

SECTION G - PROCUREMENT

1. OVERVIEW

This section provides an overview of federal and state laws that govern competitive bidding. This relates to the solicitation of bids or requests for proposals and the awarding of contracts for professional services, construction, alteration or rehabilitation of public works, public facilities and some housing projects. The intent of these laws is to ensure fair competition and opportunity.

Grantees shall use their own procurement procedures that reflect applicable state and local laws and regulations, provided that they conform to the standards set forth in this document and all other applicable state and federal laws.

All jurisdictions must award construction and vendor contracts to the lowest responsible bidder. Responsible bidder means a person who has the capability in all respects to perform fully the contract requirements and who has the integrity and reliability which will assure good faith performance. This requirement does not apply to professional services such as engineering or architectural design.

Minority contractors/subcontractors, woman-owned businesses and low/very low-income people are to be provided opportunities to contract for CDBG projects.

2. APPLICABLE LAWS

Federal law per 24 CFR Part 85.36 defers procurement rules to the state. The purpose of the Utah Procurement Code (Title 63G, Chapter 6) is to simplify, clarify and modernize the law governing procurement; to ensure fair and equitable treatment of all persons who deal with the procurement system; to provide increased economy in state procurement activities; and to foster effective broad-based competition within the free enterprise system.

3. SELECTION PROCEDURES

All procurement, regardless of method or dollar value, shall be conducted in a manner that provides maximum open and free competition. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business;
- Requiring unnecessary experience and excessive bonding;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive awards to consultants that are on retainer contracts;
- Organizational conflicts of interest;
- Specifying only a brand name product instead of allowing an equal product to be offered and describing the performance of other relevant requirements of the procurement, and
- Any arbitrary action in the procurement process.

Procurement notices must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. In competitive procurement, the description must not 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 should set forth the minimum essential characteristics and standards necessary to satisfy its intended use. 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 as a means to define the performance or other salient requirements of procurement. The specific features of the named brand must be clearly stated.

Grantees must clearly set forth all requirements the bid must fulfill and all other factors to be used in evaluating bids or proposals. Awards should only be made to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration should be given to contractor integrity, compliance with public policy, record of past performance and financial and technical resources.

4. ADVERTISING FOR CONSTRUCTION BIDS

State law requires that all cities and counties publish notice in a newspaper of general circulation a reasonable time before bid opening. If there is no newspaper published or one of general circulation in the local entity, the jurisdiction may post a notice at least five days before opening the bids in at least five public places and leave the notice posted for at least three days. (Very few, if any, grantees are eligible for posting in lieu of publishing). Posting, in addition to publishing is strongly recommended to notify potential local contractors of the contracting opportunity. For **2012** the **threshold** for bidding a **building** improvement project is **\$55,000** or for a **public works** project **\$176,300**.

5. METHODS OF PROCUREMENT FOR PROFESSIONAL SERVICES

The state CDBG program recommends that jurisdictions using professional engineers or architects adopt a process that involves publishing a request for proposal (RFP). This is not required by State law and there is no dollar threshold for professional services. Jurisdictions may procure professional services for the specific project or procurement may be done for professional services in general. In the case of general professional service contracts the requirements should be broad enough to encompass different types of projects and the contract term cannot extend beyond five years. The bidder that best meets the jurisdictions needs should be retained. See exhibit G-1 for a basic template that can be used for developing a RFP for engineer/architect services for a single project only. See exhibit G-2 for a basic template that can be used for general engineering/architectural services (recommended).

6. METHODS OF PROCUREMENT FOR CONSTRUCTION

The CDBG program recognizes the following four methods of procurement: (a) competitive sealed bids (formal advertising); (b) competitive negotiation; (c) non-competitive negotiation; (d) small purchase procedures used for the procurement of services, supplies or other property. Procurement methods, other than competitive sealed bids, can only be considered after the grantee has contacted and received approval from the state CDBG staff.

A. Competitive Sealed Bids: The first choice of procurement methods is competitive sealed bids (formal advertising). Sealed bids are publicly solicited and a firm-fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid conforms to all the material terms and conditions and is the lowest.

