

CHAPTER 7 – PROCUREMENT

INTRODUCTION

The purpose of this chapter is to provide information about the federal requirements for procurement of supplies, equipment, and services. Additional information on procurement associated with construction projects is located in Chapter 9 – Construction & Labor Standards.

GRANTEE RESPONSIBILITIES

The Department requires all grantees to adopt written Procurement Procedures and a written Code of Conduct prior to obtaining Release of Funds for a CDBG grant. A grantee must use procurement procedures that are in conformance with State and local laws and regulations, Federal law and the standards identified for grantees within 2 C.F.R. Subtitle A, Chapter II, Part 200, Subpart D, Sections 200.317-326, “Post Federal Award Requirements;” and 24 C.F.R. Subtitle B, Chapter V, Subchapter C, Part 570, “Community Block Grants.”

Grantees 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).

Under internal controls, grantee establishes standards of conduct concerning integrity and ethical values. The Grantee uses ethical values to balance the needs and concerns of different stakeholders, such as regulators, employees, and the general public. The standards of conduct guide the directives, attitudes, and behaviors of the organization in achieving the entity’s objectives. For example, an entity serving as applicant preparer should not be involved in the preparation of bid documents should said entity intend to bid on any part of the project. Nor should 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 and other compliance concerns.

Grantee 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 grantee in the procurement process. For example, if ABC & Associates intends to submit a proposal for services, ABC & Associates, as application preparer, may not assist the grantee in the procurement process. Such a conflict of interest would result in a Finding and may affect future eligibility to receive funds.

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

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

SAM Verification for Grantees, Subrecipients, Contractors, Subcontractors, Suppliers, and Firms

Grantee 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. For both instances, grantee must maintain documentation as to initial verification, and confirm verification prior to awarding a contract and charging any costs to the grant.

1. Grantee (Recipient) and subrecipient(s); and
2. Contractors, subcontractors, suppliers, and firms providing professional services (e.g. development districts, engineers, architects, planners, etc.).

The grantee and any sub-recipient (e.g. businesses participating in a commercial rehabilitation program or property owner participating in a housing rehabilitation program that is not an individual) must have a DUNS number, active SAM registry, and have no active exclusions. SAM verification of contractors, subcontractors, suppliers, and firms providing professional services consists of confirmation the entity is not debarred and/or does not have an active exclusion.

To be eligible for a CDBG award, the applicant must meet the requirements listed for item 1 above. SAM requirements are again verified at the time of semiannual project status reporting, prior to processing drawdowns, and during risk analysis and performance monitoring.

For additional information about subrecipients, see Subrecipients section below.

For more information about SAM Verification requirements, see CDBG Policy Memo 18-02 and Summary of Federal Requirements section below.

TIMING OF CONTRACT EXECUTION

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

This chapter focuses on **2 CFR§200.300** 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 the rules governing the utilization of the methods. The remaining information under this regulation pertains to the bonding requirements and general contract provisions.

Procurement procedures do not apply, however, to officials of the grantee 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 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; and
- (3) the amount of compensation charged to the program will be based on payrolls documented and provided in accordance with generally accepted practices of state and local governments.

GENERAL PROVISIONS/ 2 CFR§200.318

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; and,
- 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 the Grantee to evaluate his or her bid/offer. 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 2 CFR 200.319. Some of the situations considered 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; and
- Non-competitive awards to consultants on retainer contracts.
- Organizational conflicts of interest.

Award contracts 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 to award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement. Grantee should give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

SUMMARY OF FEDERAL REQUIREMENTS

- 1) **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.
- 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, and must allow entry of other firms to qualify at any time during the solicitation period [2 CFR§200.319(d)].
- 3) **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.
- 4) **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, and 2 CFR Part 180, “Debarment and Suspension” (2 CFR 212).

Grantee 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, grantee must review System for Award Management (SAM) (<https://www.sam.gov/>) for all contractors/firms submitting a bid/proposal. Typically, the certified administrator provides this service. SAM verification should occur at the time of submission or negotiations and must occur prior to selecting a contractor/firm for contract award. **NOTE:** SAM registration of contractor/firm is not required to verify they are not on the debarred list nor is an active SAM registration confirmation that they are not debarred/ineligible.

