CHAPTER 3.0: PROCUREMENT AND CONTRACTING

This chapter outlines the requirements for using Federal funds to purchase materials, products, or services under the CDBG Entitlement program. Whether you are a small agency purchasing occasional office supplies or a large organization contracting for millions of dollars of construction services, the requirements governing the purchasing process are designed to ensure that you:

- Follow a **free and open competitive process** in securing those products or services.
- Properly **document** your purchasing activities and decisions.
- Observe the special **rules for particular kinds of purchases** (small purchases, competitive sealed bids, competitive proposals, and sole source procurements).
- **Properly bond and insure** work involving large construction contracts and/or subcontracts.
- Use **local businesses** and contract **with small, minority and/or women-owned businesses** to the maximum extent feasible.

When it comes to spending the taxpayer's money, no matter how little the amount, it is important to ensure that the prices you pay are competitive, and that you (and the taxpayer) are getting good value. The rules don't require that you get a bargain every time you buy, but only that you pay a fair price. They don't require that you always get the latest in technology at the lowest possible cost, but only that you shop around and get what you paid for. This means that you should seek to buy with CDBG funds only what is necessary under the terms of your Subrecipient Agreement, and no more. You should also be able to ensure the integrity of your purchasing decisions; to document the history, results, and decisions behind your purchases; to follow the rules for certain kinds of transactions; and to offer opportunities to local and disadvantaged firms to respond to your purchasing needs. By following these requirements you are helping to guarantee the fairness and the vitality of our free market system, and to ensure that taxpayer resources are not being wasted.

By observing the basic rules, you'll also find your purchasing decisions can be more efficient. For example, if you set up a standardized purchasing system for securing price quotations and preparing purchase orders, you won't have to reinvent the wheel every time you want to buy materials and supplies. These efficiencies in turn can help make your limited purchasing budgets go much farther. You'll also have the satisfaction of knowing you paid a fair price for every purchase.

In addition, when you use CDBG funds to purchase materials or services, it is not sufficient simply to *state* that you got the lowest possible price and followed the rules. You have to be able to *prove it.* Therefore, to avoid disallowed costs and/or recapture of payments, it is necessary that you document the background, need, and the details of every purchasing decision, whether it involves renting an office or buying two-by-fours. At first, this may appear burdensome, but full documentation can only help you avoid serious problems and a lot of extra work in the long run.

AS YOU READ THIS CHAPTER, THINK ABOUT ...

1. Planning how would you set up a purchasing system if you were spending your own money and wanted to spend it efficiently.

2. Updating the list of vendors and contractors from whom you plan to purchase materials, supplies, equipment, and services over the next 12 months (if you don't have such a list, think about developing one for all vendors and contractors you might buy from).

3. Developing (or expanding) your own written procurement manual describing your procedures and a code of conduct for all employees involved in purchasing.

4. Identifying ways to ensure that all purchasing documents such as cost and price solicitations, purchase orders, contracts, delivery receipts, invoices, payables records, and check vouchers are integrated into one system.

5. Ensuring the *honesty and fairness* of your purchasing decisions.

3.1 General Procurement Provisions

The standards and procedures for procurement are intended to ensure that supplies, equipment, construction and other services acquired in whole or in part with Federal funds are:

a) Obtained as efficiently and economically as possible.

b) Procured in a manner that provides, to the maximum extent practical, open and free competition.

Solicitations must clearly explain all requirements that the bidder/offeror must fulfill in order for his or her bid/offer to be evaluated by the subrecipient. Solicitations for goods and services must be based on a clear and accurate description of the material, product, or service to be procured, and cannot contain features which unduly restrict competition. Some of the situations considered to be restrictive of competition include, but are not limited to:

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

Awards are to be made to the bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the subrecipient, price and other factors considered. Any and all bids may be rejected when it is in the subrecipient's interest to do so. The subrecipient must ensure that the award is only made to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement. Consideration should be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

The Federal guidelines for contracting are designed to further ensure that contracts are structured and managed in a way that is consistent with good administrative practices and sound business judgment.

