
**The State of West Virginia
Community Development
Block Grant Mitigation
(CDBG, CARES, MIT)
Procurement**





west virginia
CaD



PROCUREMENT FOR CDBG, CARES and MIT PROJECTS

A PRACTICAL GUIDE FOR SUBRECIPIENTS



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2. Equal Opportunity Issues that Affect Procurement
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DISCLAIMER

- This presentation is developed so that it can be used as a tool to determine and reference which methods of procurement WV State subrecipients should follow based on the type of service or product being solicited.
- Following recommendations will not guarantee full organizational compliance with HUD monitoring.
- Encourage you to review all policies and program design with your WVCAD Representative.

BASIC PROCUREMENT CONCEPTS & REGULATIONS



KEY ACRONYMS/DEFINITIONS

A/E	Architectural/Engineering
AFWA	Anti-Fraud, Waste and Abuse
BAFO	Best and Final Offer
CFR	Code of Federal Regulations
DBE	Disadvantaged Business Enterprise
FRN	Federal Register Notice
MBE	Minority Business Enterprise
RFB	Request for Bids
RFP	Request for Proposals
RFQ	Request for Quotations
WBE	Women's Business Enterprise

WHAT IS THE PURPOSE OF PROCUREMENT RULES?

- Promote fair and open competition
 - Promote equity and establishes Section 3 and M/W/DBE goals when necessary
- Ensure public funds are used wisely and that contractor opportunities and scopes are public and transparent
- Establish a clear scope of services that achieves the following:
 - Clear and consistent contract
 - Timeliness and expenditure
 - Prevention of fraud, waste and abuse
 - Monitoring and production goals
 - Informs the type of procurement that should be used

REGULATORY BASIS FOR CDBG PROCUREMENT

FR-6109-N-02. This is the main Federal Register Notice that governs CDBG-MIT funds. It requires that States must have sufficient procurement processes and standards in place to manage their CDBG-MIT funds and must set forth procurement standards and processes for all local governments and subrecipients that are awarded MIT funds through a State.

FR-6218-N-01. The Federal Register that governs CDBG-CV funds. must have sufficient procurement processes and standards in place to manage their CDBG-MIT funds and must set forth procurement standards and processes for all local governments and subrecipients that are awarded MIT funds through a State.

24 CFR 570.489(g). This federal regulation says that States must follow their own policies and procedures for procurement and establish standards for local governments to whom CDBG funds are awarded.

2 CFR 200.318-326 and WV Code 5G. Under the procurement policies and procedures established by the State of West Virginia, local governments and subrecipients receiving CDBG-MIT funds must follow both federal regulations at 2 CFR 200.318-26 except when procuring architecture and/or engineering services, in which case they must follow state regulations at WV Code 5G. In any case where the two codes conflict, the more restrictive code must be followed.

FAIR AND OPEN COMPETITION

- According to 2 CFR 200.319, all procurement actions must be undertaken in a manner that ensures full and open competition
- Contractors who take part in preparing bid specifications or Requests for Bid (RFBs) may not bid on those same projects
- Geographic preferences may not be used in evaluation of bids or proposals, with the following exceptions:
 - Federally required geographic preferences, such as some provisions of Section 3
 - Procurement of architectural or engineering services, as long as the geographic preference does not restrict competition
 - Requirement that a vendor possess a valid state license in a particular area
- Grantees and subrecipients are required to have written procurement procedures to ensure all procurements incorporate a clear technical description of the product or service being procured and set forth scoring or evaluation criteria

FAIR AND OPEN COMPETITION (CONT.)

- Procurement procedures should avoid any provisions that would restrict or eliminate competition. Some of the situations considered to be restrictive of competition include:
 - Placing unreasonable requirements on firms in order for them to qualify to do business;
 - Requiring unnecessary experience and excessive bonding;
 - Noncompetitive pricing practices between firms or affiliated companies;
 - Noncompetitive awards to consultants that are on retainer contracts;
 - Organizational conflicts of interest;
 - Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and
 - Any arbitrary action in the procurement process.
- If using a pre-qualified list of vendors, the list must be current and contain enough vendors to assure adequate competition

ESTABLISHING COST REASONABLENESS

- Grantees must establish and document that all costs are necessary and reasonable
- Once your request for proposals is defined and has a clear scope of services but prior to getting bids, you must do an independent estimate
 - In this context, “independent” means not provided by a party that is bidding on the project
 - Your city engineer or public works department may be able to provide an independent estimate, or you may research previous CDBG projects that are similar in type and scope
- After you get bids, you will need to compare them to the independent estimate to determine:
 - If the bids are significantly higher than your estimate, you should note to your file why that might be and determine whether it may require re-bidding. However, your estimate may not have considered all the costs in a scope of services, in which case the bids should inform your future approach to conducting a cost reasonableness analysis.
- **Getting more than one bid is not enough to establish cost reasonableness**
- You are required to do a cost or price analysis in connection with every procurement action, even change orders
- Note that FEMA Benefit-Cost Analysis (BCA) is not the same as cost analysis

PRICE ANALYSIS VS. COST ANALYSIS

- **Price analysis** means that the grantee requests several bids, proposals, or quotes for the materials, supplies, or service being procured. The winning offeror is the firm that offers the most competitive price for the requested materials, supplies, and services. Price analysis is essentially price comparison. It is the evaluation of a proposed price (i.e. lump sum) without analyzing any of the separate cost elements that it is composed of.
- **Cost analysis** is the evaluation of the separate elements (e.g. labor, materials, etc.) that make up a contractor's total cost proposal or price (for both new contracts and modifications) to determine if they are allowable, directly related to the requirement and ultimately, reasonable. A Cost Analysis is verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits.