- 5) **Written Procedures For Contractor Selection:** The grantee must have written selection procedures for procurement transactions (2 CFR §200.319(c)), adequate to ensure the following:
 - a. Avoid purchase of unnecessary or duplicate items. Where appropriate, make an analysis of lease vs. purchase alternatives (2 CFR §200.318(c);
 - b. 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(f);
 - c. All purchase orders (and contracts) are signed by the grantee's authorized official(s);
 - d. Items delivered and paid for are consistent with the purchase order and/or contract for the goods or services;
 - e. Timely payment to vendors occurs once the order is delivered, inspected, accepted, and payment authorized;
 - f. Perform a cost or price analysis for every procurement action, including contract modifications, and maintain documentation to that effect 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)); and,
 - g. 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 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)).
- 6) **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))
- 7) **Protest Procedures:** The grantee must have protest procedures in place to handle and resolve disputes relating to procurement (2 CFR §200.318(k)).
- 8) **Documenting Contractor Performance:** The grantee must have a documented system of contract administration for determining the adequacy of contractor performance (2 CFR §200.318(b)).
- 9) **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 \$150,000, 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** 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 (MBE/WBE and Section 3)

- 1) 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 §200.321(a)). For example, the grantee 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, to permit maximum participation of such businesses; and,
 - d. Require prime contractors, when subcontracts are let, to take affirmative steps to select such firms.
- 2) 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.

CONTRACT LANGUAGE

Contracts for construction: see the bid package and contract requirements in Chapter 9 – Construction and Labor Standards.

Professional service contracts must include the following provisions:

General Administrative Provisions

- Effective date of the contract.
- Names and addresses of the firm and the grantee.
- Citation of the authority of the grantee 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 and remedies for violation/breach of contract.
- Procedures for amending or revising the contract.
- Names of representatives of municipality and firm who will act as a liaison for administration of the contract
- A clause prohibiting a transfer of any interest in the contract by the consultant
- Provisions requiring the consultant 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 terms of the contract.

Federal Standard Provisions

- 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 compliance clause (Required only if the contract exceeds \$100,000)
- Access to Records/Maintenance of Records clause
- Age Discrimination Act of 1975, as amended
- Section 504 of the Rehabilitation Act of 1973, as amended

PROCUREMENT OPTIONS

Initial Decision: Will the grantee select a third party to perform all or part of the grant-funded activity, using some method of procurement?

- If no, and all of the work will be done in-house, then the grantee 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:**
If the grantee will use only its own staff to work on the grant, work may begin after the state contract is fully executed and the Department has provided a written Notice of Release of Funds. The only costs incurred prior to Release of Funds that are eligible for reimbursement from CDBG funds are general administration activity costs, unless a special pre-agreement is issued to the grantee.

Officials of the grantee who are acting in their official capacity are considered “in-house” and are eligible to be compensated for CDBG-related duties if certain conditions are met. For example, if a city council has officially designated an attorney as City Attorney or an engineer as City 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; and, (3) the amount of compensation charged to the program will be based on payrolls documented and provided in accordance with generally accepted practices of state and local governments.

The Department will disallow costs for grantee’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 grantee must show evidence that they have a history of appointment, unrelated to any current or anticipated CDBG project.

▪ **Contracted:**

If the grantee wants to contract out for services, the grantee must go through a procurement process. The grantee 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 grantee may execute prior to the Department’s issuance of a Notice of Release of Funds is for general administration services, unless a special pre-agreement is issued to the grantee. Contracts for general administration must be executed after Notice of Approval.

▪ **If the work is hired out:**

The grantee has several options for procuring a contractor:

- Micro-purchases
- 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 consultant 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 grant administration and engineering and/or planning professional services is generally acceptable provided that separate procurement processes are conducted for

each of the separate services. However, a firm serving as the General Administrator for a grantee is not allowed to bid on a contract for services if the firm assists the grantee with preparation of the procurement advertisement or any aspect of the procurement process. Assistance with the procurement process includes, but is not limited to, the preparation of advertisements or evaluation and scoring of bids.

Selection of Engineers, Planners, or Administrative Consultants Prior to Grant Award:

Generally, the use of multi-services procurement and contracting is prohibited except for: i) when local officials decide to procure the services of an engineer to assist them with both preparation of preliminary engineering plans (which is not grant application preparation) and project engineering, in the event their community is selected for grant award; ii) when a community wants to conduct one procurement process to cover both grant preparation and grant administration; and, iii) when a community wants to conduct one procurement process to cover both planning grant application preparation and planning grant implementation.

