

## VI. Procurement and Contract Management

This section provides guidance on standards and guidelines for the procurement of supplies, equipment, construction, engineering, architectural, consulting, and other goods and services for CDBG NDR programs. Depending on who is procuring the goods or services, and what is being procured, there are different standards of procurement. Subgrantees adopt federal procurement standards in signing the HCD Agreement and as such must follow the applicable federal procurement standards at 2 CFR part 200.317 through 200.326. HCD is responsible for ensuring CDBG funds are used in accordance with federal and state regulatory requirements. The use of subgrantees or contractors does not relieve HCD of this responsibility.

Procurement standards apply differently to different recipients of NDR funding, who are using them to implement different eligible activities. For instance, all subgrantees who are jurisdictions are required to follow the procurement standards from 2 CFR 200, or local standards, whichever is more restrictive. For example, the County of Tuolumne will follow federal procurement standards, unless their local procurement standards are higher. For subgrantees who are state agencies, they will follow HCD certification of state procurement standards meeting federal standards. So, for SNC and CAL FIRE, they must use state standards but ensure that any federal standards that are higher are followed. For subgrantees that are non-profits, they must follow federal procurement standards. For private citizens or businesses using CDBG NDR funding, they are not required to follow 2 CFR 200, however HCD requires them to document that their procurements meet basic federal procurement standards of being necessary and reasonable costs.

Lastly, due to the USFS' unique position as a federal partner to HCD and because it is a Federal Agency, HCD will allow them to follow the procurement standards from the Federal Acquisition Regulations, or FAR, which outlines the procurement policies and procedures for federal agencies. While the FAR and 2 CFR 200 are closely related, they do have several important differences, such as allowing service contract procurements to be used for non-construction FWHP activities. Detailed requirements related to procurements are outlined in each recipient's agreement or contract used with CDBG NDR funding.

HCD has conducted several procurement trainings for the subgrantees and has provided them with HUD's "Buying Right" procurement guide. HCD staff support subgrantees through their procurement processes and review documents as needed.

Procurement involving federal funding shall be conducted in accordance with applicable Federal, state, and local laws and regulations. As such, HCD follows the State of California's procurement processes and standards, which it has certified are equivalent to the procurement standards at 2 CFR part 200.317 through 200.326. HCD Legal has drafted a crosswalk between state procurement and 2 CFR 200.317-326 to demonstrate how the state standards align with federal requirements. In addition, HCD follows the policies and procedures identified in the State Administrative Manual (SAM) and applicable sections of the Public Contract Code (PCC). While the federal standards act

as the minimum procurement and contracting requirements for the HCD and other state agencies receiving NDR funding, if inconsistencies between federal, state and local procurement requirements arise, they follow the strictest of the requirements.

HCD procurements using CDBG NDR funding are coordinated with GMR and Contract staff. Contract staff work in the HCD's Business Services office and are tasked with meeting state procurement standards. GMR staff are tasked with meeting federal procurement standards. Together the two staff coordinate procurement processes for NDR and ensure procurement files contain all the necessary documentation for state and federal procurement standards.

## A. Personnel

The Procurement Division, Department of General Services (DGS), is responsible for every purchase of non IT supplies or equipment more than \$100 and for contracts for purchases for every state agency with such exception as stated in PCC Sections 10295, 10298, 10430, and 12100.5.

The DGS assists agencies in making determinations relative to the appropriate method of acquisition of their equipment needs. DGS also provides effective means of acquiring equipment, whether the acquisition is to be made by purchase or through non-purchasing techniques. (See, *State Administrative Manual §3500*.)

## B. Code of Conduct

2 CFR part 200.318(c)(1) requires HCD to maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award, and administration of contracts. To meet these standards, HCD follows the requirements of Article 8: Conflict of Interest § 10410, 10412 of the PCC and the guidance under part 7.10 of the State Contracting Manual, which state, "no officer or employee in the state civil service or other appointed state official shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, by any state agency or department through or by a state contract unless the employment, activity, or enterprise is required as a condition of the officer's or employee's regular state employment. No officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods."

