

CHAPTER 8

PROCUREMENT AND CONTRACTING

Introduction

Grantees using “contractors” for CDBG activities and projects must follow the procurement procedures outlined within this Chapter. This is for both property and services. Grantees often have their own local requirements for procurement and contracting; however, the use of Federal funding requires compliance with Federal regulations at a minimum. Procurement requirements for the State CDBG Program are a combination of [24 CFR Part 85.36](#) (the Common Rule) and [24 CFR 570.489\(g\)](#), which requires the State to develop any additional rules beyond Part 85.36. These two citations are considered the minimum standards. However, this Chapter adds additional requirements and limitations to the Federal standards in 85.36 and 570.489(g).

Grantees must follow the process outlined in this chapter when establishing contractual agreements with other entities when CDBG funds are being used. Such entities include professional service firms, construction contractors, providers of goods and services, and others. The contract can be with a for-profit business or a nonprofit agency, individuals or organizations.

“CDBG funds”
*include awarded funds
and all forms of
Program Income:
Waivers; Supplemental
Activities; and
Revolving Loan Funds
(RLF).*

CDBG is a unique program in that it can do many things; however, this variety of activities requires knowledge of the multiple ways to procure goods and services; and requires the grantee to understand the best process for what may need to be procured. For example, CDBG allows for the purchase of fire equipment (fire truck). However, unlike the purchase of other equipment (lap tops, even vehicles for a public service) which would use the small purchase method to procure equipment under \$150,000, the procurement of a fire truck would be better procured under the sealed bids process based on the fact that each fire truck is uniquely built and assembled pursuant to the particular needs of the community, and therefore includes a list of distinct specifications. Knowing all the options described in this chapter allows the grantee to consider the “best” option and plan their procuring process in an effective and compliant manner.

This chapter does not include requirements under subrecipients. However, subrecipients must be held to the same requirements and follow the same procedures as the grantees as defined in this chapter.

Section 1 – General Procurement Policies

The primary purpose of the procurement procedures within this chapter is to ensure an ***open, fair and competitive*** process is achieved when using outside (non-grantee

employees) contractors to implement and complete a grantee's CDBG activities and projects. The procurement process should lead to the hiring of the most cost effective, well-qualified entity that will proficiently complete the scope of work described in the contract.

Grantees are responsible for ensuring that CDBG funds are used in accordance with all program requirements. The use of contractors does not relieve the grantee of this responsibility. The grantee is also responsible for monitoring the performance of procured contractors and taking the appropriate action when performance problems arise.

When local and federal procurement and contracting requirements differ, the grantee must comply with the more stringent rule provided it adheres to applicable federal law and standards. Under 24 CFR 85.36, there are four procurement methods that allow a grantee to contract with outside entities. See Section 3 for details on each of these methods. Grantees are restricted to these options and must discuss any modifications to a method with CDBG prior to procurement. Also, the grantee must maintain a complete procurement file showing all steps taken and the documents that evidence the process method.

The procurement process is a set of actions that are completed by the grantee, with documentation at each stage that shows a process that was **open, fair and competitive** in the selection of a contractor. The Department reserves the right to review a grantee's procurement file anywhere along the process, from a review of the solicitation document (RFP/RFQ) to a review of the full process before allowing the activity to move forward, to a site review as part of the monitoring process. Depending on the results of the review and when the review is completed, the Department reserves the right to require the grantee to redo any and all actions during the process. This determination could lead to CDBG being unable to reimburse the grantee for costs associated with the contract if not procured correctly.

**Four types of
Procurement Methods:**

- ✓ *small purchase;*
- ✓ *competitive sealed bid;*
- ✓ *competitive request for proposals/
qualifications; and*
- ✓ *non-competitive
method.*

General Procedural Requirements

At a minimum, a grantee's procurement procedures must follow the applicable Common Rule ([24 CFR Part 85.36](#)) methods which incorporate the following procedures:

- ◆ Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. This description must not, in the case of competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, set forth minimum essential characteristics and standards to which it must conform to be satisfactory.

- ◆ When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or approved equal” description may be used as a means to define the performance or other important requirements of a procurement action. The specific features of the named brand that must be met by bidders must be clearly stated. Approval by the Department to use a specific brand must be obtained prior to bidding.
- ◆ Clearly set forth all requirements that bidders must fulfill and all other factors to be used in evaluating bids, proposals or qualifications.
- ◆ Grantees may not use geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference (for example, when hiring Section 3 businesses). When contracting for architectural and engineering services, geographic location may be a selection criteria provided there are an adequate number of qualified firms, given the nature and size of the project, to compete for the contract. Sole Source approval will not be given if geographical preference is an evaluation criterion.
- ◆ Awards shall be made only to responsive and responsible contractors who possess the ability or have access to resources to perform successfully under the terms and conditions of a proposed procurement. Consideration must be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
- ◆ Proposed procurement actions must be reviewed by grantee officials to avoid purchasing unnecessary or duplicative items.
- ◆ **The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used and this requirement shall supersede any conflicting provision in an executed contract funded in whole or in part with CDBG funds.**
- ◆ Contracts (Memorandum of Understanding (MOU)) with other public agencies will be considered, if not procured, the same as a subrecipient agreement, and must only allow actual costs to be paid by grantees.

Grantees must maintain sufficient records that detail the required steps of procurement and compliance with all parts of the procurement process.

- ◆ These records must include, but are not limited to:
 - ✓ Information pertinent to the rationale for the method of procurement;
 - ✓ Selection of contract type;
 - ✓ Written RFP, RFQ, Sealed Bid, or Request for Quote (Small Purchase);

- ✓ Evidence of the solicitation process;
- ✓ Submitted responses (bids);
- ✓ Contractor selection or rejection (including actual scoring documentation);
- ✓ The basis for the cost or price (cost analysis); and
- ✓ The contract.