The Federal requirements for these administrative areas are found in **24 CFR 85.36 for governmental subrecipients and in 24 CFR 84.40-48 for subrecipients that are non-profit organizations**. Because the procurement standards in 24 CFR Part 85 are generally more

specific than those found in Part 84, the former will be used as the principal basis for this chapter's presentation of applicable requirements. **Whenever there is a clear distinction between the requirements of 24 CFR Parts 85 and 84, the text will distinguish between the two sets of requirements**. However, in general, the standards set forth in 24 CFR Part 85 for procurement may be viewed as a "safe harbor" for satisfying the Federal requirements.

The general requirements for procurement include the following:

- According to 24 CFR 85.36(b)(9), a subrecipient must maintain ***records to detail the significant history of a procurement.*** These records include, not are not limited to, files on the rationale for selecting the methods of procurement used, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract *(for non-profit subrecipients,* 24 CFR 84.46 specifies that procurement records and files *for purchases in excess of the small purchase threshold fixed at 41 U.S.C. 403(ii), currently $100,000,* must include the basis for contractor selection, justification for lack of competition when competitive bids or offers are not obtained, and the basis for the award cost or price).

- ***Pre-qualified lists of vendors/contractors,*** if used, must be current, developed through open solicitation, include adequate numbers of qualified sources, and must allow entry of other firms to qualify at any time during the solicitation period (24 CFR 85.36(c)(4)).

- As part of its efforts to eliminate unfair competitive advantage, a subrecipient should ***exclude contractors that develop or draft specifications,*** requirements, statements of work, invitations for bids, and/or requests for proposals from competing for such procurement (24 CFR 84.43).

- A subrecipient must ensure that ***awards are not made to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation*** in Federal assistance programs under Executive Order 12549, "Debarment and Suspension" (24 CFR 85.35).

- There must be ***written selection procedures for procurement transactions,*** and the procedures must be adequate to ensure that:

    - **The purchase of unnecessary or duplicate items is avoided**. Where appropriate, an analysis should be made of lease versus purchase alternatives (24 CFR 85.36(b)(4) and 84.44(a)(1)-(2));

- Whenever possible, use of **Federal excess and surplus property** or **intergovernmental agreements for procurement or use of common goods and services** should be considered as a way to foster greater economy and efficiency (24 CFR 85.36(b)(5) and (6));

- **All purchase orders (and contracts) are signed by the authorized official(s)** of the subrecipient;

- **Items delivered and paid for are consistent with the purchase order** and/or contract for the goods or services;

- **Timely payment to vendors** occurs once the order is delivered, inspected, accepted, and payment authorized;

- **A cost or price analysis** is performed for every procurement action, including contract modifications, and documentation to that effect is maintained in the subrecipient files. The *method and degree of analysis is dependent on the facts surrounding the particular procurement situation,* but as a starting point, subrecipients must make independent estimates before receiving bids or proposals (24 CFR 85.36(f) and 84.45);

- **Profit or fee is negotiated separately from price** where competition is lacking or whenever a cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of past performance, and industry rates for the area (24 CFR 85.36(f)(2)); and,

- The list of **provisions in 24 CFR 85.36(i) or 84.48, as applicable**, must be included in any contracts.

- Subrecipients must ***not*** ***use "cost plus a percentage of cost" pricing*** for contracts (24 CFR 85.36(f)(4) and 84.44(c)); in addition, subrecipients should use *"time and material" type contracts* only after a determination is made that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk (24 CFR 85.36(b)(10)).

- Subrecipients must have ***protest procedures in place*** to handle and resolve disputes relating to their procurement and in all instances report such disputes to the grantee (24 CFR 85.36(b)(12)).

- There must be a ***documented system of contract administration*** for determining the adequacy of contractor performance (24 CFR 85.36(b)(2)).