Any agreement between the community and the engineer or consultant that includes preliminary and project engineering or grant writing and administration services would have to be contingent upon the award of CDBG funds. Local officials would have to follow the procedures for Competitive Proposals.

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)]

The Department considers procurement by micro-purchase procedures best suited to obtaining small quantities of supplies and services. 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, described below.

The micro-purchase method may be used for procurement of \$3,000 or less in the aggregate, per 2 CFR §200.67 Micro-purchase (or \$2,000 in the case of acquisitions for construction subject to DBRA). 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 micro-purchase threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 (Definitions).

The grantee must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the grantee considers the price to be reasonable

- **Small Purchase** [2 CFR §200.320 (b)]

The Department considers procurement by small purchase procedures best suited to obtaining small quantities of supplies or services. 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, described below.

The small purchase method may be used for procurement of \$150,000 or less in the aggregate, per 2 CFR 200.320(b). A procurement of more than \$150,000 may not be inappropriately broken up into smaller components solely to qualify for the small purchase approach. “Simplified acquisition threshold” means \$150,000. Simplified acquisition threshold means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods. Non-Federal entities adopt small purchase procedures in order to expedite the purchase of items costing less than the simplified acquisition threshold. The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 (Definitions) 200.88 (Simplified acquisition threshold) and in accordance with 41 U.S.C. 1908. As of the publication of this part, the simplified acquisition threshold is \$150,000, but this threshold is periodically adjusted for inflation. (Also see definition of §200.67 Micro-purchase.)

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

- 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 grantee 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 low bidder.
- 5) Execute a contract to the lowest responsible bidder.

o **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. 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 grantee must advertise the invitation for bids in publications of general circulation, solicit bids from an adequate number of known suppliers, 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 grantee must receive at least two or more responsible bids for each procurement transaction; and,
- 5) If awarded, a firm fixed-price contract award must be made in writing to the lowest responsive and responsible bidder. The grantee can, however, decide not to make the award to any of the bidders.
- 6) Any or all bids may be rejected if there is a sound documented reason.

o **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:

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

The review process for both statements of qualification and proposals in response to an RFP should be thorough, uniform, and well documented. The Department 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 Code of Federal Regulations 2 CFR 200.318(c)(1), which in part states: “the non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must 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 competition:

- Identify all requirements which the offerors must fulfill;
- Identify all factors used in evaluating bids or proposals; 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.
- See also, 2 CFR §200.319.

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: Grantee may assign weights to each criteria to indicate relative importance. If

interviews are required at any time in the review process, it must be expressly stated.

Request for Proposals

- 1) Request for Proposals (RFP) 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; cost reimbursement (i.e. cost plus fixed fee); fixed price; or per diem contract. Not allowable are cost plus a percentage of cost contracts.
 - 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 grantee should make available pertinent materials, such as reports, maps and site plans to assist the bidders in preparing proposals. For complicated projects, the grantee may wish to conduct a pre-bid conference to discuss the project, describe available materials, and explain relevant CDBG contract regulations.
- 2) 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) 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 deemed responsive and responsible, and those that 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; and
- 6) 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 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 shall 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. The grantee 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 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 reference, the above-cited federal rule relating to the procurement of architectural and engineering (A/E) services is quoted verbatim:

“Grantees and subgrantees 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:

- Use Qualifications-based procurement only for A/E services. In no other instances is issuance of a Request for Qualifications appropriate.
- Evaluation of competitors’ qualifications culminates in selection of the most qualified competitor, subject to negotiation of fair and reasonable compensation.
- 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 criteria provided this criterion leaves an appropriate number of qualified firms (2CFR 200.319(b)).

○ **Non-Competitive Proposals/Sole Source** [2 CFR §200.320(f)]

This method may be used only under very limited circumstances and the **grantee must obtain Department approval before using this method.**

When requesting permission to use this method, the grantee will have to show that another method of procurement was not feasible because:

- The item or service was only available from a single source;
- A public emergency or condition requiring urgency existed which did not permit the use of competitive procurement; or
- Competition was determined to be inadequate after solicitation of proposals from a number of sources.

In some cases, grantee selects one of the other methods of procurement listed above

which does not ultimately solicit an adequate number of responses. In such instances where grantee receives inadequate response, this may trigger 2 CFR §200.320(f)(4). 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. Prior to awarding a contract under these conditions, grantee must consult with and obtain Department approval.

