Administrator Linton:

> Over the years third party contracting has become overly burdensome, confusing, and too restrictive for our grantees. At the same time our grantees have become much more knowledgeable in procurement. The revised circular encompasses only FTA policy and the minimum Federal requirements. This circular should result in the empowerment of FTA grantees to exercise maximum flexibility and discretion m making procurement decisions.[11]

Administrator Linton's comments echoed FTA's findings published in the *Federal Register:*

> [M]ost of the difficulties faced by persons engaging in third party contracting stemmed from uncertainty as to what procedures and policies were required by Federal law and regulation and what procedures were recommended but not mandatory. A related problem was the seemingly haphazard way in which procurement information was disseminated to grantees and contractors.[12]

These initiatives demonstrate that FTA is striving to eliminate unnecessary procurement burdens and restrictions on grantees. The revised *Third Party Contracting Requirements,* in particular, indicates an effort on the part of FTA to focus on procurement principles and to leave to the states and the grantees themselves the details of procurement.

The questionnaire for this report was circulated in January 1995--after the third-party contracting circular was designated for revision but 9 months before the revised version was made available to the public. The FTA statements that accompanied the revised third-party contracting circular were similar to many statements made by questionnaire respondents, and several of the changes in the circular track recommendations made by questionnaire respondents. However, not all the significant problems identified by transit systems with such contracting and procurement requirements were resolved in the revised circular. Although FTA is taking steps to facilitate procurements and reduce paperwork, the federal transit grant regulations that implement congressionally enacted laws still present impediments to expedient procurements of long-lead items.

Some of the concerns expressed by questionnaire respondents about the level and extent of federal involvement in capital-asset acquisitions relate to how rules and regulations are established and disseminated. Many respondents reported past problems with keeping current on federal transit rules, guidelines, and general policies. With some notable exceptions, such as Buy America requirements, disadvantaged business enterprise participation, and National Environmental Policy Act (NEPA) requirements, FTA is not required to implement the grant aspects of the Federal Transit Act through notice and comment administrative rulemaking pursuant to the Administrative Procedures Act (5 U.S.C. § 551 *et seq.).* Consequently, many of the most important federal transit grant requirements and guidelines are contained in program guidance circulars. The circulars are publicly available, and revised circulars are mailed to grantees.

Because previously issued alerts have been superseded by revised *Circular 4220.1C* and the more recent *Circular 4220.1D,* there should be no current problems about notice of updates and changes with respect to third-party contracting guidelines. In view of the questionnaire responses, however, when future changes are made to the guidelines, perhaps some grantee confusion could be avoided by using the *Federal Register* to disseminate information not deemed appropriate for rulemaking or publication in a circular.[13]

III. REQUIREMENTS THAT IMPACT EQUIPMENT ACQUISITIONS

This section discusses major obstacles that arise most often in long-lead acquisitions of buses, rail cars, and other rolling stock.[14]

Buy America

Questionnaire respondents most often cited Buy America provisions as the cause of delay. Although this congressionally enacted law was designed to serve important social and economic purposes, it is clear that federal transit grantees are disenchanted with the regulatory permutations of the Buy America provisions in 49 U.S.C. § 5323(j).

Buy America legislation has directly affected federally funded transit procurements for almost 2 decades. The Surface Transportation Assistance Act amended the Buy America Act requirements applicable to the Urban Mass Transportation Administration in 1978. It was followed by the Surface Transportation Assistance Act of 1982 (STAA), which applied Buy America to FTA-funded procurements in excess of $500,000.

In 1983, Congress amended the law to delete the $500,000 threshold and to broadly preclude federal funds from being devoted to federal mass transportation projects unless it could be clearly established that cement, steel, and other manufactured products were American-made, although certain waivers were available.[15] STAA was modified by Congress again in 1987 to provide for escalating requirements of domestic content. In 1991, Section 1048 of the Intermodal Surface Transportation Efficiency Act (ISTEA) added "iron" to the list of covered products.

Under current statutory provisions and the FTA Buy America regulations (codified in 49 C.F.R. § 661), federal funds cannot be obligated for a grantee's project unless all the steel and iron manufactured products used in the project are produced in the United States and the manufacturing process occurs in the United States.

Waivers are available under Section 165(b) of STAA, pursuant to which the FTA Administrator can determine that application of the requirements will be inconsistent with the public interest, that the materials are not produced domestically in sufficient and reasonable quantities and of a satisfactory quality, or that the inclusion of a domestic item will increase the contract cost by more than 25 percent. In the case of a sole-source procurement, the Administrator may grant a waiver only if the grantee documents that the item is available only from a single source and that the item is not produced in sufficient and reasonably available quantities of a satisfactory quality in the United States. The regulations also specify that Buy America requirements will apply to the procurement of buses and other rolling stock unless the cost of components produced in the United States is more than 60 percent of total component cost and the final assembly takes place in the United States. The FTA master grant agreement terms and conditions require strict compliance with Buy America requirements.[16]

Ensuring compliance with Buy America requirements is complex and often engenders controversy between grantees, suppliers, and manufacturers and FTA.[17] Bidders are required to certify that any steel or manufactured products being procured are in compliance with applicable federal statutes and regulations dealing with the Buy America provisions. To facilitate compliance, foreign bus and rail-car manufacturers often establish domestic corporations and install manufacturing facilities in the United States, with uncertain tax and regulatory implications.[18] At the current time, readily available domestic suppliers of engines, transmissions, axles, wheelchair lifts, seats, and destination signs make it relatively easy to comply with Buy America requirements for basic procurements. But any major dislocations in international economics that affect these suppliers could make compliance with the Buy America restrictions more problematic in the future.[19]

Grantees rely on the manufacturer to submit a certificate of compliance. It is the federal transit auditors and triennial review staff who actually check for Buy America compliance at the end of procurement and during subsequent program reviews. If Buy America compliance is lacking, the grantee is exposed under its grant contract with FTA and is obligated to take whatever means may be available under its procurement contract to enforce the Buy America requirement with the manufacturer--even though at that point there may be little leverage left in the contract retainage or the performance bond to back up a breach-of-contract threat.[20]

Several grantees noted that Buy America compliance can be difficult because of changes requested in equipment during production, where a significant portion of the parts or remanufacturing are derived overseas. For example, near the end of King County Metro's procurement of 236 dual-mode buses from Breda Costruzioni Ferroviarie S.P.A. in 1991, FTA questioned whether change orders during the course of the procurement had reduced the domestic content of the buses below the originally certified 51.18 percent. Breda responded that recent change orders specified by Metro, if retroactively counted in the Buy America calculation, would reduce the percentage to 49.65 percent. (At that time, Buy America imposed a 50 percent content requirement.) After 1 year of discussions and consideration of seeking a public interest waiver under 49 C.F.R. § 661.7 or replacing one or more major components (such as fareboxes or radios) with domestically manufactured components, the issue was resolved by adding a few more passenger amenities and minor components that brought the domestic content up to the exact minimum percentage.[21]

Do the basic Buy America content restrictions create major delays in procurement of long-lead rolling stock? One could argue the answer is yes, because product and production facilities must be generated in the United States, thus lengthening a foreign manufacturer's production sequence. Since the policy is fixed in federal statute, there does not appear to be any relief available for procurements involving foreign manufacturers. Once certification is received for the equipment, a greater delay potential may existing during the fabrication phase of the procurement. Federal grant regulatory solutions to this second type of delay might be accomplished by conclusively establishing Buy America compliance at the time of initial contract after completion of the preaward Buy America audit or by a supplemental review when the typical first prototype bus is delivered. The authors suggest that routine change orders, which may thereafter reduce the final Buy America percentage, would then be left to the discretion of the grantee.

Some confusion concerning Buy America requirements, particularly evidenced by comments from smaller transit properties, could be addressed through administrative efforts. For example, these smaller entities should be aware that there is a qualified legal expert in this area at FTA headquarters, who deals with grantees' Buy America questions regularly.

Preaward and Postdelivery Audits

The second most burdensome category of federal requirements involves the preaward and postdelivery audits imposed under 49 C.F.R. § 663, which implements former Section 12(j) of the Federal Transit Act as supplemented by Section 319 of the Surface Transportation and Uniform Relocation Assistance Act

of 1987. The regulations apply to all rolling stock, ranging from vans to locomotives and including buses, rail cars, ferry boats, and vehicles.

The most burdensome audit seems to be the preaward audit imposed under 49 C.F.R. §§ 663.21-663.27. Pursuant to 49 C.F.R. § 663.23, the preaward audit results in a Buy America certification by the grantee that it either received a waiver from FTA of Buy America requirements or that it has established compliance through an audit that was prepared by someone other than the manufacturer or its agent. The audit report must identify component and subcomponent parts of the rolling stock to be purchased, the manufacturer of the parts, their country of origin, and costs. The report also must specify the location of final assembly for the rolling stock, describe the activities that will take place at the final assembly point, and present the cost of final assembly.[22] The preaward audit is supposed to verify that the grantee/purchaser has certified that the rolling stock contracted for is the same product described in the solicitation specification and that the proposed manufacturer is a responsible manufacturer who is able to produce a vehicle that meets the grantee's specifications set forth in its solicitation.[23] Finally, the audit must establish that the manufacturer has submitted a federal motor vehicle certification under Subpart D of 49 C.F.R. § 663.

The preaward audit must be completed before the grantee can enter into a formal contract for the purchase of the rolling stock.[24] The grantee's auditor must travel to the manufacturing facility to audit a "paper" bus or other vehicle the manufacturer has planned to "assemble" pursuant to the specifications provided by the grantee. The auditor will review any available information, such as the number of parts needed to manufacture and assemble the hypothetical vehicle, where the parts are manufactured, and at what cost. Most, if not all, of the information is totally within the control of the manufacturer.

Smaller properties likely will not have an in-house auditing capability and so may incur the delays and additional expense of selecting an auditor. Procurement officials for small properties should realize that a private auditor may not be sufficiently conversant with equipment manufacturing and assembly to understand the cost information. In addition, some information supplied by a manufacturer may be considered proprietary, confidential, or a trade secret, and manufacturers may be reluctant to disclose that information to a public agency by providing documents or information for written reports that may become subject to state and federal public disclosure requirements. As a result, some manufacturers insist that the grantee retain a trusted and nationally recognized accounting firm and that only summary findings be released to the grantee. The consultant selection process and the manufacturers' reluctance to provide immediate access to information required to develop the necessary certificates may delay awards for months.

Postdelivery audits are governed by 49 C.F.R. §§ 663.31-663.39. The postdelivery audit reviews Buy America compliance to determine if the grantee has filed a certification that demonstrates a waiver of Buy America requirements by the FTA or an audit prepared by someone other than the manufacturer's agent.[25] The postdelivery audit also verifies another certificate from the grantee that a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the manufacture of the rolling stock and monitored and reported on such manufacture. The certificate also must verify that, after review of the inspector's reports, visual inspection, and road testing, the delivered vehicles met the grantee's specifications. Finally, there may be a need for another federal motor vehicle safety standard self-certification.

Many grantees raised the issue of the duplicative nature of the audits and certifications. The preaward procedures are followed at the postdelivery stage, but at that point, they deal with an actual bus or other vehicle, enabling visual inspection of the parts, review of inspection and manufacturing data, and road testing. The acutal bus represents the final product of the specification as it may have been amended during the manufacturing process and thus after the preaward audit.

Several grantees strongly recommended that the preaward audit be imposed only if a particular manufacturer had previously demonstrated noncompliance with Buy America or federal motor vehicle standard requirements. One respondent suggested the preaward audit requirement should be satisfied by allowing the manufacturer to self-certify before the contract is formally awarded, recognizing that, under 49 C.F.R. § 663.39(a), a recipient can use the postdelivery audit to reject the rolling stock and defer final acceptance--and presumably give the grantee leverage through any remaining contract balances, statutory retainage, or performance bonds. Violation of the federal requirements that are the subject of the audit would constitute breaches of the procurement agreement.

In short, the preaward and postdelivery audits are duplicative. Federal and local interests could be sufficiently protected by preaward self-certification and close attention to the postdelivery audit for final accountability. FTA and transit grantees may wish to test this concept with a limited demonstration project to determine its viability and effectiveness. Although 49 U.S.C. § 5323(1) requires a preaward and postdelivery review of grants to buy rolling stock and independent inspections and reviews, and specifically indicates manufacturer certifications are not sufficient, the statute does not mandate detailed and repetitive audits and certificates.

FTA's Third-Party Contracting Circular

Questionnaire respondents reported that many aspects of the FTA program guidance circular on third-party contracting create substantial impediments to long-lead asset purchases.[26] The most frequently identified obstacles were restrictions on "brand name or equal" bid specifications and option restrictions. These requirements are discussed in this section in light of FTA's October 1995 *Circular 4220.1C, Third Party Contracting Requirements*, and its most recent revision, *Circular 4220.1D* (April 1996). Cost or price analysis, which also was identified as a major obstacle, is discussed in Section VI.

Apart from identifying specific obstacles, questionnaire responses indicated a desire for local control and local decision making with respect to third-party contracting issues. Transit agency respondents advocated a less detailed and less restrictive set of rules that would contain general policy-based criteria to foster procurement competition.

The revised *Third Party Contracting Requirements* makes significant changes in FTA oversight of third-party contracting. Apart from changes in preaward contract review and option restrictions, the revised circular demonstrates FTA's intent to rely more on grantee self-certification and to limit FTA involvement to oversight and enforcement of broad procurement principles. Therefore, there may be more local control and local decision making with respect to third-party contracting issues.

