

CHAPTER 4: PROCUREMENT

OVERVIEW

When administering a CDBG project it is inevitable the grant administrator will purchase equipment/materials or contract for construction, materials, engineering or consulting. Documentation must be kept on methods used to obtain goods and/or services. It is important to remember that the contract is between the local government and the firm, not between GOED and the firm.

There are five types of procurement methods:

- 1) Micro-purchases;
- 2) Small purchase;
- 3) Competitive Sealed Bid;
- 4) Competitive Proposal;
- 5) Noncompetitive or Sole Source Provider.

Each method has a different procurement process and reporting requirements. It is the responsibility of the local government to ensure that the correct procurement method is selected, implemented and documented. It is important that required reports are maintained and submitted to CDBG. While the unit of local government can delegate authority, it cannot abrogate the responsibility for the project and compliance with applicable laws.

The grant administrator must meet State as well as Federal requirements when contracting for good and services. This chapter describes the requirements for these procurement methods.

FEDERAL & STATE LAWS

The following statutes and regulations contain the standards to use when securing contract services for professional services or materials:

Federal Laws:

“Common Rule” (24 CFR Part 85): Requires that all procurement, regardless of dollar amount, be conducted so as to provide “Maximum open and free competition;” prohibits the soliciting or acceptance of gratuities or favors from contractors or potential contractors. A copy of the “Common Rule” is included at the end of Chapter 1: Project Start Up.

24 CFR Part 84: uniform administrative requirements for entities that receive federal funding.

Equal Employment Opportunity (Executive Order 11246, paragraphs 1-3 for contract under \$10,000 or paragraphs 1-7 for contracts \$10,000 and over).

Title VI of the Civil Rights Act: Requires that no one may be denied access to benefits from projects that receive federal assistance.

Section 109 of the Housing and Community Development Act of 1974: Requires nondiscrimination related to benefits from projects funded specifically under Title I of the Act.

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Section 1352, Title 31, U.S. Code: Requires certification that no federal funds will be used for lobbying activities and that required forms will be filed if non-federal funds are used for lobbying activities.

State Laws:

Local Government Purchasing Act (Nevada Revised Statutes, Chapter 332): specifies the requirements placed on local governments when purchasing materials or requesting bids. The “Local Government Purchasing Act” can be accessed at <http://www.leg.state.nv.us/NRS/NRS-332.html>

Public Works Projects (Nevada Revised Statutes, Chapter 338): contains information pertaining to design-build contracts and compensation for design professionals. The “Public Works Projects” statute can be accessed at <https://www.leg.state.nv.us/NRS/NRS-338.html>

Contractors’ Bonds on Public Works (Nevada Revised Statutes, Chapter 339): provides requirements for bonds when entering into contracts.

PROCUREMENT METHODS

I. Micro-Purchase: The micro-purchase threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1. It is \$15,000 except as otherwise discussed in Subpart 2.1 of that regulation. This threshold is periodically adjusted for inflation. This method of procurement enables non-federal entities to obtain supplies and services, valued at less than \$15,000, without soliciting competitive quotations. This method is intended to reduce administrative burdens. Non-federal entities must, to all practical extents, distribute micro-purchases equitable among qualified suppliers.

Non-federal entities may need to update their internal procurement policies to reflect the micro-purchase procurement method.

II. Small Purchase: The Small Purchase method is best suited to obtaining small quantities of supplies. Under Federal regulations a small purchase must be less than \$250,000. However, per Nevada Revised Statute 332.000, a small purchase in Nevada is less than \$50,000.

- Nevada Revised Statute 332.063 states that any annual amount that exceeds \$50,000 shall be advertised. For purchases under \$50,000, advertising is not required.
- For contracts between \$25,000 and \$50,000, requests for bid/quotes must be made to two or more capable entities.
- For contracts under \$25,000, the recommendation is to seek oral or written price bids/quotes from more than one supplier.

When assessing which action to take, the most stringent requirement is the one to follow. Generally Federal law takes precedence over State law. However, for small purchases and in the area of Labor, Nevada’s laws are more stringent.

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III. Competitive Sealed Bid: The Competitive Sealed Bid is typically used in the procurement of construction contracts. The award is based on a fixed bid price and is awarded to the firm that is the most responsible and also the most responsive to the bid request.