BEST PRACTICES FOR PROCUREMENT

Department guidance is a supplement to federal and state requirements enumerated and discussed in brief within this manual. Grantees are responsible for understanding and complying with federal or state requirements located within the original source. In some instances, the Department may require a more stringent approach in which case those requirements are detailed. Best practices are included here to encourage successful implementation.

All things considered, the due diligence is on the Grantee to award contracts only to responsible contractors 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.

Where method requires publication, the advertisement must be such as to inform interested parties and be available to the public (i.e. publicly solicited). Use of listing services requiring membership should not be solely relied upon and do not meet the intent of publication.

Where grantee received an inadequate number of responses, it is necessary to consult with the Program Representative to determine best practice prior to awarding a contract. In some instances, it may be appropriate to reissue procurement materials. However, this is not always appropriate.

Carry out SAM verification for all offerors responding to a procurement process at the time of submission and prior to negotiations. **SAM verification is required prior to entering into any contract or incurring costs charged to the grant.**

Competitive Proposals

Where Grantee selects competitive proposal method, DED recommends sending request for proposals to firms serving grantee's region of the State; however, proximity is not an adequate reason for selection and grantee must take measures to ensure fair and open competition. In addition to advertising in your local newspaper, you should also advertise in at least one other newspaper that is widely distributed in your region of the state. The grantee would evaluate the firms responding and could then conduct interviews with one or more of the firms responding and select a consultant. The community 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 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 grantee'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 and Construction Management

Where construction management and general administrative services are listed as separate activities in the CDBG Contract and are combined in the procurement process, the services must be listed as separate services in the RFP and the subsequent contract entered into. This is because:

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

While it is acceptable to incorporate general administrative and construction management activities in the same RFP, the Grantee must clearly identify them as *separate* services so that firms submitting a proposal itemize costs and delivery schedule for each service separately. This process would also allow a firm to submit a proposal for one or both of the services. Such action may also support compliance with MBE/WBE and Section 3 requirements.

CONTRACT FILE

The grantee must establish a contract file and monitor the contract to assure that the contract completion in a satisfactory and timely manner. The contract file must contain:

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

DESIGNATING GRANT ADMINISTRATION TO ANOTHER GOVERNMENTAL ENTITY

A grantee (which is required to be a unit of general local government under CDBG requirements) 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 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.

SUBRECIPIENTS

Depending on the nature of the CDBG-funded project, there may be a need to enter into agreements with subrecipients. A subrecipient is a public or private non-profit agency, faith-based organization, or for-profit business receiving CDBG funds from a grantee or another subrecipient to undertake eligible activities. In other words, a subrecipient arrangement involves instances where a grantee provides CDBG funds to organizations for their use in carrying out agreed-upon, eligible activities. Commonly projects involving implementation of a program (e.g. housing rehabilitation or commercial rehabilitation) necessitate entering into subrecipient contracts.

WARNING: The Grantee must consult with the Department prior to entering into an agreement with a subrecipient, this may include review and approval of program guidelines. For more information about program guidelines, see Chapter 4.

REFERENCES

For a complete listing of references, see Chapter 1.

SAMPLE PROFESSIONAL SERVICE/CONSULTANT AGREEMENT

This is a sample document only, and is not intended to replace advice from an attorney.

Project Title

THIS AGREEMENT made and entered into by and between the **Village/City/County** of _____, **Nebraska** (hereinafter referred to as the Village/City/County) and _____, (hereinafter referred to as the Consultant).

WITNESSES THAT:

WHEREAS, the Village/City/County and the Consultant are desirous of entering into a contract to formalize their relationship, and

WHEREAS, pursuant to Title I of the Housing and Community Development Act of 1974, as amended through 1981 and 24 CFR 570, the State of Nebraska Department of Economic Development (the Department) is authorized by the federal Department of Housing and Urban Development (HUD) to provide Community Development Block Grant Program funds (hereinafter referred to as CDBG funds) to units of local government selected to undertake and carry out certain programs and projects under the Nebraska State Community Development Block Grant Program in compliance with all applicable local, state and federal laws, regulations and policies, and

WHEREAS, the Village/City/County, as part of its [year] CDBG grant agreement with the Department, under contract number _____, has been awarded CDBG funds for the purposes set forth herein, and

WHEREAS, the Scope of Work included in this contract is authorized as part of the Village/City/County 's approved CDBG program, and

WHEREAS, it would be beneficial to the Village/City/County to utilize the Consultant as an independent entity to accomplish the Scope of Work set forth herein and such endeavor would tend to best accomplish the objectives of the local CDBG program.