### 1. Solicitation or Acceptance of Gifts

2 CFR part 200.318(c)(1) allows grant recipients to set "standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value."

The State of California requires HCD and its subgrantees to uphold ethics and bar conflicts of interest in their procurement standards. This includes real and perceived conflicts of interest. The appearance of a conflict of interest includes any indirect or noncash gifts, such as donations to employee fundraising drives, event tickets, meals, or giveaway gifts like a Thanksgiving turkey or iPad drawing given in an employee affiliated organization. These gifts could be considered

potential conflicts of interest as they may create influence, real or perceived, over the decisions regarding awards of federal funds.

## 2. Organizational Conflicts of Interest

Conflict of interest requirements are specified by HUD; however, they are also dictated by state and local law under PCC §§ 10410 – 10411. CDBG NDR subgrantees must ensure compliance by reviewing their local government situations and determining if the decision-making process was followed appropriately to ensure all HUD, California and local standards are followed; if there are conflicts, the most restrictive standards must be documented and adhered to.

California's conflict of interest standards of conduct applies to all procurement activities. A booklet on all state requirements for conflicts of interest can be found through the State of California Department of Justice webpage at <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/coi.pdf>.

All non-procurement activities (acquisition and disposition of property, direct assistance to individuals and/or businesses) are subject to the HUD requirements described in 24 CFR part 570.489(h). The general rule is persons acting on behalf of state or local government in a State CDBG decision making role, or who are in a position to gain inside information (and their family members) cannot obtain a financial interest or benefit from State CDBG funded activities. This prohibition ends one year after the decision making person has left their position.

HCD evaluates and decides if conflict of interest exists for a subgrantee/partner, employee, agent, contractor, officer, elected official, appointed official of the state, locality, any designated public agencies, subgrantees or other recipient on behalf of their employees or agents which are receiving CDBG funds. The regulations contain a list of factors to be included in any requests, and which must be considered when evaluating them, including:

- Whether the exception would provide a significant cost benefit or essential degree of expertise that would otherwise be missing.
- Whether an opportunity was provided for open competitive bidding.
- Whether the person affected is a member of a group or class of low or moderate income persons intended to be the beneficiaries, and the exception will allow the person to receive the same benefits as other members of the class.
- Whether the person has withdrawn from the role of decision maker.
- Whether the interest or benefit was present before the affected person became an employee, agent, contractor, officer, or elected official or appointed official of the state, or locality, or of any designated public agencies, or subgrantees, which are receiving CDBG funds.
- Whether undue hardship will result to the State, UGLG or affected person when weighed against the public interest.

- Any other relevant considerations.
- Request for exception must include public disclosure & attorney opinion that exception does not violate state or local law

If HCD or a subgrantee has a parent, affiliate, or subsidiary organization, HCD must also maintain written standards of conduct covering organizational conflicts of interest.

Organizational conflicts of interest refer to situations where, because of the relationships with a parent company, affiliate, or subsidiary organization, the subgrantee is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

### C. Pre solicitation

HCD is required to engage with small and minority businesses, women owned business enterprises, and with labor surplus area firms. In addition, HCD follows certain procedures when it develops and maintains lists of prequalified firms.

#### 1. Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

Per 2 CFR part 200.321, HCD "must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible." To meet this important goal, HCD follows the procedures set forth in PCC Article 12: Minority Business Participation §10470-10474. Prequalified Lists.

Per 2 CFR part 200.319(d), HCD "must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition." Also, HCD "must not preclude bidders from qualifying during the solicitation period."

These provisions are covered in the State Contracting Manual under parts 8.20 – 8.22 and parts 5.03, 5.05, *et seq.*, 5.11, 5.15, and 11.05 respectively. HCD does not currently anticipate the use of prequalified lists for procured work under the CDBG NDR grant. If that practice changes, this manual will have future updates to policies.

### D. Solicitation Requirements

Per 2 CFR 200.319, HCD has written solicitation procedures for all procurement transactions prior to securing contract services under parts 5.03, 5.05, *et seq.*, 5.11, and 5.15 of the State Contracting Manual. These procedures ensure that solicitations include:

- A clear and accurate description of the technical requirements for the material, product, or service to be procured.
- All requirements which the offerors must fulfill.
- All other factors used in evaluating bids or proposals.

