

## Chapter 7 - Record of Changes

Date	Description of Change	Section
7/2024	State of Nebraska updated procurement processes via Bills 461 and 1300.	

# CHAPTER 7 – PROCUREMENT

## PROCUREMENT OVERVIEW

The purpose of this chapter is to provide information about the federal requirements for procurement of supplies, equipment, and services. This chapter focuses on **2 CFR §200.317-200.327** which sets forth the standards that are applicable to procurement for Federal grants and cooperative agreements and sub-awards to State, local and Indian tribal governments. Rules governing the contents of bid specifications, especially the required federal provisions, are included. It also addresses the methods of procurement and all rules governing the utilization of the methods. DED guidance is a supplement to federal and state requirements enumerated and discussed in brief within this manual. Subrecipients are responsible for understanding and complying with federal or state requirements located within the original source. In some instances, DED may require a more stringent approach in which case those requirements are detailed. Best practices are included here to encourage successful implementation. Additional information on procurement associated with construction projects is in Chapter 9 – Construction & Labor Standards.

## SUBRECIPIENT RESPONSIBILITIES

DED requires all subrecipients to adopt written Procurement Procedures and a written Code of Conduct, which includes conflicts of interest policies prior to obtaining Notice of Release of Funds (ROF). A subrecipient must use documented procurement procedures consistent with State, local, and tribal laws and regulations; Federal law and the standards identified within 2 CFR Subtitle A, Chapter II, Part 200, Subpart D “Post Federal Award Requirements”, §200.317–327; and 24 CFR Subtitle B, Chapter V, Subchapter C, Part 570, “Community Development Block Grants.”<sup>1</sup> The due diligence is on the subrecipient to award contracts only to responsible contractors<sup>2</sup> possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Note that the State of Nebraska effective July 19, 2024, updated its procurement processes. Legislative Bills 461 and 1300 (108<sup>th</sup> Legislative Session) made several changes to the process for obtaining goods and services. The Department of Economic Development is making subrecipients of its federal grants aware of these changes because subrecipients are required to follow state procurement laws when the state requirements are more restrictive than the federal procurement requirements found in the Uniform Guidance (2 CFR 200, Subpart D), specifically, 2 CFR 200.317 through 200.327.

The following is a non-exhaustive list of changes to note to the state procurement processes:

- Updated the list of factors to be considered for competitive bids (Neb. Rev. Stat. § 73-808)
- Included the option of soliciting bids in the form of a public notice in a paper of general circulation (Neb. Rev. Stat. § 73-809)
- Expanded the evaluation of bids to include realistic and reasonable prices (Neb. Rev. Stat. § 73-810)
- Required a proof-of-need analysis for bids in excess of \$15 million dollars (Neb. Rev. Stat. § 73-817)

<sup>1</sup> See 2 CFR §200.318(a).

<sup>2</sup> Contractor is defined as any entity entering a contract with the subrecipient.

- Adopted the Pacific Conflict Stress Test Act (Neb. Rev. Stat. §§ 81-831 to 81-836) and the Foreign Adversary Contracting Prohibition Act (Neb. Rev. Stat. §§73-901 to 73-907). \*Effective date: April 17, 2024.

The Department strongly encourages subrecipients to consult with their legal counsel to determine how the changes in the state procurement processes affect the subrecipient and their respective procurement policies and procedures. Note, as set forth above, that subrecipients are required to apply the most restrictive federal, state or local rule to their procurement requirements when expending federal financial assistance (grants and loans) that are subject to the Uniform Guidance as set forth in 2 CFR 200.318(a).

## Internal Controls

Subrecipients must establish and maintain effective internal control over the CDBG award, providing reasonable assurance that all parties involved comply with federal, state, and local statutes, regulations, and the terms and conditions of the CDBG award. Internal controls should comply with guidance in “Standards for Internal Control in the Federal Government” issued by the Comptroller General of the United States or the “Internal Control Integrated Framework”, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).<sup>3</sup>

Under internal controls, the subrecipient establishes standards of conduct concerning integrity and ethical values. The subrecipient uses ethical values to balance the needs and concerns of different stakeholders, such as regulators, employees, and the public. The standards of conduct guide the directives, attitudes, and behaviors of the subrecipient in achieving the subrecipient’s objectives. Furthermore, these internal controls are critical when a subrecipient is working with a contractor to do work on behalf of the subrecipient. For example, a contractor shall not be involved in the preparation of bid documents should said contractor intend to bid on any part of the subrecipient’s project. Nor shall that entity be involved in reviewing, scoring, and/or decision-making involving an award of contract. Internal control of such procedures may safeguard against loss-leader arrangements, conflicts of interest, and other compliance concerns.

Conducting procurement processes prior to CDBG award does not remove the requirement to make use of internal controls. It is the subrecipient’s responsibility to comply with federal, state, and local statutes, regulations, and the terms and conditions of federal awards, including CDBG.

**WARNING:** The subrecipient must not execute any contract for goods or services prior to the DED issuing the subrecipient a written environmental clearance and Notice of Release of Funds (ROF) with the exception of contracts for general administration services.

## Conflicts of Interest

Subrecipients must take significant steps to **avoid conflicts of interest**.<sup>4</sup> In certain instances, where the applicant community solicited a firm to prepare the application, and where that firm may also provide contracted services related to the CDBG project and intends to submit a proposal for those services, that firm may not in any way assist the subrecipient in the procurement process. Such a conflict of interest may result in DED disallowing the use of CDBG funds or local matching funds for the payment of such costs of the subsequently procured contract and may affect future eligibility to receive CDBG funds.