- A subrecipient must have a ***written code of conduct governing employees, officers, or agents engaged in the award or administration of contracts*** (24 CFR 85.36(b)(3) and 84.42).

3.2 Permitted Approaches to Procurement

Depending on the scarcity of the item or service desired, and the size of the purchase, different methods of procurement are available for use by subrecipients under the Federal regulations.[1] The Prince William County procurement procedures will be followed by Subrecipients.

- Small purchases may be used for procurement less than $15,000 or less in the aggregate:(24 CFR 85.36(d)(1) and 84.44(e)(2))

  - Small purchases are made through the use of purchase orders. Competition is sought through oral or written price quotations. A subrecipient must document the receipt of an adequate number of price or rate quotations from qualified sources.
    - Purchases **less than $1,000** need three verbal quotes and
    - Purchases **$1,000 but less than $15,000** require three written quotes.

  - A procurement of more than $15,000 may not be inappropriately broken up into smaller components solely to qualify for the less complicated procedures followed under the "small purchases" approach.

- **Competitive sealed bids** (formal advertisement, 24 CFR 85.36(d)(2)): **$50,000 and over.**

  - The procurement must lend itself to a firm, fixed price contract (lump sum or unit price) where the selection can be principally made on the basis of price.

  - A subrecipient must advertise the Invitation for Bid (IFB) in publications of general circulation.

[1] Subrecipients need to be aware, however, that local or state laws or policies may require additional procedures or set lower dollar-value thresholds for some forms of procurement. Therefore, it is important to check with your grantee to learn whether any such additional procurement provisions apply.

- The IFB must include complete and accurate specifications and pertinent attachments and clearly define items or services needed, in sufficient detail for the bidders to properly respond.

- Bids must be opened publicly at the time and place stated in the IFB.

- A subrecipient must receive at least two or more responsible bids for each procurement transaction.

- If awarded, the contract must be given to the lowest responsive and responsible bidder (the subrecipient, however, can decide *not* to make the award to *any* of the bidders).

The competitive sealed bid method is the preferred approach for procuring construction services.

- **Competitive proposals** (24 CFR 85.36(d)(3)): **$15,000 but less than $50,000**

  - A subrecipient should use this method only when conditions are not appropriate for the use of formal advertising.

  - The Request for Proposal (RFP) must clearly and accurately state the technical requirements for the goods and services required.

  - A subrecipient must publicize the RFP, and to the maximum extent practicable, honor reasonable requests by parties to have an opportunity to compete.

  - Proposals must be solicited from an adequate number of qualified sources, consistent with the nature and requirements of the procurement.

  - The subrecipient must conduct a technical evaluation of the submitted proposals to identify the responsible offerors.

  - As necessary, the subrecipient conducts negotiations with those offerors who are deemed responsive and responsible and fall within a competitive price range, based on the subrecipient's evaluation of the bidders' pricing and technical proposals. After negotiations, these bidders may be given the opportunity to submit a "best and final" offer.

- The subrecipient must award the contract to the most responsive and responsible offeror after price and other factors are considered through scoring the proposals (or "best and final" offers) according to predetermined evaluation criteria. The successful proposal/offeror must clearly be the "most advantageous" source of the goods and services for the subrecipient.

  For procurement involving **architecture or engineering (A/E) services**, subrecipients may use competitive proposal procedures whereby competitors' qualifications are evaluated and **the most qualified competitor is selected**, subject to negotiation of fair and reasonable compensation. In these instances, price is ***not*** used as a selection factor. Once the most-qualified firm is identified, only that firm is asked for a price proposal that is subject to negotiation of a fair and reasonable price. If negotiations with the selected firm are unsuccessful, this process is repeated with the next highest-ranked firm, until a fair and reasonably priced contract can be awarded. The subrecipient must be careful to document the bases for its determination of the most qualified competitor and the reasonableness of the contract price. This qualifications-based approach to the competitive proposals method may ***not*** be used to purchase other than A/E services. (See 24 CFR 85.36(d)(3)(v).)[2]

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

- **Noncompetitive proposals/sole source procurement** (24 CFR Part 85.36(d)(4)):

  Noncompetitive negotiations may be utilized only under very limited circumstances. The subrecipient must show that another method of procurement was infeasible because:

  - The item or service was only available from a single source.