## 1. Full and Open Competition

One of the primary purposes of a procurement process is to ensure full and open competition. Specifically, 2 CFR part 200.319 requires that, “all procurement transactions must be conducted in a manner providing full and open competition.” To fulfill this obligation, the State of California has committed to a program of active competition in the procurement of goods and services.

PCC section 10318 makes it illegal for any agency or employee to draft or cause to be drafted any specifications in such a manner as to limit the bidding directly or indirectly to any one specific concern, or any specific brand, product, thing, or service. It is the aim and desire of the Procurement Division, Department of General Services, to require that such competition be at all times by responsible suppliers and the materials bought through such competition be properly suited to the job intended both as to price and quality (SAM § 3503).

## E. Ineligible contractors

HCD is committed to ensuring that contractor performance is measured objectively and that unfair competitive advantages are eliminated from the procurement per the requirements of 2 CFR 200.319(a). Therefore, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals are to be excluded from competing for such procurements.

### 1. Examples of restrictive situations

For procurements to be truly open and fair, governments make sure not to exclude any qualified firms from the process. Accordingly, HCD takes action to eliminate the following situations as outlined in 2 CFR 200.319(a), which are considered to restrict competition:

- Placing unreasonable requirements on firms for them to qualify to do business.
- Requiring unnecessary experience and excessive bonding.
- Noncompetitive pricing practices between firms or between affiliated companies.
- Noncompetitive contracts to contractors 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.
- Any arbitrary action in the procurement process.

## F. Geographic Preferences

To make the process fair and open, all eligible firms are allowed to participate, regardless of where they typically do business. Allowing outside firms to compete gives HCD the best opportunity at finding the right company for the job. Therefore,

HCD has committed to following 2 CFR part 200.319(b), which states that HCD, “must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.”

## G. Clear and Accurate Descriptions

For HCD to procure exactly the goods or services that it needs, it is important for its staff to draft the procurement language as carefully as possible. As required by 2 CFR part 200.319(c)(1) and SCM part 5.35, HCD ensures that solicitations incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured.

Per 2 CFR part 200.319(c)(1), these descriptions “may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth the minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specification should be avoided if at all possible.”

While federal requirements allow purchasing agents to specify the use of “brand name products or equivalent” to define the performance or other salient requirements of procurement, the specific features of the named brand which must be met by offers is clearly stated.

## H. Most Economical Approach

To comply with 2 CFR §200.318(d), HCD follows its written procedures in the SCM § 5.85, 7.61, and 7.62 that seek to avoid the “acquisition of unnecessary or duplicative items.” Therefore, consideration is given to consolidating or breaking out procurements to obtain a more economical purchase. Refer also to the SAM procurement guide.

### 1. Lease versus Purchase Alternatives

One way governments can avoid the purchase of unnecessary items is to lease goods, instead of purchasing them. Steps are taken, where appropriate, to analyze “lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.”

### 2. Cost Sharing

Another key tenet of procurement is to foster greater economy and efficiency. To promote the cost effective use of shared services across the federal government, HCD examines the effectiveness of entering into state and local intergovernmental agreements for procurement or use of common or shared goods and services in accordance with 2 CFR part 200.318(e).



## I. Surplus property

2 CFR 200.318(f) encourages HCD “to use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.” To meet this goal, the State of California adheres to PCC section 12153, which authorizes the Department of General Services to, “draft, establish, and implement policies that ensure the procurement and use of recycled resources.”

Per PCC Article 6: Purchase of Federal Surplus Property §10385-10389, HCD may “purchase, lease or otherwise acquire from the federal government or any agency thereof for use of state agencies, surplus real property, including buildings, fixtures, and equipment situated thereon, whenever in the department’s judgment the purchase or acquisition and the terms and conditions thereof are in the best interests of the state.”