Grantees must maintain a contract administration system that ensures contractors perform in accordance with the terms, conditions and specifications of their contract. Evidence of monitoring should be included in each procurement file.

Section 2 – Written Procurement and Selection Procedures

All grantees must have written procurement and selection procedures they abide by that are equivalent or comparable to those required by the Common Rule as explained in this Chapter. These policies and procedures must be included in the grantee's Public Information Binder along with executed procurement contracts and the processes used for each. Additionally, procurement procedures must include protest procedures, reflect applicable local standards and meet all standards outlined below.

Standards of Conduct

Grantees must maintain a *written* code or standards of conduct that govern the performance of its officers, employees, and contracted agents when expending CDBG funds.

[CFR 570.489 \(h\)\(2\)](#) discusses the topic of Conflict of Interest in detail. Grantees must be cautious when using existing contracted employees when incurring CDBG-related costs. Once an award is received, a previously contracted employee may perform general administrative tasks and be paid with CDBG General Administrative funds. However, if professional services are required for the implementation of a specific CDBG activity, the federal procurement process involving a formal Request for Proposal (RFP) or Request for Qualifications (RFQ) must be followed and the existing "contracted employee" would not be eligible to submit a proposal for the project. See page 16 for more details on this topic.

Full and Open Competition

All procurement transactions entered into by grantees, regardless of whether negotiated or advertised and without regard to dollar value, shall be conducted in a manner that provides full and open competition. The grantee must be alert to organizational conflicts of interest or non-competitive practices that may restrict or eliminate competition or otherwise restrain trade.

Examples of what is considered to be restrictive of competition include, but are not limited to:

- ◆ Placing unreasonable requirements on firms in order for them to qualify to do business. For example, require an administrative sub-contractor (the firm that will manage the CDBG contract for the grantee) to be able to manage many different CDBG activities leaving just one or two firms with that level of capacity.
- ◆ Non-competitive practices between firms. For example, one firm agrees to not bid for a contract with the understanding that the other will not bid for another contract.
- ◆ Organizational conflicts of interest. For example, the grantee's employee, responsible for procuring contractors "hires" a family member.
- ◆ Unnecessary experience and bonding requirements. For example, requiring excess bonding so that only one firm may be able to meet that requirement.
- ◆ Quid Pro Quo. For example, a pre-agreed "handshake" in which the firm agrees to write the grantee's CDBG Application for Funding for "free" with the understanding the firm will get the contract to administer the awarded CDBG contract.

Small, Minority and Woman-Owned Business Involvement (MBE/WBE)

HUD and the Department encourage and support the involvement of small, minority and woman-owned (MBE/WBE) business firms in CDBG projects. Each grantee must include in their procurement process the steps they will take to encourage qualified small, minority and woman-owned businesses to submit bids/proposals/quotes or qualifications. Accordingly, affirmative steps should be taken to assure that small, minority and woman-owned businesses have the opportunity to provide goods, equipment, construction or services. **Affirmative** steps include, minimally, the following:

- ◆ Maintain a list of qualified small, minority and woman-owned businesses.
- ◆ Assure that qualified small, minority and woman-owned businesses are included on solicitation lists.
- ◆ Assure that small, minority and woman-owned businesses are solicited whenever they are potential sources.
- ◆ Where the requirement permits, establish schedules for deliverables that will not discourage participation by small, minority and woman-owned businesses.
- ◆ Use the services and assistance of the Small Business Administration and the Minority Business Development Agency of the US Department of Commerce.

A small business is a firm that is organized for profit, has a place of business in the United States, is not dominant in its field, and meets size standards and other criteria set by the Small Business Administration (SBA).

If any subcontractors are to be needed and allowed, the prime contractor is also required to take the affirmative steps listed above.

Note: *The grantee is required to report annually to the Department on awarded contracts given to qualified small, minority and woman-owned businesses. See Chapter 4 for more information.*

Protests of Contract Awards

Generally, a grantee must allow for a fifteen-day waiting period prior to an intended contract award to allow for possible protests of the procurement. All protests of intended contract awards are to be resolved at the local level in accordance with written local procurement policies. In the case of a protest of an intended award of a contract funded in part or in whole with CDBG funds, the Department must be notified in writing prior to executing the contract.

Section 3 – Specific Procurement Requirements

Cost Estimates

Grantees must perform a cost or price analysis in connection with **every** procurement, including contract modifications, and must only permit allowable costs to be included. This cost analysis shall be in the form of an estimate prepared by the grantee and may include, but not limited to, the following sources:

- ◆ Researching vendors;
- ◆ Inquiries of other local governments for similar procurements;
- ◆ Inquiring of trade associations; or
- ◆ Line item estimate completed by appropriate grantee staff.

The method and degree of analysis is dependent upon the facts surrounding the particular procurement situation and grantees must make independent estimates before receiving bids or proposals. A price analysis is the process of examining and evaluating a proposed price without examining its separate cost elements and proposed profit.

Cost analysis differs from price analysis in that it is the review and evaluation of the separate elements of cost and proposed profit, and the reasonableness of those estimated costs of performance. Refer to the **Price and Cost Analysis** document on the procurement web page for additional information.

Grantees that do not complete the cost analysis prior to accepting proposals, for example, will be required to accept the lowest responsive bid/proposal and the Department will not approve a Sole Source Request.