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<sup>3</sup> See 2 CFR §200.303(a).

<sup>4</sup> A conflict of interest arises when an employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. See 2 CFR §200.318(c)(1).

## System for Awards Management (SAM) Verification for Subrecipients, Contractors, Subcontractors, Suppliers, and Firms<sup>5</sup>

SAM is an official U.S. government system that was created to provide a comprehensive list of individuals and entities debarred from contracting with the federal government. The subrecipient is responsible for maintaining SAM verification. Based on the entity's relationship to the CDBG-funded project, there are two primary levels of SAM verification. The subrecipient must maintain documentation as to initial verification and confirm verification prior to awarding a contract and charging any costs to the grant.

- First level: the subrecipient; associated entities at time of application as described in the CDBG Application Guidelines;<sup>6</sup> and commercial rehabilitation program business participants must have a Unique Entity Identifier (UEI) number, active SAM registry, and have no active exclusions.
- Second level: SAM verification of construction contractors; subcontractors; suppliers; and/or firms providing professional services consists of confirming the entity is not debarred and/or does not have an active exclusion.

## TIMING OF CONTRACT EXECUTION

Only after Notice of Approval (NOA), may the subrecipient enter general administration service contracts; entering all other contracts associated with the project must occur after Release of Funds (ROF). In other words, the subrecipient would enter construction management, housing management, lead based paint, and construction contracts after ROF. Procurement process(es) may occur prior to ROF; however, non-administrative contracts may not be entered into prior to DED's issuance of environmental clearance and ROF. Conditional contracts are discouraged.

## ROLES AND CAPACITY

### Initial Decision

Will the subrecipient select a third party to perform all or part of the CDBG Agreement activities<sup>7</sup> using some method of procurement?

- If no, and all the work will be done in-house, then the subrecipient will not have to meet any federal procurement requirements
- If yes, the federal procurement requirements will apply

Depending on the scarcity of the item or service desired and the size of the purchase, different methods of procurement are available under the federal regulations.

### Starting the Work

- **In-House:**
  - **City Officials and Staff**

If the subrecipient will use only its own staff to work on the grant, work may begin after the CDBG agreement is fully executed and DED has provided a written ROF. The only costs incurred prior to ROF that are eligible for reimbursement from CDBG funds are general administration activity costs, unless a special pre-agreement is issued to the subrecipient.

Procurement procedures do not apply to officials of the subrecipient who are acting in their official capacity. Consequently, if a city council has officially designated an attorney as City Attorney, or an engineer as City

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<sup>5</sup> Refer to CDBG Policy Memo 18-02.

<sup>6</sup> Special Policies for CDBG Applicants: 1) If an application requires participation of entities that are not eligible applicants, each such entity must provide written assurance that it concurs with the project and is committing its resources, if any, as stated in the application. 2) In addition, eligible applicants may provide CDBG funds to a Neighborhood-based Nonprofit Organization or Nonprofit Development Organization (NDO).

<sup>7</sup> Procurement must be adhered to for activities paid with CDBG funds and those funds identified as match to the project.

Engineer, the individual so designated becomes an official of the city. As an official of the city performing CDBG-related duties, his/her legal or engineering service charges are eligible program costs to the extent that they are:

- (1) reasonable for the services provided;
- (2) follow an appointment made in accordance with state and local laws;
- (3) the amount of compensation charged to the program will be based on related contractual documentation provided in accordance with generally accepted practices of state and local governments; and
- (4) services provided for compensation.

DED will disallow costs for subrecipient's that abuse the "in-house" provisions. For instance, appointments of "City Engineers" must not be made for the purpose of selecting an engineer to work on an anticipated CDBG project. The subrecipient must show evidence that they have a history of appointment, unrelated to any current or anticipated CDBG project.

#### ○ **Designating Another Governmental Entity**

A subrecipient may designate another governmental entity to perform the activity of grant administration. DED looks to Nebraska state law to determine what types of other governmental entities are considered extensions of the subrecipient such that those other governmental entities will be allowed to be designated by a subrecipient to do grant administration without a procurement process.

Nebraska planning and development regions, and subsequently formed development districts based on those regions, are recognized, and statutorily authorized in Sections 13-1901 to 13-1907 of the Nebraska Revised Statutes (Reissue 1997). Development districts formed pursuant to, and meeting the requirements of, those development district statutes are considered to be an extension of the subrecipient (assuming the subrecipient is a member of the development district), and grant administration may be delegated to such districts without a procurement process. As described below, there are certain conditions that must be met in order for the subrecipient to enter into a contract directly with a development district without a procurement process.

The Interlocal Cooperation Act<sup>8</sup> allows local governmental entities to enter into agreements for their mutual benefit. If such an interlocal agreement were entered into by a subrecipient and other governmental entities (whether one or more), and such agreement addressed the issue of CDBG administration, and authorized one of the agreeing governmental entities to do such grant administration work on behalf of other agreeing governmental entities, this arrangement would be recognized by the DED as not requiring a procurement process. Similarly, the Joint Public Agency Act<sup>9</sup> is another authorizing vehicle for interlocal agreements which would be recognized by the DED.

In accordance with the Nebraska Interlocal Cooperation Act,<sup>10</sup> subrecipients who are a member of a development district or council of governments or area planning agency may enter into a contract directly with that district, council, or agency if both of the following conditions are met:

- The city or county, as the CDBG subrecipient, must be a dues-paying member in good standing for consecutive months prior to entering into the administration contract, and must be able to provide documentation of its membership in good standing.
- The CDBG application was prepared either by the city/county itself, or by the district, council, or agency. If another third-party entity assisted the city/county with the application preparation, grant administration must then be procured in accordance with CDBG guidelines.

