CH 7 PROCUREMENT AND CONTRACTING

Introduction

The primary purpose of procurement is to assure free and open competition is achieved. This chapter describes the policies and procedures that must be followed when entering into contractual agreements with other entities when CDBG funds are being used. Such entities may include subrecipients, other governmental agencies, professional services firms, construction contractors, providers of goods and services, and others.

It is important to note that this chapter only covers federal and state procurements codes; it is the responsibility of the grantees to ensure compliance with all applicable procurement codes, including local requirements.

Section 1 - Responsibilities

Grantees involved in procurement and contracting for services related to CDBG funding and activities must ensure that all applicable Federal requirements are followed throughout the process. Local jurisdictions often have their own procurement and contracting requirements. Grantees are required to abide by all applicable procurement requirements. If an issue arises where requirements are seemingly contradictory, a grantee must follow the more stringent requirement.

Grantees are responsible for ensuring that CDBG funds are used in accordance with all program requirements. The use of designated public agencies, subrecipients, or contractors does not relieve the grantee of this responsibility. The grantee is also responsible for determining the adequacy of performance under subrecipient agreements and procurement contracts and for taking appropriate action when performance problems arise.

No bidding for construction or demolition activities may occur **until the appropriate environmental clearance and approval** has been provided by the State and **all property required for the project has been acquired** in accordance with URA, state, and local regulations.

Section 2 – Standards of Conduct

The grantee must maintain a written code or standards of conduct to govern the performance of its officers, employees or agents in contracting with and expending CDBG funds. The written code or standards of conduct must, at minimum, abide

by the State standards of conduct which includes the ethical standards of the South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991. More information can be found in Chapter 11 of this manual.

Conflicts of Interest

Employees, officers, agents, and board members must not participate in contract decisions if they have a real or apparent conflict of interest, including situations involving immediate family, partners, or related organizations. They are prohibited from soliciting or accepting gifts, favors, or monetary items from contractors, except for nominal, unsolicited items as allowed by established standards. The entity's standards of conduct must include disciplinary measures for violations.

More information can be found in Chapter 11 of this manual.

Section 3 – Procurement Requirements

Open Competition

All procurement transactions entered into by the grantee using CDBG funds, regardless of whether negotiated or advertised and without regard to dollar value, must ensure maximum open and free competition and ensure that supplies, services and construction are obtained efficiently and economically. Contracts must also be made with responsible and responsive firms. Federal requirements do not allow geographical preferences for local contractors that are not the low bidder, unless the preference is made for Section 3 Businesses.

All potential offerors must be advised that the application with cost estimate is available for review. The grantee must be alert to organizational conflicts of interest or non-competitive practices, which may restrict or eliminate competition or otherwise restrain trade.

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

- Placing unreasonable requirements on firms for them to qualify to do business;
- Non-competitive practices between firms or between affiliated companies;
- Non-competitive awards to consultants that are on retainer contracts;
- Organizational conflicts of interest;
- Contractors who develop specifications, statements of work, invitations for bids or requests for proposals that later bid on project;

- Specifying only a brand name product or manufacturer instead of allowing an equal to be offered without prior written approval from the State (may result in rebidding);
- Specifying subcontractors to be used;
- Unnecessary experience and excessive bonding requirements; or
- Any arbitrary action in the procurement process.

When contracting for architectural and engineering services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms to complete the contract.

Procedural Requirements

All CDBG procurement procedures must include 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.

Recipients **must perform some type of cost or price analysis in connection with every procurement**, including contract modifications, and must only permit allowable costs to be included.

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. Exceptions allowing "brand name or approved equal" are primarily approved for purposes of continuity (i.e., matching appearances and features). The specific features of the named brand that must be met by offerors must be clearly stated. **Approval by the State to use a specific brand must be obtained prior to bidding.** To seek approval, grantees are to write a brief letter to the State listing the specific brand/manufacturer they are seeking to utilize as well as explanation for why the specific brand/manufacturer is needed. Letters are to be sent to the CDBG procurement officer before bidding.

Procurement procedures should clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

Grantees may use State excess and surplus property rather than purchasing new equipment and property whenever such use is feasible and reduces project costs.

Awards will 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 agreement. When evaluating contractors, grantees must consider matters such as: contractor integrity, compliance with public policy, proper classification of employees, 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. Thought should be given to consolidating or breaking out procurements to obtain a more economical purchase. **The "cost plus a percentage of cost" and "percentage of construction cost" contracts cannot be used and this requirement will supersede any conflicting provision in an executed contract funded in whole or in part with CDBG funds.**

Grantees are not allowed to retain profits when contracting with other public agencies.

Contracts with other public agencies will only allow actual costs to be paid.

Grantees must maintain sufficient records to detail the significant history of a procurement. These records must include, but are not necessarily limited to:

- Information pertinent to the rationale for the method of procurement;
- Selection of contract type;
- Contractor selection or rejection; and
- The basis for the cost or price.

Grantees must maintain a contract administration system that ensures contractors perform in accordance with the terms, conditions and specifications of their contract.

Grantees 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. Grantees may not preclude potential bidders from qualifying during the solicitation period.

Section 5 – Purchase Methods

Cost Estimates

Grantees must perform some type of cost or price analysis in connection with every procurement in excess of the simplified acquisition threshold, including contract modifications, and must only permit allowable costs to be included. To ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or request for proposals must be excluded from competing for such procurements. This cost estimate must be in the form of a public body estimate and may include, but not be limited to, the following sources:

- Researching vendors;
- Inquiring of other local governments for similar procurements; or
- Inquiring of trade associations.

All methods of procurement **must** have documentation that a cost estimate was conducted. Such analysis must be submitted to the State for review, along with the contract submission. The methods of procurement available for grantees include:

- ♦ Micro-purchases;
- ♦ Small Purchases;
- ♦ Competitive Sealed Bids;
- ♦ Competitive Sealed Proposals; and
- ♦ Noncompetitive Procurement.