Brand Name or Equal

The "brand name or equal" requirement, which is a typical feature of federal procurement and grant requirements imposed by several federal agencies, was cited by some respondents as an impediment. The previous and now superseded third-party contracting circular constrained the use of this technique, and the new circular's treatment is only slightly more flexible:

> 8. Competition.
> a. Full and Open Competition
> All procurement transactions will be conducted m a manner providing full and open competition. Some of the situations considered to be restrictive of competition include, but are not limited to...
> …
> (6) The specification of only a "brand name" product without listing its salient characteristics and not allowing"an equal" product to be offered...
> …
> c. Written Procurement Selection Procedures. Grantees shall have written selection procedures for procurement transactions. All solicitations shall:
> (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, m competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.
>
> Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used.
>
> A grantee shall use a "brand name or equal" description only when it cannot provide an adequate specification or more detailed description, without performing an inspection and analysis, in time for the acquisition under consideration. Further, a grantee wishing to use "brand name or equal" must carefully identify its minimum needs and clearly set forth those salient physical and functional characteristics of the brand name product m the solicitation.[27]

"Full and open competition" in federal government procurement is required by the Competition in Contracting Act of 1984.[28] According to the Senate report accompanying the bill, Congress requires such competition to "maintain the integrity in the expenditure of public funds by ensuring that government contractors are awarded on the basis of merit rather than favoritism."[29] Other benefits of competition are "cost savings," "curbing cost growth," and "promoting significant innovative and technical changes."[30] Competition is, of course, limited or restricted to a certain extent by any contract specifications. However, when considering very restrictive specifications, such as the use of a brand name, a reviewing court or appeals board will apply strict scrutiny to be sure potential bidders who can supply the required goods are not being eliminated. Attempts to narrow the specifications to a single brand name require compelling justification of agency needs; generally, such attempts are found to be unduly restrictive.[31] Thus, the requirement is that the specifications accurately set forth the government's needs, but not eliminate competitors that could meet those needs.

Although these requirements legitimately compel open competition and performance-based specifications, they also can have the unintended effect of impeding the desire of grantees to develop bus and rail-car fleets with significant commonality. Even in those rare instances where state laws and local regulations accommodate specifying a particular product or component, the law and federal transit regulations may present barriers. Using the same durable, proven, and inexpensive parts throughout an agency's entire rolling stock results in maintenance efficiencies, more predictable inventory procedures, and pricing advantages on replacement parts. Despite the brand-name-or-equal requirement, a few manufacturers have cornered the market on certain bus parts because of their widespread acceptability within the bus industry. For example, only one alternator is supplied in the American market that will produce enough amperage for bus operations. One manufacturer's seats are overwhelmingly preferred by many bus purchasers because of their extensive laboratory testing, the availability of product engineers to answer questions, and the perceived durability of the product.[32] Questionnaire respondents suggested that a proven product that has demonstrated superior quality and suitability should be granted some sort of waiver from the requirement.

Although brand-name-or-equal requirements generally are perceived to contribute to delays in rolling-stock procurements, the only potential delay actually identified with such restrictions is the delay experienced before bids are submitted, when "equals" are submitted to engineers of transit properties who are reluctant to consider alternatives to a proven product. This may engender protests and administrative disputes and delay the scheduled opening of bids and the award of a contract. It is thus imperative that the specifications clearly state the performance requirements of the product being purchased and that the project engineers know, and promptly accept, products fully comparable to the brand name product.

Option Restrictions

Another issue that drew criticism from questionnaire respondents for delaying procurements of buses and rail cars was the prior federal limitations on options, which are no longer in effect. Four questionnaire respondents identified option restrictions as impediments to effectively using options to procure long-lead equipment. In 1988, *Third Party Contracting Requirements* was amended to add a provision on contract options that limited options for additional equipment and supplies to not more than 50 percent of the initial quantity of the same contract line item and limited the duration of service and output contracts to not more than 5 years, including any option period.[33]

In the ensuing years, the option restrictions confused and concerned some grantees who claim they missed out on efficiencies and cost savings because they were unable to amend procurement contracts to acquire more units or stretch out delivery schedules. Manufacturers lost the benefit of using transit production schedules to fill gaps in their production lines.

In December 1992, FTA clarified that grantees were not allowed to use options if an indefinite-quantity or requirements contract was appropriate. Alert Number 4 explained that options that increased the base quantity by more than 50 percent "often result in (1) increased costs to the grantee if bidders have had to base prices on possible increases in production costs; (2) unfairness to bidders who based their prices on the possibility of the grantee's exercise of its option; or (3) prices which were no longer the lowest obtainable."[34]

Questionnaire respondents acknowledged that the necessity of fairness in the procurement process extended to contract options. But respondents reported that the 50 percent limit was unreasonable, limiting grantee flexibility and delaying the procurement of long-lead rolling stock by forcing unnecessary procurement activity.

Substantial progress was made toward the goal of fair, but less burdensome, regulation of options in the revisions to the third-party contracting circular. The revised circular requires that option quantities and periods in bids be evaluated as part of the contract award. (Otherwise, the exercise of the option will be deemed sole-source procurement.) The option must be exercised in accordance with the contract award and may not be exercised unless the grantee has determined the option price is better than the market price or the option is the more advantageous offer at the time of exercise.[35]

Third Party Contracting Requirements no longer limits the quantity or duration of an option. It also has abolished the detailed rules about how exercise of the option is justified. There are no longer rules that prohibit use of options in certain circumstances.[36] In place of these detailed restrictions, the focus is on the principles of competitive procurement and better price (or other advantage) at the point of option exercise. The revisions to the circular, with respect to options, address many major concerns raised by questionnaire respondents. The next step will be to see how the revised circular works in practice, insofar as use of options is concerned.

Multiyear contracting is another technique that undoubtedly will prove useful and beneficial in combination with the new options practice. In the revised third-party contracting circular, FTA appears committed to eventually adopting this technique by its statement "...[and] the use of 'multi-year contracts' will be addressed in the 'Third Party Procurement Manual' in which FTA will discuss the benefits of using this process and include model contract clauses."[37] Multiyear contracting, in combination with the new flexibility on options, promises to revolutionize the traditional rolling-stock procurement process. In the future, fleet replacements might be contracted out over extended periods, allowing transit agencies to quickly respond to equipment needs without repetitive solicitations.

Four questionnaire respondents reported that they had successfully acquired transit equipment by negotiating an assignment of an option on equipment held by a second transit system, a technique sometimes referred to as piggybacking. This appears to be one of the most attractive procurement streamlining mechanisms available to small- and medium-sized transit systems. However, two questionnaire respondents reported that they were not permitted to acquire rights to exercise options held by other transit systems. In both cases, the transit system allegedly exercised a second transit system's option rights that were themselves in compliance with applicable rules. Although it is possible that the two reported experiences were aberrations, they also may indicate that more specific guidance with respect to piggybacking transactions may be useful. At present, information on piggybacking is limited, and the practice is not specifically addressed in the revised contracting requirements, *Circular 4220.1D*. The new FTA flexibility on options coupled with the Circular's promotion of intergovernmental procurement agreements suggest piggybacking should be explored as a method for expediting future contracts.

IV. CREATIVE FINANCING AS A MEANS OF EXPEDITING PROCUREMENTS

One of the practical causes of delay in long-lead procurements is that transit agencies often are forced to accrue the necessary funds in special accounts, secure appropriations, wait for state grants, or issue bonds before they can award contracts. A transit agency may be subject to variable funding streams or may be unable to issue bonds because of statutory or charter debt limits. Although the general common law rule is that a municipality may contract for improvements without having the funds on hand to pay for them,[38] fiscal prudence and charter provisions or ordinances often require that certifications of adequate funding or appropriations be secured before contracting.[39] Broader use of the referenced alternatives, in addition to conventional leasing, could expedite procurements by providing earlier financing and the necessary security for an agency and contractor to proceed.

The questionnaire sought information on the extent to which the transit industry was leasing property and equipment or employing innovative equipment financing mechanisms as methods to minimize procurement delays. The questionnaire asked whether transit systems using such leasing and innovative financing techniques were experiencing additional or different problems or delays.

Nine respondents who represented a range of different-sized transit systems indicated they had acquired buses in conventional lease transactions to supplement their fleets or to meet temporary capacity needs. In general, however, only larger transit systems reported using innovative financing techniques to achieve streamlined procurement timetables. Small- and medium-sized transit systems either have not yet investigated innovative financing techniques or, after investigation, have found them to be unworkable or inefficient on small-scale acquisitions.

Conventional Equipment Leasing

As noted, larger transit systems have made substantial use of capital leasing for buses, rail cars, and other equipment. Together, these systems form a major component of the U.S. transportation equipment leasing market. None of the forty-six respondents from small- and medium-sized transit systems indicated that successful experiences with leasing. Several reported that they had investigated leasing but determined it to be too expensive.

On further inquiry, transit systems that reported leasing to be too expensive fell into two categories. Five systems reported that their lease transactions were too small to attract lending and financing sources. Thus, there may be a lack of a market for small- and medium-sized capital leases on the funding supply side. Other small and medium-sized systems were unable to structure lease financings in a way that made them cost effective. Federally financed equipment and facility leases are required to be "more cost effective than acquisition or construction..." (49 U.S.C. § 5307 [b] [1]). In general, this requires that the transit system demonstrate that the total cost of the lease is less than the total purchase cost.[40] Small- and medium-sized transit systems are at a comparative disadvantage with respect to the variables that go into this calculation because they generally have lower credit ratings, which may cause higher borrowing costs.

Apart from the potential for cost savings and other advantages,[41] traditional capital leasing offers transit systems the opportunity to streamline the procurement

process. The most obvious procurement advantage is that capital leasing normally does not require local ballot approval, because money used to meet obligations in lease transactions usually is not balance-sheet debt. Capital leasing also allows transit systems to complete an equipment acquisition in one procurement, whereas a purchase may require a multistep transaction. Furthermore, lease transactions streamline procurements in situations where the lessee desires to purchase maintenance services on the purchased equipment from the vendor/lessor. Questionnaire respondents focused on the second of these three advantages. They preferred the ability to acquire more buses or rail cars in one procurement over acquiring the same number of buses or rail cars in a series of procurements.

Thus, large transit systems with high credit ratings use conventional leasing to minimize procurement delays, but medium-sized and small systems have trouble attracting capital and making conventional leases work less expensively than purchases.

One way to open up capital markets and make capital leasing more cost effective is for transit systems to pool their procurements and procurement resources to form a larger transaction (or series of transactions).

Certificates of Participation

Certificates of participation (COPs) often have been used by larger transit agencies in conjunction with conventional leasing, lease/purchase, or sale/leaseback arrangements to acquire long-lead rolling stock. COPs are a type of lease transaction in which the lessor issues shares or certificates to certificate holders (i.e., investors). Certificate proceeds are transferred by the lessor to the transit system, which uses the proceeds to pay the manufacturer. In consideration for the certificate proceeds, the transit system agrees to make payments to the lessor, which in turn pays the certificate holders. The transit system's payment obligation is usually met with annual capital funds (e.g., FTA Section 9 apportionments matched with local funds). The tax benefits of the transaction flow to the certificate holders. A trustee usually is used to issue the certificates and oversee payment processes. Depending on its legal authority under state law, a transit agency also may have the ability to issue tax revenue anticipation notes or grant revenue anticipation notes, which generally operate in the same fashion as COPs without legally creating long-term municipal debt.

The San Diego Metropolitan Transportation Development Board (MTDB) decided in 1990 to use a COPs lease transaction to acquire 130 buses to replace an aging fleet that was beginning to generate significant maintenance costs. Using Section 9 federal funds, MTDB issued $41 million in 12-year COPs for the new buses. The COPs were secured by MTDB's promise to appropriate annual principal and interest payments from its revenues and to use the new buses for at least 12 years. Security for the certificate holders was arranged by having a trustee hold title to the buses. MTDB had assurance of FTA grants to provide 80 percent of the annual principal and interest payments on the COPs. The COPs provided MTDB with several advantages:

• MTDB was able to purchase all 130 replacement buses at one time, thus accelerating the savings on the maintenance costs on the aging fleet.

• MTDB received a price discount from the manufacturer because of the size of the purchase, allowing the agency to begin accruing federal and local revenues for the next bus fleet and to provide new equipment that met all Americans with Disabilities Act and environmental requirements, which may be more stringent in subsequent years.[42]

• The time spent from planning to procurement took 1 year instead of the 4.5 years that would have been spent on a conventional cash acquisition strategy, with a reported savings of $4.3 million.