NOW, THEREFORE, in consideration of the mutual promises, covenants and provisions contained herein and the mutual benefits to be derived therefrom, the parties hereto agree as follows:

1. Services to be Provided by the Parties

- a. The Consultant shall complete, in a satisfactory and proper manner as determined by the Village/City/County, the work activities described in the Scope of Work (**Attachment #1**).
- b. The Village/City/County will provide such assistance and guidance as may be required to support the objectives set forth in the Scope of Work and will provide compensation for services as set forth in Section 3 below.

2. Time of Performance

The effective date of this contract shall be the date the parties sign and complete execution of the contract. The termination date of the contract shall be [date].

3. Consideration

The Village/City/County shall reimburse the Consultant in accordance with the Payment Schedule described in **Attachment #2** for all allowable expenses agreed upon by the parties to complete the Scope of Work. In no event shall the total amount reimbursed by the Village/City/County exceed the sum of \$_____ (_____ dollars). Reimbursement under this contract shall be based on billings that are supported by appropriate documentation of costs actually incurred. It is expressly understood that claims for reimbursement shall not be submitted in excess of actual, immediate cash requirements necessary to carry out the purposes of this agreement.

It is also understood that this contract is funded in whole or in part with funds through the State of Nebraska Community Development Block Grant Program as administered by the Department and is subject to those regulations and restrictions normally associated with federally funded programs and any other requirements that the state may prescribe.

4. Record Maintenance, Record Retention, and Access to Records

The Consultant agrees to maintain such records and follow such procedures as may be required under 2 CFR §200.300–345 and any such procedures that the Village/City/County or the Department may prescribe. In general, such records will include information pertaining to the contract, obligations and unobligated balances, assets and liabilities, outlays, equal opportunity, labor standards (as appropriate), and performance.

All such records and all other records pertinent to this contract and work undertaken under this contract shall be retained by the Consultant for a period of ten years after the final audit of the Village/City/County's CDBG project, unless a longer period is required to resolve audit findings or litigation. In such cases, the Village/City/County shall request a longer period for record retention.

The Village/City/County, the Department, and duly authorized officials of the state and federal government shall have full access and the right to examine any pertinent documents, papers, records and books of the Consultant involving transactions to this local program and contract.

5. Relationship

The relationship of the Consultant to the Village/City/County shall be that of an independent Consultant rendering professional services. The Consultant shall have no authority to execute contracts or to make commitments on behalf of the Village/City/County and nothing contained herein shall be deemed to create the relationship of employer and employee or principal and agent between the Village/City/County and the Consultant.

6. Suspension, Termination and Close Out

If the Consultant fails to comply with the terms and conditions of this contract the Village/City/County may pursue such remedies as are legally available including, but not limited to the suspension or termination of this contract in the manner specified herein:

- 1. Suspension:** If the Consultant fails to comply with the terms and conditions of this contract, or whenever the Consultant is unable to substantiate full compliance with the provisions of this contract, the Village/City/County may suspend the contract pending corrective actions or investigation, effective not less than 7 days following written notification to the Consultant or its authorized representative. The suspension will remain in full force and effect until the Consultant has taken corrective action to the satisfaction of the Village/City/County and is able to substantiate its full compliance with the terms and conditions of this contract. No obligations incurred by the Consultant or its authorized representatives during the period of suspension will be allowable under the contract except:

 - (1) Reasonable, proper and otherwise allowable costs which the Consultant could not avoid during the period of suspension.
 - (2) If upon investigation, the Consultant is able to substantiate complete compliance with the terms and conditions of this contract, otherwise allowable costs incurred during the period of suspension will be allowed.
 - (3) In the event all or any portion of the work prepared or partially prepared by the Consultant be suspended, abandoned, or otherwise terminated the Village/City/County shall pay the Consultant for work performed to the satisfaction of the Village/City/County, in accordance with the percentage of the work completed.
- 2. Termination for Cause:** The Village/City/County may terminate its contract with the Consultant if the Consultant fails to comply with the terms and conditions of this contract and any of the following conditions exist.

