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SAN FRANCISCO CENTRAL SUBWAY:
A Case Study Of The Requirements Imposed On Contractors Performing A Local Construction Project Financed In Part With Federal Funds

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The Central Subway Project is currently underway in San Francisco. It is the second phase of the San Francisco Municipal Transportation Agency (“SF Muni”) Third Street Light Rail Project. The groundbreaking ceremony for the Central Subway took place on February 9, 2010. When completed, the Central Subway will extend the SF Muni light rail system from the Caltrain commuter rail depot at 4th and King streets (near SF Giants ballpark) to Chinatown, which is just northwest of the Union Square shopping area and is the most densely populated area of the City.

As with many ambitious public work projects, the Central Subway project has been plagued with rising costs and delays. The Central Subway, originally set to open in late 2018, is now projected to open to the public in 2021. In 2000, the estimated cost of the Central Subway project was $530 million. By 2001, the cost had risen to $647 million and in 2012, the cost had reached $1.6 billion. But those rising costs and delays must be set aside as a topic for another day.

This paper will explore how a contractor is impacted by the strings attached to federal funding of a local construction project. Here, the Federal Government is contributing $948 million to the cost of the Central Subway through the Federal Transit Administration’s (“FTA”) New Starts program. [https://www.sfmta.com/projects/central-subway-project](https://www.sfmta.com/projects/central-subway-project). Other funding is provided by the State of California. As a result, the contract awarded to Tutor-Saliba in 2013 for construction of the Central Subway includes a Special Provision section entitled “Federal Contract Requirements” which include numerous provisions discussed here.
I. LABOR AND PREVAILING WAGE

A. Davis Bacon Act

The Davis–Bacon Act of 1931, 40 U.S.C. § 3141, et. seq. ("DBA"), establishes minimum wage requirements for workers on a federally funded public works project. The DBA requires that all laborers and mechanics working on a jobsite be paid no less than the local “prevailing wage” set by the U.S. Department of Labor ("DOL"). The DBA’s “prevailing wage” is the combination of a basic hourly rate and fringe benefits. The Davis-Bacon Act applies to "contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair of public buildings or public works.” The prime contractor is responsible for the full compliance of the DBA by all contractors regardless of tier.

The applicable schedule of prevailing wages and fringe benefits, referred to as the Wage Determination, is incorporated in full into the prime contract. Wage Determinations are established by DOL based on periodic surveys of wages and fringe benefits in a specific geographic area. The DOL sets a Wage Determination for each trade classification. Wage Determinations can be viewed on the DOL website. [https://wdol.gov/dba.aspx](https://wdol.gov/dba.aspx). The contractor’s obligation to pay at least the prevailing wage listed in the contract wage determination can be met by paying each laborer and mechanic the applicable prevailing wage entirely as cash wages or by a combination of cash wages and employer-provided bona fide fringe benefits. Prevailing wages, including fringe benefits, must be paid on all hours worked on the site of the work.

DOL regulations implementing the DBA impose various additional requirements including:

- Payroll shall be paid not less often than once a week.
- No payroll deductions except as permitted by DOL regulations.
• Payroll records must contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents), daily and weekly number of hours worked, deductions made and actual wages paid.

• Contractor and subcontract payroll is to be submitted on a weekly basis to the local entity for transmission to the federal government.

• If laborers or mechanics perform work in more than one classification, they must be paid at the rate specified for each classification for the time actually worked.

• Contractor's payroll records must accurately set forth the time spent in each classification in which work is performed.

• Apprentices and trainees may work on the project as provided in DOL regulations.

• Prevailing wage for any class of laborers or mechanics, including helpers, that are not listed in the wage determination incorporated into the contract are classified “in conformance with” the wage determination.

• Payrolls and basic records relating thereto are to be maintained by the contractor during the course of the work and preserved for a period of three years.