• The $41 million designated to pay for the buses remained available for other capital purposes.[43]

A variation on the same theme was the creation in 1990 of the nonprofit California Transit Finance Corporation (CTFC) by the California Transit Association. CTFC signs a lease/purchase agreement with California transit agencies that want to use tax-exempt lease/purchase financing. CTFC then sells COPs to generate funds for the transit agencies to use for equipment purchases. The transit agency is committed to lease payments covering principal and interest; those funds are used to pay back the COPs held by the purchasers, who also retain a security interest in the equipment.[44] Other typical examples include Santa Clara County Transit District's $29 million financing though equipment trust certificates of a purchase of 1000 buses in 1980 and Santa Clara County Transit District's financing of 50 light-rail cars in 1990 for approximately $50 million.[45]

In 1985, the City of Sacramento issued $29.4 million in COPs to help fund electrical substations, rail line construction, signals, track and catenary, and fifteen light-rail vehicles.[46] The same technique has been used by other local governments to finance other types of capital improvements and miscellaneous equipment.[47]

Another variation of COPs is found in state-agency-sponsored programs. New Jersey Transit has been an active lessee in the domestic market for over 10 years through the State Master Lease Program, which is financed through the sale of COPs. When equipment is purchased through this program, the contracting is handled through the New Jersey State Purchasing Bureau.[48] COPs and lease/purchase arrangements offer a transit agency the ability to raise a significant amount of money over a short period of time, provided the agency has a stable revenue stream from a dedicated tax or other funding source. COPs are typically cheaper than the carrying costs of long-term debt. There are, however, risks and major costs involved in these transactions. The credit rating of the agency is a critical factor, and transaction costs can be high. It has been estimated that fees and interest costs on certificates of participation can add up to 50 percent of equipment costs as principal and interest payments are made over the term of a particular lease:[49]

> There are also risks involved with lease-back certificates of participation financing. The federal government may decide to change the matching formula sometime during the term of the lease. Rating agencies normally discount the value of the continuation of federal funding formulas in determining a public entity's credit rating. This practice places a greater emphasis on the entity's ability to meet its obligations from local resources.
>
> Even when federal funds are not ivolved, transportation authorities or other governmental agencies have an implied obligation to make lease payments, which in turn pay the certificate investors.
>
> The issuance of certificates does require the payment of fees to securities underwriters and attorneys for the issuance of the offering, and debt service over the term of the certificates is an additional cost.... The combination of fees and interest costs on the

certificates can add up to 50% to the cost of acquiring equipment at the state and federal level, which is spread out over the term of the lease.[50]

Cross-Border Leasing

The pattern of questionnaire responses with respect to cross-border leasing was similar to that regarding traditional capital leasing. In fact, the disadvantages experienced by small and medium-sized transit systems in capital leasing may be more pronounced with respect to cross-border leasing. There are many possible variations on a cross-border lease transaction. All transit cross-border leases involve the following elements:

- A transit system makes a purchase agreement with an equipment manufacturer.
- Simultaneously, the transit system makes a sale and lease-back of the equipment with a foreign entity.
- The lease contains a purchase option, which the transit system commits to at the inception of the lease.
- The purchaser gets a loan to pay for the equipment, which is secured by the lease payments.

Typically, the lessee and a third party make an agreement pursuant to which the third party assumes the lease payment obligations and the purchase obligation in exchange for a lump sum payment equal to the present value of those obligations. The transit agency keeps the difference between the purchase price paid by the foreign purchaser and the amount paid to the third party, which can be substantial.

Small- and medium-sized transit systems reported that their lease transactions were too small to attract foreign investors. Other small- and medium-sized systems reported that the transaction costs for cross-border leases made them prohibitively expensive. Even large systems, many of which are active and frequent participants in the cross-border leasing market, enter into cross-border lease transactions primarily for their potential financial benefits, rather than to avoid procurement delays. Cross-border leasing does not offer any significant procurement advantages that are not enjoyed in a traditional lease. Procurement of financial services related to cross-border leases has been deemed subject to the FTA third-party contracting guidelines. Thus, grantees may not be able to treat the availability of cross-border leasing as an evaluation factor in selecting a vendor under an FTA-assisted capital procurement.[51]

Flexing Highway Funds

Since ISTEA was enacted in 1991, more than $2 billion in federal funds has been used to fund public transit under ISTEA's flexible funding provisions. Some interest groups believe the program has had mixed results for transit:

> According to statistics compiled by the American Public Transit Association, federal highway dollars spent per transit dollar more than doubled from 1981 to 1991, from $1.90 to $4.60. Transit has begun to make some gains under ISTEA--the ratio in fiscal 1995 will be $1 for transit to $4.30 for highways. But that is hardly a revolution, and even less so when one considers that 1992 signaled the official end of massive spending on construction of the Interstate Highway System....
>
> While most states fall somewhere in between, it is clear that hardly any of them are taking much advantage of the flexibility allowed them by ISTEA to shift money from roads to alternate transit. According to a report by the Surface Transportation Policy Project, only two states "flexed" highway money to alternate transit m 1993--one fewer than m 1992. Probably the best nationwide gauge is the Surface Transportation Program, the ISTEA spending category regarded as the most flexible. In the first four fiscal years of ISTEA, states will roll about $400 million to transit, out of a total of more than $15 billion appropriated for the Surface Transportation Program. That's a flex of just 3 percent.[52]

There have been a few significant successes, and fund transfers are gradually increasing. For example, voters in Maine in 1991 rejected a statewide referendum on a bond issue to fund a new turnpike and passed the Maine Sensible Transportation Policy Act, which paralleled many of ISTEA's provisions. Within the next 2 years, Maine switched $8 million in federal highway funds to electric buses, bicycle racks, and an intermodal center on the Maine Turnpike. The location of transit lines and community centers is now figuring into land-use permitting decisions,[53] and fund transfers have been gradually increasing.[54] Forty-three states, the District of Columbia, and the Virgin Islands have used flexible-funding provisions to transfer funds for transit projects between fiscal year 1992 and fiscal year 1995.

In the face of declining capital and operating assistance and the uncertain implementation of the principles behind ISTEA, all forms of local government, including public transit agencies, will need to look more aggressively at other means of securing local financing for their transportation programs.[55]

Several interesting conclusions may be drawn from aspects of the questionnaire and follow-up phone interviews concerning new ideas for financing long-lead rolling stock. With the exception of continuing activity in cross-border leasing and turnkey procurements by the largest transit properties, activity among larger systems in the conventional leasing arena using certificates of participation, and the use of readily available local or state law mechanisms for interim financing, very few new ideas have surfaced in the American transit industry. The dollar amounts involved in the efforts of larger transit agencies in the arenas mentioned are impressive. Unfortunately, what is not evident is smaller properties working together or federal or state programs designed to assist smaller transit agencies to cooperatively benefit from these unique financing techniques. The challenge will be to enable smaller systems to leverage shrinking public funds in the manner of aggressive programs used by large agencies, such as the New Jersey Transit Corporation and the Los Angeles County Metropolitan Transportation Authority.

63-20 Financing Possibilities

There are innovative financing techniques that would not require changes in federal laws or regulations available to transit agencies. States and political subdivisions, including most transit agencies, are authorized under federal tax law to issue obligations whose interest is exempt from federal income taxation (tax-exempt bonds).[56] Each state has statutes and administrative rules that outline the terms under which bonds may be issued; the exemption from federal taxes is derived from federal statutes and Internal Revenue Service regulations.

Under certain legal, practical, and political circumstances, a political subdivision might prefer not to issue its own tax-exempt bonds for a project. For example, a local transit agency may realize a need for a new downtown multimodal station but may be faced with a statutory limit on debt that prevents it from

issuing more bonds. The public policy of a city may favor privatization, and the redevelopment of a terminal facility by a transit district can be expected to draw municipal opposition unless community interests are somehow involved in the decision-making process. State grants for a park-and-ride facility might be strictly limited to expenditures for highway-related facilities, while a transit agency is looking for supplemental funding to initiate private enterprise uses at the proposed facility.

At a time when there are declining public funds available to support public transit procurements and projects and renewed interest in cooperating with the private sector, 63-20 financing can enable an agency working in partnership with the private sector to satisfy demands for additional capital facilities in a cost-effective manner. A nonprofit organization's board may offer an effective forum for community interests to help shape a project and work directly with public agency board members. The nonprofit organization may serve as an effective buffer between different levels of government on multijurisdictional projects, where no single agency wants to issue bonds or there is reluctance to allow one agency to assume control of key financing and contracting steps.

In 63-20 financing, a nonprofit corporation (qualified under the nonprofit corporation laws of a state) may issue tax-exempt debt for the purpose of financing facilities as long as certain requirements are met. The most well-known requirement is that title to the facilities must be transferred to a government entity when the debt is retired.[57]

Interest on 63-20 debt is exempt from federal income taxation. The cost of capital is therefore lower than it would be in conventional capital markets. A 6320 debt is sold as tax-exempt bonds, generally in the same financial markets as government tax-exempt bonds. The interest rates may be comparable, depending on the credit strength of the collateral security.

The tenant of the facility in a 63-20 financing is required to be either a government entity, such as a transit agency, or a charitable organization (qualified under Section 501[c][3] of the Internal Revenue Code). An underwriter may underwrite long-term (20 years or more) bonds issued by the nonprofit corporation. The credit support for the bonds comes from the lease of the facility to the government agency. The bonds may be issued on a nonrecourse basis to the nonprofit corporation (e.g., the bonds would be secured solely by lease revenues). In nonrecourse financing, the owners of the bonds would have no recourse against any other assets of the nonprofit corporation.

This financing mechanism has not been widely used in the public transit industry. However, nothing in the regulations governing 63-20 financing precludes its use for procuring rolling stock or acquiring real estate for major transit developments as long as careful attention is paid to applicable Internal Revenue Service and U.S. Treasury Department tests, rules, and regulations.[58] Dallas Area Rapid Transit considered and then abandoned development of 6320 financing by a nonprofit corporation to fund a procurement of forty light-rail cars through issuance of COPs and cross-border leases in the early 1990s.[59]

In a 63-20 financing for a transit agency project, the bonds would be issued by the nonprofit corporation (the issuer). In traditional financing, the issuer of the debt is the party primarily responsible for repayment of the debt. However, this is not required in a 63-20 financing. If a nonprofit issuer with substantial assets is available to a transit agency, that issuer may issue debt and pledge its full faith and credit--thereby adding real value, in addition to the value of the tax-exempt financing, to the debt issue. If the issuer owns substantial assets and has a long-term operating track record, the rating agencies/insurers are more likely to view the project favorably. For the vast majority of nonprofit organizations, outside the pale of large operating charitable hospitals, the organization may not have continuity of management and substantial financial reserves. It is more likely that the project seeking tax-exempt financing (outside of the government umbrella) is intended to be financed on the basis of cash flow from the project itself.

If the goal is to structure a cash-flow project, formation of a new nonprofit corporation under state law is generally preferable. The nonprofit may be formed with a charter specifically designed to finance a single project or a limited number of projects on a nonrecourse basis. This suggestion is based on experience with rating agencies and bond insurers. If an issuer does not add significant financial support to the project, the credit insurers/rating agencies will consider whether other unrelated activities of the issuer have the potential to adversely affect financing. Does the issuer retain the right to incur second liens on the project? Do the other activities of the issuer carry financial risk? What would be the impact of the bankruptcy of the issuer? The latter issue generally presents the most compelling case for creating a new nonprofit corporation to act as the issuer. Federal bankruptcy law permits certain types of leases to be terminated in bankruptcy. If the lease revenues from the project are the primary source of repayment for bonds, then any risk of termination of the lease, particularly a risk that would arise from unrelated activities of the issuer, is not acceptable.

To access the tax-exempt market, the issuer's debt is commonly denominated as bonds. Because the debt is corporate, however, there is more latitude available in structuring the debt than would be the case in a typical municipal bond issue. There are some market-driven conventions that may be anticipated (e.g., the customary term for municipal bonds is 20 years) that would have to be adapted to the expected useful life of the rolling stock.

Another, more important, characteristic of the municipal bond market is the risk-adverse nature of the market. In a public offering, an investor in municipal bonds typically seeks an essentially risk-free investment. Although credit quality affects pricing somewhat, the most significant factors in pricing are market issues and the bonds investment grade rating. The bonds may be secured solely by the project or they may be secured with third-party credit enhancement (e.g., a policy of municipal bond insurance or letter of credit).

Thus, a transit agency could secure debt by executing a lease with the nonprofit corporation assuring repayment of the bonds and by making other pledges of support, such as providing a letter of credit or by committing expected grants or taxes as backup security.[60] Bonds may qualify for an investment grade rating on the basis of their intrinsic credit strength or with the assistance of credit enhancement. Credit enhancement in the tax-exempt market is generally provided by a policy of municipal bond insurance or a letter of credit issued by a bank. Thus, the transit agency could improve the security of the issue by procuring bond insurance; the bond issue would then be rated on the basis of the insurer's ratings. Bond insurance is generally noncancellable, extends for the full term of the bonds, and is obtained by paying a single premium at the time bonds are issued. The insurance premium is a closing cost.

If the security for the bonds is based primarily on the viability of the transit property or project, investors (or the credit enhancer in a credit-enhanced deal) will focus on the intrinsic value of the property or project as well as the projected cash flow from the transit agency.

The project security must be in place at the time of debt issuance and must remain in place as long as the bonds are outstanding. Accordingly, the credit evaluation will examine the project from the date of funding through the date of maturity of the bonds. If bond proceeds will be used to pay construction costs, the credit examination will extend to the construction period as well as the period of operations.

Under a 63-20 financing, a government entity or appropriate nonprofit corporation can access the tax-exempt capital markets. In the case of a public transit agency, the entity can avoid the practical, legal, and political problems associated with the construction or procurement of its own facilities and the legal or political problems of issuing its own debt--with the added benefit of receiving unencumbered fee title to the facilities once the bonds are retired.

Pooling Organizations

As noted, conventional capital leasing and innovative financing techniques are not available or feasible for small- and medium-sized transit systems because of a lack of interest from the capital markets and/or high transaction costs. One possible way to open up conventional capital leasing and innovative financing opportunities for small- and medium-sized transit systems is for the systems to form their own organizations to share resources and to coordinate equipment acquisitions. An organization formed for such purposes is sometimes referred to as a pooling organization.

In the transit industry, the best example of a pooling organization may be the California Transit Finance Corporation (CTFC).[61] CTFC has provided valuable assistance to California transit agencies by serving as a nonprofit lessor for COP-financed pooled purchases and by developing standardized financing and lease documents.[62] CTFC is governed by a board of directors selected from California transit agencies. CTFC has a standing team of professionals, including a financial advisor, bond counsel, and underwriters who assist CTFC in analyzing proposed transactions for interested agencies and in developing standardized transaction documents.