PRICE ANALYSIS VS. COST ANALYSIS (CONT.)

- A price analysis is performed by comparing two or more lump sum prices in a competitive procurement situation such as sealed bids
- A cost analysis is performed when there is inadequate price competition, including the following situations:
 - Competitive proposal method where costs proposals are required to show the separate elements of the proposed cost (e.g. labor, materials, overhead and profit)
 - Noncompetitive or sole source procurement
 - If you solicit competitive sealed bids and receive only one bid and it differs substantially from your independent estimate
 - Contract modifications (i.e. change orders) that affect the scope or work or price, whether the result is a price increase or decrease

PUBLIC NOTIFICATION

- For formal procurement methods including sealed bids, the bid opening must be publicly advertised
- Public notification is often done by placing an ad in a newspaper of general circulation and/or a legal publication – recommended method for documentation purposes
- Other methods of public notification may also be appropriate, such as posting on a state or local procurement website and on social media
- 2 CFR 200.321 and Section 281 of the National Affordable Housing Act require that outreach efforts be made to the maximum extent feasible to ensure the inclusion of Minority and Women’s Business Enterprises in contracting
- Save documentation of all public notification efforts to the project file, including affidavits of publication and tear sheets

CONTRACT AWARD PREFERENCES

- Some jurisdictions have preferences in place for awarding contracts, such as to M/W/DBE, Section 3 or veteran-owned businesses, or a subrecipient may choose to create such a preference
- Since the Section 3 final rule was issued there is no longer a numeric benchmark for contracting with Section 3 business concerns, but having a Section 3 award preference in place may count as a qualitative effort toward achieving safe harbor
- Note that federal regulations prohibit geographic preferences in most cases
- Preferences should be defined by written policy to ensure they are applied fairly and consistently.
 - Example: If a bid received from a qualified Section 3 business is within 10% of the lowest bid, the contract will be awarded to the Section 3 business.

CONFLICTS OF INTEREST

- **FR-6109-N-02** states that CDBG-MIT grantees must “establish a process for promptly identifying and addressing conflicts under the grantee’s conflict of interest policy”
- **FR-6218-N-01** states must “establish a process for promptly identifying and addressing conflicts under the grantee’s conflict of interest policy”
- **24 CFR 570.489(g)** states that a grantee’s policies and procedures shall also include standards of conduct governing employees engaged in the award or administration of contracts. This also applies to procurement of supplies, equipment, construction, and services by the State, units of local general governments, and subrecipients.
- **24 CFR 570.489(h)** applies to all cases not governed by paragraph (g) above, including but not limited to “the acquisition and disposition of real property and the provision of assistance with CDBG funds by the unit of general local government or its subrecipients, to individuals, businesses and other private entities.”
- The State of West Virginia has a standard Conflict of Interest form that subrecipients are required to complete

CONFLICT OF INTEREST PROVISIONS

What conflicts are prohibited?

24 CFR 570.489(h) applies to persons “who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this subpart or who are in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from the activity, or have an 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.

Who is covered?

“Any person who is an employee, agent, consultant, officer, or elected official or appointed official of the State, or of a unit of general local government, or of any designated public agencies, or subrecipients which are receiving CDBG funds.”

ACTUAL VS. PERCEIVED CONFLICT OF INTEREST

- **Actual conflicts of interest** can (and must) be disclosed and documented, and actions taken to resolve the conflict
- **Perceived conflicts of interest** may be more complicated to address but are just as important to manage as actual conflicts. Perceived conflicts should be discussed on a case-by-case basis with legal and Anti-Fraud, Waste and Abuse (AFWA) team
- A grantee or subrecipient's procurement policies and procedures should identify how both actual and perceived conflicts of interest should be handled
- Documentation-CDBG/CV evidentiary materials form. MIT conflict of interest form

PRICING MODELS

■ Firm Fixed Price

- The contractor is paid a fixed price for the work, either as a lump sum or unit price
- Common in construction projects
- Required with competitive sealed bids

■ Time and Materials

- Contractor bills for a fixed labor rate and material costs up to a specified not-to-exceed amount
- Common in professional services

Note: The “cost + percentage” , “percentage of construction costs” and “escalation clause” pricing methods may not be used.