The appropriate method of procurement is determined by the aggregate dollar amount of goods or services acquired from a single source. Items purchased with CDBG funds, in whole or part, may not be categorized into activities in order to avoid these requirements. The following sections describe each method in further detail.

Small Purchase Procedures

The small purchase procedures allow grantees to acquire goods and services totaling no more than **$250,000,** without publishing a formal request for proposals or invitation for bids. This method of procurement is typically used to purchase commodities such as equipment or other materials. In the highly unlikely event that a grantee is purchasing materials that will exceed $250,000, they must use the sealed competitive bid process. The small purchases method can also be used to acquire eligible types of services, such as professional consulting, environmental review, or planning. This method cannot be used if the services contract will exceed $250,000 in value. If the services contract will exceed $250,000, the grantee must issue an RFP under the competitive proposals approach. **The small purchase procedures cannot be used to procure construction contractors** and these procurements must occur under the competitive sealed bid approach outlined below.

> The State must review all small purchase contracts of $25,000 or more (and professional services contracts over $5,000) prior to their execution.

Note that engineering and architectural services also cannot be procured using the small purchase method and must always be acquired using the competitive proposal approach. Under the small purchase method, grantees send a written request for quotes to potential vendors with a detailed description of the goods or services needed. In return, they receive competitive written quotations from an adequate number of qualified sources. Since this process does not require a public advertisement, written quotes must be received in response to written solicitations from a minimum of **three qualified sources**. Each quote must include pricing information that allows the grantee to compare costs across bidders and ensure cost reasonableness.

Documentation of the quotes must be attached to the purchase requisition and maintained in the grantee's files.

The award must be made to the lowest responsive and responsible source.

Competitive Sealed Bids (Formal Advertising)

Competitive sealed bids (Formal Advertising) must be used for **all construction contracts** or for **goods costing more than $250,000**. **The State must review all construction contracts of $25,000 or more prior to award/execution.**

Competitive sealed bidding requires publicly solicited sealed bids. A firm-fixed-price contract (to include unit price and quantities) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

For formal advertising to be feasible, the following minimum conditions must be present:

- A complete, adequate and realistic specification or purchase description is available;
- Two or more responsible suppliers are willing and able to compete effectively for a grantee's business; and
- The procurement can be logically structured in 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 bids must be directly solicited from competent vendors and documented. The publication must be published at least one time in a newspaper of general

circulation 30 days prior to bid opening and/or published in the Dodge Room/Associated General Contractors (AGC) or other 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 State 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; or
  - There is a local emergency affecting health and safety which will be addressed once the project is complete.

♦ **Bid Advertisement**: The advertisement must indicate that it is an Invitation to Bid and that project funding is being provided by CDBG and federal requirements will apply to the contracts. It must also include:

- the title of the project and brief scope of work;
- the name of the procurement entity;
- how to get copies of technical specifications and bid package;
- submission instructions and deadlines;
- public bid opening date;
- time and place (competitive bids) and any other appropriate instructions; and
- Buy America Build America Act (BABA) language, if applicable.

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

No lump sum bids, miscellaneous, allowances, or contingency line items are allowed. Use of these may require re-bidding

♦ **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/allowances" are not allowed.

- Bids for buildings must 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 division (and separated on pay requests).
- Bids for all ineligible work to be paid with non-CDBG funds must be delineated as a separate payment (and separate on pay requests).
- Grantees should review bid forms prior to soliciting bids in order to avoid inappropriately bidding 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 must include a provision that explains the basis for such decisions. When the lowest bid is rejected, the Project Engineer must provide a recommendation for the selected bidder and document the reason for the rejection. Additionally, an opinion from an attorney with relevant procurement experience stating that this action is consistent with local procurement policies and terms of the bid documents may be required. Such documentation will need to be submitted with the contract package to the State.

♦ **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.

When bids received pursuant to an invitation for bids exceed available funds and it is determined in writing from the procuring agency 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 low bidder's base bid, less any deductive alternates, does not exceed available funds by an amount greater than ten percent (10%) of the construction budget established for that portion of work. The negotiated price must be lower than the lowest rejected bid by any responsible and responsive bidder under the original solicitation.

The procuring agency may make a minor change to the scope of work (with prior approval from the State) to reduce the cost to be within the established construction budget. However, the procuring agency may not reduce the cost below the established construction budget by more than ten percent (10%) as a significant change in scope will require re-bidding.

- Grantees are required to submit documentation of bid negotiations. The following documentation must be submitted with a negotiated contract for the State approval:
    - A narrative explaning the negotiation process. Document that the low bidder had an opportunity to negotiate their bid by submitting a copy of the written notice given to the bidder including the revised bid due date, the revised bid form, and any revised contract documents and specifications.
    - A revised bid and a written certification from the low bidder agreeing to the negotiated bid.
        - When the lowest base bid received pursuant to an invitation for bids exceeds approved available funds and the procuring agency is able to identify additional funds for the project, in the amount of the difference between the lowest base bid and the approved available funds for the project, the procuring agency must submit its request to use those additional funds to the State.

Competitive Sealed Proposals

Competitive Sealed Proposals are a method of procurement in which a fixed-price or cost-reimbursement contract is awarded based on an evaluation process and not solely on price. This procurement method is typically used to purchase most professional services, technology systems, software, Architectural/Engineering services, etc.

The State must approve professional contracts over $5,000 prior to award/execution, regardless of the method.
For more information, see Appendix A.

Competitive Sealed Proposals may be used, with written permission from the State, if the use of competitive sealed bidding is either not practicable or not advantageous to the State or grantee. The State requires grantees to utilize Competitive Sealed Proposals for the acquisition of all Architectural/Engineering services and for the purchase of other professional services, regardless of

Architectural firms may be procured by the RFP procedure **only if cost is not an initial factor** of consideration, as State law prohibits compensation from being an initial factor of consideration.

cost. Under this procurement method, the grantee must publish a written request for submissions and then review these submissions based on established selection criteria. The Competitive Sealed Proposals method of procurement differs from the small purchases method in that the solicitation must be published and cannot be restricted to a smaller or limited number of bidders.