The following sections describe each method of procurement in further detail:

Small Purchase Method

In addition to the common use of the Small Purchase Method when procuring goods or equipment, the Department has expanded the use of the small purchase method beyond goods and equipment, under limited circumstances. Small purchase may be used by grantees, as set forth in 24 CFR 85.36, in the following two (2) instances:

- 1) To hire a consultant for a **single PTA Study** (engineers and architects can **only** be hired via the RFQ process); and
- 2) To hire a consultant for a **single federal overlay for a single CDBG Project**.

Single-subject contractors are those contracted for a single subject, such as labor standards, NEPA, or relocation, but the person or entity procured under this method can only be contracted by the grantee for that single subject and a single CDBG project. If hired under this method and the grantee needs to hire for another project or single subject; the firm, company, or individual already contracted is permitted to bid (or provide price quotes) for other small purchase requests. Each request for a small purchase bid must operate under separate contracts. However, any entity hired under any of the other procurement methods, noted below, will be prohibited from submitting a bid without prior Department review of the circumstances and written approval.

Under the small purchase method, grantees send a written request for quotes to potential vendors with a detailed description of the goods or services (scope of work) needed. In return, the grantee receives competitive quotes from an adequate number of qualified sources. Since this process does not require public advertisement, written quotes must be received in response to written solicitations from a minimum of **three qualified sources that are considered** to be responsive and responsible. Each quote must include pricing information that allows the grantee to compare costs across bidders to ensure cost reasonableness.

The small purchase process may not be used to procure construction contractors.

- ◆ Documentation of all quotes shall be attached to the purchase requisition and maintained in the grantee's procurement file.
- ◆ The award must be made to the lowest priced vendor.
- ◆ Sole Source approval under this method is **not allowable**.

Competitive Sealed Bids Method (Formal Advertising)

The competitive sealed bid process (formal advertising) should be used for all construction contracts and in some cases for large equipment purchases (for example, when purchasing a fire truck).

Usually, this method is used when the grantee is directly hiring a construction company (for example, hiring a firm to install curb cuts). The grantee is therefore a party to the contract.

When the grantee is lending funds to another entity (non-profit homeless shelter or a business) and that entity enters into a construction contract, the grantee is not required to complete the sealed bid process as outlined in this chapter.

The competitive sealed bid process requires publicly solicited bids and a firm fixed-price contract (to include unit price and quantities) that is awarded to the responsive bidder whose bid conforms to all the material terms and conditions of the invitation for bids, and is the **lowest in price**.

The contract awarding process should include reviewing the low bid for *responsiveness*. To be considered responsive a bid must conform to the material requirements of the Invitation for Bid (24 CFR 85.36(b)(8)). The grantee must examine the low bid to be sure that the bidder did not alter the specifications or other terms and conditions (e.g., delivery schedules, payment terms, etc.) or attempt to impose different terms and conditions. If the bid does not conform to the solicitation, it must be rejected and the next lowest bid examined for responsiveness.

Allowing a bidder to alter the material requirements of a solicitation gives the bidder an unfair advantage over the other bidders and destroys the integrity of the sealed bid process. It also limits the grantee's rights in the contract. The grantee shall document its findings regarding the low bidder's responsiveness in the procurement file. Minor informalities are not grounds for determining a bid to be non-responsive.

Bidders are responsive based on:

- ✓ *contractor integrity;*
- ✓ *compliance with public policy;*
- ✓ *record of past performance; and*
- ✓ *financial and technical resources.*

Grantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Once the lowest bidder is determined to be responsive and responsible and in order for formal advertising to be acceptable, the following minimum conditions must be present:

- ◆ A complete, adequate and realistic scope of work is available;

- ◆ Two or more responsible bidders are willing and able to compete effectively for a grantee’s business; and
- ◆ The procurement lends itself to a firm fixed-price contract, and the selection of the successful bidder can appropriately be made principally on the basis of price.

When the Competitive Sealed Bid (formal advertising) process is used, the following requirements apply:

- ◆ Publication Period: The invitation for bids must be publicly advertised **and** directly solicited from competent vendors. The invitation must be published at least one time in a newspaper of general circulation 30 days prior to bid opening and/or published in a trade publication of general circulation. If the publication period is not of sufficient time to attract adequate competition, the bid will have to be re-advertised.

A shortened bid period may be requested in advance and will only be approved by the Department when there are extenuating circumstances. Examples of such circumstances include:

- ✓ The project has been bid several times, documentation exists for each bid, and other funding is in jeopardy.
- ✓ The project must get underway or be completed in order to meet the timeline of an industry which has committed to begin operations and create jobs.
- ✓ There is a local emergency affecting health and safety which will be addressed once the project is complete.

- ◆ Bid Advertisement: The advertisement should indicate that it is an Invitation for Bids, project funding is being provided by CDBG and federal requirements will apply to all contracts. It should also include the title of the project and a brief scope of work, the name of the procuring entity, how to get copies of technical specifications and the bid package, submission instructions and deadlines, public bid opening date, time and place, and any other appropriate instructions.

- ◆ Clear Definition: The invitation for bids, including specifications and pertinent attachments, must clearly define the items or services needed in order for bidders to properly respond to the invitation. The bid package must also include all contractual terms and conditions applicable to the procurement.

***Remember the
Mantra: Open, Fair,
and Competitive***

- ◆ Itemized Costs: Bids must show the quantity and cost of each line item. Lump sum bids and/or bid items that are not specifically identified or are generally grouped as “miscellaneous” or “contingency” are not allowed.