1) In order for formal advertising to be feasible, the following conditions must be present:

- a) The availability of a complete, adequate and realistic specification or purchase description.
- b) Two or more responsible bidders willing and able to compete for the grantee’s business.
- c) The procurement lends itself to a firm-fixed-price contract and selection of a successful bidder can be made principally on the basis of price.

B. Competitive Negotiation: If the Competitive Sealed Bids method yields no bidders or only bids that exceed the engineer's estimate by 10%, a 2nd attempt should be made to advertise for bids. If the 2nd attempt fails to yield a practical bid, grantees may choose the 2nd method of procurement. The technique of competitive proposals is normally conducted with more than one of the contractors submitting offers, and either a fixed price or cost-reimbursable type contract is awarded, as appropriate. If competitive negotiation is used for procurement the following requirements shall apply:

- 1) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement.
- 2) The request for proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance.
- 3) The grantee shall provide mechanisms for technical evaluation of the proposals received, determination of responsible offers for the purpose of written or oral discussions, and selection for contract award.
- 4) Award may be made to the responsible offer whose proposal will be most advantageous to the grantee; price and other factors considered. Unsuccessful offers should be notified promptly.

C. Noncompetitive Negotiation: This method solicits a proposal from only one source. Noncompetitive negotiation is a 'last resort' and may be used only when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising) or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

- 1) The item is available only from a single source;
- 2) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;
- 3) After solicitation of a number of sources, competition is determined inadequate and the state approves noncompetitive negotiation.

D. Small Purchase Procedures; These are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than \$10,000. Grantees shall comply with state or local small purchase dollar limits under \$10,000. If small purchase procedures are used for procurement under a grant, price or rate quotations shall be obtained from an adequate number of qualified sources.

7. PROCUREMENT & CONTRACT LIABILITY

Adherence to the methods and procedures above does not guarantee honest and fair contractor performance. These standards do not relieve the grantee of any contractual responsibilities. The grantee is responsible for settlement of all contractual issues. Violations of law are to be referred to the city, county or non-profit that has contracted with the State to carry out the CDBG grant.

8. CODE OF CONDUCT

Grantees shall maintain a written code of standards of conduct governing the performance of their officers, employees or agents engaged in the award and administration of contracts supported by federal funds. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when the employee, officer or agent, any member of his immediate

family, his or her partner, or an organization that employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item or nominal interest value. To the extent permitted by state or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors of their agents.

The grantee shall establish procurement procedures that provide that grantee officials avoid unnecessary or duplicate items by review of proposed procurement actions. Consideration should be given to consolidation to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency, grantees are encouraged to enter into state and local intergovernmental agreements for procurement or use of common goods and services.

9. HUD SECTION 3 COMPLIANCE

Section 3 is a provision of the HUD Act of 1968, which requires that employment and other economic opportunities arising in connection with housing rehabilitation, housing construction, or other public construction projects shall, to the greatest extent feasible, and consistent with existing federal, state, and local laws and regulations, be given to low and very low-income persons. The objective is to ensure that recipients of CDBG funds, to the greatest extent feasible, provide opportunities for training and employment to low and very low income people from activities that arise in connection with the planning and carrying out of any project assisted with these funds.

In addition to providing project details and bid procedures, all procurement notices must state:

“This project is funded (or partially funded) through a Department of Housing and Urban Development (HUD) Community Development Block Grant (CDBG). The contractor will be required to comply with all federal labor standards and attendant laws, including the payment of the most current Davis-Bacon wages and compliance with Section 3 to provide employment opportunities for lower income persons. Local, minority and woman owned business owners are encouraged to bid. The lowest responsible bidder will be selected.”

The state's allocation triggers Section 3; compliance applies to projects where the **HUD (CDBG) share of the project cost exceeds \$200,000**. If a new hire is required as a result of a federally funded project, every effort must be made to recruit low-income qualified persons from the project area. Grantees are required to document their efforts to comply with Section 3 and make said documentation available upon request to the state and the public. Please contact the state for resources and suggestions on how to best comply with this requirement in your area.