To meet this goal, the Department of General Services:

- Keeps in constant touch with federal agencies charged with the sale or disposition of federal property and secures full details as to the nature and availability of the property and the terms and conditions under which it can be purchased or acquired.
- Transmits information thus secured to all state agencies in order that they may possess complete and up to date information as to the nature and selling price of available property.
- Prescribes procedures consistent with this article to be followed by state agencies in requisitioning and paying for the property and inform them of the procedures.

## J. Value Engineering

Per 2 CFR part 200.318(g), HCD examines the effectiveness of and, where appropriate, uses value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

## K. Contractor Requirements

Per 2 CFR 200.318(h) and SCM § 5.40, 10.15, and 11.05, HCD awards contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration is given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

## L. Independent Cost Estimate and Cost or Price Analysis

HCD and its subgrantees are required to determine that costs are reasonable through performing a cost or price analysis in connection with every procurement action above the Simple Acquisition Threshold [currently set at \$150,000], including contract modifications. There are two parts of the cost or price analysis. First there is the Independent Cost Estimate (ICE) which is done prior to bidding or at least accepting

bids for a procurement. Second, a cost or price analysis must be done after receiving bids but before executing a formal agreement. More detailed information on procurement requirements for CDBG NDR can be found in the [HUD Buying Right Guide](#).

An ICE provides a baseline estimation of what the required expenditures will be and what they should cost based on suppliers and market values. The method and degree of analysis is dependent on the facts surrounding the procurement situation but, as a starting point, HCD and its subgrantees complete independent estimates before receiving bids or proposals.

A cost analysis is performed when the respondents are required to submit the elements of their estimated cost, as occurs under professional, consulting, and architectural engineering services contracts. A cost analysis is necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established based on a catalog or market price of a commercial product sold in substantial quantities to the public or on prices set by law or regulation.

A price analysis is used in all other instances to determine the reasonableness of the proposed contract price.

For the NDR grant, Tuolumne County submits cost estimates related to the CRC and the USFS and SNC submit cost estimates related to the Forest & Watershed Health Pillar for review and approval by the GMR, who acts as the HCD NDR Contract Representative. The GMR is responsible for completing cost and price analysis for BUF procurements.

HCD and its subgrantees use an Independent Cost Estimate form, which documents the good or service being procured, the method for completing the estimate, the outcome of the estimate, and the supporting documentation used to substantiate the estimate.

## M. Methods of Procurement

HCD and its subgrantees are required to use one of the following methods of procurement for projects using CDBG NDR funds. These methods align with both the State of California's procurement requirements, as well as 2 CFR 200. The USFS follows similar methods that are allowed by the FAR.

### 1. Micro purchases

2 CFR part 200.320(a) defines a procurement by micro purchase as, "the acquisition of supplies or services, the aggregate dollar amount of which does not exceed \$3,000 (or \$2,000 in the case of acquisitions for construction subject to the Davis Bacon Act). To the extent practicable, the nonfederal entity distributes micro purchases equitably among qualified suppliers. Micro purchases are awarded without soliciting competitive quotations if the nonfederal entity considers the price to be reasonable."



## 2. Small Purchases

2 CFR part 200.320(b) defines a procurement by small purchase as, “those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.”

Where the dollar threshold involved is \$150,000 or less or where the competitive field is very limited, the Procurement Division requests informal quotations in lieu of using the more expensive formal method. Informal quotations are also used to determine if previous prices are still in effect when dollar amounts are relatively small. These quotes are obtained from qualified sources via telephone, fax, email, mail, or any other reasonable method. In addition, HCD maintains written documentation on the names of the businesses contacted and how they were contacted, the prices that were quoted, and the basis for selecting one firm or supplier over the other(s).

Procurements valued at \$150,000 and less are considered informal and are conducted in accordance with the State Contracting Manual, Volume II, Purchasing Authority Manual (PAM) requirements for informal competitive non-IT goods procurements.

## 3. Sealed Bids

2 CFR part 200.320(c) defines sealed bids as procurements that, “are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.” Sealed bids are the preferred method of procurement for construction contracts, assuming the following conditions from 2 CFR part 200.320(c) have been met:

- A complete, adequate, and realistic specification or purchase description is available.
- Two or more responsible bidders are willing and able to compete effectively for the business.
- The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally based on price.