- ✓ Bids for buildings should include itemized costs for each structural building system (i.e., framing, electrical, plumbing, etc.).
 - ✓ Bids for water/sewer service connections must be included as a separate section of the bid (and also separated on pay requests).
 - ✓ Bid all ineligible work to be paid with non-CDBG funds as a separate section of the bid (and also separate on pay requests).
 - ✓ Review bid forms prior to soliciting bids in order to avoid bidding on ineligible items.
 - ✓ Additive or deductive alternates may be used to allow additional options for contracting. This option may help to avoid the need to rebid or negotiate if bid costs are different than initial estimates.
- ◆ Receipt and Safeguarding of Bids: All bids, including modifications, received before the time of opening must be kept secure and unopened.
 - ◆ Public Opening: All bids must be opened publicly at the time and place stated in the invitation for bids. The public is allowed at that time to review the bids.
 - ◆ Selection and Contracting: A firm fixed-price contract award must be made by written notice to the responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs must be considered in determining which bid is lowest.
 - ◆ Rejection of Bids: A bid may be rejected when sound, documented business reasons exist. The bid documents should include a provision that explains the basis for such decisions. When the lowest bid is rejected, the grantee must provide a recommendation for the selected bidder and document the reason they were chosen. Additionally, an opinion from the grantee's attorney may be required to document that the action is consistent with local procurement policies and that the bid meets the terms and conditions of the bid documents. Such documentation shall be made a part of the procurement file.
 - ◆ Negotiations after Unsuccessful Competitive Sealed Bidding: Negotiations are permitted within the following guidelines, which consider that time or other circumstances will not permit a re-solicitation of competitive sealed bids.
 - ✓ **Bids Over Construction Budget by Five Percent or Less**: When bids received pursuant to an invitation for bids and the low bid exceeds available funds and it is determined in writing from the grantee that time or other circumstances will not permit the delay required to re-solicit competitive sealed bids, a contract may be negotiated with the lowest responsive and responsible bidder, provided that the lowest base bid does not exceed available funds by an amount greater than five percent of the construction budget established for

that portion of work. The grantee may change the scope of work (with prior approval from the Department) to reduce the cost to be within the established construction budget.

✓ **Bids Over Construction Budget by More than Five Percent:** When bids received pursuant to an invitation for bids and the low bid exceeds available funds by more than five percent of the construction budget and it is determined in writing from the procuring grantee that time or other circumstances will not permit the delay required to re-solicit competitive sealed bids, a contract may be negotiated provided that:

- Each responsible bidder who submitted a bid under the original solicitation is notified of the determination and is given a reasonable opportunity to negotiate.
- The negotiated price is lower than the lowest rejected bid by any responsible and responsive bidder under the original solicitation.
- The negotiated price is the lowest negotiated price offered by any reasonable and responsible bidders.
- If the scope of services originally addressed has been significantly changed, prior Departmental approval is required and a project revised scope of work may be necessary.
- Grantees are required to submit documentation of bid negotiations. The following documentation must be submitted with a negotiated contract for approval by the grantee's Authorized Representative and kept in the procurement file:
 - A narrative explaining the negotiation process; and
 - Documentation that each bidder had an opportunity to negotiate their bid by submitting a copy of the written notice, including revised bid due dates and any revised contract documents and specifications; and
 - A revised bid and a written certification from the lowest negotiated bidder agreeing to the negotiated bid.
- A written explanation from any bidder that decides not to participate in negotiations, if applicable.

Note: A sealed bid procurement method is not required when the contract is between a low/mod income household and a construction company under the Housing Rehabilitation activity. However, appropriate federal and required contracting language (for example, Section 3 hiring) must be in **all** procured contracts.

Competitive Proposals/Qualifications Method (RFP/RFQ)

Competitive proposals are used in two instances: 1) the acquisition of any engineering or architecture services; or 2) the purchase of other professional services where the Small Purchase method is not allowed. Under this procurement method, the grantee must publish a written request for submissions and then review these submissions based on an established selection criteria. The grantee must request proposals from enough responsible professional service companies (solicitation list) to ensure an open, fair and competitive process. This method of procurement differs from the small purchase method in that the solicitation should be published when there is enough local competition (engineering service, for example) or a list of responsible bidders is available beyond the local region (CDBG knowledgeable professional service companies). Both solicitation methods should not lead to a restricted, small, limited number of bidders.

Under this approach, there are two possible methods of soliciting proposals. A **Request for Proposals (RFP)** asks that bidders submit a response to the RFP scope of work, along with qualifications and **cost**. A **Request for Qualifications (RFQ)** only asks for information on the bidder's expertise/experience and must not discuss cost. When acquiring any service that is not architecture or engineering, the RFP process must be used, except as noted in the small purchase method. For example, if a grantee hires a for-profit grant administrator (to manage the grantee's CDBG contract) an RFP would be required. When acquiring architectural or engineering services, **only an RFQ** may be used.

Request for Proposals (RFP): When an RFP process is required; the grantee must develop a written document outlining the scope of the services and the selection criteria. The scope must be sufficiently detailed so that potential bidders are able to develop effective pricing proposals and submit appropriate qualifications. The RFP process is as follows:

- ◆ Proposals are directly solicited from qualified firms. When the grantee needs a qualified CDBG grant administrator, publishing this request in the local paper will likely not result in many bidders due to unique CDBG program requirements. Therefore, the grantee should develop a solicitation list that can be used.

Cost information
should be provided as a fixed price, depending upon the type of services being requested. The RFP should clearly describe how proposed prices should be submitted – hourly, flat rate, etc. The comparison is valid when prices compared are commensurate.

The RFP must include a summary of the scope of work and the type and relative weights of the criteria to be evaluated. The RFP should also include a request for technical and cost information. Cost information should be provided as a fixed price, depending upon the type of services being requested.