BONDING ON CONSTRUCTION PROJECTS

- Required on projects over \$100K (or local requirement if more restrictive)
- **Bid Bond** – 5% of the bid price. Assures that the bidder will execute contract documents within the timeframe specified or subrecipient may move to the next lowest bidder and use bid bond to make up the difference. Should be either a bid bond guaranteed by a surety or a certified check.
- **Performance Bond** – Assures that the contractor will complete the project according to the requirements of the contract. Equal to 100% of the contract price. Must be issued by a reputable surety company.
- **Payment Bond** – Ensures payment of subcontractors and suppliers in connection with the project. Equal to 100% of the contract price. Must be issued by a reputable surety company. May be combined with performance bond as “Performance/Payment Bond.”
- If a contractor fails to comply with the terms of a bond, the subrecipient should work with their legal representative to make a claim against the bond.

EQUAL OPPORTUNITY ISSUES THAT AFFECT PROCUREMENT





TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

What it says: No person shall be excluded from participation, denied program benefits, or subject to discrimination based on race, color, and/or national origin under any program or activity receiving Federal financial assistance.

What it means for your procurement: You must allow persons belonging to protected classes the same opportunities to compete for your projects that others are afforded. You cannot discriminate against a vendor solely because they are a member of a protected class. Also, vendors cannot discriminate against sub-vendors on the basis of protected class.

SECTION 109 OF TITLE I OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

What it says: No person shall be excluded from participation (including employment), denied program benefits, or subject to discrimination on the basis of race, color, national origin, or sex under any program or activity funded in whole or in part under Title I of the Act.

What it means for your procurement: You must allow persons belonging to protected classes the same opportunities to compete for your projects that others are afforded. You cannot discriminate against a vendor solely because they are a member of a protected class. Also, vendors cannot discriminate against sub-vendors on the basis of protected class.

AGE DISCRIMINATION ACT OF 1975

What it says: No person shall be excluded from participation, denied program benefits, or subject to discrimination on the basis of age under any program or activity receiving Federal funding.

What it means for your procurement: You cannot discriminate against a vendor solely because of their age. Also, vendors cannot discriminate against sub-vendors on the basis of age.

SECTION 504 OF THE REHABILITATION ACT OF 1973

What it says: No otherwise qualified individual shall, solely by reason of his or her disability, be excluded from participation (including employment), denied program benefits, or subjected to discrimination under any program or activity receiving Federal funding assistance.

What it means for your procurement: You cannot discriminate against a vendor solely because of their disability status if they are otherwise qualified to perform on the contract. Also, vendors cannot discriminate against sub-vendors on the basis of disability if they are otherwise qualified to perform on the contract.

SECTION 3 OF THE HOUSING AND URBAN DEVELOPMENT ACT OF 1968, AS AMENDED

What it says: Requires the provision of opportunities for training and employment that arise through HUD-financed projects to lower-income residents of the project area, to the greatest extent feasible and consistent with Federal, State and local laws and regulations.

What it means for your procurement: You should include Section 3 forms and information in your requests for bids, proposals or qualifications and require bidders to submit information that enables you to track Section 3 compliance on your projects. You may also choose to enact a Section 3 procurement preference and/or take other affirmative actions to maximize Section 3 participation on your projects, which HUD may count as a qualitative effort toward Section 3 compliance.



EXECUTIVE ORDER 11246

What it says: This Executive Order applies to all Federally assisted construction contracts and subcontracts. It provides that no person shall be discriminated against on the basis of race.

What it means for your procurement: You cannot discriminate against a vendor solely because of their race. Also, vendors cannot discriminate against sub-vendors on the basis of race.

2 CFR 200.32 I

What it says: Grantees shall take affirmative steps to encourage contracting with small minority and female owned business enterprises when possible as sources of supplies, equipment, construction, and services.

What it means for your procurement: Your procurement must include all of the following:

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 Minority Business Development Agency of the Department of Commerce; and
6. Ensuring general contractors require their subcontractors to follow steps 1-5 above.

SECTION 508 OF THE REHABILITATION ACT OF 1973

What it says: Requires that all information and communication technology that is developed, procured or maintained by federal agencies must be accessible to persons with disabilities. HUD extended this responsibility to grantees and contractors via the document, “HUD Policy on Section 508 of the Rehabilitation Act and Accessible Technology.”

What it means for your procurement: You must develop and publish procurement documents in a manner that is accessible to individuals with disabilities. Examples include making sure the text is in a contrasting color and appears in the correct order so that screen readers and other assistive technology devices can correctly interpret the content. Guidelines for making communications and technology 508-compliant can be found at www.section508.gov.

METHODS FOR DETERMINING TYPE OF PROCUREMENT (WHAT) & SOLICITATION (HOW)





Remember always check SAMs
Always check cost reasonableness



MICRO PURCHASE METHOD FOR ALL OTHER PROCUREMENTS

When to Use: Under \$10K

No quotes or advertisements required

Purchasing is reviewed by combining all transactions from the same vendor

Required Documentation:

Itemized budget line items allocated into single transactions per vendor type

SMALL PURCHASE METHOD FOR ALL OTHER PROCUREMENTS

When to Use: \$10,000.01 to \$249,999.99K (or local requirement if more restrictive)

Price or rate quotations three or more

Copies of all written bids

Emailed bids ok

No advertisement

Lowest quotation accept

SMALL PURCHASE METHOD FOR ALL OTHER PROCUREMENTS

When to Use: \$10,000.01 to \$249,999.99K (local requirement if more restrictive)