According to a 1995 FTA report:

> The CTFC program allows transit to issue their COPs using common lease agreements, trust agreements and resolutions. Issues are sold at the same time allowing all participants to be incorporated into a single official statement. Significant time savings occur because multiple service procurements are avoided and the cost of issuance are shared between the participants.
>
> The program is flexible to allow different credit structures between agencies. Even agencies with different credit ratings can be sold at the same time by creating two series within one issue. The issue is structured to avoid any cross default liability between participants.[63]

Similar nonprofit corporations could be established in other states. All states either have a district nonprofit corporations act or sections within their corporation codes to govern the vast array of charitable and eleemosynary organizations throughout the United States.

On a state-by-state basis, the broad constitutional and police powers of each state would have to be examined to determine whether there is authority for legislative establishment of state agencies, commissions or quasi-municipal corporations, or authorities devoted to supporting transit agency procurements. Such agencies could be expected to serve as a leasing entity; manage cooperative multiagency procurements; supply credit guarantees; pool participant funds for loans, grants, or direct purchases; and assemble a professional staff to put deals together, monitor transactions, and develop standardized contract and financing forms.[64] With access to funding sources, such entities could absorb some of the transaction costs for smaller transit agencies.[65]

Pursuant to Section 350 of the National Highway System Designation Act of 1995, the U.S. Department of Transportation has been authorized to enter into agreements with as many as ten states to establish state infrastructure banks (SIBs) (or to enter into multistate infrastructure banks).[66] An SIB would facilitate and encourage investment and eligible transportation infrastructure projects sponsored by public and/or private entities. By forming an SIB, a state may be able to use its federal-aid highway apportionment, federal transit allocations, and state/local funds to make loans, provide credit enhancement, or serve as a capital reserve for bond or debt financing. It also could be used to subsidize interest rates or to finance purchase and lease transactions. SIBs may serve as a mechanism for more widespread pooling arrangements.

V. REQUIREMENTS THAT IMPACT RIGHT OF WAY AND LAND ACQUISITIONS

This section provides a discussion of major obstacles to long-lead acquisitions of rights of way and land. The timing obstacles in these acquisitions arise from condemnation and environmental requirements.

Condemnation Obstacles

Questionnaire responses identified two significant areas of delay in acquiring real property: the federal review of appraisals and FTA approval for condemnation actions and administrative settlements. Five questionnaire respondents identified appraisal review as a significant delaying factor; seven respondents gave examples of FTA's delay on review of condemnation or administrative settlements.

Four respondents commented on how difficult it is to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and their implementing regulations[67] and similar state requirements. Because uniform federal and state relocation acts are not within the purview of transit regulatory agencies, and assessing those statutes is beyond the scope of this research project, this issue will not be discussed further in this report. But based on survey responses, transit agencies view these requirements as the most significant impediments to cost-effective real-property acquisition. For an excellent discussion on relocation requirements, consult *Law of Eminent Domain*, Section 34.06.[68]

In 1993, FTA liberalized its practice of requiring two appraisals and a reviewer's analysis when the estimated property value exceeded $100,000,[69] but continued the policy of mandatory federal oversight at certain thresholds:

> Prior FTA concurrence is required when the reviewer's recommended offer of just compensation exceeds $250,000, or when a property transaction in excess of $250,000 must be resolved through eminent domain proceedings. Prior FTA concurrence is also required when a settlement is $50,000 higher than the grantee's offer and an administrative settlement must be negotiated.

A related discussion sheet added the following statement:

> [W]hen there is a contamination factor in the acquisition process, the cost to remediate the contaminated property needs to be reflected in the appraisal data that contribute to the establishment of the final market value. [70]

FTA's *Circular 5010.1B,* issued on September 7, 1995, continues the same thresholds requiring FTA approval;[71] however, the same circular offers the possibility of an alternative procedure:

> A grantee conducting a major capital project may prefer a process approval, which permits higher dollar thresholds before FTA prior concurrence is needed. To do this, a FTA real estate specialist must review and approve the processes used in acquiring and clearing real estate. Grantees may request a review through the FTA Regional Office.[72]

The technique may be available to many large transit agencies that possess dedicated real estate or that have developed sufficient experience in condemning and acquiring local properties. The technique would help these agencies to develop a formalized acquisition and negotiation protocol that will pass FTA muster.

One recommendation from questionnaire respondents is that required monitoring and/or approvals of real estate acquisitions should be delegated, when possible, to regional offices to avoid delays caused by centralized review.[73] Appraisal techniques and methods of evaluation are generally well understood by attorneys and appraisers who work in these arenas. Where there is an appraisal issue over the highest and best use of the property or whether severance damages or special benefits should be applicable, or when there is suspected contamination, the transit agency and property owner's appraisals typically will differ widely. Generally, the complexities of the local real estate market and the effect of the need for remediation on fair market value are uniquely within the knowledge of the local parties who must arrive at a very complex balancing of risks to reach settlement. Review of those negotiations can be more expedient if made by knowledgeable local FTA staff, based on the analysis by the transit agency and its local appraisers, engineers, and attorneys.

Seventeen questionnaire respondents suggested that the federal thresholds for approval be revised upward, particularly the $50,000 "trigger" for FTA review of settlements in excess of the original offer. This revision may now be possible under the FTA *Circular 5010.1B,* Section 7b.(2)(e), "process approval" approach. During the current era of reduced federal and state funding, it is unlikely that any grantee would take any risk with administrative settlements on property acquisitions funded by FTA, which could be considered an argument for less need for strict oversight. Every local match dollar is important to a transit agency, and state constitutional and statutory provisions generally mandate a fair-market-value approach that parallels federal requirements.

Federal Requirements for Acquiring Contaminated Land

Contaminated property interjects significant additional uncertainty into the evaluation process. Although a majority of states have some form of "quick take" statute that transit agencies can use to gain immediate possession of property to ascertain the nature of the contamination, many others do not.[74] A public owner in these states must assess whether being slightly more generous in the offer and taking more risks on the potential cost of cleanup will be sufficient to expedite the negotiations and thus save time (and money) in the ultimate project development. A transit agency will often have little time or flexibility in negotiations for the acquisition of a contaminated parcel. Because property cannot be acquired until there is an approved project, by the time acquisition can actually proceed, there already may be a well-advanced schedule and budgeting commitments of state or local funds that can be lost if not used. When the property is contaminated and the parcel cannot be avoided by an alignment change or other means, the agency will be forced to remediate the property on a tight schedule as a condition to purchase--leading inevitably to use of the most expeditious, and often most expensive, cleanup methods.

If the contamination source can be readily traced to the current property owner's actions or if liability for remediation is otherwise clear or covered by insurance, a property owner may be persuaded to assume cleanup responsibility before public purchase. The Dallas Area Rapid Transit (DART) system enjoyed some success with a policy that allowed a willing seller the opportunity to cleanup a parcel before the public agency formally acquired the site. Private parties reasoned they could accomplish the remediation quicker and at a lower cost with more control over the process and usually more receptivity from environmental agencies. In the long run, their net recovery was increased because DART could then acquire the property at its full fair market value without lowering the price for future remediation efforts.

The issue of how contaminated property should be evaluated in a public agency setting is one of significant legal and appraisal dispute.[75] Public owners want to convince a judge or jury that they should reach a conclusion about fair market value and then deduct the likely cost of the remediation on a dollar-for-dollar basis. A public agency's questions to its appraisers at trial will focus on the stigma attached to the property by virtue of its "environmental problems" (which were probably uncovered by the public agency's environmental assessment and reacquisition testing program). On the other side, the condemnees will stress the speculative nature of potential future cleanup exercises and argue that they were an innocent purchaser and should not have to pay for the sins of prior owners. Even more telling, the property owners' attorneys may argue that the price previously paid by the owner actually reflected an inherent discount by the market as a result of the known or suspected contamination.

These can be powerful arguments to a jury, particularly when the current owner has not caused the contamination.[76]

The condemnee's attorney also may argue that the true impact of suspected contamination on the fair market value of a property is much less than a dollar-for-dollar estimate of remediation contractor costs, because a lot depends on who the hypothetical "willing buyer" would be and the intended use of the property. Not much, if any, reduction in the fair market value could be justified if a prospective purchaser intended to demolish a building on contaminated property and pave it over for a park-and-ride lot, particularly if that is the best use of the property in that vicinity.

Given the likelihood of disputed testimony among appraisal, environmental, and real estate experts testifying on the extent of contamination and impact on fair market value, a confused jury is not likely to accept a public agency's appraisal and offset position in all respects. The guidance in case law concerning how to factor remediation costs into a fair market value evaluation is minimal and split.[77]

Local complexities of these types of transactions suggest significant discretion should be left with the transit agency, with federal approvals being required only where major increases in value are conceded for purposes of an administrative settlement. Given the legal and public policy constraints on acquiring or condemning property, the authors believe that the threshold for FTA local office approval of administrative settlements should be raised higher than $250,000.[78] Similar flexibility is needed in approvals for settlements that exceed the grantee's

original offer--an offer that, by federal regulation, must be at the appraised value as confirmed by the review appraiser and offered at the commencement of negotiations.[79] This means the transit agency necessarily will be starting at a lower end of the price range, before it has received the owner's appraisal analysis and spent time discussing with the owner how the property is employed in a business or valued for future development. In short, it is likely that the $50,000 threshold will be exceeded on any property purchase exceeding $400,000 to $500,000, based on the transit agency's initial appraisals. Questionnaire respondents recommended a higher threshold before FTA approval is mandated, but they did not indicate a range. The authors suggest the threshold be at least $100,000. These types of policy revisions would address many of the concerns raised by questionnaire respondents concerning FTA's real-property acquisition approval requirements.

The new circular appears to impose more prerequisites to a grantee's use of federal funds to acquire contaminated properties, particularly those properties that could be identified as being contaminated by hazardous waste. As now provided in FTA *Circular 5010.1B,* Section 7.b(1):

> Hazardous Waste Contamination. Under no circumstances will there be Federal participation m costs to remediate a property unless the grantee has exercised due diligence before acquisition on seeking and evaluating the risks for contamination and has aggressively sought legal recourse against potentially responsible parties. Due diligence includes a parcel-by-parcel Phase I Hazardous Waste Initial Site Assessment, with both on-site and off-site reconnaissance, conducted by personnel trained and experienced in identifying potential hazardous material problems. The Phase I assessment should be coordinated with appropriate State agencies and documented in a report that describes the procedures and methodology used and contains an analysis of the results, opinions and recommendations regarding further action. If the potential for contamination exists, further studies (a Phase II Preliminary Site Investigation) by appropriately qualified specialists will be necessary in order to assess the type and cost of mitigation that might be required. Results of the reports should be discussed with FTA prior to acquisition of property.
>
> The legal responsibility for hazardous material cleanup rests within the property title chain and, as such, ownership should be avoided until the grantee can be reasonably certain the property is contamination-free. If contamination is encountered during construction, legal actions should be taken against previous property owners as liable parties for the costs involved in the cleanup.

In effect, the new policies mandate a much more aggressive approach to avoiding transit investment in remediation costs and to federal oversight of a grantee's acquisition negotiations of contaminated property.

In recognition of FTA's concern that federal funds not be spent to remediate contaminated property, is detailed federal oversight of the local negotiations with property owners and of dealings with state and local environmental agencies necessary? The authors recommend that FTA policies on contaminated property purchases accommodate a "process approval" approach similar to that provided in FTA *Circular 5010.1B,* Section (2)(e), for permitting higher dollar thresholds before FTA concurrence so that transit agencies can avoid potential delays through cause if the project acquisition process is reviewed at each stage.

Other Considerations When Acquiring Contaminated Land

In any land acquisition, problems and potential delays can arise if the land in question is contaminated. An acquisition of railroad right of way or yard property can be particularly troublesome. Railroad rights of way may be long, narrow strips of contaminated soil. Decades of locomotive refueling and hazardous material car storage make the probability of contamination in railroad yards high. The liability of a purchaser for such environmental contamination arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Resource Conservation and Recovery Act, and the Federal Water Pollution Control Act and from state counterparts.[80] These laws present transit systems with potential liability for contamination arising before their ownership of land and rights of way.

If a Phase I (which is nonpervasive) or Phase II (which involves taking core samples) environmental audit of land to be acquired by a transit system does not reveal soil or groundwater contamination, the transit system will be able to acquire the land with relatively little potential environmental liability because of the "innocent purchaser" provision of CERCLA.

If, on the other hand, an environmental audit reveals soil or groundwater contamination, the liability and potential liability associated with the land is so great that many transit systems simply will not acquire the land. Instead, they will pursue acquisition of land at the next best location for the project. Thus, in some cases, transit systems are forced away from the best project location in favor of a project location that is not contaminated. The failure of current environmental laws to adequately mitigate the potential environmental liability of transit systems may impede development of the best and most efficient transit systems or facilities. Beyond this problem, potential environmental liability that prompts a transit system to change plans for the location of a facility may delay acquisition or construction of the facility.

Alternatively, if the transit system cannot, or chooses not to, move to an alternative site, it is compelled to clean up the land it acquires and dispose of the contaminated soil and materials. In many cases, the cost of cleanup and disposal can exceed the value of the property. Moreover, cleanup and disposal causes substantial, and unavoidable, delays in project completion.

