CHAPTER 8 – PROCUREMENT

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Introduction
The purpose of this chapter is to provide information about the federal requirements for procurement of supplies, equipment, and services.

Grantee Responsibilities
The Department requires all grantees to adopt written Procurement Procedures prior to obtaining Release of Funds for a HOME grant. A grantee must use procurement procedures that are in conformance with State, Federal and local laws and regulations.

Warning: The grantee must not execute any contract for goods or services prior to the Department issuing the grantee a written Notice of Release of Funds with the exception of contracts for general administration services.

Appropriate Procurement Procedures
The following are the principal sources of procurement requirements specified for HOME grantees.

2 CFR 200 §§.318 thru .326 Procurement Standards, (which have been adopted by HUD through 2 CFR Part 2400), supersedes the requirements formerly set out in 24 CFR §§84 and 85 for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

2 CFR 200 contains rules governing the contents of bid specifications, especially the required federal provisions. It also addresses the methods of procurement and all the rules governing the utilization of the methods.

All grantees must not award contracts to contractors that have been debarred from work on federal projects. (SAM)

It is recommended that non-profits also review this information as guidance for establishing procurement procedures.
General Provisions
The standards and procedures for procurement are intended to ensure that supplies, equipment, construction, and other services are both:

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

Solicitations must explain all the requirements that the bidder/offeror has to meet for his or her bid/offer to be evaluated by the grantee. Solicitations for goods and services must be based on a clear and accurate description of the material, product, or service to be procured, and cannot contain features which unduly restrict competition.

Some of the situations considered to be restrictive of competition include, but are not limited to:

- Placing unreasonable qualifying requirements on firms.
- Requiring unnecessary experience and excessive bonding.
- Specifying only “brand name” products instead of allowing “an equal” product.
- Non-competitive pricing practices between firms or affiliated companies.
- Non-competitive awards to consultants on retainer contracts.

Awards are to be made to the bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the grantee, price and other factors considered. Any and all bids may be rejected when it is in the grantee’s interest to do so.

The grantee must ensure that the award is made only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement. Consideration should be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Summary of Federal Requirements
Records and Files
According to 2 CFR 200.318(i), the grantee must maintain records to detail the significant history of a procurement. The grantee must maintain files on the rationale for selecting the methods of procurement used, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract.

Pre-Qualified Lists of Vendors/Contractors
The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period. 24 CFR 200.319(d)

Unfair Competitive Advantage
To eliminate unfair competitive advantage, if the grantee has used a contractor to develop or draft
specifications, requirements, statements of work, invitations for bids, and/or requests for proposals, the grantee should exclude that contractor from the competition for such. 2 CFR 200.319(a)

Debarred/Ineligible Contractors
The grantee 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, “Debarment and Suspension” (2 CFR 200 Appendix II (H)).

Written Procedures for Contractor Selection
The grantee must have written selection procedures for procurement transactions to ensure that:

• The purchase of unnecessary or duplicate items is avoided. Where appropriate, an analysis should be made of lease vs. purchase alternatives (2 CFR 200.318 (d);
• Whenever possible, use of federal excess and surplus property, or of intergovernmental agreements for procurement or use of common goods and services should be considered as a way to foster greater economy and efficiency (2 CFR 200.318 (e) and (f)).
• All purchase orders (and contracts) are signed by the grantee’s authorized official(s);
• Items delivered and paid for are consistent with the purchase order and/or contract for the goods or services.
• Timely payment to vendors occurs once the order is delivered, inspected, accepted, and payment authorized.
• A cost or price analysis is performed for every procurement action, including contract modifications, and documentation to that effect is maintained in the grantee’s files. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the grantee must make independent estimates before receiving bids or proposals (2 CFR 200.323 (a).
• Profit or fee is negotiated separately from price where competition is lacking or a cost analysis is performed. To establish a fair and reasonable profit, consideration will 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 rates for the area (2 CFR 200.323 (b)).

Contract Pricing
The grantee must not use “cost plus a percentage of cost” pricing for contracts (2 CFR 200.323 (d)); in addition, the grantee should use “time and material” type contracts only after a determination is made that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk (2 CFR 200.318 (j)(1)).

Protest Procedures
The grantee must have protest procedures in place to handle and resolve disputes relating to procurement (2 CFR 200.318 (k))

Documenting Contractor Performance
The grantee must have a documented system of contract administration for determining the adequacy of contractor performance (2 CFR 200.319 (a)).
Code of Conduct
The grantee must have a written code of conduct governing employees, officers, or agents engaged in the award or administration of contracts (2 CFR 200.318 (c)(1)).

Bonding and Insurance
For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold (2 CFR 200.88), the grantee must ensure that its procurement meets the minimum federal requirements (2 CFR 200.325) 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 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 on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

Use of Local, Small, Minority and/or Women-Owned Businesses
Federal regulations make it very clear that grantees should make every effort to use local business firms and contract with small, minority-owned, and women-owned businesses in the procurement process. Specifically, the grantee must take affirmative steps to use small firms, minority-owned firms, women-owned firms, or labor surplus area firms (2 CFR 200.231).

Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using 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; and
(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

In conformance with the requirements of Section 3 of the Housing and Community Development Act of 1968, to the greatest extent feasible, the grantee must award contracts for work to be performed to eligible business concerns located in or owned by residents of the target area to ensure that the employment and other economic opportunities generated by federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very-low income persons, particularly those who are recipients of government assistance for housing (see 24 CFR 570.607(b)).