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<sup>8</sup> Neb. Rev. Stat. §13-801–13-827 (Reissue 1997 and Cumulative Supplement 2002).

<sup>9</sup> Neb. Rev. Stat. §13-2501–13-2550 (Cumulative Supplement 2002).

<sup>10</sup> Neb. Rev. Stat. §13-801–13-827 (Reissue 1997 and Cumulative Supplement 2002).

- A development district shall, as directed by its policy board, serve as a regional resource center, and provide planning, community and economic development, and technical assistance to local governments which are members of the district and may provide assistance to industrial development organizations, tourism promotion organizations, community development groups, and similar organizations upon request.

- **Contracted:**

Procurement procedures do apply when an outside entity will perform components of the CDBG agreement on behalf of the subrecipient. These outside entities are defined as contractors. A contractor is a public or private non-profit agency, faith-based organization, or for-profit business receiving CDBG funds from a subrecipient or another contractor to undertake eligible activities. The subrecipient must select the proper procurement method that meets all federal, state and local laws for the type of good or service sought and the amount of the contract. The only contract the subrecipient may execute prior to the DED's issuance of a ROF is for general administration services, unless a special pre-agreement is issued to the subrecipient. Contracts for general administration services must be executed after NOA.

- **If the work is hired out:** The subrecipient has several options for procuring a contractor:
  - Micro-purchase
  - Small purchase
  - Competitive sealed bid
  - Competitive proposals
  - Non-competitive proposals/sole source
- **No loss-leader arrangements:** The intent of federal regulations is to require maximum open and free competition. "Loss-leader" arrangements, where a contractor offers to prepare a grant application or preliminary engineering estimates at cut rates or at no cost in return for a future contract if the application is funded, are prohibited by federal regulations. Some firms may suggest this approach because costs incurred by a city or county prior to the award of CDBG, such as preparation of the application or preliminary engineering studies, are not eligible for reimbursement with CDBG funds. However, loss-leader arrangements violate federal regulations which require "maximum open and free competition." Professional organizations also consider this practice unethical because it deprives the client of the benefits that can result from competition among competent, professional firms.
- **Use of One Firm for Grant Administration and Professional Services such as Engineers, Planners, or Architects:** The use of a single firm for CDBG grant administration and engineering and/or planning professional services is prohibited as a deemed conflict of interest perceived or evident.
- **Selection of Engineers, Planners, or Administrative Consultants Prior to Grant Award:** The use of multi-services procurement and contracting is prohibited.

## GENERAL PROVISIONS / 2 CFR §200.318 AND 2 CFR §200.319

The intent of standards and procedures for procurement is to ensure that supplies, equipment, construction, and other services are:

- Obtained as efficiently and economically as possible
- Procured in a manner that provides, to the maximum extent practical, open and free competition

Solicitations for goods and/or services must explain all the requirements that the bidder/offeror must meet for the subrecipient to evaluate his or her bid/offer. Solicitations must be based on a clear and accurate description of technical requirements of the material, product, or service to be procured and cannot contain features which unduly restrict competition.<sup>11</sup> Some of the situations considered restrictive of competition include, but are not limited to:<sup>12</sup>

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

The subrecipient must award contracts to the bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the subrecipient, price and other factors considered. Any and all bids may be rejected when it is in the subrecipient’s interest to do so. The subrecipient must ensure to award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement. Subrecipients should consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.<sup>13</sup>

## SUMMARY OF FEDERAL REQUIREMENTS

- 1) **Records and Files:** The subrecipient must maintain records sufficient to detail the history of procurement. The subrecipient must maintain files on the rationale for selecting the methods of procurement, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract.<sup>14</sup>
- 2) **Pre-Qualified Lists of Vendors/Contractors:** If such lists are used, they must be current, developed through open solicitation, include adequate numbers of qualified sources to ensure maximum open and free competition, and must allow entry of other firms to qualify at any time during the solicitation period.<sup>15</sup>
- 3) **Unfair Competitive Advantage:** To eliminate unfair competitive advantage, if the subrecipient has used a contractor to develop or draft specifications, requirements, statements of work, invitations for bids, and/or requests for proposals, the subrecipient must exclude that contractor from the competition for such.<sup>16</sup>
- 4) **Debarred/Ineligible Contractors:** The subrecipient must ensure that awards are not made to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549 and 12689, and 2 CFR Part 180 “OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement)”.<sup>17</sup> Subrecipient must verify and maintain documentation that the firm/contractor and any subcontractor does not have an active exclusion on SAM. Federal agencies maintain the active exclusion/debarred list. To determine eligibility, subrecipient must review SAM ([SAM.gov | Home](https://sam.gov)) for

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<sup>11</sup> See 2 CFR §200.319(d).

<sup>12</sup> See 2 CFR §200.319(b).

<sup>13</sup> See 2 CFR §200.318(h).

<sup>14</sup> See 2 CFR §200.318(i).

<sup>15</sup> See 2 CFR §200.319(e).

<sup>16</sup> See 2 CFR §200.319(b).

<sup>17</sup> See 2 CFR §200.214.

both the business name of contractors/firms and the owner of the business or firm who submitted a bid/proposal. SAM verification must occur at 1) the time of submission or negotiations and 2) prior to selecting a contractor/firm for contract award.