HCD follows the requirements of PCC Article 3: Competitive Bidding and Other Acquisition Procedures §10300-10334. Except for contracts and purchases covered by SAM Chapter 1200 and SAM Chapter 5200, contracts and purchases in amounts exceeding \$150,000 are normally made by sealed bid procedure. Policies are also included in SCM § 5.11, 5.15, 5.80 (A), 5.90, and 11.05. In emergency situations or other special circumstances, statutes may exempt purchases from the bid procedure. Sealed bids are opened and read at a specified time and are maintained on file (PCC section 10301). SAM § 3503.

HCD makes a diligent effort to secure at least three competitive bids. If it cannot obtain three competitive bids, the employee who solicited the bids prepares and

signs a list of the firms or individuals contacted. The agency attaches the bid solicitation list and the bids received.

#### 4. Competitive Proposals

Per 2 CFR part 200.320(d), the technique of competitive proposals is normally conducted with more than one source submitting an offer and either a fixed price or cost reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids.

HCD follows the requirements of PCC Article 3: Competitive Bidding and Other Acquisition Procedures §10300-10334. For service contracts, HCD follows PCC Article 4: Contracts for Services §10335-10381. Competitive proposals are used for purchases over the Simplified Acquisition Threshold. This procurement method requires formal solicitation, fixed price or cost reimbursement contracts, and is used when sealed bids are not appropriate. The contract should be awarded to the responsible firm whose proposal is most advantageous to the program, with price being one of the various factors.

#### 5. Procurement by Noncompetitive Proposals

Procurement by noncompetitive proposals, also known as sole source procurement, occurs when a proposal is solicited only from one source. Noncompetitive procurement requires HCD 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 HCD.
- 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 subgrantee's Authorized Representative explaining the circumstances and requesting a sole source approval from HCD.
- 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 subgrantee's Authorized Representative requesting a sole source approval from HCD 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 nonresponsive or non-responsible, include the written justifications.
- Full copies of all bids received, including nonresponsive proposals.
- Review scoring results for each respondent based on selection criteria indicated in RFP/RFQ, including names of subgrantee's review panel.
- Proof of no debarment of all proposals received.
- Complete draft contract (ready to execute); this must include all CDBG federal contract provisions.

## N. Pre-Award

### 1. Debarment Check

Per 2 CFR part 200, Appendix II (I), "a contract award must not be made to parties listed on the government wide Excluded Parties List System in the System for Award Management (SAM)...the Excluded Parties List System in SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority."

Prior to awarding a contract, HCD's GMR takes the following steps:

- Search for the awarded party's name at:  
<https://www.sam.gov/portal/public/SAM/>
- Verify that the awarded party has not been included on any federal debarment lists, which includes ensuring they have a current registration number for DUNs.

### 2. Conducting Cost/Price Reasonable Analysis

2 CFR part 200.323 requires HCD to "perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the nonfederal entity must make independent estimates before receiving bids or proposals." HCD also applies SCM Chapter 2 Appendix, §2(B)(2).

#### a. *Negotiating Profits*

2 CFR 200.323(b) requires HCD to, "negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must 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 subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work."

This applies when there is no price competition in a procurement. Profit is to be considered separately from the cost analysis and should be documented as such, however this is not a “cost plus percentage of cost” contract. Refer to HUD’s [Quick Guide to Cost and Price Analysis](#) for further detail.

#### *b. Cost Reasonableness Determination*

HCD and its subgrantees use a standard form to document the outcomes of the cost or price analysis and determine whether the cost of the bid or proposal is reasonable. The form includes a description of the method used to analyze the cost, a comparison of the cost to the independent cost estimate, and the outcome of profit negotiations.

### **3. Prohibited Contracts**

The following types of contracts are either prohibited by 2 CFR part 200 or should be used sparingly, with careful oversight.