Under this approach, there are two possible methods of soliciting proposals. A **request for proposals** (RFP) asks that offerors submit both qualifications and cost information. A **request for qualifications** (RFQ) only asks for information on the offeror's expertise/ experience and not on cost. When acquiring any service that is not architecture or engineering, the full RFP process must be used. For example, if a grantee was to hire a for-profit CDBG contract administrator and that contract exceeded $250,000, an RFP would be recommended.

Competitive Sealed Proposals are awarded in accordance with the following requirements:

- Request for Proposals must be publicized and identify the general scope of work and all significant factors of evaluation, including price where appropriate, and their relative importance;
    - Adequate public notice of the request for proposals must be published at least fifteen days prior to when proposals are due.
    - Proposals must be solicited from two or more qualified sources.
- Request for Proposals must clearly and accurately state the technical requirements for the goods and services required;
- Grantees must have a written method for conducting technical evaluations of the proposals received and making selections;
- Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the grantee, with price and other factors considered.

When acquiring architectural or engineering services, either an RFP or an RFQ may be used. In most cases, an RFP process should be used, since it provides the grantee additional information, including proposed timelines, understanding of the scope of work, and cost considerations. An RFQ should only be used in limited circumstances, such as when a specialized service is being procured. Note that if an architectural or an engineering firm is being hired to provide a non-architectural/engineering service, that service must be procured using either the small purchases process or an RFP. For example, some engineering firms also provide construction and grants management services, both of which would require the use of an RFP.

Request for Proposals: 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 in addition to a published advertisement; and
    - Direct solicitation efforts must be documented;
    - The RFP must include a summary of the scope of work and the type and relative weights of the evaluative criteria;
    - The RFP must also include a request for technical and cost information (except for architectural); and
    - Cost information must be provided as a fixed price, depending upon the grantee's project.
- RFPs must be published at least 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 locality's system;
- recent and current as well as projected workload; and
- ability to meet time and budget requirements.

If the scope of work allows room for differing types of approaches, the grantee may wish to award points for the most appropriate or effective approach. For example, if hiring an architect to design a new community center, the grantee may award points for the most creative or energy efficient design.

In addition, cost must be one of the selection factors for an RFP (except for architectural). The grantee may 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 must include a minimum of three people.

This committee is required to evaluate proposals based on the exact criteria and weights published in the bid solicitation and information to bidders.

If mathematical errors are discovered during the review process, the individual scorer must verify and initial the correct score.

The grantee 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.

For architectural services, negotiations are entered into with the top ranked firm to determine price since it was not an initial factor of consideration in the proposal.

The grantee awards the contract to the bidder that scores 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 and the selection is made following the stated criteria. In some grantees, cost is used as the "tie breaker" between equally qualified firms.

Request for Qualifications: The RFQ process may only be used in two instances: (1) for complicated engineering or architectural services or (2) when the RFQ is used to narrow a pool of potential bidders, and a formal RFP will follow. In any other competitive proposal instance, the RFP must be used.

Grantees must obtain prior approval from the State before using an RFQ as a method of procurement.

The RFQ process does not request cost information at the time of solicitation. However, grantees must still ensure that all services are cost reasonable. The process for undertaking an RFQ is as follows:

- The RFQ is publicly advertised, **and** qualifications are solicited.
- RFQs must 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 must be listed in order of importance and may include, but are not limited to:

- Resume;
- previous projects completed;
- specific personnel to work on the project; and/or
- specific expertise of the firm in general.

As noted above, cost is not a factor in the qualification process.

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 must 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 grantee 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 procuring agency may either begin to negotiate with the highest ranked firm, or proposals are solicited from the highest rated firms that submitted qualifications and are ranked.

Negotiations are then initiated with the top ranked firm.

When Competitive Sealed Proposals are utilized, the following requirements apply.

Technical Evaluation: The grantee must provide a mechanism for technical evaluation of the proposals received, determinations of responsible offeror for the purpose of written or oral discussions and a recommendation of the selection for contract award.

Award: Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offerors must be notified promptly.

Non-competitive Procurement

Non-competitive procurement requires **prior** State approval and may be approved for use only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and one or more of the following circumstances applies:

- The total dollar amount of the acquisition of services is below $5,000 and does not require state approval;
- The item is available only from a single source;
- 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; or

In any case, some form of cost or price analysis must be made and documented in the procurement files for non-competitive procurement actions.

- After solicitation of a number of sources, competition is determined inadequate.

Grantees are required to submit a written request documenting the rationale for a specific product or service. Attach service agreement or other documentation that the company is a single source provider (i.e., utility providers).

For contracts that require State review, standard documentation must be submitted with the agreement to include the following:

- Complete and unexecuted contract agreement;
    - A current copy of the CDBG Contract Special Provisions must be incorporated to the agreement.
- Cost estimate from provider showing unit prices and quantities;
- Recommendation to award contract from Engineer/Architect;
- Cost reasonable determination from Engineer/Architect; and
- Project area maps/drawings, if applicable

Complete all standard State forms that are applicable (i.e., C-1 Contract Transmittal Form, Section 102 Disclosure Report, Section 3 Forms, etc.).

Note: Davis-Bacon wage determination must be included when contracting for services, if applicable. **The only time Davis Bacon is not applicable is for contracts less than $2,000 or for local governments providing force account labor.** See Chapter 8 for further guidance concerning Davis-Bacon applicability and regulations.

Design-Build

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, particularly open bidding/low bid requirements. Please contact the State for the appropriateness and applicability of the design/build process for your project. A checklist identifying key steps and information required in the Design/Build process is included in Forms section of the website.