**NOTE:** All prime contractors must be active, registered and not debarred in SAM. Any entity receiving federal funds must be active and not debarred. Subcontractors only require verification that they are not debarred. It is not required that a contractor/firm be active in SAM to verify they are not debarred. Also, an active SAM registration is not confirmation that they are not debarred/ineligible to receive funds. See DED Policy memo 18-02.

- 5) **Written Procedures for Contractor Selection:** The subrecipient must have written selection procedures for procurement transactions.<sup>18</sup> These procedures must ensure that all solicitations:
- a. Avoid acquisition of unnecessary or duplicate items. Consider consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, make an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach<sup>19</sup>
  - b. When possible, use local intergovernmental agreements or inter-entity agreements for procurement or use of common goods and services to foster greater economy and efficiency<sup>20</sup>
  - c. Whenever possible, use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs<sup>21</sup>
  - d. Whenever possible, use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunity for cost reductions<sup>22</sup>
  - e. All purchase orders (and contracts) are signed by the subrecipient's authorized official(s)
  - f. Items delivered and paid for are consistent with the purchase order and/or contract for the goods or services
  - g. Timely payment to vendors occurs once the order is delivered, inspected, accepted, and payment authorized
  - h. Perform a cost or price analysis for every procurement action, including contract modifications, and maintain documentation to that effect in the subrecipient's files. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the subrecipient must make independent estimates before receiving bids or proposals<sup>23</sup>
  - i. Negotiate profit or fee separately from price where competition is lacking or a cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of past performance, and industry profit rates for the surrounding geographical area for similar work<sup>24</sup>
- 6) **Contract Pricing:** The subrecipient must not use "cost plus a percentage of cost" pricing for contracts;<sup>25</sup> in addition, the subrecipient may use a "time and materials" type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk.<sup>26</sup>
- 7) **Protest Procedures:** The subrecipient must have protest procedures in place to handle and resolve disputes relating to procurement<sup>27</sup>

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<sup>18</sup> See 2 CFR §200.318(a).

<sup>19</sup> See 2 CFR §200.318(d).

<sup>20</sup> See 2 CFR §200.318(e). Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

<sup>21</sup> See 2 CFR §200.318(f).

<sup>22</sup> See 2 CFR §200.318(g).

<sup>23</sup> See 2 CFR §200.324(a).

<sup>24</sup> See 2 CFR §200.324(b).

<sup>25</sup> See 2 CFR §200.324(d).

<sup>26</sup> See 2 CFR §200.318(j)(1)

<sup>27</sup> See 2 CFR §200.318(k)

- 8) **Documenting Contractor Performance:** The subrecipient must have a documented system of contract administration for determining the adequacy of contractor performance in accordance with the terms, conditions, and specifications of their contracts or purchase orders<sup>28</sup>
- 9) **Code of Conduct:** The subrecipient must maintain a written code of conduct covering conflicts of interest and governing the actions of its employees, officers, or agents engaged in the selection, award, and administration of contracts<sup>29</sup>

**NOTE:** The desire to award contracts to local firms is not a legitimate excuse for avoiding an open and competitive procurement process.

## BONDING AND INSURANCE

For construction or facility improvement contracts or subcontracts exceeding \$250,000,<sup>30</sup> the subrecipient must ensure that its procurement meets the minimum federal requirements<sup>31</sup> for bid guarantees, performance bonds, and payment bonds. These include:

- 1) A **bid guarantee** from each bidder equivalent to 5% of the bid price. The “bid guarantee” must be a firm commitment in the form of a bid bond, certified check or other negotiable instrument as assurance that the bidder, upon acceptance of the bid, is prepared to execute a contract within the time specified for the bid amount;
- 2) A **performance bond** from the contractor for 100% of the contract price to secure the contractor’s fulfillment of all obligations under the contract; and
- 3) A **payment bond** from the contractor for 100% of the contract price, to assure payment of all persons supplying labor and material under the contract

## USE OF LOCAL, SMALL, MINORITY AND/OR WOMEN-OWNED BUSINESSES (MINORITY BUSINESS ENTERPRISE (MBE) OR WOMEN BUSINESS ENTERPRISE (WBE) AND SECTION 3)

- 1) Federal regulations make it very clear that subrecipients should make every effort to use local business firms and enter into contract with small, minority-owned,<sup>32</sup> and women-owned businesses<sup>33</sup> in the procurement process. Specifically, the subrecipient must take affirmative steps to use small firms, minority-owned firms, women-owned firms, or labor surplus area firms when possible.<sup>34</sup> For example, the subrecipient should:
  - a. Incorporate such businesses in solicitation lists whenever they are potential sources
  - b. Ensure that such businesses are solicited when identified as potential sources
  - c. Divide procurement requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation of such businesses
  - d. Establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women’s business enterprises
  - e. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce
  - f. Require prime contractors, when subcontracts are let, to take affirmative steps to select such firms.<sup>35</sup>
- 2) In conformance with the requirements of Section 3 of the Housing and Community Development Act of 1968, to the greatest extent feasible, and consistent with existing Federal, state, and local laws and regulations, the subrecipient must ensure contracts for work awarded in connection with Section 3 projects are provided to

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<sup>28</sup> See 2 CFR §200.318(b)

<sup>29</sup> See 2 CFR §200.318(c)(1)

<sup>30</sup> \$250,000 is the current Simplified Acquisition Threshold

<sup>31</sup> See 2 CFR §200.326

<sup>32</sup> Minority business enterprise means a business which is at least 51% owned by one or more minority individuals, or in the case of any publicly owned business, at least 51% of the voting stock is owned by one or more minority individuals. The daily business operations are likewise managed by the minority owner