The Competitive Sealed Bid method has the following required steps:

1. Prepare the bid document/CDBG to review;
2. Obtain the wage determination from the CDBG Program Specialist;
3. Advertise for bids (assuming the value is greater than \$50,000);
4. Obtain a 10 day wage check from the CDBG Program Specialist (10 days prior to bid opening date);
5. Contractor selection made by commission or council;
6. Selection process is recorded and copy of minutes is sent to the CDBG Program Administrator;
7. The contractor and subcontractors are debarred (request to CDBG Program Specialist);
8. The contract is issued and placed in the grantee's file;
9. The preconstruction conference is scheduled and held.

For CDBG-funded projects, preparation of the bid documents requires not only the technical specifications and normal contract provisions but also the inclusion of required CDBG documents:

1. Supplemental General Conditions,
2. Specific Certifications, and
3. Section 3 Documents.
4. Build America Buy America Documents

There are nine (9) **Supplemental General Conditions:**

1. Equal Opportunity Clause for contracts \$10,000 and under;
2. Standard Equal Opportunity Clause for construction **under** \$10,000;
3. Standard Equal Opportunity Clause for construction **over** \$10,000;
4. Federal Labor Standards Provisions;
5. Federal Wage Rate Determination;
6. State Prevailing Wage Rates for Public Works for Construction of \$250,000 or more;
7. Compliance with Air and Water Acts;
8. Special Condition – Hazards, Safety Standards and Accident Prevention;
9. Special Condition – Unfair Trade Practices.

There are five (5) **Specific Certifications:**

1. Certification (Bidder/Prime Contractor) – Equal Employment opportunity;
2. Certification (Subcontractors) – Equal Employment Opportunity;
3. Certification (Bidder/Prime Contractor) – Lobbying;
4. Certification (Subcontractors) – Lobbying;
5. Certification (Bidder/Subcontractor) regarding Debarment.

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Section 3 Documents:

1. Section 3 Provisions for Contracts;
2. Section 3 Clause
3. Certification (Bidder/Prime Contractor) – Section 3 and Segregated Facilities;
4. Certification (Subcontractors) – Section 3 and Segregated Facilities;
5. Section 3 Workforce Breakdown;
6. Section 3 Qualitative Reporting

All forms for this chapter are located in Chapter 4: Exhibits folder. The process is reviewed again in Chapter 5: Construction Management and Labor Standards.

IV. Competitive Proposal Method: If more than one source is submitting a proposal, and either a fixed-price or not-to-exceed type of contract is awarded, the competitive proposal method is used. This method is typically used in the selection of professional service providers. There are two types of this method:

- 1) Request for Proposal (RFP)
- 2) Request of Qualifications (RFQ)

The RFP Document:

- Must clearly and accurately state technical requirements for goods and services required;
- The grantee must publicize the RFP and honor reasonable requests for an opportunity to compete;
- Proposals must be solicited from an adequate number of qualified sources;
- The grantee must conduct a technical evaluation of the submitted proposals.
- The grantee must conduct negotiations with responsive and responsible entities that submitted RFPs based on evaluation of the proposals;
- The grantee must award the contract to the most responsive and responsible entity;
- The successful entity must clearly be the most advantageous source of the goods and services.

The RFQ: For procurement of architecture, surveyor or engineering services, the Request for Qualifications method is used.

The need to obtain the services an engineer, architect or other professional consultant is common in the CDBG program. Engineers or other consultants are often hired to do feasibility studies, draft preliminary engineering reports, do project design and develop plans and specifications for the projects. Their duties might also include grant administration and project management responsibilities. When entering into contracts, it is important to remember that all requirements set out in the Nevada Revised Statutes must be met in addition to the federal requirements.

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Following are steps that should be followed when choosing professional services. Forms, sample letters and notices for use in setting up an RFQ/RFP process are included at the end of this chapter.