• The records are subject to FTA inspection and copying, and in addition, representatives of the FTA or DOL may interview employees during working hours on the job.
• Each payroll submitted shall be accompanied by a signed “Statement of Compliance” certification which, if false, may result in federal civil or criminal prosecution of the contractor or subcontractor.

The Copeland “Anti-Kickback” Act of 1934 is a supplement to the DBA. It prohibits a federal construction contractor or subcontractor from inducing an employee into giving up any part of the compensation he or she is entitled to receive under the terms of his or her employment. It also prohibits any deductions from pay not specifically listed as permissible, and requires the submission of certified payroll on a weekly basis.

Contractors or subcontractors found to have violated the DBA may be subject to debarment from future contracts for up to three years. In addition, contract payments may be withheld in sufficient amounts to satisfy liabilities for unpaid wages. Breach of the required contract clauses under the DBA may also be grounds for termination of the contract for default. Falsification of the required certified payroll records or any kickback of wages may subject a contractor or subcontractor to civil or criminal prosecution, the penalty for which may be fines and/or imprisonment.

B. Contract Work Hours and Safety Act

The Contract Work Hours and Safety Standards Act (“CWHSSA”) governs hours and safety standards and applies to certain federally assisted construction contracts over $100,000 subject to DBA wage standards. It requires contractors and subcontractors on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half (1.5) times the basic rate of pay for all hours worked over 40 hours in a work week. A contractor found in violation of CWHSSA must pay back wages. This Act also prohibits unsanitary, hazardous, or dangerous working conditions on federal and federally financed and assisted construction projects.
The CWHSSA requirements governing payroll, reporting and record keeping are similar to the DBA as are the penalties for violations.

II. SAFETY

A. Seismic Safety

The U.S. Department of Transportation (“DOT”) has promulgated Seismic Safety Regulations for new building construction which are found at 49 C.F.R. Part 41. The regulations apply to new buildings that will be owned or leased by DOT, or are constructed with federal funds. Essentially, DOT references the 1988 National Earthquake Hazards Reduction Program Recommended Provisions and equivalent model building codes as acceptable standards.

B. Drug Free Workplace

DOT regulations regarding “Drug Free Workplaces,” and related guidance pertaining to substance abuse (drugs and alcohol) are primarily aimed at employers and employees working in the transportation industry, such as railroads, trucking and airlines, etc. However, when federal funds for a project are provided by DOT, contractors will find a “Drug Free Workplace” clause in their contract. The Drug Free Workplace Act of 1988, 41 U.S.C. § 81, provides that companies that receive a federal grant of any size must maintain a drug-free policy. Typically this means that the contractor must take the following steps:\(^1\)

- Publish and give a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy;

\(^1\) [https://webapps.dol.gov/elaws/asap/drugfree/require.htm](https://webapps.dol.gov/elaws/asap/drugfree/require.htm)
• Establish a drug-free awareness program to make employees aware of a) the dangers of drug abuse in the workplace; b) the policy of maintaining a drug-free workplace; c) any available drug counselling, rehabilitation, and employee assistance programs; and d) the penalties that may be imposed upon employees for drug abuse violations;

• Notify employees that as a condition of employment on a Federal contract or grant, the employee must a) abide by the terms of the policy statement; and b) notify the employer, within five calendar days, if he or she is convicted of a criminal drug violation in the workplace;

• Notify the contracting or granting agency within 10 days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace;

• Impose a penalty on – or require satisfactory participation in a drug abuse assistance or rehabilitation program by – any employee who is convicted of a reportable workplace drug conviction;

• Make an ongoing, good faith effort to maintain a drug-free workplace by meeting the requirements of the Act.

If a contractor does not have a Drug Free Workplace policy, or fails to enforce it, the contractor may be subjected to penalties including suspension of progress payments, suspension or termination of the contract, and/or referral to agency suspension and debarment proceedings.

C. Driver Safety

Contractors performing federally assisted public works projects are “encouraged” (but not required) by a federal clause in their contract “to promote safety policies to decrease
crashes by distracted drivers, including policies to ban text messaging while driving."