<sup>33</sup> Be at least 51% owned and controlled by women

<sup>34</sup> See 2 CFR §200.321(a)

<sup>35</sup> 2 CFR §200.321(b)



business concerns that provide economic opportunities to Section 3 workers residing within the metropolitan area (or nonmetropolitan county) in which the project is located.<sup>36</sup>

## BUILD AMERICA, BUY AMERICA ACT (BABA)

The subrecipient shall comply with the provisions of Build America, Buy America Act (“BABA”). BABA was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58, §§ 70901-52). BABA has an impact on all federally funded projects, including CDBG-DR, that involve purchases of iron, steel, and other construction materials. Under BABA, the Buy America Domestic Content Procurement Preference (“Buy America Preference” or “BAP”) applies to all iron, steel, and specified manufactured products and specified construction materials, including (1) non-ferrous metals; (2) lumber; (3) composite building materials; and (4) plastic and polymer-based pipe and tube (herein after referred to as “specified construction materials”).

## CONTRACT LANGUAGE

*DED’s template for “Professional Service Agreement” is available on DED’s website. This template may be adopted by subrecipients for contracting for professional services, see checklist in Appendix 3. DED strongly encourages the subrecipient’s attorney to review the template prior to execution. For contracts involving construction, refer to Chapter 9 – Construction and Labor Standards.*

The following provisions must be included within non-construction contracts:

### General Administrative Provisions

- Effective date of the contract.
- Names and addresses of the contractor and the subrecipient.
- Citation of the authority of the subrecipient under which the contract is entered into and the source of the funds.
- Conditions and terms under which the contract may be terminated by either party for cause and for convenience and remedies for violation/breach of contract.
- Procedures for amending or revising the contract.
- Names of representatives of the subrecipient and contractor who will act as a liaison for administration of the contract.
- A clause prohibiting a transfer of any interest in the contract by the contractor.
- Provisions requiring the contractor to maintain records and furnish reports.

### Scope of Services

- Detailed description of the extent and character of the work to be performed.
- Time for performance and completion of contract services, including project milestones, if any.
- Specification of materials or other services to be provided (i.e., maps, reports, etc.)

### Method of Compensation

- Provisions for compensation for services including fee and or payment schedules and specification of maximum amount payable under the contract.
- **NOTE:** all costs charged to CDBG (including any required match and leverage) must be clearly associated with the terms of the contract.

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<sup>36</sup> See 24 CFR §75.19.

## Federal Standard Provisions (must be included in contract language)

- Compliance with Executive Order 11246, as amended (required for service contractors only if the contractor has 50 or more employees and the contract is for more than \$50,000)
- Title VI of the Civil Rights Act of 1964 clause
- Section 109 of the Housing and Community Development Act of 1974 clause
- Section 3 of the Housing and Urban Development Act of 1968<sup>37</sup>
- Access to Records/Maintenance of Records clause
- Age Discrimination Act of 1975, as amended
- Section 504 of the Rehabilitation Act of 1973, as amended<sup>38</sup>
- Build America, Buy America Act (BABA)
- Conflict of Interest 2 CFR §200.318

## PROCUREMENT METHODS [2 CFR 200.320]

Among the procurement approaches described below, the competitive sealed bid resulting in a firm, fixed price contract is the preferred procurement approach when there are numerous available and qualified providers, when the requirements and specifications are thoroughly detailed and are unlikely to change, and where the subrecipient has the opportunity to make the provider assume a large share of the risk for non-performance.

### Micro Purchases<sup>39</sup>

**The DED considers procurement by micro-purchase procedures best suited to obtaining small quantities of supplies and services.** Subrecipients may follow either their local small purchase procurement policy or the federal policy. If the local policy is used, it must be at least as stringent as the federal policy, described below.

*The micro-purchase method may be used for procurement of supplies or services, the aggregate of which does not exceed the micro-purchase threshold.<sup>40</sup> As of the publication date of this Manual, the micro-purchase threshold set by the Federal Acquisition Regulation (FAR) at 48 CFR part 2, subpart 2.1 is \$10,000, except for construction at \$2,000 and services at \$2,500. Additionally, a subrecipient may establish a higher threshold than the micro-purchase threshold identified in the FAR. The subrecipient may self-certify a threshold of up to \$50,000<sup>41</sup> on an annual basis. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:*

- *A qualification as a low-risk auditee, in accordance with the criteria in §200.520 for the most recent audit;*
- *An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or*
- *For public institutions, a higher threshold consistent with State law.*

A procurement of more than this threshold may not be inappropriately broken up into smaller components solely to qualify for the micro-purchase approach. The subrecipient must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive price or rate quotations if the subrecipient considers the price to be reasonable based on research, experience, purchase history, or other information and documents its files accordingly.

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<sup>37</sup> HUD published a final rule updating requirements related to Section 3 of the Housing and Urban Development Act of 1968, as amended. The final rule was published on September 29, 2020 and became effective on November 30, 2020. Section 3 projects with commitments made before November 30, 2020 must continue to comply with the previous Section 3 requirements of 24 CFR part 135. Section 3 projects with commitments made on or after November 30, 2020 are subject to 24 CFR part 75.

<sup>38</sup> See 29 U.S.C. 794

<sup>39</sup> See 2 CFR §200.320(a)(1).

<sup>40</sup> See 2 CFR §200.320(a)(1). The “micro-purchase threshold” means the dollar amount at or below which a subrecipient may purchase property or services using micro-purchase procedures. Generally, the micro-purchase threshold for procurement activities administered under Federal awards is not to exceed the amount set by the FAR at 48 CFR part 2, subpart 2.1, unless a higher threshold is requested by the subrecipient and approved by the cognizant agency for indirect costs. The subrecipient is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures.