Required Documentation:

- ❑ Purchase order or Contract
- ❑ Invoice
- ❑ 3+ Price/Quotations
- ❑ Written documentation that addresses the following:
 - When did the Subrecipient call?
 - What product/specifications did the Subrecipient inquire about?
 - What businesses/vendors did the Subrecipient call?
 - What was the answer received for each?
 - Summary of bids showing lowest bid accepted

COMPETITIVE SEALED BID SOLICITATION METHOD

When to Use: Construction/Demo Projects (or local requirement if more restrictive) where the following conditions exist:

- Specification or purchase description
- Two or more suppliers
- Lends itself to a firm fixed-price contract
- Successful bidder basis of price.
- Public bid opening
- Firm fixed-price contract is awarded to the lowest responsible and responsive bidder

COMPETITIVE SEALED BID SOLICITATION METHOD

When to Use: Construction/Demo Projects (or local requirement if more restrictive) where the following conditions exist

Required Documentation:

- ❑ Contract-firm fixed price
- ❑ Bids must be advertised in newspaper- providing bidders sufficient response time prior to the date set for opening the bids
- ❑ Copy of newspaper advertisement and affidavit
- ❑ Copies of bids received from an at least two of qualified sources
- ❑ Copy of bid opening minutes and sign in sheet
- ❑ Bids must be publicly open at the time and place stated in the ad
- ❑ Summary of bids

Competitive Procurement 250,000 and over for goods

Required Documentation:

- ❑ Contract-firm fixed price-for supplies you can accept purchase order
- ❑ Bids must be advertised in newspaper- providing bidders sufficient response time prior to the date set for opening the bids
- ❑ Copy of newspaper advertisement and affidavit
- ❑ Copies of bids received from an at least two of qualified sources
- ❑ Copy of bid opening minutes and sign in sheet
- ❑ Bids must be publicly open at the time and place stated in the ad
- ❑ Summary of bids



PROCURING DIFFERENT TYPES OF PROFESSIONAL SERVICES

- Construction Management
- System of Record
- Architectural and Engineering
- Environmental and Historic Preservation Services
- Legal and Accounting
- External Audit
- Surveyor

ARCHITECTURAL/ENGINEERING VS. OTHER PROFESSIONAL SERVICES

- A Request for Proposals (RFP) for architectural/engineering (A/E) services only asks for the offeror's expertise/experience
 - Price is negotiated after a decision has been made on who is the most qualified
- An RFP for other professional services asks that offerors submit both qualifications and pricing
 - Pricing is scored along with other factors, although it is not required be the determining factor under this method
- RFPs are most commonly used with professional services but may be used on any type of project, even construction
- A cost analysis is required for both A/E and other professional services to assure that costs are reasonable, allowable and allocable to the award

COMPETITIVE PROPOSAL METHOD FOR OTHER PROFESSIONAL SERVICES-not architect/engineer

When to Use: Over \$250K with Scope that is not clearly defined (or local requirement if more restrictive)

1. Grantee issues RFP-(request for proposals)
 - Per WV code 5G, must be published as a Class II legal advertisement but subrecipients may use additional notification methods as well-advertisement recommended for documentation purposes
 - Must include scoring criteria such as specialized experience or technical expertise, past record of performance, capacity to perform the work within time limitations, familiarity with the type of problems applicable to the project as well as price
2. Selection committee ranks proposals and selects the three most qualified proposals
 - Per WV code 5G, evaluation committee must consist of 3-5 individuals with subject matter expertise
3. Selection committee interviews the three most qualified firms, then ranks them and makes award decision
 - Cost reasonableness must be documented prior to executing contract

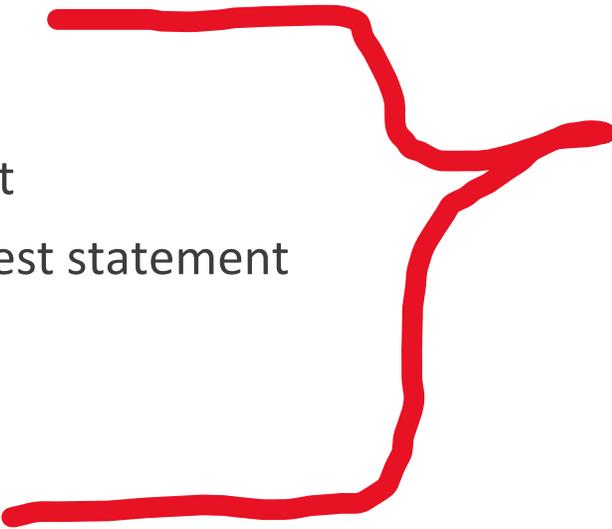
REQUEST FOR QUOTATION (RFQ) METHOD FOR OTHER PROFESSIONAL SERVICES-not arch/eng

When to Use: Over \$250K where the scope of work is specific and conformity to specifications and price are the only factors used in the evaluation process (or local requirement if more restrictive)

1. Publish Class II legal advertisement. Proposals must be received from two or more qualified sources to permit reasonable competition consistent with state and federal regulations.
 - The RFQ must identify all technical qualification requirements and that price is a factor in the selection process and identify selection method for determining responsible vendors.
2. Evaluate all quotations received using a formal process for technical evaluation of quotations.
3. Award to the firm or individual whose proposal meets the minimum qualifications at the **lowest price**.
4. Notify unsuccessful vendors promptly in writing and document notification in project file.