Section 6 - Contracting

Contract Requirements

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

Grantees must also include the following provisions for all contracts:

- Provision addressing termination for cause and for convenience by the Grantee including how it will be affected and the basis for settlement (for all contracts above $10,000);
- Equal Employment Opportunity Compliance;
- Davis-Bacon Act Compliance;
- Contract Work Hours and Safety Standards Act Compliance for all contracts over $100,000 that involves hiring mechanics or laborers;
- Section 3 Compliance for all construction contracts over $200,000;
- Rights to Inventions Made Under a Contract or Agreement;
- Clean Air Act Compliance;
- Debarment and Suspension;
- Byrd Anti-Lobbying Amendment Compliance;
- Section 6002 of the Solid Waste Disposal Act Compliance; and
- Compliance with the prohibition on certain telecommunications and video surveillance service or equipment as prescribed by 2 CFR 200.216.
- Compliance with the Build America, Buy America Act (BABA)

Grantees are permitted under Title I to designate public agencies to assist in carrying out eligible activities on behalf of the grantee. Such designation is a non-procurement action by which the grantee may obtain services through non-competitive negotiations with another public agency (e.g., an area-wide planning agency). For more information, see Appendix B.

Similarly, Intergovernmental and Cooperative Agreements can be used by local jurisdictions to assist in the development, operation, and/or management of CDBG programs and projects. For more information, see Appendix C.

Bonding and Insurance

Grantees must, at minimum, provide the equivalent insurance coverage for real property and equipment acquired or improved with CDBG funds as provided to property owned by the grantee. Federally owned property does not need to be insured unless it is required by the terms and conditions of the agreement.

Contracts Less Than $250,000

For all contracts of $250,000 or less, grantees will follow local procedures relating to bonding and insurance. Also, please consult your engineer to protect the interest of the grantee.

Contracts More Than $250,000

For construction contracts over $250,000 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 must consist of a bid bond, certified check, or other negotiable instrument accompanying the bid;
- A performance bond from contractors for 100% of the contract must be executed in connection with each contract;
- A payment bond on the part of the contractor for 100% of the contract price; and
- All bonds must be obtained from companies holding certificates of authority as acceptable sureties.

Grantees must follow all minimum Federal requirements for bid guarantees, performance bonds, and payment bonds.

Protests of Contract Awards

Protestors of contracts must submit an intent to protest within seven business days of the award or the notice of intent to award, whichever is earlier. For sole source procurements and emergency procurements, protesters must submit an intent to protest within five business days. A grantee must allow for a fifteen-day waiting period, the period in which potential protestors must file an official protest, prior to the execution of the intended contract award 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 any case of the protest of an intended award of a contract funded in part or in whole with CDBG funds, the State must be notified immediately.

Grantees are responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to:

- source evaluation;
- protests; and
- disputes and claims.

Local procurement procedures must include protest procedures and reflect applicable State law, including Sec. 11-35-4210 of the South Carolina Consolidated Procurement Code.

Section 7 - Construction

Procurement of Construction Services

The State must review all construction contracts of $25,000 or more prior to award/execution. For construction service contracts, the grantee must follow these steps:

1. Plans, Specifications and Bid Package prepared;

   - An architect or engineer will typically 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.
     - Make sure 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 here and in the attachments to this chapter.)
   - Bid and contract documents must include but are not limited to the following:
     - Technical specifications;
       - Technical specifications must not specify brand names unless there is an "or equal" substitution allowed or the State has pre-approved use of a specific brand name.

A CDBG Recommended Contract Checklist for construction services is included in the attachments to this chapter.

- Local, State and Federal requirements for:
  - Equal opportunity requirements
  - Labor standards requirements (including a current, applicable wage decision);
  - Section 3 requirements and Section 3 forms;
  - General contract terms and conditions such as termination clauses, access to and retention of records, etc.; and
  - Timeframe for contract completion. **Contract agreements must not be pre-dated.**
- General industry conditions;
- Itemized cost and unit pricing information or schedule of values;
- Method of payment and amount of contract;
- Advertisement for Bid;
- Copy of proposed Contract Form; and
- Bid Bond Form.

♦ Include a request that all bidders return bids even if they are not going to bid. Have them mark that bid "No Bid." A written "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 must be included.

♦ Bids must be effective for 60-90 days after bid opening to allow for appropriate review and approvals.

♦ Build America, Buy America (BABA) language must also be included in all construction contracts.

2. Prior to bidding the project, the Grant Administrator must review the bid documents to ensure that the scope of work is consistent with the approved CDBG application. A *Construction Contract Review Checklist* is included in the Forms for this chapter;

♦ Reviews must ensure consistency throughout the solicitation and specifications regarding the Owner, bid expiration, contract period, etc. Also, make sure the contract period is consistent with the grant period.

♦ Reviews must ensure that environmental clearance and approval from the State has been obtained and all real property acquisition is complete prior to taking bids or executing contracts.

- 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 State approval before proceeding further.
- 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.
    - 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. No contract will be approved until all CDBG-funded activities have been approved.
- In general, pre-bid conferences can serve to restrict competition and may not be mandatory. The only time a pre-bid conference may potentially be mandatory is when the nature of the project is unique or complex. The unit of local government must provide documentation to the State for review/approval prior to bidding that the pre-bid conference requirement is justified and will not unduly restrict competition.

3. Construction bids must be publicly solicited using sealed bids. (See Section 4 for a complete description of requirements.) Prior to bid opening:
    - The invitation for bids must be publicly advertised **and** bids directly solicited from competent vendors.
        - The publication must be published at least one time in a newspaper of general circulation 30 days prior to bid opening and/or published in South Carolina Business Opportunities (SCBO) or other 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.
    - 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 must be logged with the name and address of bidder, and the time and date of receipt.
- Confirm wage decision ten days prior to bid opening.

4. Conduct a public bid opening;
   - All bids must be read aloud during this meeting. Minutes of the meeting must be maintained for at least three years from the conclusion of the project 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 must be sent back unopened.**

The following referenced forms are available in the Forms section of the website:
- Architect/Engineer's Certification of Accessibility
- Notice of Intent to Award
- Debarment Certification Form
- CDBG Section 102 Disclosure Form
- *CDBG Contract Transmittal Form (C-1)*

5. Review bids;
   - Determine if they are legally and technically responsive. Unit prices always prevail in determining the lowest bid in case of adding errors.
   - Check with the State's Licensing Board for General Contractors to verify contractor's business license number and type, and the type 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, references, financial data, 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 State to determine if the provisions for non-competitive procurement found in Section 3 of this chapter apply. Remember, a bid marked "No Bid" is considered a bid. For contracts that result in 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 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 completed.