- ✓ If the RFP is published, it should be published a minimum of fifteen days before the proposals are due.
 - ✓ Evaluative criteria may include, but not be limited to: qualifications of project personnel, education, past performance and related experience on previous projects completed; experience with the CDBG program; experience and/or familiarity with the existing grantee's systems; recent and current as well as projected workload; and ability to meet time and budget requirements. If the scope of work allows room for different types of approaches, the grantee may wish to award points for the most appropriate or effective approach. For example, if hiring a grant administrator, asking the bidder to describe the process they will use to administer the grant, which could be given a point value, based on how appropriate the process would work with the grantee's organizational structure.
 - ✓ In addition, cost shall be one of the selection factors for an RFP. The grantee must determine how many points will be awarded for the cost factor.
- ◆ A qualified review committee rates and ranks the proposals using the published selection criteria. The grantee must document this review and the selection process. The review committee must consist of an uneven number of members, to avoid ties in the ranking process, and should include a minimum of three people. This committee is required to evaluate proposals based on the exact criteria and weights published in the request for proposals information to proposers.
- ✓ If mathematical errors are discovered during the review process, the individual scorer must verify and initial the correct score.
 - ✓ The recipient may choose to interview the top ranked firms following submission and ranking of proposals. If interviews are conducted, the committee must also rank the proposals following the interviews. The interviewing process may not be used to avoid the open, fair and competitive requirements of this chapter.
- ◆ The grantee awards the contract to the bidder that scored the highest in its assessment of how the proposal met the selection criteria. Under this procurement method, this contract need not be awarded to the lowest bidder so long as the final price is reasonable (as evidenced by the cost analysis done prior to the submittal

Note: An engineer currently under contract as a grantee's contract engineer may not submit a RFQ in response to a new CDBG project.

of proposals) and the selection is made following the stated criteria. A grantee may use cost as a “tie breaker” between equally qualified firms.

Request for Qualifications (RFQ): The RFQ process may only be used in two instances: (1) for engineering or architectural services; or (2) when the RFQ is used to narrow a pool of potential bidders and a formal RFP will follow. Since the latter is rarely used, please discuss this process with the Department prior to its use. This section will not address the second instance and will only address the RFQ for engineering or architectural services. The RFQ process may not be used in any other circumstances.

The RFQ process **may not** request cost information at the time of solicitation. However, recipients must still ensure that all services are cost reasonable, and therefore, complete a cost analysis prior to publishing the RFQ. The process for undertaking an RFQ is as follows:

- ◆ The RFQ is publicly advertised **and** qualifications are solicited.
 - ✓ RFQ’s must be published, but the grantee may also use a solicitation list to increase competition.
 - ✓ RFQ’s should be published at least fifteen days before the qualifications are due.
 - ✓ The solicitation must include the criteria and weights to be used in reviewing qualifications.
 - ✓ Qualifications should be listed in order of importance and may include, but are not limited to: résumé; previous projects completed and specific personnel to work on the project; and/or specific expertise of the firm in general.
- ◆ The qualifications are reviewed by a qualified committee and ranked. The review committee must consist of an uneven number, to avoid ties in the ranking process, and should include a minimum of three people. This committee is required to evaluate qualifications based on the criteria and weights published in the solicitation.
 - ✓ If mathematical errors are discovered during the review process, the individual scorer must verify and initial the correct score.
 - ✓ The recipient may choose to interview the top ranked firms following submission and ranking of proposals. If interviews are conducted, the committee must also rank the proposals following the interviews. The interviewing process may not be used to avoid the open, fair and competitive requirements of the chapter.
- ◆ For architectural or engineering services, negotiations are entered into with the top ranked firm to determine price, since it was not an initial factor in the proposal.

Non-competitive Procurement Method (Sole Source)

Non-competitive procurement requires Department approval in writing and may be approved for use only when the award of a contract is infeasible under small purchase procedures, sealed bids, or RFP/RFQ proposals and one of the following circumstances applies:

- ◆ **Where the item is available from only a single source.** This requires a letter from the Authorized Representative explaining the circumstances and requesting a sole source approval from the Department.
- ◆ **Where a public exigency or emergency is such that the urgency will not permit a delay** beyond the time needed to employ one or the other procurement methods. This also requires a letter from the grantee's Authorized Representative explaining the circumstances and requesting a sole source approval from the Department.
- ◆ **Where after solicitation of a number of sources (RFP/RFQ), competition is determined to be inadequate (one responsible proposal).** This requires a letter from the grantee's Authorized Representative requesting a sole source approval from the Department and must include the following full procurement file to date:
 - ✓ Copy of RFP/RFQ (with all exhibits and attachments);
 - ✓ Cost analysis, completed prior to issuing RFP/RFQ (or at a minimum, before receiving bids);
 - ✓ Solicitation list, public notices (with proof of publication) and/or other method(s) of distribution, including proof that RFP/RFQ was delivered to the solicitation list;
 - ✓ List of all proposals received. If any were considered non-responsive or non-responsible, include the written justifications;
 - ✓ Full copies of all bids received, including non-responsive proposals;
 - ✓ Review scoring results for each respondent based on selection criteria indicated in RFP/RFQ, including names of grantee's review panel;
 - ✓ Proof of non-debarment of all proposals received; and
 - ✓ Complete draft contract (ready-to-execute); this must include all CDBG federal contract provisions.

*If you hire, for example, a **Davis-Bacon** professional service company, require all documents to be delivered to the grantee's office prior to making the final payment.*

Note: If a grantee enters into a contract **prior** to the Department approving a sole source request, the costs associated with that contract will not be reimbursed by the Department.

Professional Services Procured Outside the Federal Procurement Process (24 CFR Part 85.36): Contracted Employees

Many CDBG grantees do not have the internal resources to hire civil service employees (staff) to perform all tasks associated with the day-to-day operations of a city or county, and more particularly when utilizing CDBG funding. The services of an architect, engineer, accountant, or other professional may be needed to complete tasks typically performed by a civil service employee.