Competitive Procurement over 250,000 for Professional Services

Required Documentation:

- ❑ Contract-firm fixed price-for supplies you can accept purchase order
 - ❑ Bids must be advertised in newspaper- providing bidders sufficient response time prior to the date set for opening the bids
 - ❑ Copy of newspaper advertisement and affidavit
 - ❑ Copies of bids received from an at least two of qualified sources
 - ❑ Copy of bid opening minutes and sign in sheet
 - ❑ Bids must be publicly open at the time and place stated in the ad
 - ❑ Summary of bids
 - Selection committee name and title list
 - Selection committee bid review attendance sheet
 - Each committee member signed Conflict of Interest statement
 - Scoring criteria
 - Scoring sheets
 - Cost reasonableness documentation
- 
- RFP and RFQ

COMPETITIVE METHOD FOR ARCHITECTURAL/ENGINEERING

When to Use: Under \$250K (or local requirement if more restrictive) *WV Code 5G-1-4*

1. Subrecipient conducts (and documents) discussions with three or more professional firms qualified to perform on the contract
 - May publish a Class I legal advertisement (this means it only needs to be published one time)
 - If special circumstances exist and seeking competition is not practical, the subrecipient may obtain the State's prior approval to select a firm on the basis of previous satisfactory performance and knowledge of the agency's facilities and needs
2. After selection, the subrecipient offer or develop the scope of services required and negotiate a contract
 - Cost reasonableness must still be documented

COMPETITIVE PROPOSAL METHOD FOR ARCHITECTURAL/ENGINEERING

When to Use: Under \$250K (or local requirement if more restrictive) *WV Code 5G-1-4*

Required Documentation (before contract awarded):

- ❑ Tear sheet of advertisement
- ❑ Affidavit of advertisement
- ❑ Documentation of the discussions with three or more firms include date held and signature of official who conducted the meeting
- ❑ Scope of service
- ❑ Cost reasonableness form
- ❑ Draft of proposed contract

COMPETITIVE PROPOSAL METHOD FOR ARCHITECTURAL/ENGINEERING

When to Use: Over \$250K (or local requirement if more restrictive) *WV Code 5G-1-3*

1. Grantee issues solicitation (price may not be included as an evaluation factor)
 - Per WV code 5G, must be published as a Class II legal advertisement but subrecipients may use additional notification methods as well
 - Must include scoring criteria such as specialized experience/technical expertise, past performance, capacity to perform the work within time limitations, familiarity with the type of problems applicable to the project
 - WV Code Chapter 5G prohibits the use of price as evaluation criteria. Instead, the price is to be negotiated after the selection of the architect/engineer
2. Selection committee ranks proposals and selects the three most qualified proposals
 - Per WV code 5G, evaluation committee must consist of 3-5 individuals with subject matter expertise
3. Selection committee interviews the three most qualified firms, then ranks them and begins price negotiations with the most qualified offeror
 - Cost reasonableness must be documented prior to executing contract

COMPETITIVE PROPOSAL METHOD FOR ARCHITECTURAL/ENGINEERING

When to Use: Over \$250K (or local requirement if more restrictive) *WV Code 5G-1-4*

Required Documentation (before contract awarded):

- ❑ Tear sheet of advertisement
- ❑ Affidavit of advertisement
- ❑ Documentation of the discussions with three or more firms include date held and signature of official who conducted the meeting
- ❑ Scope of service
- ❑ Cost reasonableness form
- ❑ Draft of proposed contract

REQUIRED PROCUREMENT DOCUMENTATION SUBMITTED TO WVCAD PRIOR TO AWARDING BID

- Affidavit
- Tear sheet
- Selection committee name and title list
- Selection committee bid review attendance sheet
- Each committee member signed Conflict of Interest statement
- Scoring criteria
- Scoring sheets
- Cost reasonableness documentation

NOTE: Does not include the other documents required in the Bid Document review checklist



DESIGN-BUILD METHOD FOR CONSTRUCTION

- A Design-Build contract is a contract between a subrecipient and a design-build firm to furnish the architectural, engineering and related services as required for a given public project and to furnish the labor, materials and other construction services for the same public project.
- Not permitted

NONCOMPETITIVE PROPOSAL (SOLE SOURCE) SOLICITATION METHOD

When to Use: Projects of any dollar threshold where one of the following circumstances exists:

- 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.
- Competition was determined to be inadequate after receiving proposals from numerous sources.
- Cost reasonableness must still be documented
- A pre-existing contract with a vendor is not sufficient reason to use sole source procurement
- Re-using a vendor by letting them “piggyback” on their existing contract is not permitted because it discourages fair and open competition
- If One bid received first advertisement for bid-THEN MUST REBID. If one received second⁵⁰ time –Document and award