Step #1: Define nature and extent of professional services: Before the grant administrator begins the solicitation for engineering or other professional services contracts, s/he has to know what kind of service needed. Start by answering the following questions:

- Is the contract for a feasibility study, economic analysis or preliminary engineering?
- Does the consultant need to be responsible for handle financing, design, construction management or a combination of duties?
- Will the consultant be responsible for periodic inspections of construction work?
- If so, how often should inspections be made?
- Do the inspections cover only physical improvements?
- Is the consultant responsible for monitoring compliance with program requirements, such as labor standards?

Once the need is defined, the scope of the consultant's responsibilities can be developed. The "Project Responsibilities Checklist", at the end of this chapter can be used as a guide for helping define the consultant's scope of work.

Step #2: Requests for Qualifications (RFQ) and Request for Proposals (RFP)

As a general rule, professional services are solicited on the basis of the skill, knowledge and ability of the consultants. Procurement requirements of the NRS and the Common Rule also apply to contracts for consulting services. The CDBG program has a suggested procedure for selecting professional services while other agencies, most notably USDA-Rural Development, mandate RFQs and RFPs for certain services, particularly engineering and architectural design. In Nevada, engineers, architects and surveyors are prohibited from bidding for work on the basis of the fees they would charge. While this does not hold true for other professions, the same selection processes can be used. The **Hawke's Flowchart** detailing a suggested process for consultant selection is provided in Chapter 4: Exhibits.

An RFQ is a process where firms compete on the basis of their expertise. An RFP, on the other hand, is a process where qualified firms compete on the basis of their proposed methods of doing the work. Which process should be used depends on the nature and extent of the services to be provided.

Step #3: Noticing and Evaluation of RFQ's or RFP's

Either process goes through four basic steps:

- 1) The first step is the notice requesting that qualifications or proposals be submitted.
- 2) Next, the firms are evaluated based on their submissions. Interviews for the purpose of obtaining more information may be conducted depending on the situation. A final ranked list of firms is then generated.
- 3) Step three consists of starting with the highest ranked firm and negotiating a reasonable price for the service. If an acceptable price cannot be agreed upon, the next firm on the list is considered and negotiations begin with the second firm. The process is repeated until a fee agreement is

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obtained. If no responsive or responsible proposals are received, a contract can be negotiated as provided in NRS 332.148.

- 4) The fourth and final step is to enter into a contract with the professional service firm.

Step #4: Contracting with professional consultants and engineers

Once a consultant has been chosen, the grant administrator must ensure that a contract is executed that sets forth the specific activities to be performed, the amount of compensation and other terms and conditions of the contract. The contract should include:

- the names and addresses of both parties, effective dates, and scope of services;
- the maximum amount of the contract and the method of payment;
- a requirement that the consultant's records be open to inspection by any federal, state or local agency that has monitoring responsibility for the CDBG funded project;
- identification of the local public official who will serve as the contractor's primary contact;
- a termination clause that explains circumstances under which the unit of government or firm can cancel the contract.

All contracts for engineering or consulting services must contain the following federal standards as conditions of the contract:

- Equal Employment Opportunity: Executive Order 11246, paragraphs 1-3 for contract under \$10,000 or paragraphs 1-7 for contracts \$10,000 and over.
- Title VI of the Civil Rights Act: Requires that no one may be denied access to benefits from projects that receive federal assistance.
- Section 109 of the Housing and Community Development Act of 1974: Requires nondiscrimination related to benefits from projects funded specifically under Title I of the Act.
- Section 1352, Title 31, U.S. Code: Requires certification that no federal funds will be used for lobbying activities and that required forms will be filed if non-federal funds are used for lobbying activities.

Many engineers, architects and other professionals will provide their own contract language to the city/county. It is up to the grant administrator's city/county to decide which documents to use. Whichever document is used, the required information listed above must be contained in the document or included as an addendum. Copies of the required documentation can be found in Chapter 4: Exhibits.

IV. Non-competitive or Sole-Source Provider Method: This method of procurement may be used only under very limited circumstances. The grantee must consult with state CDBG staff before utilizing this method. A cost analysis verifying the proposed cost data must be done before a decision is made to use this method.

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OTHER REQUIREMENTS

Procuring Other Professional Services:

When procuring other professional services (other than engineers, architects and surveyors) if the services are paid from CDBG funds, grantees are:

- Required to use the RFP method of solicitation;
- Price must be a consideration (not required in the RFQ process);
- The RFP must be advertised, with the selection criteria included in the legal ad.
- The RFP must be advertised, for a minimum of 21 days.