Contractors are encouraged to include such a provision in project subcontracts.

Similarly, contractors performing federally assisted public works projects are
“encouraged” (but not required) by a federal clause in their contract “to promote on-the-job seat
belt use policies and programs for those who operate company owned, rented, or personally
operated vehicles” and to include such a provision in project subcontracts.

III. ACCESS TO RECORDS

One of the most important provisions associated with federal funding is that the
Federal Government has the right to access the contractor’s books, documents, papers and
records (hereinafter “records”), even when the contract is awarded on a fixed price basis. This
right of access extends to all records which are “directly pertinent” to the contract and includes
the right to make copies of such records. 49 C.F.R. 18.36(i)(10). The records must be
maintained for a period of not less than three years after the date of termination or expiration of
the contract, or until any claims or litigation arising from the performance of the contract are
fully resolved. 49 C.F.R. 18.36(i)(11). The Access to Records provision makes it clear that the
Federal Government has the right to conduct a full and comprehensive audit of contractor costs
and compliance records.

IV. DOMESTIC PREFERENCES

A. Buy America

The Central Subway project requires the contractor to comply with the Buy
America Act (“BAA”), 49 U.S.C. 5323(j), and DOT Buy America regulations, 49 C.F.R. Part
661, et. seq. In brief, the statute and regulations provide that steel, iron, and manufactured
products used in the project must be produced in the United States, unless there is a waiver of the
BAA requirements. The FTA Administrator may waive the general requirements of BAA upon
finding that: (1) it would be inconsistent with the public interest; (2) the materials for which a waiver is requested are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; (3) the inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent.

If the contractor fails to comply with the BAA requirements, it is considered a material breach of contract that could give rise to a termination for default. Moreover, an intentional or willful failure to comply may subject the contractor to debarment or suspension proceeding. 49 C.F.R. § 661.19.

An interesting provision of the DOT regulations is found at 49 C.F.R. 661.21. It provides that a state may impose more stringent Buy America or buy national requirements than those contained in the BAA or implementing regulations. The FTA, however, will not participate in a state or local contract that provides for any of the following: (1) State Buy America or buy national preference provisions which are not as strict as the Federal requirements; (2) State and local Buy America or buy national provisions which are not explicitly set out under State law (e.g. administrative interpretations of non-specific State legislation); and (3) State and local buy local preference provisions.

B. Cargo Preference Requirements

The Central Subway project specifications require the contractor to use privately owned United States-flag vessels whenever shipping any equipment, material, or commodities pursuant to the underlying contract for at least 50 percent of the gross tonnage involved. The requirement extends only to situations where “such vessels are available at fair and reasonable rates.” A bill-of-lading must be filed for each shipment of cargo with the Maritime Administration in Washington, DC. These requirements are found in the Cargo Preference Act


C. Fly America

The Central Subway Project requires that the contractor comply with the “Fly America” Act, 49 U.S.C. 40118, and the General Services Administration’s implementing regulations at 41 C.F.R. Part 301-10. The regulations required that recipients and subrecipients of federal funds, and their contractors, use U.S. Flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. If a foreign air carrier is used, the contractor must submit an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier. The contractor is also required to provide a certificate of compliance with the Fly America requirements. The contractor also must include these requirements in all subcontracts for the Project that may involve international air transportation.

An interesting article on the Fly America Act and its codeshare exception can be found at Kelly, The Fly America Act Controversy: An Analysis of GSA Contracts Involving Foreign Carriers and Important Considerations, 47 Pub. Cont. L. R. 509 (Summer 2018)

V. FRAUD

Federal Government contractors have long understood that a contractor that submits a false invoice, a false certification or any other false statement that relates to the performance of a federal contract may find itself facing possible civil or criminal charges under
the False Claims Act. The Department of Justice, however, cannot prosecute every conceivable case of a false claim in conjunction with a project funded in whole or in part with federal funds. In response, Congress enacted the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801, et seq. (“PFCRA”) which provides an administrative process for handling false claims and statements where the alleged liability is less than $150,000. The DOT implementing regulations are found at 49 C.F.R. Part 31.