- Review SAM.gov to confirm contractor is not excluded from participating in federal contracts and print out a verification sheet. If a search indicates "no records found", this means that the contractor is not registered or may have their record set to private. If a contractor's record is set to private, they must provide the SAM documentation to the Grantee.
- Prepare and mail Notice of Intent to Award form subject to the State's review of the bid and contract documents to the selected or appropriate bidders. This form is available in the Forms section of the website.

6. Errors in Bidding;

- The bid document must indicate how bidding errors will be handled.
  - When an error is discovered in one or more bids to be submitted, contractors must 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 engineer's recommendation must acknowledge that the correction occurred prior to submittal of the bid.
- Once bids are opened, the bids may not be altered.
  - If the engineer determines there are computation or mathematical errors while preparing the itemized bid tabulation, the engineer may show the correction on the itemized bid tabulation. The correction must be specified as the engineer's correction, based on computations verified for all bidders.
  - The engineer must explain the procedure in the recommendation of award.
  - In addition, each original bid as well as the correction must be listed on the itemized bid tabulation. All contractors must be notified, and any contractor may choose to withdraw their bid if the correct computation is not acceptable.
  - Change orders cannot be used to correct errors in bidding documents prepared by the engineer after the bids have been opened.
- Generally, discrepancies must be handled as follows:

Do not submit proposed contracts for State review and approval prior to obtaining bids and selection of the apparent low bidder.

- Discrepancies between the multiplication of units of work and unit prices must be resolved in favor of the unit prices.
- Discrepancies between the indicated sum of any column of figures and the correct sum thereof must be resolved in favor of the corrected sum.
- Discrepancies between words and figures must be resolved in favor of the words.

- It is not acceptable to award a bid and then submit a change order for an additional activity(ies) or to remove ineligible items from the contract. The Grantee must 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 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 State.

7. Within twenty days after the bid opening, the grantee must submit the proposed contract, a description of the method of procurement, and selection procedures and whether the grant activities will involve multiple construction contracts to the State for approval, including the following documentation:

- A copy of the solicitation of the bid which must clearly define the items or services needed for the bidders to properly respond to the invitation.
- 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.
- A certified copy of the itemized bid tabulation or proposal tabulation sheet reflecting all bids.
- Evidence that cost analysis was performed to determine the reasonableness of the price, if appropriate, and engineer's recommendation of contract award. The recommendation must include:
  - Whether the bids were considered responsive.
  - Identify and explain any bid discrepancies and how they were considered/corrected in accordance with the bid documents.

When bids for construction projects are significantly under budget, **all cost savings must be prorated among funding sources**. A budget revision to reflect the contract costs may be required with the contract.

- Whether any alternates were accepted and the total recommended contract amount.
- How cost reasonableness was determined.
- Explanation for any delays in submitting bid documents for approval.

- A copy of the itemized bid form from the lowest bidder.
- A copy of the completed but not executed contract.
- Verification through www.sam.gov that the contractor is not on the Excluded Parties list.
- Debarment Certification Form
- Verification that the contractor is not on the State Suspensions and Debarments list accessed at http://procurement.sc.gov/PS/legal/PS-legal-suspend-debar.phtm
- Updated Section 102 Disclosure Report form indicating all contractors, services and the amount of the contracts (only for HUD grants received by the unit of local government which exceeded $200,000).
- The CDBG Contract Transmittal Form (C-1) which certifies that the grantee has included all applicable provisions in the contract. The C-1 must list the CDBG line-item budget relevant to the contract submitted. If the contract has multiple funding sources, the source and amount must be listed accordingly. This form must be signed and dated by an official in charge of procurement for the grantee. The form includes a certification that the grantee or project administrator has reviewed the documents and certifies they are consistent with the approved CDBG application and environmental review and are in compliance with all CDBG requirements. This form along with a Construction Contract Review Checklist and a copy of the CDBG Contract Special Provisions is included in the Forms for this chapter.

Documentation of BABA compliance must be provided for a minimum of 95% of all iron, steel, manufactured products, and construction materials used in the project. The grantee must provide an itemization to identify the products, quantities, and costs as support documentation (only for applicable projects).

Contracts submitted for State review within fifteen or fewer days before bid expiration must also submit a letter from the contractor agreeing to a thirty-day extension of the bid.

8. The State will notify the grantee in writing regarding the contract;

- No contracts may be executed until the State has given contract approval. Failure to adhere to this policy could result in disallowed costs.

- Once a contract has been approved, the agreement must be executed in a timely manner. Any delays should be documented in the files.

9. Award/execute contract and secure performance and payment bonds within ten days; and
   - The bidder who is awarded a contract 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.
   - Performance Bond Form from a surety company appearing on the U.S. Treasury Department's latest approved list, or Best's Key Rating Guide, which must show a financial strength of at least five times the contract price.
     - The performance bond must equal not less than 100% of the contract price.
   - Payment Bond Form from a surety company appearing on the U.S. Treasury Department's latest approved list, or Best's Key Rating Guide, which must show a financial strength rating of a least five times the contract price.
     - The payment bond must equal not less than 100% of the contract price.
   - Approve contractor's bonds and execute contract within ten days of receipt.
10. Issue Notice to Proceed and send copy to the State. The Notice to Proceed cannot be issued until the contract has been executed.

Procurement of Construction Services



PREPARE SPECIFICATIONS AND BID PACKAGE

TECHNICAL SPECIFICATIONS
EQUAL OPPORTUNITY REQ.
LABOR STANDARDS REQ
GENERAL CONTRACT TERMS
GENERAL INDUSTRY CONDITIONS
COST AND PRICING INFORMATION
METHOD OF PAYMENT
AMOUNT OF CONTRACT
ADVERTISEMENT FOR BID
BIDDER'S INFORMATION
CONTRACT FORM (NOT EXECUTED)
BID BOND FORM
"NO BID" REQUEST
OBTAIN WAGE DECISION

ARCHITECT/ENGINEER PREPARES TECHNICAL SPECIFICATIONS

PUBLICLY ADVERTISE USING SEALED BIDS (ADVERTISE FOR 30 DAYS IN PAPER, AGC, ETC.)