 - (1) The lack of compliance with the provisions of this contract are of such scope and nature that the Village/City/County deems continuation of the contract to be substantially detrimental to the interests of the Village/City/County;
 - (2) The Consultant has failed to take satisfactory action as directed by the Village/City/County or its authorized representative within the time specified by same;
 - (3) The Consultant has failed within the time specified by the Village/City/County or its authorized representative to satisfactorily substantiate its compliance with the terms and conditions of this contract; then, the Village/City/County may terminate this contract in whole or in part, and thereupon shall notify the Consultant of the termination, the reasons therefore, and the effective date provided such effective date shall not be prior to notification of the Consultant. After this effective date, no charges incurred under any terminated portions are allowable.
- 3. Termination for Other Grounds:** This contract may also be terminated in whole or in part:

 - (1) By the Village/City/County, with the consent of the Consultant, or by the Consultant with the consent of the Village/City/County, in which case the two parties shall devise by mutual agreement, the conditions of termination including effective date and in

case of termination in part, that portion to be terminated.

- (2) If the funds allocated by the Village/City/County via this contract are from anticipated sources of revenue, and if the anticipated sources of revenue do not become available for use in purchasing said services.
- (3) In the event the Village/City/County fails to pay the Consultant promptly or within 60 days after invoices are rendered, the Village/City/County agrees that the Consultant shall have the right to consider said default a breach of this agreement and the duties of the Consultant under this agreement terminated. In such an event, the Village/City/County shall then promptly pay the Consultant for all services performed and all allowable expenses incurred.
- (4) The Village/City/County may terminate this contract at any time giving at least 10-days notice in writing to the Consultant. If the contract is terminated for convenience of the Village/City/County as provided herein, the Consultant will be paid for time provided and expenses incurred up to the termination date.

7. Changes, Amendments, Modifications

The Village/City/County may, from time to time, require changes or modifications in the scope of services to be performed hereunder. Such changes, including any increase or decrease in the amount of compensation therefore, which are mutually agreed upon by the Village/City/County and the Consultant shall be incorporated in written amendments to this contract.

8. Personnel

The Consultant represents that he/she has, or will secure at his/her own expense, all personnel required in performing the services under this contract. Such personnel shall not be employees or have any contractual relationship to the Village/City/County.

All services required hereunder will be performed by the Consultant or under his supervision and all personnel engaged in the work shall be fully qualified and shall be authorized or permitted under state or local law to perform such services.

None of the work or services covered by this contract shall be subcontracted without prior written approval of the Village/City/County. Any work or services subcontracted hereunder shall be specified by written contract or agreement and shall be subject to each provision of this contract.

9. Assignability

The Consultant shall not assign any interest on this contract, and shall not transfer any interest on this contract (whether by assignment or notation), without prior written consent of the Village/City/County thereto: Provided, however, that claims for money by the Consultant from the Village/City/County under this contract may be assigned to a bank, trust company, or other financial institutions without such approval. Written notice of any such assignment or transfer shall be furnished promptly to the Village/City/County.

10. Reports and Information

The Consultant, at such times and in such forms as the Village/City/County may require, shall

furnish the Village/City/County such periodic reports as it may request pertaining to the work or services undertaken pursuant to this contract, the costs and obligations incurred or to be incurred in connection therewith, and any other matters covered by this contract.

11. Findings Confidential

All of the reports, information, data, etc., prepared or assembled by the Consultant under this contract are confidential and the Consultant agrees that they shall not be made available to any individual or organization without prior written approval of the Village/City/County.

12. Copyright

No reports, maps, or other documents produced in whole or in part under this contract shall be subject of an application for copyright by or on behalf of the Consultant.

13. Compliance With Local Laws

The Consultant shall comply with all applicable laws, ordinances and codes of the state and local governments and the Consultant shall save the Village/City/County harmless with respect to any damages arising from any tort done in performing any of the work embraced by this contract.

14. Title VI of the Civil Rights Act of 1964

No person shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

15. Section 109 of the Housing and Community Development Act of 1974

No person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied benefits of or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.

16. Section 3 Compliance in the Provision of Training, Employment and Business Opportunities

- a. The work to be performed under this contract is on a project assisted under a program providing direct federal financial assistance from the Department of Housing and Urban Development and is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u. Section 3 requires that to the greatest extent feasible opportunities for training and employment be given lower income residents of the project area and contracts for work in connection with the project be awarded to business concerns which are located in, or owned in substantial part by persons residing in the area of the project.
- b. The parties to this contract will comply with the provisions of said Section 3. The parties to this contract certify and agree that they are under no contractual or other disability which would prevent them from complying with these provisions.
- c. The consultant will send to each labor organization or representative or workers with which he/she has collective bargaining agreement or other contract or understanding, if any, a notice advising the said labor organization or workers' representative of his/her commitments under this Section 3 clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment or training.