SPECIAL CONSIDERATIONS FOR PROFESSIONAL SERVICES



NEGOTIATING A FAIR CONTRACT COST & PRICE

- Must follow 2 CFR 200.324 and 2 CFR 200, Subpart E
- For each contract in which there is no price competition (such as A/E) and in all cases where a cost analysis is performed, profit must be negotiated separately, considering the following factors:
 - Complexity of work
 - Contractor risk and investment
 - Amount of subcontracting
 - Contractor's past performance
 - Industry profit rates in the surrounding geographical area for similar work



APPLICABLE COST PRINCIPLES FROM SUBPART E

- Necessary and reasonable to carry out the Federal award
- Allocable to Federal awards under the rules of 2 CFR 200, Subpart E
- Authorized (or not prohibited) under state or local laws or rules
- Conforms to other limitation or exclusions in Federal law or rules or other governing regulation
- Consistent with policies and rules applicable to Federal awards and other activities of state or local governments

APPLICABLE COST PRINCIPLES FROM SUBPART E (CONT.)

- Treated consistently
- Determined in accordance with generally accepted accounting principles
- Not used to meet cost sharing or matching requirements of any Federal award
- Net of applicable credits (for example, the agency must take advantage of discounts, rebates, refunds, recoveries and adjustments)
- Adequately documented

IMPLEMENTING PROCUREMENT SUCCESSFULLY



STEP 1: CONTACT YOUR PROCUREMENT & LEGAL DEPARTMENTS

Engaging your procurement and legal representatives before you begin the process is important for several reasons:

- They can advise you on any specific procurement requirements for your jurisdiction and provide form templates or required language that you must include in the request for bid or proposal
- They may have experience or expertise navigating federal procurement requirements as well as state and local ones
- If their review and approval is required, advising them of your timeframe may help them plan their work to minimize delays to your project

STEP 2: DEVELOP BID SPECIFICATIONS OR SCOPE OF SERVICES

- If prepared by architect or engineer, must include a seal indicating they are a WV registered design professional
- Proper development of the bid specifications or scope of services is important because it becomes the basis of the agreement or contract
- Scope should be as detailed as possible to ensure that all bids are based on the same work (so you are comparing “apples to apples”)
- For construction projects, include drawings, maps, photos, start and end points, type of materials to be used and any other information that could affect the price or require the bidder to make assumptions

STEP 2: DEVELOP BID SPECIFICATIONS OR SCOPE OF SERVICES (CONT.)

- Ask for itemized prices or a base bid + alternates to minimize the need for change orders
- Upon completion of the working drawings, a certified architect or engineer must execute a certification to the effect that the project design is in conformance with the minimum standards contained in the American Standard Specifications for Making Buildings and Facilities Accessible to, and Usable By, the Physically Handicapped, Number A-117.1R-1971, as modified by 41 CFR 101-19.603. Such certifications also must be co-signed by the chief elected official of the subrecipient.
- REMINDER: If applicable, **make sure the environmental release of funds has been obtained before executing the contract.**

STEP 3: DEVELOP AN INDEPENDENT ESTIMATE

- You may be able to do this in-house with assistance as needed from other departments (such as public works), or you may have an outside firm give you an estimate
 - IMPORTANT: If an outside firm gives you an estimate, they must be prohibited from submitting a bid or proposal for the work, as this would be a conflict of interest
- Estimates may be developed by comparing data such as:
 - Actual costs of past projects with a similar scope (adjusted for inflation as necessary)
 - Cost estimates submitted by offerors on other similar projects
 - Competitive price lists, published catalog or market prices of commodities and products, similar indices and discount or rebate arrangements
- Planning to use the bids to establish the estimate is unacceptable because the estimate must be developed prior to soliciting bids



STEP 4: DETERMINE THE APPROPRIATE PROCUREMENT METHOD

See slides above for thresholds

STEP 5A: ASSEMBLE THE REQUEST FOR BIDS OR PROPOSALS – BASIC DOCUMENTS

- Request or Invitation
 - Submission deadline and requirements, info about pre-bid or pre-proposal meeting (if having one), federal funds disclaimer, EEO language, reservation of right to select more than one firm or no firms, bid bond instructions, other basic information
- Bid specifications or scope of work
- Pricing or bid form
- Scoring/evaluation criteria
 - Competitive Proposals: Qualitative factors and their relative weight
 - Sealed Bids: Contract awarded to lowest responsible and responsive bidder
- Sample contract or contract terms (ask your procurement or legal representative)

STEP 5B: ASSEMBLE THE REQUEST FOR BIDS OR PROPOSALS – DAVIS BACON & SECTION 3 FORMS

In addition to the documents on the previous slide, include the following for –

- **Davis-Bacon (if public construction where total cost is >\$2K):**

- Current state (if applicable) and federal wage determinations
- Federal labor standards (HUD-4010)

- **Section 3 (if new construction, rehab or demolition project receiving >\$200K in HUD funds)**

- Section 3 assessment and certifications
- Subcontractor and employee info forms
- Sample Section 3 contract clause
- Sample forms to document Section 3 qualitative efforts and report hours for Section 3 and targeted Section 3 workers