<sup>41</sup> Micro-purchase thresholds higher than \$50,000 must be approved by the cognizant agency for indirect costs.

## Small Purchase<sup>42</sup>

The DED considers procurement by small purchase procedures best suited to obtaining small quantities of supplies or services. Subrecipients may follow either their local small purchase procurement policy or the federal policy. If the local policy is used, it must be at least as stringent as the federal policy, described below.

*The small purchase method may be used for procurement of property or services exceeding the threshold for the micro-purchase method and up to the simplified acquisition threshold.<sup>43</sup> As of the publication date of this Manual, the simplified acquisition threshold (SAT)<sup>44</sup> is \$250,000, but this threshold is periodically adjusted for inflation. A procurement of more than \$250,000 may not be inappropriately broken up into smaller components solely to qualify for the small purchase approach.*

Competition is sought through oral or written price or rate quotations. The subrecipient must document the receipt of an adequate number (usually at least three) of price or rate quotations from qualified vendors.

Documentation requirements:

- 1) Identify in writing the item to be procured.
- 2) Solicit in writing, written quotes from at least three qualified bidders. Verbal quotes, documented by the subrecipient in writing, are acceptable for purchases of less than \$500 .
- 3) Identify the lowest responsible bidder.
- 4) Notify each bidder in writing as to whether or not they are the apparent lowest responsible bidder.
- 5) Draft and execute a contract with the lowest responsible bidder.

## Competitive Sealed Bid<sup>45</sup>

**The DED considers this method of procurement best suited to obtaining contractors for construction projects and for large quantities of goods or materials.** This method must lend itself to a firm, fixed price contract (lump sum or unit price) where the selection can be made principally on the basis of price.

- 1) The subrecipient must advertise the invitation for bids in publications of general circulation and solicit bids from an adequate number of qualified sources, providing them sufficient time to respond prior to bid opening;
- 2) The invitation for bids must include complete and accurate specifications and pertinent attachments, and clearly define items or services needed, in sufficient detail for the bidders to properly respond;
- 3) Bids must be opened publicly at the time and place stated in the invitation for bids;
- 4) The subrecipient must receive at least two or more responsible bids for each procurement transaction;
- 5) If awarded, a firm fixed-price contract award must be made in writing to the lowest responsive and responsible bidder.<sup>46</sup> The subrecipient can, however, decide not to make the award to any of the bidders; and
- 6) Any or all bids may be rejected if there is a sound documented reason.

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<sup>42</sup> See 2 CFR §200.320(a)(2).

<sup>43</sup> See 2 CFR §200.320(a)(2). The “simplified acquisition threshold” means the dollar amount below which a subrecipient may purchase property or services using small purchase methods. Subrecipients adopt small purchase procedures to expedite the purchase of items at or below the simplified acquisition threshold. The simplified acquisition threshold for procurement activities administered under Federal awards is set by FAR at 48 CFR, part 2, subpart 2.1. The subrecipient is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. However, in no circumstances can this threshold exceed the dollar value established in the FAR (48 CFR part 2, subpart 2.1) for the simplified acquisition threshold.

<sup>44</sup> Simplified Acquisition Threshold identified in 2 CFR §200.88

<sup>45</sup> See 2 CFR §200.320(b)(1).

<sup>46</sup> Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest.

## Competitive Proposals<sup>47</sup>

*The DED considers this procurement method best suited to obtaining professional services.* This is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. This method has two options:

- Request for Proposals (RFP) and
- Request for Qualifications (RFQ)

The review process for both statements of qualification and proposals in response to an RFQ or RFP, respectively, should be thorough, uniform, and well documented. DED prefers that the committee or board carrying out the review, to the extent possible, include persons with technical skills. Reviewers should have no potential conflicts of interest with the firms or individuals under review (e.g. family relationships, close friendships, or business partnerships).

Refer to 2 CFR 200.318(c)(1), which in part states: “the [subrecipient] must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract.”

Procedures must ensure that all solicitations promote full and open competition:<sup>48</sup>

- Identify all requirements which the offerors must fulfill;
- Identify all factors used in evaluating bids or proposals;<sup>49</sup> and
- Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not contain features that unduly restrict competition.<sup>50</sup>

RFPs and RFQs require the following:<sup>51</sup>

- 1) RFPs or RFQs must be publicized and identify all evaluation factors and their relative importance.
- 2) Proposals must be solicited from an adequate number of qualified offerors (at least three), which means that the individuals or entities meet certification, registration, or other professional qualifiers for service performance;<sup>52</sup>
- 3) Subrecipients must have a written method for conducting technical evaluations of the RFP or RFQ proposals received according to the criteria specified in the proposal, and for selecting awardees;
- 4) Awards must be made to the responsible offeror whose proposal is most advantageous to the subrecipient, with price and other specified factors considered. Price is used as a selection factor for RFPs.
- 5) Subrecipients may use competitive proposal procedures for qualification-based procurement of architectural/engineering (A/E) professional services, whereby offeror’s qualifications are evaluated, and the most qualified offeror is selected subject to negotiation of fair and reasonable compensation. Price is not used as a selection factor for RFQs.
- 6) **The RFQ method, where price is not used as a selection factor, can only be used in procurement of A/E professional services.** It cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort. **(NOTE: this does not include professional planning services).**

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<sup>47</sup> See 2 CFR §200.320

<sup>48</sup> See 2 CFR §200.319

<sup>49</sup> See 2 CFR §200.319(d)(2)

<sup>50</sup> See 2 CFR §200.319(d)(1). The description may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, must 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 equivalent” description may be used to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated.