SEND AMENDMENTS TO BID DOCUMENTS, IF ANY, TO ALL BIDDERS

CONFIRM WAGE DECISION 10 DAYS PRIOR TO BID OPENING

CONDUCT PUBLIC BID OPENING

REVIEW BIDS

IF ONLY ONE BID RECEIVED, RE-BID OR CONTACT THE STATE FOR OPTIONS

IF CONTRACT IS OVER $25,000, SUBMIT PROPOSED CONTRACT ALONG WITH ALL C-1 CONTRACT SUBMITTAL REQUIREMENTS TO THE STATE FOR REVIEW WITHIN 20 DAYS

OBTAIN THE STATE APPROVAL OF CONTRACT

AWARD CONTRACT

SECURE PERFORMANCE AND PAYMENT BONDS WITHIN 10 DAYS

EXECUTE CONTRACT

ISSUE NOTICE TO PROCEED

Buy America Build America Act Requirements

The Build America, Buy America Act (BABA) requires that all iron, steel, manufactured products, and construction materials use for federally funded infrastructure projects are produced in the United States, unless otherwise exempt or subject to an approved waiver. This requirement is known as the "Buy America Preference (BAP)."

Pursuant to the Buy America Build America Act (BABA), Grant Recipients that receive funding for infrastructure projects funded on or after FY23 must ensure compliance with the following:

- all iron and steel used in the project must be produced in the United States - this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- specifically listed manufactured products must be manufactured in the United States - this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and:
- Metals other than iron or steel (non-ferrous metals), Lumber, Composite building materials, and Plastic and polymer-based pipe and tube materials, including PVC pipe must be produced in the Unites States.

In the planning phase of any CDBG-funded project, grantees should determine whether the project is subject to the BAP and if so, for which classification(s) of products. The following process outlines the criteria for CDBG projects subject to the BAP, with four potential outcomes:

- Complies with the BAP according to HUD's Phased Implementation Waiver;
- The BAP is not applicable to the entire project because it is not an infrastructure project;
- The BAP is not applicable to the project due to one of HUD's general waivers; or
- The BAP is not applicable because a project- or product-specific waiver was reviewed by HUD and approved.

BAP Qualification Determination Process

Grantees must follow the process as outlined below to determine the applicability of BAP for their project:

1. Determination of applicability:

    - Grantees must determine if the funds being used are being used for an infrastructure project as defined by BABA. Examples of CDBG projects that are considered infrastructure projects, include:

        - Rehabilitation, maintenance, and reconstruction of buildings and real property; and
        - Construction and repair of public facilities and improvements, such as water, sewer, or other utilities, roads, bridges, sidewalks, libraries, or broadband infrastructure.

    - Examples of funded activities that may not be subject to the BAP include:

        - Acquisition of real property;
        - Relocation and demolition;
        - Public services;
        - Public facility operating expenses;
        - Supportive services;
        - Special economic development activities;
        - Administrative activities; and / or
        - Disaster and emergency response.

    - If grantees determine that BABA applies to the project, they must continue to step two; if the project does not, then grantees are not required to abide by BAP.

2. Identification and Classification of the products to be used in the project

    - Grantees must identify and classify the products that will be used during the infrastructure project. The following products are subject to BAP for all present and future obligated CDBG Funds:

        - Iron and/or steel;

            - Items that consist completely or predominantly of iron, steel, or a combination of both. "Predominantly" means

the cost of the iron and steel content exceeds 50% of the total cost of all the item's components.

- Construction Materials;
  - Non-ferrous metals;
  - Lumber;
  - Plastic- and polymer-based products;
  - Glass;
  - Fiber optic cable;
  - Optical fiber;
  - Engineered wood; and
  - Drywall.
- Manufactured Products; and
  - Articles, materials, or supplies that have been:
    - Processed into a specific form and shape; or
    - Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- Applicable to Appalachian Regional Commission (ARC) grants only:
  - Cement and cementitious materials;
  - Aggregates such as stone, sand, or gravel; or
  - Aggregate binding agents or additives.

♦ The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.

3. Consideration of General Waivers

    - There are two categories of general waivers that may be used. If a waiver is applicable, the project would not be subject to BAP. The two waivers are:

    1. Exigent Circumstances Waiver;

        i. If there is an urgent need to immediately complete the project because of threat to life, safety, or property of residents and the community.

    2. De Minimis, Small Grants, and Minor Components Waiver.

        i. If the total cost of the project from all sources is equal to or less than $250,000, or if covered BAP materials for a portion of a project comprise no more than 5% of the total cost of covered materials used in a project.

    - These waivers are effective until November 23, 2027.

4. Consideration of Project-Specific Waivers

    - Grantees should consider the criteria for project-specific waivers and determine if the project is eligible for a waiver due to the public interest, nonavailability of materials, or unreasonable cost. A Project-Specific Waiver may be considered under the following conditions:

        - If applying the BAP to the project is inconsistent with the public interest;

        - If the materials used in the project are not produced in the United States or not available in sufficient quantities; or

        - If the inclusion of domestically produced materials would increase the cost of the overall project by more than 25 percent.

    - If a grantee believes that these conditions may be applicable for their project, reach out to the State for more information on how to apply for a Project-Specific Waiver. HUD will consider project-specific waivers only under exceptional circumstances, and approvals will be granted on a very limited basis

    - If a grantee has completed the following steps and has not qualified for a waiver, the grantee must apply BAP and the project

documentation must demonstrate that materials were procured from domestic sources in compliance with the BAP.

Production Requirements/Cost Determination

Items that consist completely or predominantly of iron, steel, or a combination of both, must have all manufacturing processes occur in the United States. This includes the initial melting stage and all subsequent stages such as the application of coatings. Similarly, all construction materials must have all manufacturing processes occur in the United States.