Many of our grantees have contracted for these positions prior to receiving CDBG funding and may have completed the hiring (procurement) process outside the federal procurement requirements of 24 CFR 85.36, which then results in a noncompliant procurement process when using CDBG funds.

If the grantee utilizes services of a previously contracted employee to perform CDBG-related tasks, such as clearing the general conditions for a CDBG activity, these expenses may be reimbursed with CDBG **general administrative (GA) funds only**.

However, if professional services are required for the implementation of a specific CDBG activity, the federal procurement process involving a formal Request for Proposal (RFP) or Request for Qualifications (RFQ) must be followed and the existing “contracted employee” would not be eligible to submit a proposal for the project.

For example, if the grantee receives CDBG funding to complete the construction of new sewages lines, a RFQ procurement process would be required to hire an engineer for preparation of the plans and specifications for the project. The grantees’ existing contract engineer would be unable to bid on the CDBG-funded water project, as it would be considered a conflict of interest.

Design/Build Method

The Design/Build process is a method of project delivery in which one entity (designer/builder) is competitively selected to enter into a single contract with an owner to provide for architectural services, engineering design services, and construction services. The Design/Build process is normally for exceptionally unique or complex projects and requires a great deal of careful planning and professional execution to be successful. Design/Build projects do not easily lend themselves to compliance with CDBG procurement requirements, such as the open bidding/low bid requirements. Please contact the Department for the appropriateness and applicability of the design/build process for your project.

Section 4 – Professional Services Contracts

These procedures must be followed when entering into a Professional Services Contract:

Prepare a Professional Services Contract which includes the following:

- ◆ Effective and specific dates of the contract period (three-year period, maximum).
- ◆ Project milestones identifying performance indicators and completion of contract services or other performance measures.
- ◆ Specification of materials and other services to be provided by either party (e.g., maps, reports, printing, etc.).
- ◆ Provisions for compensation for services including fee and/or payment schedules and specification of maximum amount payable under the contract. Cost schedules should be directly related to the scope of services and relate back to the RFP/RFQ. Any additional costs or reimbursable expenses must be specified in the agreement and be subject to pre-authorization by the grantee.
- ◆ ***All required federal contract language should be included in the contract for services.***
- ◆ ***All grantees' contracts should be reviewed and approved by the grantee's legal counsel. Also, the contract should be put in front of the governing body for action according to standard local procedures.***

Section 5 – Procurement of Construction Services

For construction service contracts, the grantee must follow these steps:

1. Prepare the Plans, Specifications, and Bid Package.

An architect or engineer should prepare the technical bid specifications. These specifications must provide a complete and accurate description of the specifications for materials, products, and services to be provided or performed. Ensure they include required Federal and State CDBG provisions and clauses, such as compliance with minimum standards for accessibility by the physically handicapped. (An ***Architect/Engineer's Certification*** for these standards is available in the attachments to this chapter).

- ◆ Bid and contract documents should include but are not limited to the following:
 - ✓ Technical specifications. Technical specifications must not specify brand names unless there is an “or equal” substitution clause included or the department has pre-approved the use of a specific brand name.
 - ✓ Local, State and Federal requirements for:

- Equal opportunity requirements (including Section 3 hiring and contracting, if applicable).
- Labor standards requirements (including a current, applicable wage decision).
- General contract terms and conditions such as termination clauses, access to and retention of records, etc.
- Timeframe for contract completion. **Contract agreements must not be pre-dated or back-dated.**

- ✓ General industry conditions/standards.
- ✓ Itemized cost and unit pricing information.
- ✓ Method of payment and amount of contract.
- ✓ Advertisement for Bid.
- ✓ Copy of proposed Contract Form.
- ✓ Bid Bond Form.
- ✓ Include a request that all bidders return bids even if they are not going to bid. Have them mark their bid "No Bid." Receipt of a "No Bid" is considered a bid.
- ✓ Any qualification requirements for bidders and provisions to explain the basis for rejecting any bids as well as how bid errors will be handled.
- ✓ Bids should be effective for 60-90 days after bid opening to allow for appropriate review and approvals.

NEPA considers an executed construction contract Choice Limiting. If the clearance process for the NEPA requires Departmental approval, the grantee risks losing funding if a construction contract is executed with (or before) the AUGF.

2. Prior to bidding the project, the grantee should review the bid documents to ensure that the scope of work is consistent with the approved CDBG activity.

- ◆ If it is discovered that an unapproved component or activity has been added to the bid documents or significant changes have been made that delete approved activities and this will change the scope of approved activities for which CDBG funds will be used, the grantee must obtain CDBG approval before proceeding further.

- ◆ Reviews should ensure consistency throughout the solicitation and specifications in regards to the business owner, bid expiration, contract period, etc. Also, make sure the contract period is consistent with the CDBG grant/contract period.
- ◆ In general, pre-bid conferences may serve to restrict competition and should not be mandatory. The only time a pre-bid conference should be mandatory is when the nature of the project is unique or complex. The grantee must be prepared to provide certification that the pre-bid conference requirement is justified and will not unduly restrict competition.
- ◆ If CDBG funding is needed for additional activities, such a change may require one or all of the following documents be submitted for approval:
 - ✓ Project Amendment Request Form including documentation of LMI benefit or national objective requirements.
 - ✓ Public hearing evidence.
 - ✓ Revised environmental review documentation.
- ◆ If the grantee decides to include unapproved, additional activities for which CDBG funds will **not** be used, then the grantee must provide a funding commitment for such activities.