The PFCRA applies to the Central Subway Project. It provides that upon execution of the contract, “the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to this Contract or the FTA-assisted project for which this Contract work is being performed.” Penalties include liability of up to $5,000 per false claim and an additional assessment of up to two times the amount of the false claim. A more detailed discussion of the PFCRA can be found at Davidson, Combatting Small-Dollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act, 37 Pub. Cont. 2. Jour. 213 (Winter 2008).

VI. SOCIAL POLICY

A. Non-Discrimination

The Central Subway Project contract requires that the contractor agree that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability, and further, that it will comply with “applicable Federal implementing regulations and other implementing requirements FTA may issue.”

B. Equal Employment Opportunity

There are several requirements imposed on the contractor performing a federally funded project with regard to equal employment opportunity. If the contractor is found to be in noncompliance with any of the nondiscrimination clauses or the EEO rules and regulations, the
contract may be cancelled and the contractor may face suspension and debarment proceedings. Some of these requirements are summarized below:

- Contractor must take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age.
- Contractor must, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
- Contractor must send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice advising of the contractor's EEO commitments and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- Contractor must furnish all EEO information and reports required by Executive Order 11246 and the rules, regulations, and orders of the Secretary of Labor. Contractor must also permit access to books, records, and accounts to ensure compliance.
- Contractor must refrain from discrimination against present and prospective employees for reason of age and comply with any implementing requirements FTA may issue.
• Contractor must comply with the requirements of the EEO Commission relating to employment of persons with disabilities and comply with any implementing requirements FTA may issue.

• Contractor must designate a responsible official to monitor all employment related activity to ensure that the contractor’s EEO policy is being carried out, to submit reports as required, and to keep records. Contractor’s records must include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed.

• Contractor shall include in all subcontracts over $_________ these nondiscrimination and EEO provisions, and shall ensure that subcontractors are in compliance.

VII. ENVIRONMENT

A. Clean Air

The Clean Air Act, 42 U.S.C. 7401, et seq., is a federal law that regulates air emissions. In the Central Subway contract, the contractor agrees to comply with all applicable standards, orders or issued pursuant to this statute, and to report violations to the City and County of San Francisco which will, in turn, report violations to FTA and the appropriate EPA Regional Office. The contractor also agrees to include these requirements in each subcontract exceeding $100,000.
B. Clean Water

The Clean Water Act, 33 U.S.C 1251, *et seq.*, (also known as the Federal Water Pollution Control Act) regulates pollutant discharges into U.S. waters and requires EPA to establish water quality standards, among other things. The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Act, and to report each violation to the City which will, in turn, report each violation to FTA and the appropriate EPA Regional Office. The contractor also agrees to include these requirements in each subcontract exceeding $100,000 financed in whole or in part with Federal assistance provided by FTA.

C. Recycled Products

The Central Subcontract contract provides that the contractor agrees to comply with the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6962, including but not limited to the regulatory provisions of 40 C.F.R. Part 247, Comprehensive Procurement Guideline for Products Containing Recovered Materials, and Executive Order 12873, Federal Acquisition, Recycling, and Waste Prevention (1993) as they apply to the procurement of the following items:

- **Paper and paper products.** Paper and paper products, excluding building and construction paper grades.

- **Vehicular products.** (a) Lubricating oils containing re-refined oil, including engine lubricating oils, hydraulic fluids, and gear oils, excluding marine and aviation oils. (b) Tires, excluding airplane tires. (c) Reclaimed engine coolants, excluding coolants used in non-vehicular applications.

