

# CHAPTER 8 – PROCUREMENT

## Chapter Outline

Introduction

Grantee Responsibilities

Appropriate Procurement Procedures

Labor Standards

24 CFR Part 85 Chapter 36 (Units of Local Government)

General Provisions

Summary of Federal Requirements

Bonding and Insurance

Use of Local, Small, Minority and/or Women-Owned Businesses

Procurement Methods

Designating Grant Administration to Another Governmental Entity

24 CFR 84.44 (Non-profits)

24 CFR 84.21(CHDOs Undertaking CHDO Set-Aside Projects)

## Introduction

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

## Grantee Responsibilities

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

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

## Appropriate Procurement Procedures

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

Units of Local Government: 24 CFR 85.36 (Procurement)

Non-profits (including CHDOs doing non-CHDO set-aside projects): 24 CFR 84.44 (Procurement Standards)

CHDOs doing CHDO set-aside projects: 24 CFR 84.21 (Financial Management Standards)

*Note: The Department recommends that CHDOs adhere to the procurement standards described in 24 CFR 84.44 to enable the organization to be eligible for non-CHDO set-aside projects.*

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

## **Labor Standards**

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

## **24 CFR Part 85 Chapter 36 (Units of Local Government)**

24 CFR Part 85 Chapter 36 sets forth the standards that are applicable to procurement for Federal grants and cooperative agreements and subawards 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.

It is recommended that non-profits also review this information as guidance for establishing procurement procedures.

## **General Provisions**

The standards and procedures for procurement are intended to ensure that supplies, equipment, construction, and other services are both:

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

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

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

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

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

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

## **Summary of Federal Requirements**

### Records and Files

According to 24 CFR 85.36(b)(9), the grantee must maintain records to detail the significant history of a procurement. The grantee must maintain files on the rationale for selecting the methods of procurement used, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract.

### Pre-Qualified Lists of Vendors/Contractors

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 (24 CFR 85.36(c)(4)).

### 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.

### 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, "Debarment and Suspension" (24 CFR 85.35).

### Written Procedures for Contractor Selection

The grantee must have written selection procedures for procurement transactions to ensure that:

- The purchase of unnecessary or duplicate items is avoided. Where appropriate, an analysis should be made of lease vs. purchase alternatives (24 CFR 85.36(b)(4));
- 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 (24 CFR 85.36(b)(5) and (6)).
- All purchase orders (and contracts) are signed by the grantee's authorized official(s);
- Items delivered and paid for are consistent with the purchase order and/or contract for the goods or services.
- Timely payment to vendors occurs once the order is delivered, inspected, accepted, and payment authorized.
- A cost or price analysis is performed for every procurement action, including contract modifications, and documentation to that effect is maintained in the grantee's files. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the grantee must make independent estimates before receiving bids or proposals (24 CFR 85.36(f)).
- Profit or fee is negotiated separately from price where competition is lacking or a cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of past performance, and industry rates for the area (24 CFR 85.36(f)(2)).

### Contract Pricing

The grantee must not use “cost plus a percentage of cost” pricing for contracts (24 CFR 85.36(f)(4)); 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 (24 CFR 85.36(b)(10)).

### Protest Procedures

The grantee must have protest procedures in place to handle and resolve disputes relating to procurement (24 CFR 85.36(b)(12)).

### Documenting Contractor Performance

The grantee must have a documented system of contract administration for determining the adequacy of contractor performance (24 CFR 85.36(b)(2)).

### 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 (24 CFR 85.36(b)(3)).

## **Bonding and Insurance**

For construction or facility improvement contracts or subcontracts exceeding \$100,000, the grantee must ensure that its procurement meets the minimum federal requirements (24 CFR 85.36(h)) 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**

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 (24 CFR 85.36(e)).

For example, the grantee should:

1. Place such businesses in solicitation lists whenever they are potential sources.
2. Ensure that such businesses are solicited when identified as potential sources.
3. Divide procurement requirements, when economically feasible, to permit maximum participation of such businesses.
4. Establish delivery schedules, where the requirement permits, which encourages participation by such businesses.

5. Use the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce.
6. Require prime contractors, when subcontracts are let, to take affirmative steps to select such firms.

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

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

## **Procurement Methods**

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

### Small Purchase [24 CFR 85.36 (d)(1)]

The Department considers procurement by small purchase procedures best suited to obtaining small quantities of supplies. 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 \$100,000 or less in the aggregate, per 24 CFR 85.36(d)(1). A procurement of more than \$100,000 may not be inappropriately broken up into smaller components solely to qualify for the small purchase approach.