STEP 5C: ASSEMBLE THE REQUEST FOR BIDS OR PROPOSALS – ADDITIONAL FORMS

Contact WVCAD to obtain the following forms:

- Contract Document Checklist
- Special Equal Opportunity Provisions
- Clean Air and Water Acts
- Special Conditions Pertaining to Hazards, Safety Concerns, and Accident Prevention
- Architect's Certification
- Bonding and Insurance Requirements
- Access to and Maintenance of Records
- Certification of Owner's Attorney

STEP 6: SOLICITATION PACKAGE REVIEW AND APPROVAL

- The entire solicitation package must be reviewed by the subrecipient's legal counsel and project administrative staff to ensure compliance with applicable federal, state and local provisions.
- For construction: Submit **Notice of Intent to Bid** form, **Bid Document Checklist** and bid solicitation package to WVCAD prior to advertisement
 - Notice of Intent to Bid and Bid Document Checklist should be obtained from WVCAD
<https://wvcad.org/resources/cdbg-manual>
- Upon review and approval of these documents, WVCAD will issue an **Authorization to Bid Letter** in order to bid and an **Authorization to Proceed with Contract** after procurement documentation has been submitted
- <https://wvcad.org/resources/cdbg-manual>

STEP 7: NOTIFY POTENTIAL VENDORS

- Follow formal or informal notification requirements depending on method of procurement
- Formal procurement requires a Class II legal advertisement to be published once a week for two successive weeks. Bid advertisements must be published not less than one week apart in a local newspaper of general circulation. Also, the bid date must be at least 14 days after the first publication date.
- Even if using informal notification, should still make outreach efforts to M/W/DBE and Section 3 firms
- Outreach/notification efforts should be as broad as possible to ensure adequate competition and save the trouble of having to do a cost analysis due to inadequate competition
- Document all outreach and notification efforts, even if using informal procurement method

STEP 8A: HOLD PRE-BID OR PRE-PROPOSAL MEETING

- Required for subrecipients per WVCAD
- For construction projects, this meeting is an opportunity to review requirements pertaining to Davis-Bacon, Section 3 and Equal Opportunity and allow attendees to ask questions about the solicitation
- The solicitation invitation should include the date, time and location of the meeting and specify whether meeting attendance is optional or mandatory
- If offerors will be allowed to submit questions about the solicitation after the meeting, include the deadline for submitting questions
- All questions received and responses to questions must be published as an addendum to the solicitation

STEP 8B: ADDENDA TO THE SOLICITATION

- If it is necessary to amend bid documents during the advertisement period, addenda must be sent to all bidders who have received bid documents
- Addenda may be used to issue corrections or modifications to the solicitation, update wage determinations and/or respond to offeror questions
- No addenda may be issued within five days of bid opening. If an addendum is necessary within the five-day period, the bid opening date must be extended the appropriate time to allow all vendors sufficient time to amend their bids

STEP 9: EVALUATE BID OR PROPOSAL SUBMISSIONS

- **Sealed Bid Method Only:** Hold public bid opening in accordance with State or local law
- Review bids or proposals to verify that all required documents have been submitted
- Tabulate bids or evaluate proposals according to established rubric
- **A/E RFPs Only:** Schedule interviews with top 3, make decision and negotiate price
- Check references and federal and state debarment status of the selected bidder or proposer
- Document cost reasonableness
- Send Notice of Intent to Award and copies of all required documents to State for approval prior to contacting any bidders or proposers

STEP 10: AWARD THE CONTRACT

- Upon approval from WVCAD, notify the winning offeror
- Work with legal to draft contract and obtain approval from subrecipient's governing body in the form of an ordinance or resolution
- Obtain copies of performance bonds, insurance and any other documents you require as a condition of award
 - If performance/payment or other bond is required, recommend including contract clause that contractor will secure bond within a certain number of days of contract execution or contract may be terminated
- If Davis-Bacon applies: Update wage determinations if more than 90 days between bid opening and contract award dates
- Notify unsuccessful vendors promptly in writing and return their bid bonds (if applicable)

REQUIRED CONTRACT INFORMATION

- Effective date of contract
- Names and addresses of subrecipient and contractor, as well as contact info for subrecipient and contractor representatives who will administer the contract
- Citation of authority of the subrecipient under which the contract is entered into and source of funds
- Conditions and terms under which the contract may be terminated by either party and remedies for violation/breach of contract
- Detailed description of 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 by both parties, i.e., maps, reports, printing
- Provisions for compensation for services including fee and/or payment schedules and specification of maximum amount payable under contract
- All contracts must be written as lump sum not-to-exceed contracts
- <https://wvcad.org/resources/cdbg-manual>

PROCUREMENT CHALLENGE: NOT ENOUGH BIDS

- **Why it's an issue:** Receiving no qualified responses to a solicitation is an obstacle to completing your project, but even receiving only one bid is not enough to assure cost reasonableness.
- **What to do:** Perform a cost analysis by comparing the cost components of the bid to your independent estimate, costs or estimates on past or current similar projects, or verbal estimates from other industry professionals. Document your determination and proceed if costs are reasonable. If unreasonable, you may ask the bidder for a Best and Final Offer (BAFO) or re-bid the project.
- **What not to do:** Do not award without performing a cost analysis and do not just “piggyback” on an existing contract.
- **How to avoid it next time:** Solicit to a wider network of vendors, consider consolidating project scopes to make the solicitation larger and more appealing to vendors