- d. The Consultant will include this Section 3 clause in every subcontract for work in connection with the project and will, at the direction of the applicant for, or receipt of federal financial assistance, take appropriate action pursuant to the subcontract upon a finding that the subcontractor is in violation of regulations issued by the Secretary of Housing and Urban Development, 24 CFR Part 135. The Consultant will not subcontract with any subcontractor where it has notice or knowledge that the latter has been found in violation of regulations under 24 CFR Part 135 and will not let any subcontract unless the subcontractor has first provided it with a preliminary statement of ability to comply with the requirements of these regulations.
- e. Compliance with the provisions of Section 3, the regulations set forth in 24 CFR Part 135, and all applicable rules and orders of the Department issued hereunder prior to the execution of the contract, shall be a condition of the federal financial assistance provided to the project, binding upon the applicant or recipient for such assistance, its successors and assigns. Failure to fulfill these requirements shall subject the applicant or recipient, its consultants and subcontractors, its successors and assigns to those sanctions specified by the grant or loan agreement or contract through which federal assistance is provided, and to such sanctions as are specified by 2 CFR Part 135.

17. Age Discrimination Act of 1975, As Amended (42 U.S.C. 6101, et.seq.)

No person will be excluded from participation, denied program benefits or subjected to discrimination on the basis of age under any program or activity receiving federal funding assistance.

18. Section 504 of the Rehabilitation Act of 1973, As Amended (29 U.S.C. 794)

No otherwise qualified individual will, solely by reason of his or her handicap, be excluded from participation (including employment), denied program benefits or subjected to discrimination under any program or activity receiving federal assistance funds.

19. Executive Order 11246, As Amended.

This Order applies to all federally assisted construction contracts and subcontracts. The Grantee and subcontractors, if any, will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The Grantee and subcontractors, if any, will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

20. Conflict of Interest 2 CFR §200.318

No officer, employee or agent of the Grantee who will participate in the selection, the award, or the administration of this grant may obtain a personal or financial interest or benefit from the activity or have an interest in any contract, subcontract or agreement with respect thereto, or the proceeds thereunder either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter. It is further required that this stipulation be included in all subcontracts to this contract. Upon written request, exceptions may be granted upon a case by case basis when it is determined that such an exception will serve to further the purposes of the Act and the effective and efficient administration of the recipient's program or project. These exceptions are granted by the Department.

21. Audits and Inspections

The Village/City/County, the Department, the State Auditor and HUD or their delegates shall have the right to review and monitor the financial and other components of the work and services provided and undertaken as part of the CDBG project and this contract, by whatever legal and reasonable means are deemed expedient by the Village/City/County, DED, the State Auditor and HUD.

22. Hold Harmless

The Consultant agrees to indemnify and hold harmless the Village/City/County, its appointed and elected officers and employees, from and against all loss and expense, including attorney's fees and costs by reason of any and all claims and demands upon the Village/City/County, its elected or appointed officers and employees from damages sustained by any person or persons, arising out of or in consequence of the Consultant's and its agents' negligent performance of work associated with this agreement. The Consultant shall not be liable for property and bodily injury as may result from the negligence of any construction contractor or construction subcontractor.

23. Governing Law

This Agreement will be governed by the laws of the State of Nebraska, without regard to that body of law controlling conflicts of law. Any legal proceeding arising out of, or relating to this Agreement shall be instituted in any court of general jurisdiction in the State of Nebraska.

This agreement contains all terms and conditions agreed to by the Village/City/County and the Consultant. The attachments to this agreement are identified as follows:

ATTACHMENT #1

SCOPE OF WORK and FEES for _____, NEBRASKA for _____ consisting of _____ pages.

ATTACHMENT #2

PAYMENT SCHEDULE for _____, NEBRASKA for _____ consisting of _____ pages.

WITNESS WHEREOF, the Village/City/County and the Consultant have executed this contract agreement as of the date and year last written below.

VILLAGE/CITY/COUNTY (_____, Nebraska)

By: _____

Title: _____

Date: _____

CONSULTANT (_____)

By: _____

Title: _____

Date: _____

APPROVED as to legal form:

Village/City/County Attorney

By: _____

Date: _____