



Niagara Frontier Transportation Authority
Serving Buffalo Niagara

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181 Ellicott Street
Buffalo, New York 14203
716-855-7300
Fax: 716-855-7657
TDD: 855-7650
www.nfta.com

April 29, 2011

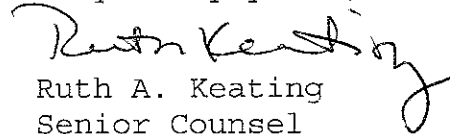
Mr. Robert M. Graber
Erie County
Clerk of the Legislature
92 Franklin Street
4th Floor
Buffalo, New York 14202

Re: Niagara Frontier Transportation Authority
Notice of Proposed Rulemaking

Dear Mr. Graber:

Pursuant to section 1299-t of the Public Authorities Law, notice is hereby given of a proposed amendment to 21 NYCRR Part 1159, the NFTA's Procurement Guidelines. Enclosed is a copy of the NFTA's Notice of Proposed Rulemaking together with the text of the proposed revisions. If you or someone on your staff have any questions or require any further information please call me at 855-7398.

Very truly yours,


Ruth A. Keating
Senior Counsel

RAK

Enclosures

Time:

Date:

Location:

6. *Interpreter services* (check only if a public hearing is scheduled):

- ☐ Interpreter services will be made available to hearing impaired persons, at no charge, upon written request to the agency contact designated in this notice.

7. *Accessibility* (check appropriate box only if a public hearing is scheduled):

- ☐ All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.
- ☐ Attached is a list of public hearing locations that are **not** reasonably accessible to persons with a mobility impairment. An explanation is submitted regarding diligent efforts made to provide accessible hearing sites.

8. *Terms of rule* (SELECT ONE SECTION):

- A. ☒ The full text of the rule is attached since it is under 2,000 words.
- B. ☐ A summary of the rule is attached since the full text of the rule is over 2,000 words.
- ☐ Full text is posted at the following State website: _____
- ☐ Full text is not posted on a State website.
- ☐ Full text is not posted on a State website; this is a consensus rule or a rule defined in SAPA § 102 (2)(a)(ii).
- C. ☐ Pursuant to SAPA §202(7)(b), the agency elects to print a description of the subject, purpose and substance of the rule as defined in SAPA §102(2)(a)(ii) [Rate Making].

9. *The text of the rule and any required statements and analyses may be obtained from:*

Agency contact Ruth A. Keating

Agency Name Niagara Frontier Transportation Authority

Office address 181 Ellicott Street, Buffalo, New York 14203

Telephone (716) 855-7398 E-mail: Ruth_Keating@nfta.com

10. *Submit data, views or arguments to* (complete only if different than previously named agency contact):

Agency contact _____

Agency name _____

Office address _____

Telephone _____ E-mail: _____

11. Public comment will be received until:

- ☒ 45 days after publication of this notice (MINIMUM public comment period when full text is attached because it is under 2000 words or full text of rule has been posted on a State web site or the rule is a consensus rule or a rule defined under SAPA §102[2][a][ii] [Rate Making]).
- ☐ 60 days after publication of this notice (MINIMUM public comment period when full text is not attached or full text is not posted on a State web site or the rule is not a consensus rule or a rule defined under SAPA §102[2][a][ii] [Rate Making]).
- ☐ 5 days after the last scheduled public hearing required by statute (MINIMUM, with required hearing). This box may not be checked and the minimum 60-day comment period applies if full text is not attached or text is not posted on a State web site or the rule is not a consensus rule or a rule defined under SAPA §102[2][a][ii] [Rate Making]).
- ☐ Other: (specify) _____.

12. A prior emergency rule making for this action was previously published in the _____ issue of the Register, I.D. No. _____.

13. Expiration date (check only if applicable):

- ☐ This proposal will not expire in 365 days because it is for a "rate making" as defined in SAPA §102(2)(a)(ii).

14. Additional matter required by statute:

- ☐ Yes (include below material required by statute).

- ☒ No additional material required by statute.

15. Regulatory Agenda (The Division of Housing and Community Renewal; Workers' Compensation Board; and the departments of Agriculture and Markets, Banking, Education, Environmental Conservation, Family Assistance, Health, Insurance, Labor, Motor Vehicles and State and other department specified by the Governor or his designee must complete this item. If your agency has an optional agenda published, that should also be indicated below):

- ☐ This action was a Regulatory Agenda item in the first January issue of the _____ (year) Register.
- ☐ This action was a Regulatory Agenda item in the last June issue of the _____ (year) Register.
- ☐ This action was not under consideration at the time this agency's Regulatory Agenda was submitted for publication in the Register.
- ☒ Not applicable.