Manufactured products must meet two production requirements:

- The final product must be manufactured in the United States; and
- At least 55% of the cost of the components making up the manufactured product must be associated with the components that were mined, produced, or manufactured in the United States.

Project Implementation and Recordkeeping

Grantees should ensure that all relevant stakeholders are informed about the BAP requirements and determine whether a project is subject to the BAP, and if so, for which classification(s) of materials.

Grantees must maintain documentation in accordance with CDBG requirements for recordkeeping and record retention. It is the grantee's responsibility to ensure that all records related to BABA compliance are properly maintained, including any records kept by third parties (subrecipients, contractors, etc.). This includes retaining all documentation that demonstrates:

- All the iron, steel, manufactured products, and construction materials used in infrastructure projects are produced in the United States; or
- The project is covered by a HUD general waiver and is therefore exempt from the BAP; or
- A project/product-specific waiver was reviewed by the State and approved.

CDBG grantees must retain supporting documentation from subrecipients, contractors, and vendors to develop records demonstrating compliance with the BABA requirements on a project and material level basis, regardless of whether infrastructure is the primary purpose of the project.

Documentation of BABA compliance must be provided for a minimum of 95% of all iron, steel, manufactured products, and construction materials used in the project. The grantee must provide an itemization to identify the products,

quantities, and costs as support documentation. The bid tab is generally not sufficiently detailed to itemize each separate product or material. Until further guidance is provided, the grantee must provide written evidence from the manufacturer or supplier that:

- Identifies the item purchased;
- Affirms the location of manufacture as within the United States; and
- Is signed by an authorized company representative.

Examples of Acceptable Documentation:

1. Procurement List(s) of Covered Materials purchased for the public infrastructure project, prepared by the grantee, subrecipient, or contractor, showing:
    - Type of covered material (iron, steel, manufactured product, or construction material)
    - Product or material description
    - Federal Financial Assistance (FFA) source(s)
    - FFA obligation date(s)
    - Cost per unit and total cost of purchase/contract
    - Manufacturer or vendor
    - Actual purchaser (grantee, subrecipient, or contractor)
    - Special quality standards, if applicable
    - U.S.-made verification, if available (e.g., "Made in the USA" label, product specifications, vendor/contractor certification)
2. Documentation Supporting U.S. Origin, such as:
    - Product label showing "Made in the United States"
    - Product description or technical specifications demonstrating compliance with BABA
    - Certificate or letter from the manufacturer verifying compliance
    - Signed certification from the contractor affirming BABA compliance
    - Signed certification from the manufacturer affirming BABA compliance

For further clarification, or any questions regarding BABA compliance, please contact the State.

Change Orders

Change orders must be kept to an absolute minimum and are for unforeseen problems or issues that arise during construction. Change orders cannot 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 cannot not be used to correct bidding computation errors.

The grantee must obtain written approval from the State for all change orders, including no cost change orders, prior to execution of the change order.

Documentation submitted with every change order must include:

- Contract Change Order Transmittal Form (C-2), which must be signed and dated by an official in charge of procurement for the grantee (included in the Forms for 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.

In addition to the change order documentation, the grantee must submit an updated Section 102 Disclosure Form if the construction contract amount or any other pertinent information has changed.

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 must 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, a new CDBG activity, or a change in location, beneficiaries or how the project will be carried out, a Project Amendment Request form may also be necessary. If the change involves a new activity not previously included on the original bid and will result in a significant cost change order (i.e., greater than 30% of the contract) then the new activity may have to be re-bid. Please contact the State Procurement Specialist for a determination. Factors to be considered include whether the change order

will exceed the project budget, if the service area will change, if the original intent of the project will be altered, etc.

Section 8 - Subrecipient Agreements

The grantee is responsible for ensuring that CDBG funds are used in accordance with all program requirements. The use of designated public agencies, subrecipients, or contractors does not relieve the grantee of this responsibility. The grantee is also responsible for determining the adequacy of performance under subrecipient agreements and procurement contracts and for taking appropriate action when performance problems arise.

When entities outside of the grantee government receive CDBG funds to **carry out** eligible activities **on behalf of** the grantee, subrecipient agreements are needed to maintain accountability. These documents describe the terms and conditions under which CDBG funds are provided and establish a basis for legal action if those terms and conditions are not met.

Definition of Subrecipient

A subrecipient is a public or private non-profit agency, authority or organization, or other eligible entity described in Section 105(a)(15) of Title I, that is provided CDBG funds through a subrecipient agreement to **carry out** agreed upon eligible activities.

When an entity is selected as a subrecipient, there are no regulatory requirements governing how the locality selects that entity. However, the grantee must ensure that the entity has the capacity to carry out the project. The locality may simply designate a non-profit organization or an entity described in Section 105(a)(15) of Title I to act as a subrecipient to carry out an activity. However, the grantee and the subrecipient must then enter into a written agreement that meets all applicable requirements.

In the context of a project, a subrecipient may exhibit one or more of the following characteristics:

- Determines who is eligible to receive what federal assistance;
- Has its performance measured in relation to whether objectives of a federal program were met;
- Has responsibility for programmatic decision-making;
- Is responsible for adherence to applicable program requirements specified in the federal award; and

- In accordance with its agreement, uses the federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the State.

Subrecipient Agreements

For subrecipients, compliance with applicable requirements is covered through a Subrecipient Agreement. The following general requirements are applicable:

- All CDBG requirements are applicable to subrecipients.
- Procurement by the subrecipient must follow the open and competitive requirements of the State's procurement code.
- Uniform administrative requirements in 2 CFR Part 200 must be met. (See Chapter 3 for more information on CDBG Financial Management.)

The State may allow the grantee to allow the subrecipient to retain program income for use for specified eligible activities, provided a subrecipient agreement remains in effect during any period the subrecipient has control over the program income. The agreement must specify the activities that will be undertaken. Program income is subject to all CDBG requirements.