10. SMALL AND MINORITY FIRMS, WOMEN-OWNED BUSINESSES

It is federal policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority business are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps may include the following:

- Place qualified small, minority and women-owned businesses on solicitation lists.
- Assure that small and minority businesses are solicited whenever they are potential sources.
- Grantees must take similar appropriate affirmative action in support of women owned businesses.

- Grantees are also encouraged to procure goods and services from local project areas.

11. CONTRACT PRICING

Grantees shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. See section D and OMB circular A-87

12. GRANTEE PROCUREMENT RECORDS

Grantees shall maintain records that detail the history of the procurement process. Records should explain the rationale for the following: the chosen method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost.

13. CONTRACT PROVISIONS

In addition to provisions defining a sound and complete procurement contract, any recipient of federal grant funds shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by state and federal law. Grantees shall ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

- A. Contracts other than small purchases shall contain provisions or conditions that will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for appropriate sanctions and penalties.
- B. The state will not draw down the final 5% of the grant funds until the state staff has reviewed the project. The state reserves the right to withhold an amount greater than 5% if there is any evidence of non-compliance. Furthermore, grantees should advise the contractor that since the federal government has yet to pay out on this portion of the contract there will be no interest earned or paid on this contract as required by state code 13-8-5.
- C. All contracts in excess of \$10,000 shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated because of circumstances beyond the control of the contractor.
- D. All contracts awarded in excess of \$10,000 by grantees and their contractors or sub-grantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity", as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR 60 Part 60-1, Obligations of Contractors and Subcontractors).
- E. All contracts and sub-grants for construction or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act. This Act provides that each contractor or sub-grantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to the grantor agency.
- F. All construction contracts in excess of \$2,000 awarded by grantees and sub-grantees shall include a provision for compliance with the Davis-Bacon Act. Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage

determination made by the Secretary of Labor. In addition, contractors shall be required to submit payroll sheets once a week. The grantee shall place a copy of the current prevailing wage determination issued by the Department of Labor (available from the state staff) in each solicitation and the award of a contract shall be conditioned upon the acceptance of the determination. The grantee shall report all suspected or reported violations to the state staff.

- G. Where applicable, all contracts awarded by grantees and sub-grantees in excess of \$2,000 for construction contracts and in excess of \$2,500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act. Under Section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard workweek of 40 hours. Work in excess of a standard workweek is permissible provided that worker is compensated at a rate of not less than 1 ½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions that are unsanitary, hazardous, or dangerous to his health and safety as determined under Secretary of Labor. These requirements do not apply to the purchases of supplies or materials.
- H. Where applicable, all contracts awarded by grantees and sub-grantees in excess of \$100,000 for the completion of housing rehabilitation, housing construction, and other public construction shall contain the Section 3 Construction Clause (provided by the state office) and Section 3 becomes a requirement of the Contractors and subcontractors.
- I. The contract shall include notice of grantor agency requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of grantor agency requirements pertaining to copyrights and rights in data.
- J. All negotiated contracts (except those awarded by small purchase procedures) awarded by grantees shall include a provision to the effect that the grantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. Grantees shall require contractors to maintain all required records for three years after grantees make final payment and all other pending matters are closed.
- K. Contracts shall recognize mandatory standards and policies relating to energy efficiency that are contained in the International Energy Conservation Code.
- L. The State Division of Housing and Community Development is permitted by Federal Procurement Policy to require changes, remedies, changed conditions, access and record retention and suspension of work clauses.
- M. Additionally, the state strongly recommends that all contractors have a performance and bid bond. All contractors are required to be licensed in Utah. **It is the responsibility of the grantee to verify that contractors are licensed in the State of Utah.**

14. CONTRACT ADMINISTRATION

Grantees shall maintain a contract administration system ensuring that contractors perform in accordance with the terms, conditions, and specification of their contract or purchase orders.