16. 5-Year Review of Existing Rules (ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS)

This rule is proposed pursuant to SAPA §207 (item 1D applies) (check applicable boxes):

Attached is a statement setting forth a reasoned justification for modification of the rule. Where appropriate, include a decision of the degree to which changes in technology, economic conditions or other factors in the area affected by the rule necessitate changes in the rule.

Attached is an assessment of public comments received by the agency in response to the listing of the rule in the regulatory agenda.

An assessment of public comments is not attached because no comments were received.

- ☒ Not applicable.

17. Regulatory Impact Statement (RIS)

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS, EXCLUDING SUMMARIES OF STUDIES, REPORTS OR ANALYSES [Needs and Benefits]):

A. The attached RIS contains:

☐ The full text of the RIS.☐ A summary of the RIS.☐ A consolidated RIS, because this rule is one of a series of closely related and simultaneously proposed rules or is virtually identical to rules proposed during the same year.B. A RIS is **not attached**, because this rule is:☐ subject to a consolidated RIS printed in the *Register* under I.D. No.: _____;
issue date: _____.☐ exempt, as defined in SAPA §102(2)(a)(ii) [Rate Making].☒ exempt, as defined in SAPA §102(11) [Consensus Rule Making].C. ☐ A **statement is attached** claiming exemption pursuant to SAPA § 202-a (technical amendment).**18. Regulatory Flexibility Analysis (RFA) for small businesses and local governments**

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS):

A. The attached RFA contains:

☐ The full text of the RFA.☐ A summary of the RFA.☐ A consolidated RFA, because this rule is one of a series of closely related rules.B. ☐ A **statement is attached** explaining why a RFA is not required. This statement is in scanner format and explains the agency's finding that the rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments and the reason(s) upon which the finding was made, including any measures used to determine that the rule will not impose such adverse economic impacts or compliance requirements.C. A RFA is **not attached**, because this rule:☐ is subject to a consolidated RFA printed in the *Register* under I.D. No.: _____;
issue date: _____.☐ is exempt, as defined in SAPA §102(2)(a)(ii) [Rate Making].☒ is exempt, as defined in SAPA §102(11) [Consensus Rule Making].**19. Rural Area Flexibility Analysis (RAFA)**

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS):

A. The attached RAFA contains:

☐ The full text of the RAFA.☐ A summary of the RAFA.☐ A consolidated RAFA, because this rule is one of a series of closely related rules.B. ☐ A **statement is attached** explaining why a RAFA is not required. This statement is in scanner format and explains the agency's finding that the rule will not impose any adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas and the reason(s) upon which the finding was made, including what measures were used to determine that the rule will not impose such adverse impact or compliance requirements.C. A RAFA is **not attached**, because this rule:☐ is subject to a consolidated RAFA printed in the *Register* under I.D. No.: _____;
issue date: _____.☐ is exempt, as defined in SAPA §102(2)(a)(ii) [Rate Making].

☒ is exempt, as defined in SAPA §102(11) [Consensus Rule Making].

20. Job Impact Statement (JIS)

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS):

A. The attached JIS contains:

☐ The full text of the JIS.

☐ A summary of the JIS.

☐ A consolidated JIS, because this rule is one of a series of closely related rules.

B. ☒ A **statement is attached** explaining why a JIS is not required. This statement is in scanner format and explains the agency's finding that the rule will not have a substantial adverse impact on jobs and employment opportunities (as apparent from its nature and purpose) and explains the agency's finding that the rule will have a positive impact or no impact on jobs and employment opportunities; except when it is evident from the subject matter of the rule that it could only have a positive impact or no impact on jobs and employment opportunities, the statement shall include a summary of the information and methodology underlying that determination.

☐ A JIS/Request for Assistance [SAPA §201-a(2)(c)] is attached.

C. A JIS is **not attached**, because this rule:

☐ is subject to a consolidated JIS printed in the *Register* under I.D. No.: 1997-2002 - 1002
issue date: 1997-2002 - 1002

☐ is exempt, as defined in SAPA §102(2)(a)(ii) [Rate Making].

☐ is proposed by the State Comptroller or Attorney General.

AGENCY CERTIFICATION (To be completed by the person who PREPARED the notice.)

I have reviewed this form and the information submitted with it. The information contained in this notice is correct to the best of my knowledge.