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

**Procurement Methods**

Note about the procurement methods: 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 grantee has the opportunity to make the provider assume a large share of the risk for non-performance.

**Micro-Purchases (2 CFR 200.320 (a))**

Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold of $3000 (§200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

**Small Purchase (2 CFR 200.320 (b))**

Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold which is currently $150,000. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources. Grantees 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.

The small purchase method may be used for procurement of $150,000 or less in the aggregate, per 2 CFR 200.88. A procurement of more than $150,000 may not be inappropriately broken up into smaller components solely to qualify for the small purchase approach.

**Competitive Sealed Bid (2 CFR 200.320 (c))**

The Department considers this method of procurement best suited to obtaining contractors for construction projects and for large quantities of goods or materials (See Chapter 10 – Construction and Labor Standards for more on construction contracting).
Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions stated below apply.

1. In order for sealed bidding to be feasible, the following conditions should be present:
   a. A complete, adequate, and realistic specification or purchase description is available;
   b. Two or more responsible bidders are willing and able to compete effectively for the business; and
   c. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

2. If sealed bids are used, the following requirements apply:
   a. Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publically advertised;
   b. The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
   c. All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;
   d. A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
   e. Any or all bids may be rejected if there is a sound documented reason.

Competitive Proposals (2 CFR 200.320 (d))
The Department 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 not-to-exceed type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. This method has two sub-parts—the Request for Proposal and the Request for Qualifications.

Request for Proposals:
   1. The Request for Proposals (RFP) must clearly and accurately state the technical requirements for the goods and services required.
2. The grantee must publicize the RFP, and to the maximum extent practicable, honor reasonable requests by parties to have an opportunity to compete.
3. Proposals must be solicited from an adequate number of qualified sources, consistent with the nature and requirements of the procurement.
4. The grantee must conduct a technical evaluation of the submitted proposals to identify the responsible offerors.
5. As necessary, the grantee must conduct negotiations with those offerors who are deemed responsive and responsible and fall within a competitive price range, based on the grantee’s evaluation of the bidders’ pricing and technical proposals. After negotiations, these bidders may be given the opportunity to submit a “best and final” offer.
6. The grantee must award the contract to the most responsive and responsible offeror after price and other factors are considered through scoring the proposals or “best and final” offers according to predetermined evaluation criteria. The successful proposal/offeror must clearly be the most advantageous source of the goods and services.

Request for Qualifications
For procurement involving architecture or engineering services, the grantee may use the Request for Qualifications (RFQ) competitive proposal procedure whereby competitors’ qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. In these instances, price is not used as a selection factor.

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, this process is repeated with the next highest-ranked firm, until a fair and reasonably priced contract can be awarded.

The grantee must take care to document the basis for its determination of the most qualified competitor and the reasonableness of the contract price. This qualifications-based approach to the competitive proposals method may not be used to purchase other than architectural and engineering services (2 CFR 200.320 (d)(5)).

For applicants’ information, the above-cited federal rule relating to the procurement of architectural and engineering (A/E) services is quoted verbatim:

The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor 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:

- Qualifications-based procurement can be used only for A/E services.
- A Request for Qualifications may be issued.
- The competitors’ qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.
- An RFQ cannot be used 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 criteria provided this criterion leaves an appropriate number of qualified firms (2 CFR 200.319 (b)).

**Non-Competitive Proposals/Sole Source (2 CFR 200.320 (f))**

Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply and with Department approval:

1. The item is available only from a single source;
2. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
3. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
4. After solicitation of a number of sources, competition is determined inadequate.

**Labor Standards**

Chapter 10 – Construction & Labor Standards contains crucial information for grantees contemplating awarding contracts for construction or rehabilitation of 12 or more HOME-assisted units.

**Designating Grant Administration to Another Governmental Entity**

A local government grantee may conduct the activities of grant administration for itself, without a procurement process. This statement seems self-evident, but it is included here because the capacity to do one's own grant administration activities forms the foundation for also allowing the grantee to designate (delegate) grant administration activities to some other governmental entities without a procurement process.

The Department looks to Nebraska state law to determine what types of other governmental entities are considered extensions of the grantee such that those other governmental entities will be allowed to be designated by a grantee to do grant administration without a procurement process.
Development regions, and subsequently formed development districts based on those regions, are recognized and statutorily authorized in Sections 13-1901 to 13-1907, 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 grantee (assuming the grantee is a member of the development district), and grant administration may be delegated to such districts without a procurement process.

The Interlocal Cooperation Act, Sections 13-801 to 13-827, Nebraska Revised Statutes, (Reissue 1997 and Cumulative Supplement 2002) allows local governmental entities to enter into agreements for their mutual benefit.

If such an interlocal agreement were entered into by a grantee and other governmental entities (whether one or more), and such agreement addressed the issue of CDBG grant 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 Department as not requiring a procurement process.

Similarly, the Joint Public Agency Act, Sections 13-2501 to 13-2550, Nebraska Revised Statutes (Cumulative Supplement 2002) is another authorizing vehicle for interlocal agreements which would be recognized by the Department.

**Nonprofit organizations and CHDOs receiving HOME funds must follow the same procurement procedures and standards as outlined above.**