The development or redevelopment of contaminated land is a widespread problem and is particularly acute in urban areas. Thousands of sites across the country are in need of some environment cleanup or remediation before any redevelopment can occur. These sites, which often have low or moderately low levels of contamination and are located in urban areas, are sometimes referred to as "Brownfields." Following the lead of several state environmental agencies, the Environmental Protection Agency (EPA) has developed an initiative called the Brownfields Action Agenda to facilitate the redevelopment of these contaminated urban lands. EPA's Brownfields Action Agenda, which was announced in January 1995, is a description of the actions EPA will take to facilitate development of these low-level contaminated sites. The project will include at least fifty redevelopment demonstration projects on contaminated sites. More than twenty sites had been designated as of fall 1995.

On May 25, 1995, EPA issued several new policy statements directly related to the Brownfields Action Agenda, including a new Guidance on Agreements with Prospective Purchasers of Contaminated Property (Purchaser Guidance). The Purchaser Guidance is designed to explain the circumstances under which EPA will enter into covenants, commonly known as prospective purchaser agreements, not to sue purchasers of contaminated property.

At the center of the Purchaser Guidance is the principle that prospective purchaser agreements are appropriate only if there is substantial public benefit.

Apart from environmental benefits from cleanup, EPA will look at other public benefits, including development of abandoned or blighted property or provision of improved public transportation and infrastructure.

It may be possible to diminish the problems and delays associated with the acquisition of contaminated land by establishing an initiative in the transit industry like that being employed more generally through the Brownfields Action Agenda.

Apart from EPA's Brownfields Action Agenda, some state environmental agencies have demonstrated a willingness to find nontraditional ways to bring contaminated properties back into use. For example, some states offer a model for establishing an environmental cleanup fund for transit systems. Other states have established trust funds in response to increased liabilities and costs associated with leaking underground storage tanks (USTs). Although state UST trust funds can vary significantly, they generally provide up to $1 million per tank cleanup, subject to provisions requiring the land owner to pay for a portion of the cleanup before the tank trust fund is tapped.[81] Many states finance their UST trust funds by establishing taxes on tank owner/operators and registration fees. Other states use a tax on the petroleum products stored in the tanks. Most states make participation in the UST trust fund mandatory.[82] States could establish trust funds modeled after the UST trust funds to provide financial resources for cleanup of land acquired for transit systems or facilities. The trust funds could be funded with a sales or gas tax or a more narrowly tailored user fee.

However, a new financing mechanism probably would not be fully effective without a change in law that would limit a transit system's liability for past contamination of land acquired for transit use. The essential goal would be to ensure that once trust fund monies were expended, the transit system would have a high level of assurance that all of its potential liability in connection with past contamination was alleviated.

Minnesota was one of the first states to address the liability issues associated with buying, selling, or developing property contaminated by hazardous substances. Under Minnesota's 1992 Land Recycling Act, persons not otherwise responsible for contamination of a particular property are eligible for future liability protection when they voluntarily undertake and complete cleanup actions approved by the state pollution control agency.[83] Although the Land Recycling Act does not provide liability protection to persons responsible for contamination, it does provide a mechanism for making contaminated land salable, by giving potential buyers the ability to limit their liability in land purchases. In addition, property owners may request the assistance of the agency in anticipation of future property transactions or to obtain financing for new property development.[84]

Under the Land Recycling Act, a qualified property owner can arrange for an environmental investigation of the subject property and establishment of a cleanup plan. The state pollution control agency reviews the adequacy and completeness of the site investigation and approves the cleanup plan. After the approved cleanup plan is completed, the state issues a certificate of completion, which gives liability protection to qualified property owners, their successors, lenders, and other parties associated with the property, provided that such parties are not otherwise responsible for the contamination.

The Land Recycling Act also allows the state pollution control agency to approve a cleanup plan addressing some, but not all, contamination at a particular property, if the cleanup plan includes all actions necessary to make possible the development of the property in a manner that protects public health and the environment. In the case of an approved partial cleanup plan, the owner is required to agree to cooperate with the state in any future cleanup of the remaining environmental problems. On completion of an approved partial cleanup plan, the state pollution control agency will issue a certificate that protects the owner from liability for any remaining contamination.

Programs like EPA's Brownfields Action Agenda and Minnesota's Land Recycling Act and other applications of the land recycling concept do not offer a perfect solution. Land recycling might not be feasible or appropriate in some transit contexts. It is, however, a possible solution for some transit projects where the only other options available are to not acquire the property or to cleanup the property completely. When coupled with a dedicated fund for environmental cleanups, land recycling could be a practical solution to this major transit problem with respect to some projects.

Acquisitions for Future Transit Development

For transit systems, the acquisition of rail rights of way for possible future transit development is severely limited by the National Environmental Policy Act (NEPA) and the implementing regulations. The typical offering of a rail right of way for sale begins and ends long before a transit system can commit to the acquisition. For any major action of a federal agency that has a significant impact on the environment, NEPA requires the preparation of an environmental impact statement (EIS). A project that is funded or partly funded, assisted, regulated, or approved by a federal agency is a major federal action. Under federal regulations, any such project will require an EIS unless (1) it is specifically excluded by the regulations or (2) after preparation of an environmental assessment, it is determined that there is no significant impact. In the latter case, a "finding of no significant impact" (FONSI) is made.[85]

From the inception of a project, NEPA implementing regulations require coordination among FTA, cooperating agencies, the involved transit system, and the public.[86] A transit system may not acquire property for a project until the project is classified within a categorical environmental exclusion, a FONSI is made, or a final EIS is approved.[87] FTA may not issue a letter of intent to obligate funds for a project until the NEPA process is completed, which could take from several months to more than 2 years.[88]

Sellers almost always want to sell faster than transit buyers can buy. This is especially true for railroad rights of way. In contrast to the timetable for compiling the environmental review process for a transit right-of-way acquisition project, a rail carrier usually can secure regulatory approval for the sale of a rail right of way in a period between 1 week and 5 months, depending on the structure and nature of the transaction. If a rail carrier intends to sell a line, but simultaneously convey its common carrier service obligation on the line to the buyer, an Interstate Commerce Commission (ICC) class exemption would permit the sale to be consummated 7 days after a notice is filed with the ICC.[89] If a rail carrier intends to sell a line and retain its common carrier service obligation on the line, authority for the sale and ICC review of the intended transaction structure will take between 3 and 5 months. The point is that, under almost all scenarios, the selling rail carrier will be in a position to sell much faster than a transit system is going to be in a position to buy.

One FTA categorical exclusion has possible application to property acquisitions. However, the exclusion is so narrowly drawn that it rarely provides a transit system with a viable avenue of relief from the prepurchase environmental review process. The acquisition of land for "hardship" or "protective" purposes normally does not require NEPA approval.[90] A hardship acquisition is an early acquisition of property by a transit system at the property owner's request to alleviate a particular harm to the owner resulting from an inability to sell the property. A protective acquisition is an acquisition to prevent the imminent development of a parcel of property that is needed for a proposed transportation corridor. To qualify as a protective acquisition, the transit system must document and clearly demonstrate the imminent development. A hardship or protective acquisition will apply only to eligible parcels in a project and therefore cannot be used to sweep a whole acquisition into the categorical exclusion. Moreover, a property acquisition fits the hardship/protective purchase exclusion only if the acquisition will not limit the evaluation of alternatives that may be required in the NEPA process for later phases of the project, including alternative transit corridor alignments.[91]

Thus, except in a very narrow set of circumstances where a rail carrier is a qualified hardship seller or the rail right of way in question is slated for imminent development, the NEPA environmental review process represents a significant delaying factor for a transit system interested in acquiring a rail right of way for possible use in a future transit project.

FTA has, in certain circumstances, adopted a slightly more flexible approach to the problem of right-of-way acquisition delays resulting from the environmental review process. The approach is discretionary and has not been used frequently enough to be characterized as a policy or practice of the agency. However, it does present one possible solution to this problem.

FTA has, in prescribed circumstances, issued a letter to a transit system that is planning to acquire a right of way for a possible future transit use, stating that the fair market value of the right of way may be an eligible cost for a future, federally funded transit project that includes the right of way.[92] FTA will not issue such a letter if the right of way in question is part of a previously defined transportation project. Moreover, FTA will not issue such a letter after an acquisition has been consummated or for acquisitions made for purposes other than right-of-way preservation. Thus, the key to securing a preproject FTA letter is to seek it before an acquisition and before the right of way in question becomes part of a defined transportation project.

As one would expect, the point at which a particular right of way moves from "preservation" to "project" varies from case to case and is difficult to define precisely. However, there are some general guidelines applicable to most right-of-way preservation situations. A transit system would not want to incorporate a right of way preserved for a possible future transit project into a transportation improvement program. Doing so would be contrary to the stated motivation for the acquisition. Public statements and press releases regarding the acquisition, to the extent they are required or deemed necessary, should be strictly limited to the corridor-preservation aspects of the acquisition. A transit system should strive to avoid any statements or communications linking an acquired, or a to-be-acquired, right of way to a currently identified transit project. Once an FTA letter is secured and a right of way is acquired, a transit system would not want to undertake any physical changes in the right of way. Any kind of preconstruction engineering or other activities on the right of way would undermine the stated intent for the acquisition.

Assuming this option does not work, a transit system will need to look to other options. If the property in question is a right of way underlying a line of railroad slated for abandonment, a transit system can gain up to an additional 6 months to forestall sale to another party by seeking a "public use" condition on the abandoned rail line. When the ICC issues a decision making the requisite findings for a rail line abandonment, that decision also will include the agency's determination whether the rail line in question is "suitable for other public purposes." In practice, virtually all ICC abandonment decisions include a statement to this effect.[93] If the ICC makes such a determination, any party may seek a public use condition (PUC) on the rail line at issue.

A party seeking a PUC must submit a written request that identifies the condition sought, the public importance of the condition, the time period for the condition, and a justification for the time period.[94] A Commission-imposed PUC may include a prohibition against the disposal of rail assets and property on the line for up to 180 days from the effective date of the abandonment, unless the properties have first been offered, on reasonable terms, for sale for public purposes. The PUC mechanism prevents the Commission from losing jurisdiction over a right of way slated for abandonment and gives transit providers a window of opportunity before the corridor is sold or liquidated for private use.

If FTA's categorical exclusions, the FTA prepurchase approval procedure, and the PUC procedures do not apply or work in a particular case, the only remaining avenue for relief open to a transit system is, through diligence and persistence, to attempt to expedite the NEPA process itself This is not always possible.

VI. STATE AND LOCAL LAW IMPEDIMENTS

Range of Difficulties

State and local laws imposing permitting requirements, environmental constraints, contracting processes, and property acquisition procedures contribute significantly to procurement delays.

Although the questionnaire responses did not include many comments on state and local obstacles, several general observations may be made. For example, federal requirements of the type identified in this report were perceived to be major causes of delay more often than local requirements. Questions addressing both federal and state/local delays typically produced more comments and concerns on federal issues. However, this trend may be explained by local transit agencies' greater familiarity with local requirements, such that potential local delays are already accommodated in procurement schedules and preparation efforts.

More significant, the questionnaire did not unearth any examples of "one-stop" procedures or other statutory or regulatory techniques to cut through local requirements that could serve as a model for other agencies. It seems the public transit industry is better able to negotiate state environmental and transportation agency regulatory requirements than federal mandates.

Local and state law issues leading to reported delays centered on (1) compliance with state environmental laws and remediation regulations, (2) problems inherent in completing the legal steps necessary to condemn property and relocate individuals and businesses, and (3) the absence of legal authority for more innovative procurement techniques. Several comments from small transit agencies also pointed to delays resulting from state agency approvals for contracting authority or funding.

In the absence of expediting state or local techniques, the state/local problems leading to delays in the acquisition of long-lead items or real property are even more stark. The questionnaire response of one New York transit agency is typical. To acquire real property, the Metropolitan Transportation Authority of New York could find itself working through statutes and regulations implementing the following:

- New York Eminent Domain Procedure Law, which imposes numerous procedural requirements, including public hearings, for condemnation proceedings
- State environmental laws (e.g., the State Environmental Quality Review Act, which requires EISs in some instances and consideration of environmental remediation requirements, making property acquisitions more complex, time consuming, and costly)
- New York Transportation Law Section 18, which gives the State Commissioner of Transportation a right of first refusal to purchase abandoned railroad property
- New York State Historic Preservation Act, which requires regulatory approvals before construction on some designated properties
- Local environmental laws (e.g., New York City Uniform Land Use Review Procedure, which requires local approval for some property transactions in New York City)
- Local zoning laws and codes, which sometimes adversely impact acquisition and disposal of property

Texas transit agencies have to deal with an equally daunting list of environmental laws, depending on the nature of the project: Texas Solid Waste Act, Texas Underground Storage Tanks Act and Texas Municipal Solid Waste Act, Texas Water Quality Acts, Texas Asbestos Health Protection Act, and Texas Clean Air Act.

California's Public Contract Code requirements for procuring long-lead equipment are more restrictive than federal procurement standards. The California Department of Transportation's right-of-way procedures fill nine volumes, and the California Transportation Commission (CTC) is reluctant to fund projects requiring condemnation. CTC, which controls disbursal of state rail development bond funding, also requires a complete indemnity of CTC in perpetuity from the property seller, resulting in further delay of real-property transactions.

Contracting restraints imposed by state or local agencies were also indicated as potential delays. According to questionnaire responses, the Chicago Transit Authority must secure the permission of the Illinois Department of Transportation to advertise for contracts and then to award equipment contracts. The New York State Department of Transportation must review and approve all transit agency specifications, although it provides about 10 percent of the funding for new transit bus purchases.