I have reviewed Article 2 of SAPA and Parts 260 through 263 of 19 NYCRR, and I hereby certify that this notice complies with all applicable provisions.

Name Ruth A. Keating Signature _____

Address 181Ellicott Street, Buffalo, New York 14203

Telephone (716) 855-7398

E-Mail Ruth_Keating@nfta.com

Date 04/29/2011

Please read before submitting this notice:

1. Except for this form itself, all text must be typed in the prescribed format as described in the Department of State's Register procedures manual, *Rule Making in New York*.
2. **Collate the original notice and attachments** as: (1) form; (2) text or summary of rule; and, **if any**, (3) regulatory impact statement, (4) regulatory flexibility analysis for small businesses and local governments, (5) rural area flexibility analysis, (6) job impact statement. Submit the originals, as collated and **ONE copy of that collated set**.
3. **Mail or hand deliver hard copy of rule making package to:** Department of State, Division of Administrative Rules, 99 Washington Ave., Suite 650, Albany, NY 12231-0001.
4. **E-mail text/substance and attachments to:** nysregister@dos.state.ny.us or attach a disk containing the text/substance and required material.

Statement of Agency's Findings of no Impact on Jobs and Employment Opportunities

The Niagara Frontier Transportation Authority has determined adoption of the proposed rule will have no impact on jobs or employment opportunities for the following reasons:

1. The subject of the proposed rule is to conform to changes in state law. Changes to the rules will not impact the level of procurements made by the NFTA, and therefore will not impact jobs or employment opportunities.

Statement Concerning Adoption of a Consensus Rule

The Niagara Frontier Transportation Authority has determined that no person is likely to object to the rule being amended for the following reasons:

1. The major changes are to conform to state law requirements.
2. The changes are not controversial.

Subsection (3) to subdivision (h) of section 1159.4 is amended to add a new subsection (v) follows:

(v) The published selection criteria shall be as follows: Professional Services, 40% qualifications and experience, 30% technical criteria and 30% cost; Revenue Generating and Other Services, 20% qualifications and experience, 30% technical criteria and 50% cost; Technical/Operation Sensitive Services, 20% qualifications and experience, 40% technical criteria and 40% cost; Transit Buses, 20% qualifications and experience, 50% technical criteria and 30% cost.

Subsections (v), (vi), (vii) and (viii) to subdivision (h) of section 1159.4 are renumbered (vi), (vii), (viii) and (ix).

Subsection (vii) to subsection (2) of subdivision (i) of section 1159.4 is amended as follows:

(vii) The selection board, at its option may conduct interviews, presentations, and/or discussions. If this option is elected, interviews, presentation, and/or discussions must be held with each consultant who has submitted a technical proposal if the initial solicitation was by way of RFQ. If not, interviews, presentations, and/or discussions must be held with each consultant in the competitive range in accordance with the evaluation of the technical proposals.

A new subdivision (j) of section 1159.4 is added as follows:

(j) *Options.* An option is a unilateral right in a contract by which, for a specified time, the Authority may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract. An option must be evaluated as part of the original contract award. In addition, for procurements funded by the Federal Transit Administration, a cost and price

analysis must be conducted at the time of exercise of the option in order to ensure that the option price is still fair and reasonable.

Subdivisions (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v) and (w) of section 1159.4 are renumbered (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w) and (x).

A new subsection (5) is added to subdivision (l) of section 1159.4 as follows:

(5) All eligible contracts for the purchase of goods or services which are to be awarded on a single source basis, sole source basis or pursuant to any other method of procurement that is not a competitive procurement and where the aggregate consideration under the contract may reasonably be valued in excess of \$1,000,000 and eligible amendments to contracts previously approved by the Comptroller where the value of the amendment is 10% or more of the contract amount previously approved by the Comptroller are subject to the prior review and approval of the New York State Comptroller. Please refer to section 2979-a of the Public Authorities Law and Part 206 to 2 N.Y.C.R.R. for relevant definitions and the process to be followed.

A new subsection (2) is added to subdivision (q) of section 1159.4 as follows:

(2) The Federal Aviation Administration and the Federal Transit Administration each have specific criteria for the procurement of Design-Bid-build and Design-build contracts. Please refer to the relevant Advisory Circular for specific requirements.

A new subsection (3) is added to subdivision (q) of section 1159.4 as follows:

(3) The Federal Aviation Administration and the Federal Transit Administration each prohibit the use of in-State or local geographical preferences, with the exception of architectural and engineering services.

A new subsection (4) is added to subdivision (q) of section 1159.4 as follows:

(4) The Federal Aviation Administration and the Federal Transit Administration require a cost analysis or a price analysis in connection with every procurement action.