If the services are paid from local funds, the grantees select the firm of choice adhering to state statutes.

Procurement with Small Business Minority/Women-Owned Firms:

CDBG recipients must make the following efforts to use minority and women-owned firms when possible:

- Place qualified firms on solicitation lists;
- Divide requirements into small tasks;
- Use SBA and Minority Business Development Agency services;
- Require prime contractors to take the same affirmative steps listed above.

DOCUMENTING COMPLIANCE:

Grantees must document the following:

- 1) A description of the procurement policies and procedures used on the CDBG-funded project;
- 2) Data on all contracts awarded, such as:
 - Names of contractors with contact information;
 - Types of contractor (small business, minority-owned, etc.);
 - Amounts of contracts awarded.
- 3) Evidence that the state has reviewed the local government's procurement records;
- 4) Documentation of contract work, including:
 - Copies of award letters;
 - Inspection reports;
 - Contract amendments;
 - Payment log;
 - Monitoring letter/findings.

Additionally, the grantee must ensure that debarments have been requested for:

1. All contractors;
2. All subcontractors;
3. All sub recipients.

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MANDATORY CONTRACT PROVISIONS

There are several mandatory contract provisions. They are as follows:

- 1) Provision for remedies;
- 2) Termination for cause and convenience;
- 3) Non-discrimination (Executive Order 11246);
- 4) Reporting requirements;
- 5) Patent rights;
- 6) Copyrights and rights in data;
- 7) Access to records;
- 8) Records retention (minimum of seven [7] years after date of closeout letter);
- 9) Compliance with environmental statutes;
- 10) Energy efficiency;
- 11) For Construction Contracts:
 - Copeland Anti-Kickback Act;
 - Compliance with Contract Work Hours and Safety Standards Act;
 - Davis-Bacon Act (contracts over \$2,000).

BONDING REQUIREMENTS

Bonding requirements are included in the bid document. The following are construction contractor bonding requirements:

- 1) Bid bonds;
- 2) Performance bonds;
- 3) Payment bonds.

Bid Bonds are used to assure the bidder's good-faith intentions;

- Must equal five percent (5%) of the bid price;
- Are submitted in a form that guarantees funds availability;

Bid bonds are returned to the unsuccessful bidders.

Performance Bonds are used to ensure completion of work and:

- Are required on all public works projects greater than \$100,000;
- May be waived on public works projects under \$100,000 in lieu of an irrevocable letter of credit;
- Must be equal to 100 percent of the contract price;
- Must be held for up to one year after the date of final completion.

Payment bonds are used to ensure payment to subcontractors and suppliers and are:

- Required on all public works projects greater than \$100,000;
- Must be equal to 100 percent of the contract price;
- Must guarantee payments to subcontractors and material suppliers.

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OTHER REQUIREMENTS

Conflict of Interest: A conflict of interest is: A real or seeming incompatibility between a person's private interests and his/her public or fiduciary duties. *Black's Law Dictionary*.

Persons with CDBG responsibilities, decision-making power or information may NOT:

- Obtain a financial interest or benefit from CDBG activity;
- Have any interest in contract or subcontract.

This also applies to family members and business ties and applies during tenure and one year after tenure. If there is any doubt regarding conflict of interest, the involved individual should recuse him- or herself and disclose the conflict.

Two examples are: a CDBG Grant Administrator cannot help a grantee with the procurement of grant administration if they intend to submit a proposal. Or, a Town Clerk cannot sit on a bid committee if a spouse, sibling, son/daughter, or business partner is bidding on a construction contract.

SUMMARY

Whichever method of procurement is right for your project, the important points to remember are:

- Have a fair, open, and competitive process;
- Document the selection process;
- Maintain records sufficient in detail to document the history of the procurement process (rationale of the method; selection of contract type; contractor selection or rejection; the basis for the contract price);
- Avoid conflicts of interest;
- Make awards only to responsible contractors who possess the ability to perform successfully;
- Settle any disputes in a timely manner;
- Have a complaint process in place to handle and resolve disputes relating to procurement.