<sup>51</sup> See 2 CFR §200.320(b)(2).

<sup>52</sup> Any response to publicized RFPs must be considered to the maximum extent practical.

**PUBLICATION RECOMMENDATION:** DED recommends sending RFPs to firms serving your region of the State. In addition, publicly advertising via print method (ex. newspaper, etc.) and/or online platforms (online forums, websites, etc.). The subrecipient must publicly advertise in at least one newspaper that is widely distributed in its region of the state. The subrecipient evaluates the firms responding and may conduct interviews with one or more of the firms responding and select a consultant. The subrecipient negotiates a contract with terms and conditions to its satisfaction. The subrecipient review committee scores all proposals received in accordance with the terms described and published with the RFP or RFQ, depending on the method used.

#### **Competitive Proposals Evaluation Criteria:**

- Specialized experience or technical expertise of the firm and its personnel in connection with the type of services to be provided and the complexity of the project.
- Past record of performance on contracts with the municipality and other clients, including quality of work, timeliness, and cost control.
- Capacity of firm to perform the work within time limitations, taking into consideration the current and planned workload of the firm.
- Familiarity of the firm with the type of problems applicable to the project.

**NOTE:** Subrecipient may assign weights to each criterion to indicate relative importance. If interviews are required at any time in the review process, it must be expressly stated.

#### **Request for Proposals (RFP)**

RFPs must clearly and accurately state the technical requirements for the goods and services required.

- It should specify the scope of services and the type of contract to be provided (e.g., cost reimbursement (i.e. cost plus fixed fee or fixed price). Cost plus a percentage of cost contracts are not allowable.
- The RFP also should specify the cost and pricing data required to support the proposed cost, anticipated start and completion dates, and ranking and evaluation criteria. The subrecipient should make available pertinent materials, such as reports, maps and site plans to assist the offerors in preparing proposals. For complicated projects, the subrecipient may wish to conduct a pre-bid conference to discuss the project, describe available materials, and explain relevant CDBG regulations.
  - 1) Subrecipient must publicize the RFP, identify all evaluation factors and their relative importance, and to the maximum extent practicable, honor reasonable requests by parties to have an opportunity to compete;
  - 2) Proposals must be solicited from an adequate number of qualified offerors, consistent with the nature and requirements of the procurement;
  - 3) Subrecipient must conduct a technical evaluation of the submitted proposals to identify the responsible offerors;
  - 4) As necessary, the subrecipient must conduct negotiations with those offerors deemed responsive and responsible, and those that fall within a competitive price range, based on the subrecipient's evaluation of the offeror's pricing and technical proposals. After negotiations, these offerors may be given the opportunity to submit a "best and final" offer;
  - 5) Subrecipient must award the contract to the most responsive and responsible offer or after price and other factors are considered through scoring the proposals or "best and final" offers according to predetermined evaluation criteria. The successful offeror must clearly be the most advantageous source of the goods and services.

#### **Request for Qualifications (RFQ)**

For procurement involving architecture or engineering services, the subrecipient shall use the RFQ competitive proposal procedure whereby offerors' qualifications are evaluated, and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. In these instances, price is not used as a selection factor. The subrecipient should

review and rank every statement received, and either contact the first two or three choices to request a proposal covering the scope of services and estimated costs or select the top firm and begin negotiations.

Once the most-qualified firm is identified, only that firm is asked for a price proposal, which is subject to negotiation of a fair and reasonable price. If negotiations with the selected firm are unsuccessful, repeat this process with the next highest-ranked firm, until a fair and reasonably priced contract can be awarded.

The subrecipient must document the basis for its determination of the most qualified offeror and the reasonableness of the contract price. This qualifications-based approach to the competitive proposals method may only be used in the procurement of A/E professional services. The approach cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort.<sup>53</sup>

For reference, the above-cited federal rule relating to the procurement of architectural and engineering (A/E) services is quoted verbatim: *“The [subrecipient] may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offerors’ qualifications are evaluated, and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.”*

This means that:

- Use qualifications-based procurement only for A/E services. In no other instances is issuance of an RFQ appropriate.
- Evaluation of offerors’ qualifications culminates in selection of the most qualified offeror, subject to negotiation of fair and reasonable compensation.
- An RFQ is not allowable to purchase other types of services, even though A/E firms are potential sources to perform other types of services.

In addition, the federal procurement regulations generally discourage the use of local geographical preferences in the evaluation of bids or proposals except where mandated by federal statutes, due to the restrictions on open competition, which result. However, in procuring architectural and engineering services, geographic location is permitted as a selection criterion provided this criterion leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.<sup>54</sup>

### Non-Competitive Proposals/Sole Source<sup>55</sup>

This method may be used only under the following limited circumstances (listed below). When requesting permission to use this method, the subrecipient must provide documentation that another method of procurement was not feasible because:

- The aggregate dollar amount for the acquisition of property or services does not exceed the micro-purchase threshold;<sup>56</sup>
- The item or service was only available from a single source;
- A public emergency or condition requiring urgency existed which did not permit a delay from publicizing a competitive solicitation; or
- Competition was determined to be inadequate after solicitation of proposals from a number of sources.

In some cases, subrecipient selects one of the other methods of procurement listed above which does not ultimately solicit an adequate number of responses. In such instances where subrecipient receives inadequate response, this may trigger 2

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<sup>53</sup> See 2 CFR §200.320(b)(2).