Under Ohio Revised Code Section 153.50 *et seq.*, the Greater Cleveland Regional Transit Authority (RTA) is required to bid for construction projects in a way that potentially allows the award of separate contracts to major subtrades. Typically, the solicitation calls for bids by single prime and for bids under a schedule listing specific trade packages. If the latter total is lower than the lowest prime bid, then separate awards are made for the trade packages, and RTA, in effect, becomes the general contractor with a series of prime contracts. The specification development, bid evaluation, and award processes are necessarily more attenuated.

The Dallas Area Rapid Transit (DART) district's enabling legislation requires DART to obtain local government approvals to acquire property and to condemn property for major projects. Delays often result when property owners and community organizations who oppose the project use available legal means to do so.

These are but a few of the contracting, real estate acquisition, and environmental impediments encountered by transit agencies as a result of state and local requirements.

Although this report points out a few advancements made in state laws to address these issues, there are too few examples. The absence of more innovation and flexibility in local and state procurement requirements suggests two conclusions: (1) innovative legislation at the state level is required across the board to enable transit agencies to accelerate procurement activities and (2) federal laws and regulations should be enacted that reward and recognize grantees that have the legal authority and initiative to accelerate and to experiment with innovative procurement techniques.

Public Involvement and Intergovernmental Coordination

The questionnaire responses did not reveal any methods of public involvement that guaranteed quick project approvals and expedited permitting by other government agencies.

In the absence of expediting features in state laws, transit agencies have become much more adept at using public involvement and environmental processes to identify and resolve problems that could delay a project or procurement. Typically, transit agencies find themselves faced with a series of local and state permits and concurrent environmental review processes, any one of which could serve to impede or block the project.

The clear theme of the responses was to take a proactive approach with affected communities and public agencies that would necessarily be involved with the project. As noted in a recent American Public Transit Association presentation on public involvement, "[t]he quickest way to complete the project is to go through the process and not around it."[95] Some of the techniques recommended in that presentation and typically used by transit agencies that take a more aggressive approach to interacting with the public include the following:

- Presentations at regional organizations (metropolitan planning organizations, business organizations, intergovernmental work groups, League of Women Voters, municipal leagues, etc.)
- Regional forums called by the transit agency (invited representatives of public and private organizations)
- Public hearings
- Creation of citizen or interest group advisory committees
- Creation of technical advisory groups (municipal engineers and public works officials, architect/engineering association representatives, associated general contractors and labor, etc.)
- Local neighborhood meetings
- Local liaison contacts with key community leaders or public officials and special briefings
- Open houses and question/answer meetings
- Facilitated discussions on problems and points of local opposition
- Field trips

- Project support coalitions organized by citizens benefiting from the project (to counter opposition groups)
- Media coordination
- Informational materials[96]

Sometimes a transit agency can win approval of a zoning application in court based on whether the transit agency or the local government has superior police powers.[97] However, the negotiation or litigation process usually consumes significant public time, funds, and goodwill. Instead of advocating independent legal authority, transit agencies appear to have more success by simply "working the system" as aggressively as possible.

Four transit agencies reported that delays in project implementation can be mitigated, to some degree, by a more aggressive public involvement strategy that uses legally mandated environmental review processes to forge agency and community consensus. This type of effort takes time, personal commitment, and money, but may be the only way to achieve the agency's goal.

A good example of how a more proactive environmental and public participation process can facilitate the development of an unpopular project is the Municipality of Metropolitan Seattle's (Metro) efforts to develop its first large bus-operations base. The project is illustrative of the types of problems that can waste public assets, frustrate staff, and cause a loss of trust in public board members when proposed facilities are not readily embraced by surrounding localities. Metro had long recognized that its countywide bus system required a major bus maintenance facility, capable of serving 200 buses, in the north part of the City of Seattle to balance fleet maintenance and storage requirements and to avoid unnecessary deadhead time. The size of a facility and the community's aversion to a steady stream of noisy and odoriferous diesel buses leaving in the early morning and returning in the evening prompted community opposition to several locations identified by Metro as potential sites.

Finally, after going through several proposed locations, King County officials proposed that Metro build the base at an abandoned garbage dump adjacent to the main interstate freeway, which was within the general search area for the facility. The site posed some extraordinary costs and problems because the refuse and garbage had to be removed and transit-only direct access to and from the interstate freeway had to be provided.

Metro officials realized, however, that the agency's best hope of securing a site for the facility was to listen to citizens living in the area and to create an action plan that both met these citizens' most immediate concerns and involved them in the decision-making process. The Metro Council adopted a resolution that gave owners of adjacent property the option of selling their property to Metro within a specified period of time after the base was constructed, at a fair market value established before construction of the base. Most important, Metro invited local citizens to participate in the design of the facility; their comments and suggestions made a significant difference. The base was designed and constructed to include increased landscaping and a playing field and tennis courts that extended over the top of the facility, which was constructed at a lower elevation for that purpose. As a result of a community-approved design solution, the North Operating Base was constructed with virtually no controversy and has proven to be a valuable capital asset to Metro transit system service.

More aggressive environmental and public involvement processes can result in project approvals and better designs for transit facilities with NIMBY ("not-in-my-backyard") type problems. The key is involving responsible citizens and community organizations in meaningful ways early in the development of a project and at both the siting and the design stages.

In the face of declining grants and fare box revenues, transit agencies may find it increasingly difficult to invest resources in the environmental and design phases to secure public buy-ins in the form of commitment to particular design features and environmental mitigation. An alternate approach is to use the state's local environmental process to scope the project and affected communities more broadly and then identify the amount available for mitigation (as well as other budget constraints) for public comment and suggestion. Although this process of dealing with a wider range of community interests and introducing more debate on the mitigation aspects of the project is time consuming, the end result may be project approval, lower costs, and shared concerns for cost effectiveness as the varying interest groups help the public body broker acceptable compromises.

Open Records Laws and Cost/Price Analyses

The federal Freedom of Information Act and state open records laws were enacted to provide for public access to information about government activities and decision making. When the government activity at issue is contracting, a conflict arises between the need for disclosure and the need to protect certain information that comes into the possession of the government from private business entities. Such information generally is required for the performance of a cost/price analysis. Federal laws, and many state laws, specifically protect from disclosure trade secrets and confidential commercial and financial information; however, the protection is not uniform.

FTA's new third-party contracting circular continues to require grantees to perform a cost or price analysis in connection with every procurement action, including contract modifications. The relevant text is taken almost verbatim from the superseded 1988 *Third Party Contracting Guidelines, Circular 4220.1B* (Chapter I, paragraph 7). Seven questionnaire respondents identified cost/price analysis as a significant obstacle in long-lead procurements.

A cost analysis is required whenever offerors are required to submit the elements of their estimated costs, such as in professional consulting or architectural and engineering service contracts. A cost analysis is also required when there is inadequate price competition, such as sole-source procurements, contract modifications, or change orders, unless price reasonableness can be established from catalogs or general market prices. In all other cases, a price analysis is conducted.

The grantee no doubt has an obligation to demonstrate that the purchase price is reasonable under circumstances where cost analyses are required.

Typically, a cost analysis requires the grantee to secure the information from offering parties. Often, the offering parties consider the information sought in connection with cost analyses to include trade secrets or other commercially sensitive information.[98] Treatment of trade secrets under state open records laws varies greatly from state to state. More than a dozen states have open records laws containing general exclusions for records required to be kept confidential under other statutes or regulations, but in many cases it is unclear whether these exclusions cover trade secrets in business records submitted to grantees by offering parties.[99] At least twenty-five states have limited or qualified exemptions in their open records laws that arguably could cover trade secrets, but it is not known in advance if and under what circumstances the information will remain confidential.[100]

Even among most of the twenty-five states that have statutory exemptions for trade secrets, there is no assurance that the information the manufacturer does not want disclosed will be protected. One reason is insufficient defining language and/or qualifications or conditions in the exemption. Only six states have open records laws with unqualified trade secret protection.[101] Other open records laws exempt trade secrets without defining the term,[102] and some exempt commercial information (variously described), but do not use the term "trade secret."[103] Another approach is permissive trade secret exemptions that leave the decision whether to keep information confidential to the discretion of government officials. The District of Columbia law is an example of this.[104] Michigan law provides protection for information if a "promise of confidentiality" is made by the public body receiving the information, but the protection does not apply if the information is submitted as a condition of receiving, a government contract.[105]

In most states, however, grantees cannot give businesses any assurance that trade secrets or other confidential information will be protected. As a result, offering parties often are reluctant to provide the information necessary for the grantee's cost analysis, and the procurement negotiations are delayed. Whether the information sought is in fact a trade secret or otherwise protected is always an issue, which can only be determined by recourse to the state law in the state of the procuring agency. Based on questionnaire responses, the primary problems with cost analysis are delays in contract negotiations and the chilling effect of potential disclosure of trade secrets or other proprietary information.

In the long run, this problem can be resolved by enacting strong trade-secret exemptions to open-records laws in states that do not have them and improving and broadening existing, but inadequate, trade-secret exemptions. More than half of the states have enacted the Uniform Trade Secrets Act,[106] which is a clear indication of the interest of many state legislatures in protecting trade secrets. Alternatively, setting cost thresholds that must be attained before cost analyses are required or providing administrative waivers, where a grantee and the manufacturer could demonstrate a history of contract cost management, may be ways to mitigate these delays.

Turnkey Procurement

The questionnaire sought information from transit systems on whether various types of turnkey procurement provided an avenue for avoiding delays in long-lead capital purchases. Questionnaire responses indicate that large transit systems have used or at least considered turnkey procurement, while most small-and medium-sized transit systems have not.[107] Even among transit systems that have undertaken turnkey procurement projects, many report that turnkey procurement involves its own distinct procurement delays. The primary impediments to various types of turnkey procurement in transit appear to derive from state law. Where state law permits turnkey procurement, turnkey procurement has the potential to alleviate procurement delays.

In a traditional transit procurement, project design services are procured, and then technical consultants prepare design or performance specifications for the project. Thereafter, construction services are procured by public bid, and construction is completed, usually with project management assistance from the design consultant or a project management firm. Typically, design is based on qualifications-based competitive bidding, and construction is based on lowest bid. This traditional process is referred to as "design-bid-build."

Although turnkey procurement means different things to different people, it can generally be defined as any of a number of alternative forms of procurement in which project design, construction and/or equipment, supplies, administration, and operating services are combined in a single procurement. In its simplest form, turnkey procurement is a combination of design and build functions. Thus, in a design-build procurement, a single entity is responsible for design and construction of a project. A variation on design-build procurement that has been used in the transit industry is sometimes called "super turnkey" procurement. In this variation, the performing entity contributes to project funding and secures real estate development rights in connection with the project.

Although time can be saved by abbreviating the design process and using fast-track development techniques, major delays can affect turnkey transit projects. Transit projects are by nature horizontal; they affect numerous private and public properties and utilities and typically span several jurisdictions. Jurisdictions will have varying preferences about alignment, stations, street furniture, amenities, and scheduling, which will often will cause design changes that then require contract price adjustments. Turnkey change orders are typically much more difficult to negotiate than modifications under a traditional design-bid-build contract, thus outweighing some of the time benefits gained by the turnkey approach.

One way to avoid, or at least minimize, such effects is to carry the design to 30 percent (preliminary design) under a traditional approach and at the same time seek to purchase or condemn right of way as soon as possible based on the preliminary design effort. The transit agency also should negotiate as many of the interlocal and utility relocation agreements as possible to maximize definition of the project before award of the turnkey contract and thus minimize future changes in scope. In summary, success at turnkey development requires a proactive and well-planned transit agency program that has invested sufficient resources to anticipate and avoid as many changes as possible once the project gets under way.

State law may preclude the selection of engineers or architects on the basis of price and may not have statutory exceptions applicable to design-build procurements. In some cases, if purchasing engineering and construction services are considered separate transactions and not one final product, turnkey procurement could be effectively prohibited. One large commuter rail authority reported that it had considered turnkey procurement for construction of an equipment maintenance facility. The applicable state procurement laws required low-bid procurement with respect to construction and qualifications-based bids on design. Therefore, the commuter rail authority was unable to use a design-build turnkey procurement to complete the project.

According to a survey by the Building Futures Council, most state laws do not expressly prohibit design-bid-build procurement alternatives, but obtain the same result by requiring separate procurements for project design and project construction.[108] Even if a particular state law does not require separate design and construction bids, it can have some bifurcation effect by requiring Brooks Act-style procurement for design services and/or requiring low-bid procurement for construction. Thirteen states allow design-build to some extent. Of that group, seven have fairly broad design-build authorization, while the other six tend to statutorily authorize design-build on a project-specific basis only.[109] Perhaps state and local attorneys should consider a different conceptual approach--the purchase of a facility rather than distinct aspects of the process.

In an effort to make state law more friendly to turnkey procurement, the Building Futures Council has formulated a model design-build procurement act

for state and local contracting. The model act would cover all types of construction, including transportation project construction, and all types of procuring agencies, including special-purpose districts and other political subdivisions of state and local governments. The model act contains a durable definition of design-build and a basic procedural framework for design-build procurement.[110]

Apart from the model act, several states have revised their procurement statutes to facilitate use of turnkey procurement techniques. Virginia has enacted a comprehensive reform of its public contracting statutes, which allows for significant use of design-build and other types of turnkey procurement, and the State of Washington has specifically extended the technique to certain types of large state or local government projects.[111]

Notwithstanding progress made at the federal level in promoting intelligent use of turnkey procurement techniques,[112] current state laws represent a substantial obstacle to more widespread use of turnkey procurement techniques in transit. Elimination of rigid prohibitions on alternative procurement methodologies such as design-build would represent a significant improvement in the prospects for transit planners and managers attempting to save time in capital project procurements.