3. Construction bids must be publicly solicited using sealed bids.

Prior to bid opening:

- ◆ The invitation for bids must be publicly advertised **and** bids solicited from competent companies. The publication should be published at least one time in a newspaper of general circulation 30 days prior to bid opening and/or published in a trade publication of general circulation. If the publication period is not of sufficient time to attract adequate competition, the bid will have to be re-advertised. The grantee may consider a longer advertising period for more complex projects to allow bidders more time to prepare their proposals.
- ◆ Provide an opportunity for small, women-owned and minority-owned businesses to participate.

4. Amendments or addenda to bid documents, if any, must be sent to all bidders who were sent or who obtained bid documents.

- ◆ Maintain a log of bidders who were sent or obtained bid documents and addenda. All bids received during the bidding period should be logged with the name and address of the bidder, and the time and date of receipt.

5. Confirm Davis Bacon wage decision ten days prior to bid opening.

6. Conduct a public bid opening.

- ◆ All bids should be read aloud during this meeting. Minutes of the meeting should be maintained to document the project name and number, time and date of the bid opening, bidder's name and bid amount in order of opening.

**Do not accept
late bids!**

*They should be
returned to the
bidder unopened.*

7. Review bids.

- ◆ Determine if they are legally and technically responsive. Unit prices always prevail in determining the lowest bid in case of addition (calculation) errors.
- ◆ Check with the California State Licensing Board for General Contractors to verify contractor's business license number and type, and the types of work the contractor is permitted to bid on or to perform under the license.
- ◆ Evaluate the contractor's capacity to perform by considering, among other things, the bidder's experience, past record of performance, and the capacity of the firm to perform within the stated time and bid amount.
- ◆ If only one bid is received, either re-bid the contract or contact the Department to determine if the provision for sole source applies. For contracts that result in a re-bid, publish a solicitation in a newspaper of general circulation and directly solicit bids from contractors. A shortened bid period should only be requested if there are extenuating circumstances beyond the control of the local government. Examples include:
 - ✓ The project has been bid several times, documentation exists for each bid, and other funding is in jeopardy.
 - ✓ The project must get underway or finish in order to meet the timeline of a business which has committed to begin operations and create jobs.
 - ✓ There is a local emergency affecting health and safety which will be addressed once the project is complete.
- ◆ Prepare and mail a **Notice of Intent to Award** form to the selected or appropriate bidders. This form is available in the attachments to this chapter.

8. Errors in Bidding

- ◆ The bid document should indicate how bidding errors will be handled. When an error is discovered in one or more bids to be submitted, contractors should have an opportunity to correct the bids they have submitted prior to bid opening, by initialing and dating the change. If a contractor has corrected and initialed his bid

prior to bid opening, the grantee must acknowledge that the correction occurred **prior** to submittal of the bid.

- ◆ Once bids are opened, a bid may not be altered. If the grantee determines there are computation or mathematical errors while it is preparing the bid tabulation, the grantee may show the correction on the bid tabulation. The correction should be specified as the grantee's correction, based on computations verified for all bidders. The grantee should explain the procedure in its recommendation of award. In addition, each original bid as well as the correction should be listed on the bid tabulation. All contractors must be notified and any contractor may choose to withdraw their bid if the correct computation is not acceptable.
- ◆ It is generally not acceptable to award a bid and then submit a change order for an additional activity or to remove ineligible items from the contract. The grantee should allow all bidders the opportunity to include any such proposed changes in their bid or the project may require re-bidding.
- ◆ Changes in the price of an item procured through competitive sealed bidding are not generally allowed. If an increase in the price of materials, equipment and/or labor can be determined to be justified and reasonable, a change order request may be submitted to the grantee.

***Change orders
should not be used to
correct errors in
bidding documents
prepared by the
grantee after the bids
have been opened.***

9. **After the bid opening**, the grantee must maintain copies of the proposed contract, a description of the method of procurement, and selection procedures in the procurement file, including the following documentation:

- ◆ A copy of the solicitation bid which should clearly define the items or services needed in order for the bidders to properly respond to the invitation;
- ◆ A copy of the bid or proposal tabulation sheet;
- ◆ Copy of the advertisement's Proof of Publication and bidder's list or other documentation as to how responses were solicited;
- ◆ Bidder's information which delineates the method of bidding, bid evaluation, the basis of contract award, etc;
- ◆ Evidence that a cost analysis was performed to determine the reasonableness of the price, if appropriate, and the grantees' recommendation for contract award;
- ◆ A copy of the itemized bid form from the lowest bidder;
- ◆ A copy of the completed and executed contract; and
- ◆ Debarment Certification form.

- ◆ Completed Section 3 forecasts:
 - Bidder's Proposed Section 3 Contracts and Subcontracts
 - Bidder's Section 3 Proposed New Hires
- ◆ The CDBG Contract Transmittal Form (CTF) certifies that the recipient has included all applicable provisions in the contract. The CTF should list the CDBG line item budget relevant to each contract activity. If the contract has multiple funding sources, the source and amount should be listed accordingly. This form must be signed and dated by the grantee's Authorized Representative. This form along with a copy of the CDBG Contract Special Provisions is included as an attachment to this chapter. These documents must be maintained in the grantee's procurement file and Public Information Binder.

10. Award/execute contract and secure performance and payment bonds within ten days.

- ◆ Bidder to whom award is made must submit performance and payment bonds in the amount of the contract price within the period specified in the bid documents or within ten days after contract documents have been presented to the contractor for signature.
- ◆ Approve contractor's bonds and execute contract within ten days of receipt.
- ◆ Issue a Notice to Proceed.

Section 6 – Contract Requirements

All contracts are required to contain Federal and State clauses pertaining to equal opportunity, labor standards, and general terms and conditions. The Department has prepared a standard set of these provisions for use in professional services or construction contracts. These provisions are an attachment to this chapter.