<sup>54</sup> See 2 CFR §200.319(c).

<sup>55</sup> See 2 CFR §200.320(c).

<sup>56</sup> See previous section for additional information regarding the micro-purchase threshold.

CFR §200.320(c)(5). After solicitation of a number of sources, where competition is determined inadequate, it may be appropriate to convert the process into procurement by noncompetitive proposal.

**\*NOTE: Prior to awarding a contract under these conditions, subrecipient must consult with and obtain DED approval.**

## COMPETITIVE PROPOSALS

Where subrecipient selects the competitive proposal method, the DED recommends sending RFPs to firms serving subrecipient's region of the State; however, proximity is not an adequate reason for selection and subrecipient must take measures to ensure fair and open competition. In addition to advertising in the local newspaper, the subrecipient should also advertise in at least one other newspaper that is widely distributed in its region of the state. The subrecipient would evaluate the firms responding and could then conduct interviews with one or more of the firms responding and select a consultant. The subrecipient then negotiates a contract with terms and conditions to its satisfaction. Be sure to **score all proposals received in accordance with the terms described and published** with the RFP or RFQ, depending on the method used.

A response to an RFP/RFQ should not be confused with a competitive bid. A bid is an estimate of cost in response to detailed specifications. A response to a RFP/RFQ in the competitive proposal process is a description of how a consultant proposes to approach solving a subrecipient's problem. Competitive proposals refer to the comparison of qualifications and may include fees where required or deemed appropriate. However, the main focus in selecting the consultant is to evaluate the content of the proposal and the consultant's qualifications and demonstrated competence.

## PROCURING FOR GENERAL ADMINISTRATION, CONSTRUCTION MANAGEMENT, HOUSING MANAGEMENT, AND LEAD-BASED PAINT SERVICES

Where general administrative, construction management, housing management, and lead-based paint services are awarded as separate services, the procurement RFP process must list each as separate services, evaluated separately, and contracted separately. This is because:

- General administrative services are subject to timing defined by the NOA and
- Construction management, housing management, and lead-based paint services are related to the project activities (i.e. non-administrative) and subject to timing defined by the ROF.

Each service must be procured independently by the subrecipient and clearly identify them as *separate* services so that firms submitting a proposal itemize costs and delivery schedule for each service separately.

Subrecipients must take significant steps to avoid conflicts of interest. In certain instances, where the applicant community solicited a firm to prepare the application, and where that firm may also provide professional services related to the CDBG project and intends to submit a proposal for those services, that firm may not in any way assist the subrecipient in the procurement process. **Such a conflict of interest would result in a Finding disallowing the use of CDBG funds or local matching funds for the payment of such costs of the subsequently procured contract and may affect future eligibility to receive funds.**

## REQUEST REFERENCES

Any time a consultant solicits a subrecipient's business, the subrecipient should always check references prior to entering into contract with them. Request a list of prior clients, showing the organization's name, address, phone number and contact person, as well as a brief description of the work performed. A list of the most recent clients is preferable (especially previous CDBG projects). Contact each reference. Some useful questions might be:

- Were you satisfied with the work?
- Was it performed on time?

- Was the consultant knowledgeable about the program?
- Were the tasks or work products prepared by the consultant useful?
- Did the consultant work with local staff to develop local capacity?
- Were the costs or charges reasonable? Did they stay within their original budget?
- Would you hire them again?

In addition, subrecipients should check to see if the work done for these clients is similar to what the subrecipient wants the consultant to do. The ability to write a grant application does not mean the same consultant has the capability to assist with managing a grant.

Sometimes the firm a subrecipient is interested in will be a new firm with few, if any, client references. New, small firms can be just as good as well established, large firms, so instead of asking for client references, the subrecipient could ask for past employer references.

Checking references prior to contracting is the most important action you can take to avoid becoming involved with a less than satisfactory firm.

## **INVOLVE LOCAL STAFF**

Whenever a subrecipient retains a consultant to assist with preparing a grant application or managing a CDBG project, make sure that someone from the city or county works with the consultant and understands the community's application or the management issues involved. The subrecipient should have a local staff person become familiar with the regulations for the CDBG program and work closely with the consultant in developing the application or managing the project. A consultant is a technical resource.

## **CONTRACT FILE**

The subrecipient must establish a contract file and monitor the contract to assure that the contract is completed in a satisfactory and timely manner. The contract file must contain:

- Description of method used to select consultants and related documentation
- Qualification statements, RFP, and proposal(s) received
- Any documentation used to evaluate respondents, if applicable
- SAM verification (no active exclusions/debarment)
- Negotiation methods
- Cost and pricing data
- Contract for services
- Records of payments and supporting documentation (in financial management files); and
- Contract amendments, if any, and rationale for amendment



## PROCUREMENT FREQUENTLY ASKED QUESTIONS

The city has an appointed city engineer, and the proposed planning project would require expertise, can the city use the appointed city engineer?

No, the city would still need to complete a Request of Proposals (RFP) to hire a planner. The RFP needs to include the cost as criteria.

Does the city have to use the city appointed engineer for the project?

No, the city can conduct a Request for Qualifications for an engineer.

If the city received a denial response from a firm, does that qualify as fair procurement?

Yes, if the city receives more than one response, then procurement doesn't have to be converted to sole source. Sole source is only needed if one proposal/response is received. Keep records of the response documentation received as part of the project file.

How many Requests for Qualifications should be sent out?

At least three, but DED recommends contacting a variety of firms to increase the chances of responses and not having to request sole source.