A new subsection (5) is added to subdivision (q) of section 1159.4 as follows:

(5) The Federal Transit Administration requires the use of Part 31 of the Federal Acquisition Regulations with respect to pricing issues.

A new subsection (6) is added to subdivision (q) of section 1159.4 as follows:

(6) The Federal Transit Administration has specific rules governing advance payments and progress payments. Advance payments are prohibited. Progress payments are permitted provided that title has been obtained. Please refer to FTA Circular 4220.1F.

Subsection (2) to subdivision (q) of section 1159.4 is renumbered to (7).

Subsection (2) to subdivision (s) of section 1159.4 is amended as follows:

(2) [The director, EEO/diversity development, shall maintain a list of all MBE, WBE and DBE entities certified to perform public work, supply items for purchase contracts, or perform personal or professional services of a kind and nature which may be needed by the authority.] An updated list of all DBE certified firms in New York State may be obtained from the New York State Unified Certification Program website at www.biznet.nysucp.net. A directory of MWBE certified firms may be

obtained from the New York State MWBE website at www.nylovesmwbe.ny.gov. The Procurement Department shall be responsible for referencing such lists prior to the publication of a notice of procurement opportunity or informal solicitation to determine the availability of certified DBE, MBE and WBE entities.

A new subsection (3) to subdivision (s) of section 1159.4 is added as follows:

(3) The Director, EEO/Diversity Development shall ensure that the Authority establishes appropriate goals for participation by minority or women-owned business enterprises in procurement contracts awarded by the Authority and for the utilization of minority and women-owned business enterprises as subcontractors and suppliers by entities having procurement contracts with the Authority. Statewide numerical participation target goals shall be established by the Authority based on the findings of the 2010 disparity study.

A new subsection (4) to subdivision (s) of section 1159.4 is added as follows:

(4) Every effort will be made to achieve the MWBE goals assigned to projects. The Authority's procurement solicitation documents shall include MWBE goals as appropriate. These documents are advertised and posted on the Authority's website. MWBE utilization will be monitored and reported by the EEO/Diversity Development Department with assistance from the Engineering and Procurement Departments.

A new subsection (5) to subdivision (v) of section 1159.4 is added as follows:

(5) The Federal Transit Administration prohibits cardinal changes, defined as significant changes in contract work that cause major deviations from the original purpose of the work or the intended method of achievement, or cause revisions 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. Please refer to FTA Circular 4220.1F for further information.

A new subdivision (y) of section 1159.4 is added as follows:

(y) *Waiver of competition pursuant to section 2879 of the public authorities law.* Pursuant to section 2879 of the Public Authorities Law the Board may waive competition for the purchase of goods or services from small business concerns or those certified as minority- or women-owned business enterprises, or goods or technology that are recycled or remanufactured, in an amount not-to-exceed \$200,000.00. Such a waiver may only be granted for non-federally funded purchases and shall require a two-thirds vote of the Members in attendance at a Meeting of the Board.

Subdivisions (x), (y), (z), (aa), (ab), (ac) and (ad) of section 1159.4 are renumbered to (z), (aa), (ab), (ac), (ad), (ae) and (af).

A new subsection (6) to subdivision (ab) of section 1159.4 is added as follows:

(6) EEO/Diversity Development Department: The Office of EEO/Diversity Development shall develop DBE and MWBE goals. EEO/Diversity Development will monitor DBE and MWBE participation for federal and state funded project. The EEO/Diversity Development Department will also report DBE and MWBE utilization to appropriate federal and state agencies.

Subsection (5) to subdivision (b) of section 1159.5 is amended as follows:

5. *Protestor's Appeal to Federal or State Agencies.* In the event [that the Authority fails to abide by the protest procedures set forth above, and] federal or state funds are participating in the procurement, then the protestor may seek a review by the appropriate funding agency. The Federal

Transit Administration will only consider a protest if the Authority (a) does not have protest procedures, (b) has not complied with its protest procedures, or (c) has not reviewed the protest when given the opportunity to do so. The Federal Transit Administration will exercise discretionary jurisdiction over those appeals involving issues important to the Federal Transit Administration's overall public transportation program.

Protestors shall file such a protest not later than five (5) business days after a final decision is rendered under the Authority's protest procedure. In instances where the protestor alleges that the Authority failed to make a final determination on the protest, protestors shall file a protest with the appropriate agency not later than five (5) business days after the protestor knew or should have known of Authority's failure to render a final determination on the protest.