Competition is sought through oral or written price 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.

#### Competitive Sealed Bid [24 CFR 85.36 (d)(2)]

The Department considers this method of procurement best suited to obtaining contractors for construction projects and for large quantities of goods or materials (See Chapter 10 – Construction and Labor Standards for more on construction contracting). 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.

- a.. 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.
- b. 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.
- c. Bids must be opened publicly at the time and place stated in the invitation for bids.
- d. The grantee must receive at least two or more responsible bids for each procurement transaction.
- e. 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.

#### Competitive Proposals [24 CFR 85.36(d)(3)]

The Department considers this procurement method best suited to obtaining professional services. This is normally conducted with more than one source submitting an offer, and either a fixed-price or not-to-exceed type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. This method has two sub-parts—the Request for Proposal and the Request for Qualifications.

##### Request for Proposals:

1. The Request for Proposals (RFP) must clearly and accurately state the technical requirements for the goods and services required.
2. The grantee must publicize the RFP, and to the maximum extent practicable, honor reasonable requests by parties to have an opportunity to compete.
3. Proposals must be solicited from an adequate number of qualified sources, consistent with the nature and requirements of the procurement.
4. The grantee must conduct a technical evaluation of the submitted proposals to identify the responsible offerors

5. As necessary, the grantee must conduct negotiations with those offerors who are deemed responsive and responsible and fall within a competitive price range, based on the grantee's evaluation of the bidders' pricing and technical proposals. After negotiations, these bidders may be given the opportunity to submit a "best and final" offer.
6. The grantee must award the contract to the most responsive and responsible offeror after price and other factors are considered through scoring the proposals or "best and final" offers according to predetermined evaluation criteria. The successful proposal/offeror must clearly be the most advantageous source of the goods and services.

#### Request for Qualifications

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

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

The grantee must take care to document the basis for its determination of the most qualified competitor and the reasonableness of the contract price. This qualifications-based approach to the competitive proposals method may not be used to purchase other than architectural and engineering services (24 CFR 85.36(d)(3)(v)).

For applicants' information, 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:

- Qualifications-based procurement can be used only for A/E services.
- A Request for Qualifications may be issued.
- The competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.
- An RFQ cannot be used to purchase other types of services, even though A/E firms are

potential sources to perform other types of services.

In addition, the federal procurement regulations generally discourage the use of local geographical preferences in the evaluation of bids or proposals except where mandated by federal statutes, due to the restrictions on open competition, which result. However, in procuring architectural and engineering services, geographic location is permitted as a selection criteria provided this criterion leaves an appropriate number of qualified firms (24 CFR 85.36(c)(2)).

#### Non-Competitive Proposals/Sole Source [24 CFR Part 85.36 (d)(4)]

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 due to one of the following:

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

### **Designating Grant Administration to Another Governmental Entity**

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

The Department looks to Nebraska state law to determine what types of other governmental entities are considered extensions of the grantee such that those other governmental entities will be allowed to be designated by a grantee to do grant administration without a procurement process.

Development regions, and subsequently formed development districts based on those regions, are recognized and statutorily authorized in Sections 13-1901 to 13-1907, Nebraska Revised Statutes (Reissue 1997). Development districts formed pursuant to, and meeting the requirements of, those development district statutes are considered to be an extension of the grantee (assuming the grantee is a member of the development district), and grant administration may be delegated to such districts without a procurement process.

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

If such an interlocal agreement were entered into by a grantee and other governmental entities (whether one or more), and such agreement addressed the issue of CDBG grant administration, and authorized one of the agreeing governmental entities to do such grant administration work on behalf of other agreeing governmental entities, this arrangement would be recognized by the Department as not requiring a procurement process.

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

#### **24 CFR 84.44 (Non-profits)**

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a)(1), (a)(2) and (a)(3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity; compliance with public policy, including, where applicable, Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u); record of past performance; financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by implementation of E.O.s 12549 and 12689, "Debarment and Suspension," at 24 CFR part 24.

(e) Recipients shall, on request, make available for the Federal awarding agency, pre-award review and procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in HUD's implementation of Circular [A-110](#).

(2) The procurement is expected to exceed \$100,000 or the small purchase threshold fixed at 41 U.S.C. 403 (11), whichever is greater, and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

## **24 CFR 84.21(CHDOs Undertaking CHDO Set-Aside Projects)**

(a) HUD shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following:

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in Sec. 84.52. If a recipient maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101-453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, "Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, HUD, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) HUD may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ``Surety Companies Doing Business with the United States."''