  - A public emergency or condition requiring urgency existed which did not permit the use of competitive procurement.

[2] It is important to note that many states have laws which *require* the use of qualifications-based selection (QBS) procedures when purchasing professional A/E services. In those states, the discretion afforded by 24 CFR 85.36(d)(3)(v) is removed. Absent a state QBS law, a recipient could opt to use QBS or competitive proposals. In the latter instance, prices are solicited from all contractors and considered in the selection process.

- Competition was determined to be inadequate after receiving proposals from numerous sources.

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

In other instances, for example, complicated rehabilitation projects, or unique human service activities, other forms of competitive and noncompetitive procurement may be necessary or desirable. In cases where price is not the single most important objective, it is still important to try to assure the highest possible quality of procurement at the lowest reasonable price through "open and free competition."

3.3 Bonding

The requirements for bonding in procurement are as follows:

- **For construction or facility improvement (sub)contracts exceeding $100,000**, the following *minimum Federal requirements (24 CFR 85.36(h) or 84.48(c))* for bid guarantees, performance bonds, and payment bonds must be met. These include:

  - A **bid guarantee** from each bidder equivalent to **5 percent of the bid price**. The "bid guarantee" must be a firm commitment in the form of a bid bond, certified check, or other negotiable instrument as assurance that the bidder is prepared to execute a contract within the time specified for the bid amount.

  - A **performance bond** from the (sub)contractor for **100 percent of the contract price** to secure the (sub)contractor's fulfillment of all obligations under the contract.

  - A **payment bond from the (sub)contractor for 100 percent of the contract price** to assure payment of all persons supplying labor and material under the contract.

- **For non-profit subrecipients**, 24 CFR 84.48(c) states that for contracts or subcontracts awarded for construction or facility improvement **equal to or less than $100,000**, a subrecipient must follow its own policies for bid guarantees, performance bonds, and payment bonds.

For both **non-profit subrecipients** and **governmental subrecipients**, however, the Subrecipient Agreement may mandate compliance with *the grantee's bid guarantee, bonding, and insurance requirements* in instances of contracts or subcontracts for construction or facility improvements with a value equal to or less than $100,000.

3.4 Use of Local Businesses; Contracting with Small, Minority, and/or Women-Owned Businesses

Federal regulations, both CDBG and non-CDBG, make it very clear that subrecipients should make every effort to use local business firms and contract with small, minority-owned and/or women-owned businesses in the procurement process. Specifically,

- A subrecipient must take **affirmative steps to use small firms, minority-owned firms, women-owned firms, or labor surplus area firms** in its CDBG-financed activities (24 CFR 85.36(e) or 84.44(b)). The efforts which a subrecipient should make include:
    - Incorporating such businesses in **solicitation lists** whenever they are potential sources.
    - Ensuring that **such businesses are solicited** when identified as potential sources.
    - **Dividing procurement requirements**, when economically feasible, to permit maximum participation of such businesses.
    - Requiring prime contractors, when **subcontracts** are let, to take affirmative steps to select such firms.
- In conformance with the requirements of ***Section 3 of the Housing and Community Development Act of 1968,*** to the greatest extent feasible, subrecipients must award contracts for work to be performed to eligible ***business concerns located in or owned by residents of the target area*** to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons, particularly those who are recipients of governmental assistance for housing (see 24 CFR 570.607(b)).

Subrecipients should note, however, that the desire to award contracts to local firms is *not* a legitimate excuse for avoiding an open and competitive procurement process.