- **Construction products.** (a) Building insulation products, including the following items: (1) Loose-fill insulation, including but not limited to cellulose fiber, mineral fibers (fiberglass and rock wool), vermiculite, and
perlite; (2) Blanket and batt insulation, including but not limited to mineral fibers (fiberglass and rock wool); (3) Board (sheathing, roof decking, wall panel) insulation, including but not limited to structural fiberboard and laminated paperboard products, perlite composite board, polyurethane, polyisocyanurate, polystyrene, phenolics, and composites; and (4) Spray-in-place insulation, including but not limited to foam-in-place polyurethane and polyisocyanurate, and spray-on cellulose. (b) Structural fiberboard and laminated paperboard products for applications other than building insulation, including building board, sheathing, shingle backer, sound deadening board, roof insulating board, insulating wallboard, acoustical and non-acoustical ceiling tile, acoustical and non-acoustical lay-in panels, floor underlayments, and roof overlay (coverboard). (c) Cement and concrete, including concrete products such as pipe and block, containing coal fly ash or ground granulated blast furnace (GGBF) slag. (d) Carpet made of polyester fiber for use in low- and medium-wear applications. (e) Floor tiles and patio blocks containing recovered rubber or plastic. (f) Shower and restroom dividers/partitions containing recovered plastic or steel. (g) (1) Consolidated latex paint used for covering graffiti; and (2) Reprocessed latex paint used for interior and exterior architectural applications such as wallboard, ceilings, and trim; gutter boards; and concrete, stucco, masonry, wood, and metal surfaces. (h) Carpet cushion made from bonded polyurethane, jute, synthetic fibers, or rubber containing recovered materials. (i) Flowable fill containing coal fly ash and/or ferrous foundry sands. (j) Railroad grade crossing surfaces containing coal fly ash, recovered rubber, or recovered steel.
• **Transportation products.** (a) Traffic barricades and traffic cones used in controlling or restricting vehicular traffic. (b) Parking stops made from concrete or containing recovered plastic or rubber. (c) Channelizers containing recovered plastic or rubber. (d) Delineators containing recovered plastic, rubber, or steel. (e) Flexible delineators containing recovered plastic.

• **Park and recreation products.** (a) Playground surfaces and running tracks containing recovered rubber or plastic. (b) Plastic fencing containing recovered plastic for use in controlling snow or sand drifting and as a warning/safety barrier in construction or other applications. (c) Park benches and picnic tables containing recovered steel, aluminum, plastic, or concrete. (d) Playground equipment containing recovered plastic, steel, or aluminum.

• **Landscaping products.** (a) Hydraulic mulch products containing recovered paper or recovered wood used for hydroseeding and as an over-spray for straw mulch in landscaping, erosion control, and soil reclamation. (b) Compost made from yard trimmings, leaves, grass clippings, and/or food waste for use in landscaping, seeding of grass or other plants on roadsides and embankments, as a nutritious mulch under trees and shrubs, and in erosion control and soil reclamation. (c) Garden and soaker hoses containing recovered plastic or rubber. (d) Lawn and garden edging containing recovered plastic or rubber. (e) Plastic lumber landscaping timbers and posts containing recovered materials.

• **Non-paper office products.** (a) Office recycling containers and office waste receptacles. (b) Plastic desktop accessories. (c) Toner cartridges. (d) Plastic-
covered binders containing recovered plastic; chipboard and pressboard binders containing recovered paper; and solid plastic binders containing recovered plastic. (e) Plastic trash bags. (f) Printer ribbons. (g) Plastic envelopes. (h) Plastic clipboards containing recovered plastic. (i) Plastic file folders containing recovered plastic. (j) Plastic clip portfolios containing recovered plastic. (k) Plastic presentation folders containing recovered plastic.

- **Miscellaneous products.** (a) Pallets containing recovered wood, plastic, or paperboard. (b) Sorbents containing recovered materials for use in oil and solvent clean-ups and as animal bedding. (c) Industrial drums containing recovered steel, plastic, or paper. (d) Awards and plaques containing recovered glass, wood, paper, or plastic. (e) Mats containing recovered rubber and/or plastic. (f)(1) Non-road signs containing recovered plastic or aluminum and road signs containing recovered aluminum. (2) Sign supports and posts containing recovered plastic or steel. (g) Manual-grade strapping containing recovered steel or plastic.