PROCUREMENT CHALLENGE: “PIGGYBACKING”

- **Why it’s an issue:** While it can save time and effort, “piggybacking” on an existing contract may result in a finding because it does not promote fair and open competition.
- **What to do:** Before relying on an existing contract, you will need to review the contract with your legal representative to see if the scope and terms are broad enough to include your project. You will also need to determine if the original contract was procured correctly under applicable federal, state and local requirements. Initiate a new procurement if needed.
- **What not to do:** Do not use the sole-source method of procurement to justify piggybacking on an existing contract.
- **How to avoid it next time:** You may speak to your procurement representative about whether to include a provision in the contract permitting a certain number of extensions, but at some point you will need to re-procure.

PROCUREMENT CHALLENGE: CHANGE ORDERS

- **Why it's an issue:** Too many contract modifications (change orders) can increase the risk of findings if cost reasonableness is not properly documented and create a concern about contractor fraud, waste and abuse.
- **What to do:** Perform a cost analysis on every change order, whether it increases or decreases the total price. Confirm that each change order is necessary due to circumstances beyond the contractor's control—if the change order is the result of a change that should have been accounted for in the original bid, speak to your legal representative about whether to approve it.
- **What not to do:** Do not approve change orders without performing due diligence, including a cost analysis if the change involves a budget increase or decrease.
- **How to avoid it next time:** Ask for both lump sum and unit prices or utilize base bid + alternatives. Be very explicit in the RFB or RFP about what costs should be included in the bid or proposal and the circumstances under which change orders will be approved.

ADDITIONAL GUIDANCE FOR CONSTRUCTION CHANGE ORDERS

- **Under \$10K:** Subrecipients may approve field expedient change orders but must ensure the following:
 - Change is within the approved project scope and eligible under CDBG regulations
 - Change necessary for the successful completion of the project
 - Sufficient funds are on hand to cover the change without jeopardizing the completion of the project
 - Cost analysis is performed and documented
- **Over \$10K:**
 - Must be prepared by architect/engineer and presented to subrecipient and State for approval with necessary supporting documentation including estimates, specifications and plans
 - Change order request must be signed by the engineer, subrecipient and contractor.
 - No action can be taken without the approval of WVCAD—any work started prior to approval cannot be reimbursed with CDBG funds
 - Cost analysis must be performed and documented



OPTIMIZING YOUR PROCUREMENT PROCESSES

- Construction projects does not automatically mean sealed bid method
- What Qualifies a Service as Being Tied to Construction?
- Construction and Unit Pricing
- Unit-Based Pricing for Change Orders
- Developer-Builder vs. General Contractor
- Bidding before having site control or plans and specifications

DOCUMENTING YOUR PROCUREMENT





PREPARING THE CONTRACT FILE

- Solicitation Packet
- Authorization to Bid letter from WVCAD
- Method of procurement and rationale for using that method
- Documentation of pre-bid or pre-proposal meeting, all questions received, responses and addenda (if applicable)
- Copies of all returned bids or proposals
- Documentation of public bid opening (if applicable) such as sign-in sheet, minutes and bid tabulation

PREPARING THE CONTRACT FILE (CONT.)

- Scoring or threshold criteria (depending on the method) and actual scoring sheets
- Documentation of cost reasonableness for ALL procurement actions, regardless of method
- Documentation of federal and state non-debarment and reference contacts for winning vendor
- Notice of Intent to Award (or comparable form)
- All notes and correspondence pertaining to the procurement and subsequent change orders
- Executed contract and any subsequent modifications
- Payment requests and supporting documentation

ADDITIONAL RESOURCES

- FR-6109-N-02: <https://www.govinfo.gov/content/pkg/FR-2019-08-30/pdf/2019-18607.pdf>
- 24 CFR 570.489: <https://www.govinfo.gov/app/details/CFR-2012-title24-vol3/CFR-2012-title24-vol3-sec570-489>
- 2 CFR 200: <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200?toc=I>
- Buying Right CDBG-DR and Procurement: A Guide to Recovery: <https://www.hudexchange.info/resource/5614/buying-right-cdbg-dr-and-procurement-a-guide-to-recovery/>
- State of West Virginia Purchasing Handbook: <http://www.state.wv.us/admin/purchase/Handbook/default.html>
- HUD Quick Guide to Cost and Price Analysis: https://www.hud.gov/program_offices/cpo/grantees/cstprice#whatIsPrice
- Title II of the National Affordable Housing Act: https://www.hud.gov/sites/documents/19576_HOMELAWS.PDF
- Section 508 info: [https://www.hud.gov/program_offices/cio/Section 508 At HUD and www.section508.gov](https://www.hud.gov/program_offices/cio/Section_508_At_HUD_and_www.section508.gov)
- Debarment check: www.sam.gov and <https://www.state.wv.us/admin/purchase/debar.html>

QUESTIONS?