VII. CONCLUSIONS

The questionnaire results and the authors' research identified many significant federal, state, and local obstacles to expedient capital asset acquisitions; they also identified actual or potential solutions to these obstacles. Questionnaire responses, research, and consideration of a series of recent federal transit policy revisions or clarifications also demonstrate that regulators are taking the steps necessary to streamline procurement of long-lead assets.

Even so, more can be done administratively to alleviate acquisition delays without undermining the basic principles and goals of applicable laws. In areas where regulators lack authority to act, legislative changes may be required.

Areas in which administrative revisions are feasible include the following:

- Revision of the federal transit preaward and postdelivery audit requirements
- Examination of the purpose of land purchase transactions, considering the complexities of such transactions and the preexisting legal parameters established by state laws and regulations

Regulatory or legislative changes at the federal and state level would be necessary to address certain other obstacles to long-lead asset acquisitions. State procurement laws need to be liberalized to facilitate greater use of turnkey procurements and other more innovative contracting and financing techniques. State legislatures also need to look for ways to provide incentives for private parties and local governments to clean up contaminated land desired for public transit projects.

This report also identified several innovative financing techniques, such as COPs, expanded options, and 63-20 financing, that more transit agencies could use individually or collectively to respond to constrained finances.

Finally, the transit industry itself must work to improve dissemination of information on federal grant requirements and innovative financing techniques and to advocate expenditure of federal, state, and local monies to explore wider application of these innovations. Perhaps the most appropriate approach is to "think globally but act locally" in concert with other state, regional, and local agencies that could also benefit from reform. Although the American Public Transit Association and other transportation organizations and members of Congress who are sensitive to public transit needs can seek funding and regulatory flexibility, the major theater for providing the tools to speed procurements will be state legislatures.

Assuming that the trend toward deregulation by FTA and the devolution of federal programs and funding to the states continues, the public transit industry must be ready to assume more responsibility for implementing contracting and financing techniques that result in expedient procurement of buses, trains, and capital improvements. The major challenge for the transit community will be to, under federal requirements and procedures and when all else fails, thoroughly facilitate the use of these innovative techniques by a broader spectrum of transit agencies.

Much progress has been made in improving and expediting long-lead asset procurements. Nonetheless, the transit community, including lawmakers, regulators, and transit industry leaders, will have many opportunities to make further improvements.

ENDNOTES

[1] The questionnaire elicited subjective information on the impediments to capital asset acquisitions and was not intended to gather objective data that could be used, for example, to generate a statistical report. The authors synthesized the questionnaire responses. Where responses were self-explanatory, the authors relied on them. Where responses did not contain sufficient factual information or appeared to be based on a misunderstanding of applicable law or on unstated assumptions, the authors made telephone inquiries to the respondents to ascertain missing information or to clarify points. In many cases, telephone inquiries permitted the authors to narrow the scope of the report. Although most telephone inquiries were productive, the authors excluded unclear or incomplete information provided in responses when they were unable to make contact with the individuals responsible. Where permission was granted, the identity of persons or transit systems contacted by the authors is included in the text or notes. Obstacles identified in only a limited number of responses or alleviated by changes made during the time between the receipt of the responses and the completion of the report are not discussed.

[2] Each of the questions in the questionnaire generated numerous answers, and the issues listed here were not the only issues raised by questionnaire respondents.

The questionnaire sought information on the most significant general federal legal requirements faced by transit systems in equipment and real property acquisitions. With respect to the most significant obstacles to equipment acquisitions, 26 respondents identified one or more aspects of the Buy America requirements, 12 respondents identified aspects of the procurement process itself (e.g., the Department of Transportation procurement regulations or the FTA requirements contained in the *Third Party Contracting Circular),* and 7 respondents identified the Section 13(c) certification process. With respect to real-property acquisitions, 15 respondents identified the uniform relocation and appraisal requirements, 12 respondents identified environmental requirements, 5 respondents identified the regulatory impact of railroad right-of-way acquisitions, and 4 respondents identified one or more aspects of the grant approval process as the most significant obstacles.

The questionnaire also sought information on the most significant state or local legal requirements faced by transit systems involved in equipment and real property acquisitions. Fifteen respondents identified state public bidding requirements, seven respondents identified eminent domain laws or state relocation requirements, and six respondents identified state environmental laws as the most significant state and local requirements.

The questionnaire specifically sought information on particular obstacles imposed under the Federal Transit Act, implementing regulations, or FTA program guidance circulars. To a large extent, this question elicited cumulative information. However, ten respondents identified preaward contract review and seven respondents identified the cost and price analysis requirements as significant obstacles. Four respondents identified the contract modification and option restrictions as problems. In a related question, seven respondents identified the rules prohibiting brand name descriptions as a significant obstacle in equipment procurements.

To develop possible solutions for long-lead procurements, the questionnaire also sought information regarding mechanisms or techniques that transit agencies had used (or considered) to minimize procurement delays. Twelve systems reported the consideration of conventional capital leasing to resolve or alleviate procurement delays. However, only half of this group had actually used conventional capital leasing. Along the same lines, eleven questionnaire respondents reported having considered cross-border leasing, but only fourfrom that group had actually consummated a cross-border lease transaction. Twelve systems reported the use of options or assignment of purchase rights to mitigate procurement delays. Eleven systems reported employment of turnkey procurement techniques. Three additional systems reported having considered use of turn-key procurement. Four systems reported the use or consideration of interim bonds or other short-term financing instruments.

[3] The history, process, and substance of labor protection under Section 13(c) are addressed in TRANSIT LABOR PROTECTION--A GUIDE TO SECTION 13(c) FEDERAL TRANSIT ACT, **TCRP LRD No.** 4 (June 1995). The issues facing a transit system in acquiring railroad rights of way are addressed in STRATEGIES TO FACILITATE ACQUISITION AND USE OF RAILROAD RIGHT OF WAY BY TRANSIT PROVIDERS, **TCRP LRD No.** 1 (September 1994). There have been some significant developments since publication of the latter article.

[4] FTA is required by 49 U.S.C. pt. 5307(d)(1) (formerly § 9(e)(2) of the Federal Transit Act, as amended) to obtain specific annual certifications for its formula assistance program for urbanized areas.

[5] See FY 1995 *Certifications and Assurances for FTA Assistance,* 59 FED. REG. 51794 (Oct. 12, 1994).

[6] 59 FED. REG. 21890,21895 (Apr. 26, 1994).

[7] 59 FED. REG. 46878 (Sept. 12, 1994).

[8] 59 FED. REG. 51794 (Oct. 12, 1994).

[9] 60 FED. REG. 19638 (Apr. 6, 1995).

[10] 60 FED. REG. 53451 (Oct. 13, 1995). The first installment of the Best Practices manual was made available in May 1996.

[11] Dear Colleague Letter from Gordon J. Linton, Administrator, Federal Transit Administration, U.S. Department of Transportation (Oct. 1, 1995).

[12] 60 FED. REG. 53452 (Oct. 13, 1995).

[13] As noted, there is no *current* notice problem with respect to third-party contracting guidelines; however, in the past, FTA has implemented changes in some of its most important procurement rules through dissemination of Procurement Alerts. On occasion, FTA has announced policy and procedural changes in "Dear Colleague" letters. FTA's mailing list for such letters does not include all persons who might have a need to know of the policy changes the letters announce. This piecemeal approach to disseminating important information has been a source of frustration and confusion for procurement professionals, legal counsel, and transit project planners. As noted, all of these alerts have been superseded by revised *Circular 4220.1C.*

[14] One of the impediments often cited by questionnaire participants was the requirement of vehicle testing by Penn State's Transportation Institute at Altoona pursuant to regulations in 49 C.F.R. § 665. Any new bus model acquired with FTA's assistance has to be certified as tested in accordance with the federal regulation or retested if there have been major changes in chassis design, major changes in components, or major changes in configurations since the last test report on that particular unit. Questionnaire complaints focused primarily on the initial delays in testing a new bus model and delays resulting from

partial testing, where only the chassis had been previously tested or there had been other revisions to the bus model in design iterations since its initial test. 49 C.F.R. §§ 665.11(c) and (d).

Currently, transit properties primarily rely on certifications provided by bus manufacturers. That process has become increasingly routinized as the transit industry and FTA grantees have become accustomed to the Altoona loop in the procurement process. Most, if not all, of the past aberrations that delayed deliveries have been resolved as transit properties began to require that the necessary certifications be provided with the bid submittal. The authors conclude that delays in bus orders due to Altoona testing is not currently a source of delay in most procurements, despite the apprehension of several transit agencies and problems that did slow procurements in the past.

[15] Buy America Act of 1983, Pub. L. No. 97-424, § 165(b), 96 Stat. 2137 (Jan. 6, 1983).

[16] Subsection 12(a) of the new Master Agreement for federally financed transit projects reads as follows: a. Buy America. The Recipient agrees to comply with 49 U.S.C. § 5323(j), FTA's Buy America regulations at 49 C.F.R. § 661, and any implementing guidance FTA may issue. (FTA Master Agreement [31, Oct. 1, 1996).

[17] The Urban Mass Transportation Administration, FTA's predecessor, took a hard line on Buy America compliance with an order of rail cars for the Sacramento Rail Transit District (RTD) system. After months of dispute, RTD forced the supplier to partially disassemble and reassemble the trucks on a portion of the order to ensure Buy America compliance.

[18] Foreign manufacturers with current American assembly plants include New Flyer, with a manufacturing site in North Dakota, and Nova Bus and Orion/BIA, with manufacturing facilities in New York. The Dayton, Ohio, transit system is under contract with a Czechoslovakian and American joint venture, which is also locating a final assembly facility in the United States. Breda Costruzioni Ferroviarie has a final assembly and testing facility in Issaquah, Wash.

[19] FTA's policy of spreading Buy America requirements throughout a grantee's operations if the grantee accepts operating grants and then citing the grantee in a triennial review for noncompliance on all agency procurements, whether or not involved in the original capital grant, was mentioned as a source of concern.

The survey and follow-up phone conversations confirmed that imposing Buy America requirements for parts and warranty repairs during the life of the contract without any threshold can also be extremely difficult. Foreign manufacturers may have no financial or marketing incentive to use American components in developing replacement parts and systems. The local supplier network for the foreign bus or railcar manufacturer may resist the imposition of American components and materials or argue that their supplier warranties cannot be maintained.

[20] 49 C.F.R. § 661.17 reads as follows:

If a successful bidder fails to demonstrate that it is in compliance with its certification, it will be required to take the necessary steps in order to achieve compliance. If a bidder takes these necessary steps, it will not be allowed to change its original bid price. If a bidder does not take the necessary steps, it will not be awarded the contract if the contract has not yet been awarded, and it is in breach of contract if a contract has been awarded.

[21] Some buses were delayed getting into revenue service until the Buy America issue could be resolved and the equipment appropriately retrofitted.

[22] 49 C.FR. § 663.25 (1995).

[23] 49 C.F.R. § 663.27 (1995).

[24] 49 C.F.R. § 663.21 (1995).

[25] 49 C.F.R. § 663.35 (1995).

[26] Ten questionnaire respondents identified preaward review as a significant delay factor on long-lead procurements. However, issuance of the revised *Third Party Contracting Circular* appears to have alleviated this problem. FTA *Circular 4220.1D,* 5b (Apr. 15, 1996).

[27] *Circular 4220.1D §* 8.

[28] Pub. L. No. 98-369, 98 Stat. 1175; see 41 U.S.C. 253 a (a), which provides that specifications shall "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law."

[29] S. Rep. No. 50, 98th Cong., 2d. Sess. 3, 1984 U.S. CODE CONG. & ADMIN. NEWS 2174, 2176.

[30] *Id*. cited at n. 82, D. Milton, *Standards of Review Specifications in Government Procurement: An Equal Protection Analog,* 58 GEO. WASH. L. REV. 573 (February 1990).

[31] See, *e.g.*, Hobart Brothers Co., Comp. Gen. Dec. B-222579, 86-2 CPD P120; Target Fin. Corp., Comp Gen. Dec. B-228131, 87-2 CPD P506.

[32] Conversation with Mike Voris, Supervisor, Revenue Fleet Procurement, King County Metro (Mar. 13, 1995).

[33] Former *Third Party Contracting Circular 4220.1B,* ch. I, para. 9.

[34] FTA Alert No. 4, December 1992.

[35] Circular 4220.1D, para. 9(g).

[36] See Circular 4220.1B, ch. I, paras. 9c, 9d(2), and 9b.

[37] 60 FED. REG. 53452-53453 (Oct. 13, 1995).

[38] McQuillin Municipal Corporations § 37.61 (3d Rev. Ed).

[39] *Id.* and §§ 37.63 and 37.64; 63 C.J.S. Municipal Corporations §§ 1084 and 1085. For a typical example of a state statute imposing a certification requirement on local governments to verify available appropriations refer to MASS. GEN. L. ch. 44 § 31C.

[40] 49 C.F.R. §§ 639.21-639.27.

[41] For an introduction to the mechanics of lease financing and a summary of FTA's rules for lease transactions, *see* PUBLIC FINANCIAL MANAGEMENT, INC. AND KPMG PEAT MARWICK, INTRODUCTION TO PUBLIC FINANCE AND PUBLIC TRANSIT, chs. III and IV, FTA-26-0002-93-1 (January 1993).

[42] NATIONAL CONFERENCE OF STATE LEGISLATURES, EIGHT WAYS TO FINANCE TRANSIT (January 1994), at 38-40.

[43] FTA Report No. FTA-VA-260002-93-1, *supra* note 41, at 105.

[44] EIGHT WAYS TO FINANCE TRANSIT, su*pra* note 42, at 41.