#### *a. Time and Materials Contracts*

Both federal and state regulations forbid the use of time and materials contracts, except in specific scenarios. These types of contracts create an open-ended contract price, which provides no positive incentive to the contractor to control costs or labor efficiency.

2 CFR part 200.318(j)(1) states that HCD, “may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and material type contract means a contract whose cost to a nonfederal entity is the sum of: i) the actual cost of materials; and ii) direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses and profit.”

Time and material type contracts may be used only after a determination has been made that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at their own risk.

A time and materials contract provides no positive profit incentive to the contractor for cost control or labor efficiencies. Therefore, subgrantees must document how they will maintain a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls. If a time and materials contract is required and justified, the contract must outline clear terms for labor and materials to be included and set a maximum threshold based on cost analysis.

#### *b. Cost Plus Contracts*

2 CFR 200.323 (d) states that, “the cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.” HCD will not enter into cost plus contracts for the NDR grant.

## O. Contract Provisions

The following provisions must be included in any contract between a vendor or contractor and HCD.

### 1. Special Conditions

#### *a. Insurance Requirements*

HCD requires that, at a minimum, contractors provide the equivalent insurance coverage for real property and equipment acquired or improved with federal funds as provided to property owned by HCD. Federally owned property need not be insured unless required by the terms and conditions of the federal award.

#### *b. Bonding Requirements*

2 CFR part 200.325 requires that, for construction contracts or subcontracts exceeding the Simplified Acquisition Threshold, HCD obtain assurances that its interest is adequately protected.

All HCD subgrantees and contractors must obtain fidelity bonds sufficient to safeguard against fraud and misuse of funds, per 2 CFR part 200.304(b).

In accordance with Government Code section 11007.4, the State of California has elected to be self-insured for liability exposures. The state and its employees acting in the course and scope of their employment are insured for tort liability arising out of official state business. Contractors of the State of California must comply with bond requirements under PCC §7103 according to the amount of the contract award.

HCD subgrantees or contractors that are not state agencies must provide evidence of fidelity bonding to meet the OMB requirements listed in 2 CFR part 200.304(b) and 31 CFR part 223, Surety Companies Doing Business with the United States, or provide a self-insurance certification to HCD for the activities associated with any CDBG NDR activities.

#### *c. Procedures for When Bids Exceed Cost Estimates*

In some cases, the lowest bid received will exceed the amount of funds allocated for the project. When this happens, the contractor or vendor must notify the GMR, who consults with HCD contract staff and staff at the Department of General Services to determine the best option to proceed.

### 2. Federal Funding Compliance Provisions

In addition to other provisions required by HUD, all contracts made by HCD under the CDBG NDR grant award must contain provisions covering the following, as applicable.

#### *a. Equal Employment Opportunity.*

Except as otherwise provided under 41 CFR §60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR §60-1.3 must

include the equal opportunity clause provided under 41 CFR §60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR §1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR §60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

*b. Davis Bacon Act, as amended (40 U.S.C. 3141-3148).*

When required by federal program legislation, all prime construction contracts more than \$2,000 awarded by nonfederal entities must include a provision for compliance with the Davis Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR §5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. HCD or its subgrantees must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation.

The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. HCD or its subgrantees must report all suspected or reported violations to the federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR §3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Copeland Act provides that each contractor or subgrantee must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. HCD must report all suspected or reported violations to the federal awarding agency.

*c. Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708).*

Where applicable, all contracts awarded by the HCD or its subgrantees entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR §5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours.

Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings



or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

*d. Rights to Inventions Made Under a Contract or Agreement*

If the federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and HCD or its subgrantee wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” HCD and its subgrantees must comply with the requirements of 37 CFR §401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

*e. Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended*

Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-federal awardee to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

*f. Energy Policy and Conservation Act*

Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. 6201).