**D. Energy Conservation**

One of the Central Subway project’s Federal provision states: “The Contractor must comply with mandatory standards and policies relating to energy efficiency which are contained in the State’s energy conservation plan issued in compliance with the Energy Policy and Conservation Act of 1975.” That Act was passed in response to the 1973-1974 OPEC oil embargo and related energy crisis. Among other things, it established the Strategic Petroleum Reserve, automobile fuel economy standards and invites States to submit energy conservation plans to the federal government which, if approved, would make the State eligible for federal funds to assist in implementing such plans.
VIII. FTA CIRCULAR 42201F THIRD PARTY CONTRACTING GUIDANCE

FTA Circular 42201F, which is incorporated by reference into the Central Subway contract, is a rather lengthy document that provides contracting guidance for recipients of Federal assistance awarded by the FTA when using that Federal assistance to finance its procurements (third party contracts). It can be found at:


The Circular provides guidance recipients of the federal funds - here the city of San Francisco. The Circular itself does not have the force and effect of a regulation but rather describes how a recipient of FTA assistance can comply with applicable Federal requirements. The Circular makes clear that governmental recipients of federal funds are to comply with the “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 C.F.R. Part 18, also referred to as the “Common Grant Rules.”

The guidance provided in the Circular is too lengthy and broad to summarize in this paper. However, below are a few of the guidance provisions:

- No employee, officer, agent, or board member, or immediate family member, may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. A conflict of interests would arise when any of the listed individuals has a financial or other interest in the firm selected for award.

- Record Keeping. The recipient must prepare and maintain adequate and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project
implementation. The records must be maintained for three years after final payment and all other pending matters are closed. The recipient must also prepare, maintain, and distribute the following documents among others as necessary: written records detailing the history of each procurement including procurement method; its reasons for contractor selection or rejection; justification for any noncompetitive award; a written responsibility determination for the successful contractor; justification for the contract cost or price.

• The Common Grant Rules require bonds for all construction contracts exceeding the simplified acquisition threshold unless FTA determines that other arrangements adequately protect the Federal interest. FTA’s bonding policies generally require (1) each bidder to provide a bid guarantee equivalent to 5 percent of its bid price, (2) the contractor to obtain a performance bond for 100 percent of the contract price, and (3) the contractor to obtain a standard payment bond for 100 percent of the contract price.

• A recipient may not use Federal assistance to finance:
  o Improper Contract Expansion. A contract has been improperly expanded when it includes a larger scope, greater quantities, or options beyond the original recipient’s reasonably anticipated needs. A contract has also been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity. The Common Grant Rules
requires the recipient to have procurement procedures that preclude the recipient from acquiring property or services it does not need.

- Cardinal Changes. A significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract, is a cardinal change. Such practices are sometimes informally referred to as “tag-ons.” A change within the scope of the contract (sometimes referred to as an “in-scope” change) is not a “tag-on” or cardinal change.

- The following contract types are restricted or prohibited:
  - Cost Plus a Percentage of Cost; and
  - Percentage of Construction Cost.
  - Time and Materials contracts may be used only after determining that no other contract type is suitable. If the contract specifies a ceiling price that the contractor may not exceed except at its own risk.

- Each recipient is expected to have appropriate written bid protest procedures. The recipient has the responsibility to notify FTA when it receives a bid protest and to keep FTA informed about the status of the protest. Note: FTA has an appeals process for reviewing protests of a recipient’s procurement decisions. FTA has jurisdiction over protests that
allege that recipient does not have protest procedures, or has not complied with its protest procedures, or has not reviewed the protest when presented an opportunity to do so.

https://www.transit.dot.gov/funding/procurement/third-party-procurement/protests