[45] GEORGE M. GUESS, GEORGIA STATE UNIVERSITY, COMPARATIVE FINANCING TECHNIQUES FOR PURCHASING URBAN RAIL CARS, UMTA-GA-11-0021-91-1, September 1991, at 21-22.

[46] JEFFREY A. PARKER & ASSOCIATES, How TO EVALUATE OPPORTUNITIES FOR CROSS-BORDER LEASING AND CERTIFICATES OF PARTICIPATION IN PUBLIC TRANSPORTATION, FTA Report No. FTA-MA-90-7005-931 (November 1993), at 13.

[47] For example, the North Carolina Municipal Leasing Corporation, Winston-Salem, N.C., has acquired approximately $84 million in real and personal property, including at least one parking facility; Brevard County, Fl., issued $24 million in certificates of participation in 1989 for the lease/ purchase of a new county government building; and the City of Winston-Salem, since 1985, has financed equipment

costing between $4.5 million to $5 million annually, solid waste disposal capacity, and 34 units of low-income housing. EIGHT WAYS TO FINANCE TRANSIT, *supra* note 42, at 41-46.

[48] New Jersey Transit Corporation Questionnaire Response, Jan. 11, 1995.

[49] Los ANGELES COUNTY TRANSPORTATION COMMISSION, OFFICIAL STATEMENT (PROSPECTUS), Dec. 9, 1992.

[50] EIGHT WAYS TO FINANCE TRANSIT, *supra* note 42, at 48-49.

[51] CROSS-BORDER LEASING GUIDELINES, Program Guidance Circular 7020.1 (Apr. 26, 1990), Section 7.

[52] *The Highway Revolution That Wasn't*, GOVERNING 30 (May 1995).

[53] *Id*.

[54] Total transfers to FTA by fiscal year (in millions):

FY 92	FY 93	FY 94	FY 95
303.8	469.2	609.7	801.8

Cumulative total transfers to FTA FY 92 to FY 95 (in millions): $2,184.5.

[55] For example, Santa Clara County, Calif., plans to lease to developers county-owned lands or air rights above park-and-ride lots at transit stations to build apartment complexes on stilts or podiums along with other commercial amenities to serve adjacent light-rail lines. The county anticipates revenues from transit ridership increases, rent from the leases, and new property taxes. At least one estimate predicts the county could eventually make tens of millions of dollars a year in the so-called "trandominiums" or condominiums at light-rail stations. GOVERNING 40 (March 1995).

[56] This material is substantially based on a memorandum titled "Tax-Exempt Financing By Nonprofit Corporations Alternative Financing Methods" prepared by Cynthia M. Weed, a municipal finance partner in the Seattle office of Preston Gates & Ellis.

[57] Revenue Ruling 63-20 and all of the subsequent positions of the Internal Revenue Service have been compiled in a subsequent official statement, Revenue Procedure 82-26.

[58] The 63-20 financing is specifically authorized by federal tax law and, therefore, is subject to the limitations established by the Internal Revenue Service. Revenue Procedure 82-26 is a compilation, in a single document, of all of the Internal Revenue Service positions concerning Revenue Ruling 63-20. (see, e.g., DEPT. OF THE TREASURY, INTERNAL REVENUE CUMULATIVE BULLETIN 1982-1 (January-June).

[59] COMPARATIVE FINANCING, *supra* note 45, at 9.

[60] Letters of credit are issued by foreign or domestic banks having a rating of A or better. The letter of credit is an undertaking by the bank to pay debt service directly or on nonpayment by the issuer. The issuer enters into a reimbursement agreement with the bank. On the basis of the letter of credit, the bank's credit rating is assigned to the bonds. Letters of credit typically have a term of five to seven years, and the government sponsor or nonprofit, as the case may be, would be required to obtain a new letter of credit or an extension of the existing letter of credit before the expiration date. Letter-of-credit fees are paid annually and are traditionally priced as a percentage of the credit amount.

[61] Additional examples include the Florida Department of Transportation Transit Finance Corporation and the Arkansas Loan Fund.

[62] An instructive summary of CTFC's operations is found in How TO EVALUATE, *supra* note 46, at 81-87.

[63] *Id.* at 82.

[64] Based in part on a phone conference with Alex Burnett, Public Financial Management, Inc., San Francisco (Apr. 26, 1995).

[65] Suggested in a phone conference by Jeffrey Parker, Jeffrey A. Parker & Associates, Chevy Chase, Md. (Apr. 25, 1995).

[66] 60 FED. REG. 67159 (Dec. 28, 1995).

[67] 42 U.S.C. § 4601 *et. seq.* and 49 C.F.R. § 24.

[68] All states and the District of Columbia have adopted some form of relocation legislation consistent with the Uniform Act. NICHOLS, LAW OF EMINENT DOMAIN, § 34.06. The federal Highway Administration published two model state acts to help states comply with the Uniform Act. The first model is called specific relocation enabling legislation because it contains detailed provisions that track the Uniform Act. The second model is called the broad enabling legislation because it requires compliance with federal requirements under the Uniform Act without providing any specifics. The Nichols treatise includes a table showing which states have specific and which have broad legislation (§ 34.06[5]). Apparently, 29 states have specific legislation, and 21 states and the District of Columbia have broad legislation.

[69] Prior regulatory thresholds under FTA Circular 5010.1A para. 7.b(1) required two appraisals and a reviewer's analysis on property value exceeding $100,000 and prior federal agency concurrence if the just compensation exceeded $150,000 or had to be resolved through eminent domain proceedings or where a settlement was proposed at least $25,000 higher than the grantee's original offer.

[70] FTA Region 10 Bulletin No. 9324, Guidance on Real Property, Real Estate (July 13, 1993).

[71] FTA Circular 5010.1B 7.b(2)(d), at I-16.

[72] FTA Circular 5010.1B 7.b(2)(e).

[73] FTA has shown some appreciation for this problem in the past. For example, when Tri-Met had time-sensitive negotiations on a series of parcels needed for a recent transit project, it arranged with FTA for the administrative settlement packages to be sent express directly to FTA's Washington, D.C., headquarters office for review with a concomitant commitment by FTA to turn the reviews around within a few days.

[74] NICHOLS, *supra* note 68, at Vol. 7, § 2.04 (3d ed.).

[75] James A. Chalmers and Scott A. Roehr, *Issues in the Valuation of Contaminated Property*, THE APPRAISAL JOURNAL 28 (January 1993); Bill Mundy, *Stigma and Value*, THE APPRAISAL JOURNAL 7 (January 1992). But see DEBORAH L. CADE, NCHRP PROJECT 20-6, TRANSPORTATION AGENCIES AS POTENTIALLY RESPONSIBLE PARTIES AT HAZARDOUS WASTE SITES, NCHRP LRD No. 34 (November 1995).

[76] Property owners may also argue that they do not have to be assessed with the cost of cleanup because the condemning agency has the right to pursue a contribution action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, *et seq.* If the condemning agency must clean up the contamination caused by another party the agency may then pursue that party; most states have similar contribution remedies encompassing hydrocarbon contaminations. Thus, the property owner's attorney can honestly assert that if there are cleanup problems that fall within the scope of CERCLA, the public agency will have recourse in the future not only against the property owner, but also against prior owners of the parcel who may have directly caused the contamination if that can be proved by the government. Tri-Met is currently pursuing a CERCLA action against oil companies and prior property owners and tenants after spending $1.4 million to clean up a block acquired for its Westside Project. Telephone conference with Tri-Met General

Counsel Brian Playfair (Apr. 20, 1995).

[77] Reported case law on this issue goes in different directions. *See* Department of Transp. ex rel. People v. Parr, 259 Ill. App. 3d 602, 633 N.E.2d 19 (1994), *appeal denied*, 157 Ill. 2d 497, 642 N.E.2d 1276 (1994); Department of Transp. v. Finkelstein, 629 So. 2d 932 (Fla. App. 4 Dist. 1993), *aff'd*, 656 So. 2d 921 (Fla. 1995); City of Santa Fe v. Komis, 114 N.M. 659, 845 P.2d 753 (1992); Department of Health v. Hecla Mining Co., 781 P.2d 122 (Colo. App. 1989); State v. Brandon, 898 S.W.2d 224 (Tenn. App. 1994); Redevelopment Agency of the City of Pomona v. Thrifty Oil Co., 5 Ca. Regstr. 2d 687 (2d Dist. 1992); City of Olathe v. Stott, 861 P.2d 1287 (Kan. 1993).

[78] Survey responses suggested a range from $350,000 to $500,000.

[79] 49 C.F.R. § 24.102(d) (1995) reads as follows:

Establishment and offer of just compensation. Before the initiation of negotiations, the Agency shall establish an amount which it believes is just compensation for the real property. The amount shall not be less than the approved appraisal of the fair market value of the property, taking into account the value of allowable damages or benefits to any remaining property. (See also § 24.10.) Promptly thereafter, the Agency shall make a written offer to the owner to acquire the property for the full amount believed to be just compensation.

[80] 42 U.S.C. §§ 9601-9675; 42 U.S.C. §§ 6901-6992k; 33 U.S.C. §§ 1251-1387.

[81] Some states require the owner to pay a percentage of the cleanup costs, while other states establish a deductible of between $5,000 and $50,000.

[82] For example, in Minnesota the state tank trust fund requires the tank owner/operator to pay the first 10 percent of cleanup costs up to $250,000, and 25 percent of the cleanup costs above that amount. The tank trust fund covers up to $1 million per tank for both cleanup and third-party liability, with an aggregate limit of $2 million per facility. Minnesota imposes a two-cent-per-gallon fee (collected at rack) to fund its state tank trust fund. MINN. STAT. §§ 115C.07.12 (1995).

[83] MINN. STAT. §§ 115B.175-179 (1995).

[84] Property owners not currently interested in selling or developing property also may investigate and clean up property with assistance from the state pollution control agency.

[85] 23 C.F.R. § 771 (1996).

[86] 23 C.F.R. § 771.111 (1996).

[87] 23 C.F.R. § 771.113 (a)(1) (1996).

[88] 23 C.F.R. § 771.113(c) (1996).

[89] The buyer must be a noncarrier, and the anticipated revenues from freight operations must be below $20 million (in 1991 dollars). 49 C.F.R. §§ 1150.32 and 1201 1-1 (a). If the buyer is affiliated with another rail common carrier that does not operate a line that connects with the subject line, the buyer still can acquire the line seven days after making an additional filing (49 C.F.R. § 1180.2[d] [2]). Even if revenues exceed the cited threshold, a buyer's affiliate operates a connecting rail line, or the buyer is itself a carrier, the sale usually can be consummated within a period between three weeks (in the case of anticipated revenues in excess of the prescribed threshold) and approximately six months (in the other two cases) after making the requisite ICC filing. 49 C.F.R. §§ 1150.35; 49 C.F.R. § 1121.

[90] 23 C.F.R. § 771.117(d)(12) (1996).

[91] 23 C.F.R. § 771.117(d)(12) (1996).

[92] The letter is not a Letter of Intent nor a Letter of No Prejudice.

[93] 49 C.F.R. § 1152.28(a)(1); *see, e.g.*, Union Pacific R. Co.--Aban.--Fremont & Teton Counties, ID, 6 I.C.C.2d 641 (1990).

[94] 49 C.F.R. § 1152.28(a)(2) (1995).

[95] Pam Wolfe, Public Involvement--Obstacle or Expeditor, APTA 1994 Rapid Transit Conference (June 13, 1994), at 4.

[96] *Id.* at 9-12.

[97] City of Evanston v. Regional Transp. Auth., 202 Ill. App. 3d 265, 559 N.E.2d 899, *appeal denied*, 135 Ill. 2d 555, 564 N.E.2d 836 (1990).

[98] *The* same problem arises in a Buy America preaward audit.

[99] Linda B. Samuels, *Protecting Confidential Business Information Supplied to State Government: Exempting Trade Secrets from State Open Records Laws*, 27 AM. Bus. L. J. 474-79(1989).

[100] *E.g.*, ARIZ. REV. STAT. ANN. § 39121.03 (1985).

[101] *E.g.*, CONN. GEN. STAT. ANN. *§* 119(b)(5) (1988).

[102] *E.g.*, MD. STATE GOV'T CODE ANN. § 10-617(d) (1984).

[103] *E.g.*, WASH. REV. CODE ANN. *§* 42.17.310(1)(h) (1989).

[104] *E.g.*, D.C. CODE ANN. § 1-1524(a)(1) (1987).

[105] *E.g.*, MICH. COMP. LAWS ANN. *§* 15.243(1)(g) (1981).

[106] *See* Samuels, *supra* note 99, at 473.

[107] For a summary of turnkey procurement methods and the risk factors of turnkey procurement projects, *see* THOMAS J. LUGCIO JR., AND JEFFREY A. PARKER, TURN-KEY PROCUREMENT OPPORTUNITIES AND ISSUES, FTA-MA-08-7001-921 (June 1992).

[108] The Building Futures Council is an independent, nonprofit corporation comprising professionals in many facets of the procurement and construction industry.

[109] COMMITTEE ON MANAGEMENT AND CONTRACTING ALTERNATIVES, BUILDING FUTURES COUNCIL REPORT ON DESIGN-BUILD AS AN ALTERNATIVE CONSTRUCTION DELIVERY METHOD FOR PUBLIC OWNERS (January 1995), Appendix E.

[110] *Id.* at Appendix F.

[111] VA. CODE ANN. § 11-41.2 (Michie 1994); WASH. REV. CODE §§ 39.10 and 39.04.210-39.04.230.

[112] Subsections 17.e and 36.c(12) in the new FTA Master Agreement specifically approve grantee use of turnkey procurements.

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