*g. Debarment and Suspension (Executive Orders 12549 and 12689)*

A contract award from a covered procurement over \$25,000 (see 2 CFR §180.220 and 2424) must not be made to parties listed on the government wide Excluded Parties List System in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR §180 that implement Executive Orders 12549 (3 CFR §1986 Comp., p. 189) and 12689 (3 CFR §1989 Comp., p. 235), “Debarment and Suspension.” The Excluded Parties List System in SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

*h. Byrd Anti Lobbying Amendment (31 U.S.C. 1352)*

Contractors that apply or bid for an award of \$100,000 or more must file the required certification. Each tier certifies to the tier above that it will not and has not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a

member of Congress in connection with obtaining any federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with nonfederal funds that takes place in connection with obtaining any federal award. Such disclosures are forwarded from tier to tier up to HCD.

#### *i. Solid Waste Disposal Act*

A nonfederal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR §247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.”

### **P. Contract Management**

Per 2 CFR part 200.318(i), HCD and its subgrantees “must maintain records sufficient to detail the history of procurement. These records include, but are not necessarily limited to, the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.” State requirements are also outlined in SCM part 9.09.

In addition, 2 CFR part 200.318(b) requires HCD to “maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.” SCM parts 1.04 and 9.04 detail specific requirements for the responsibilities of any contract manager for the state. HCD will ensure that contractors are in compliance through regular desk monitoring and on-site visits.

#### **1. Awarding Agency or Pass through entity review**

Per 2 CFR part 200.324, HCD must make available, upon request by HUD or the State of California, procurement records. HCD and its subgrantees must ensure that their procurement policies and procedures are comprehensive regarding the level of documentation to be maintained for the purchase of any goods or services. Whenever contractors or subgrantees conduct a procurement, they will provide HCD with records of contracts, amendments and evidence that the procurement has been reviewed. Contractors and subgrantees may keep original files for their records and provide HCD with copies and make them available and readily accessible for audit, monitoring or other reviews. Audit and record retention requirements of the state also outline the level of documentation to be maintained under SMC §7.50 and 9.16.

## Q. Disputes

Per federal regulations, HCD is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of a procurement. These include, but are not limited to, source evaluation, protests, disputes, and claims.

### 1. Rejecting Bids

Subgrantees must have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to HCD. A protestor must exhaust all administrative remedies with the subgrantee before pursuing a protest with HCD, and with HUD. Reviews of protests by HCD are limited to:

- Violations of state or federal law or regulations and the standards of procurement
- Violations of the subgrantee's protest procedures for failure to review a complaint or protest
- Protests received by HCD other than those specified above will be referred to the subgrantee

When the range of bids received is such that purchase is not in the best interest of the state, all bids will be rejected. When all bids are rejected, all bidders will be advised.

Also, all bids may be rejected when it is determined, with consideration of the surrounding circumstances, that it would be in the state's best interest to do so.

## R. Contract Award

Depending on the type of procurement used, HCD executes the required contract type. Regardless of the services provided or templates used, all contracts must include all required CDBG Compliance Provisions.

## S. Contract Modifications

### 1. Amendments

HCD reviews all proposed contract amendments to ensure that the amendment is in accordance with NDR program or project objectives. Any amendment that does not meet NDR objectives is not eligible for consideration.

Prior to approving an amendment that adjusts project costs, HCD completes cost or price analysis, including an ICE. Once the ICE is complete, HCD reviews the proposed costs from the contractor and ensures that the costs are reasonable. In addition to project costs, HCD reviews amendments to ensure that the proposed change in scope and project timeframe are reasonable and necessary to complete NDR objectives.

HCD reserves the right to extend existing agreements via amendments, so long as full and open competition is not jeopardized as set forth in 2 CFR part 200.319,

and SCM part 5.15, and that the ability to extend the agreement is stipulated within the existing agreement.

## 2. Change Orders

The procurement process extends to change orders received for previously procured work. Amendments or change orders must be reviewed by HCD before approval or execution by the contractor and must be determined to be reasonable and necessary to complete the contracted task.

Before approving the change order, an ICE must be completed by HCD to ensure that the change order is reasonable. Once the ICE is completed, HCD may compare it to a quote supplied by the contractor to perform the work.

Where feasible and appropriate, care must be taken to limit change orders to prevent a violation of free and open competition for NDR funds. Once accepted, the change order becomes a part of the contract record and all record retention policies governing contracts are applicable.