Section 7 – Change Orders

Change orders should be kept to an absolute minimum and are for unforeseen problems or issues that arise during construction. Change orders should not be done at the time of contract award, unless all bidders have been given the opportunity to submit the same cost changes. Change orders also should not be used to correct bidding computation errors.

The General Contractor must obtain written approval from the grantee for all change orders prior to execution of the change order.

Documentation in the grantee's file with every change order must include:

- ◆ Contract Change Order Transmittal Form, which must be signed and dated by the grantee's Authorized Representative (the form is included in the attachments to this chapter);
- ◆ Supporting justification which describes why the change is necessary;
- ◆ Itemized cost/unit price/quantities;
- ◆ A cost and price analysis (usually conducted by an engineer) that determines the costs are reasonable;
- ◆ Any revised plans and specifications; and
- ◆ Certification that no acquisition is necessary to complete the change order work.

The architect/engineer or project inspector usually prepares change orders; however, the grantee must approve and authorize change orders before they are executed. **The proposed change should also be verified and/or recommended for approval by the project engineer, project manager, architect or other technical support personnel.** The grantee should compare such change orders to the CDBG construction budget prior to approval.

If a change order will result in a significant change in the scope of work, a new CDBG activity, or a change in location, beneficiaries, or how the project will be carried out, a revised **Project Setup/Completion Report** may also be necessary, along with Department approval. If the change involves a new activity not previously included in the original bid and will result in a significant cost change, then the new scope may have to be re-bid. Please contact the CDBG Contract Management Representative for a determination. Factors to be considered include whether the change order will exceed the project budget, if the service area will change and affect national objective compliance, if the original intent of the project will be altered, the NEPA scope of work is changed, etc.

Section 8 – Bonding and Insurance

Contracts Less Than \$150,000

For all contracts of \$150,000 or less, grantees will follow local procedures relating to bonding and insurance. Also, please consult your engineer to protect the interests of the grantee.

Construction Contracts Over \$150,000

For construction contracts over \$150,000 the minimum bonding and insurance requirements are as follows:

- ◆ A bid guarantee from each bidder equal to 5% of the bid price. The bid guarantee shall consist of a bid bond, certified check, or other negotiable instrument accompanying the bid.
- ◆ A performance bond from contractors for 100% of the contract shall be executed in connection with each contract.
- ◆ A payment bond on the part of the contractor for 100% of the contract price.
- ◆ All bonds shall be obtained from companies holding certificates of authority as acceptable sureties.

Note: The Department encourages grantees to require adequate liability insurance from all contractors.

Section 9 – Section 3 Requirements

Section 3 of the Housing and Urban Development Act of 1968, amended in 1992, ensures that employment and other economic opportunities generated by certain HUD financial assistance shall, to the greatest extent feasible, and consistent with existing Federal, State and local laws and regulations, be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low- and very low-income persons.

Thresholds and Applicability

Section 3 applies to training, employment, contracting and other economic opportunities arising in connection with the expenditure of CDBG funds for public construction. These requirements also apply to contractors and subcontractors performing work on Section 3-covered project(s) for which the amount of the assistance exceeds \$200,000 and the contract or subcontract exceeds \$150,000. Section 3 does not apply to contracts for the purchase of supplies and materials, unless the contract includes the installation of the materials.

Grantees must make all bidders and contractors aware of the Section 3 requirements and take appropriate steps to promote and encourage the hiring of Section 3 residents and businesses.

A Section 3 resident is:

- ◆ A public housing resident; or

- ◆ An individual who resides in the city or county in which the Section 3-covered assistance is expended, and who is a low-income person or a very low-income person.

A Section 3 Business is defined as a business:

- ◆ Where 51% or more of the business is owned by Section 3 residents; or
- ◆ Whose permanent, full-time employees include persons, at least 30% of whom are currently Section 3 residents, or within three years of the date of first employment with the business concern were Section 3 residents.

Section 3 Procurement Standards

Section 3 strongly encourages a preference for Section 3 businesses in the evaluation of bids or proposals. However, Section 3 does not supersede the general requirement of 24 CFR 85.36(c), which requires all procurement transactions be conducted in an open, fair and competitive manner.

Geographic preference is not allowed for scoring competitive bids. However, Section 3 consideration may be included as an evaluation factor in procurements where price is not the sole determining factor or when a business meets Section 3 hiring goals.

Grantees must include Section 3 information in all bid packages and contracts, including:

- ◆ *Section 3 Information Sheet for Contractors and Businesses*
- ◆ *Section 3 Business Self Certification*
- ◆ *Bidder's Proposed Section 3 Contracts/Subcontracts*
- ◆ *Bidder's Section 3 Proposed New Hires*
- ◆ *Contractor's Section 3 Business Utilization Report*
- ◆ *Contractor's Section 3 New Hires Report*

Also, the grantee should discuss Section 3 requirements at a pre-construction conference, if applicable, and determine what efforts are being made to comply. Contractors should be required to submit final reports on their efforts to utilize Section 3 employees or businesses prior to receiving a final payment.

A business seeking to qualify as a Section 3 business bears the responsibility to certify or to submit evidence that the business qualifies. A Section 3 business should submit evidence to demonstrate the ability to perform successfully under the terms and conditions of the proposed contract. A **Section 3 Business Self Certification** form is provided as an attachment.

General Compliance

Grantees and covered contractors may strongly demonstrate compliance with Section 3 by meeting numerical goals for providing training employment and contracting opportunities to Section 3 residents and Section 3 covered individuals and groups. Numerical goals apply to contracts awarded on Section 3-covered projects and activities.

Additional information on Section 3 requirements for CDBG grantees is included in **Chapter 4: Equal Opportunity and Fair Housing.**