Before undertaking any activities or disbursing any CDBG funds to a subrecipient, the grantee must submit a proposed subrecipient agreement for State approval. A Section 102 Disclosure form showing the subrecipient must be submitted with the agreement if it was not shown on the Disclosure form in the approved application. Once State approval is given, the grantee may execute a written agreement with the subrecipient. The agreement will remain in effect during any period that the subrecipient has control over CDBG funds, including program income. At a minimum, the written agreement with the subrecipient must include provisions concerning the following items:

- **Description of work** - The agreement must include a comprehensive description of the type of work to be performed, a schedule for completing the work, and a budget.
    - The responsibilities of each party to the agreement must be addressed.
    - These items must be in sufficient detail to provide a sound basis for the grantee to effectively monitor performance under the agreement.
    - The description does not need to refer to quantities and work specifications because if changes are required to the project, the subrecipient will have to revise the agreement.

- **Drawdown of Funds -** The subrecipient will request a drawdown of needed funds by submitting a request for payment to the Grantee.
    - The Subrecipient will make this request at least three (3) weeks in advance of need.
    - Funds must be disbursed by the grantee in a timely manner. (See Chapter 3, Financial, for more on the timely drawdown of funds.)
    - No more than five thousand dollars ($5,000) in CDBG funds may be kept on hand by the subgrantee at any time.
- **Unexpended Grant Funds -** The Subrecipient agrees that it will return to the grantee any unexpended grant funds and accounts receivable provided by the Grantee under this Agreement.
- **Program income -** The agreement must include the disposition of any program income received as a result of the CDBG project in compliance with all CDBG requirements. (See Chapter 3 for more information.)
- **Records and reports** - The grantee must specify in the agreement the records the subrecipient must maintain and the reports the subrecipient must submit in order to assist the grantee in meeting its recordkeeping and reporting requirements.
- **Uniform administrative requirements -** The agreement must require the subrecipient to comply with applicable uniform administrative requirements, 2 CFR Part 200.
- **Financial** - Guidelines for financial and compliance audits of federally assisted programs, 2 CFR Part 200.
- **Procurement** - The subrecipient must comply with federal, state, and CDBG procurement requirements if a contractor is hired to carry out the project including submission of the contract and procurement method for review prior to execution.
- **Federal and State Laws -** The subrecipient is responsible for compliance with all applicable Federal or State laws, Executive Orders, and regulations of the CDBG program.
- **Conditions prohibiting inherently religious activities** – Where applicable, HUD rules prohibiting the use of CDBG funds for inherently religious activities on the basis of 24 CFR 570.200(j) must also be included in the agreement.
- **South Carolina Illegal Immigration Reform Act:** Subrecipients are required to comply with the South Carolina Illegal Immigration Reform Act

requiring verification of lawful presence in the United States of any alien eighteen years of age or older who has applied for state or local public benefits, as defined in 8 U.S.C. Section 1621, or for federal public benefits, as defined in 8 U.S.C. Section 1611.

- **Other program requirements** - The agreement must require the subrecipient to carry out each activity in compliance with all Federal and State laws and regulations except that:
    - The subrecipient does not assume the grantee's environmental responsibilities.
    - The subrecipient does not assume the grantee's responsibility for initiating the review process under the provisions of 24 CFR Part 52, Intergovernmental Coordination Regulations.

- **Debarment Certification** - The Subrecipient must verify that all contractors and subcontractors are not excluded from doing business with the Federal government and will provide the "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion-Lower Tier Covered Transactions", prior to receiving Federal Funds.
    - The Subrecipient certifies that neither the organization nor its officers are debarred, suspended, ineligible or voluntarily excluded from receiving federal funds.
    - The Subrecipient must require that any prime contractor or lower tier contractor must also complete this debarment certification and the Subrecipient will keep it on file for review as outlined in records and reports.
    - The Subrecipient must also check the eligibility on all contractors and subcontractors who perform work under this Agreement regardless of dollar amount.
    - The Subrecipient must request the appropriate eligibility check through the State prior to award of any contract.

- **Labor Requirements -** This project is funded in part by with CDBG funds and is subject to the labor requirements as outlined in the Subgrantee Agreement Standard Provisions, as are applicable throughout the entire project.

- **Use of Real Property and Reversion of Assets -** Upon expiration or termination of the agreement the subrecipient must transfer on behalf of the grantee, to the State, or the State's assignee, any CDBG funds on hand

at that time and any accounts receivable attributable to the use of CDBG funds.

- Any real property acquired or improved in whole or in part with CDBG funds must continue to be used for the purpose for which it was acquired or improved. Any changes in its use within 5 years of closeout of the grant must be approved by the State in writing.

- **Amendments -** Any changes in the scope of the project, as outlined in the agreement, including cost increases, must be submitted in writing by the subrecipient to the grantee as a request for an award adjustment. Any adjustment granted by the grantee must be appended to this agreement as an amendment. Copies of any changes must be submitted to The State for programmatic purposes.

- **Monitoring -** All subrecipient records with respect to any matters covered by the agreement must be made available to the Federal, State, or Grantee officials at any time during normal business hours, as often as deemed necessary to audit, examine, and make excerpts or transcripts of all relevant data.

  - Any deficiencies noted in reports must be fully cleared by the Subrecipient within 30 days after receipt by the subrecipient. Failure of the subrecipient to comply with the above requirements will constitute a violation of this contract and may result in the withholding of future payments.

- **Liability** - The subrecipient understands and warrants that it will defend any liability arising from this Agreement and that the grantee accepts no liability, in so far as such funds are expended in accordance with this Agreement.

  - The subrecipient agrees to repay to the State funds equal to the amount of Community Development Block Grant (CDBG) funds provided to the Subrecipient by the Grantee which the State has determined that its agents or assigns have caused to have been advanced and/or expended in violation of this Agreement and/or any federal, state or local laws or policies governing the use of CDBG funds; this provision also applies to any Funds considered to be program income generated by this Agreement.

  - The State is the sole arbiter in all matters concerning the eligibility of costs and interpretation of the provisions of law, statute, and policy as well as terms and conditions of this Subrecipient Agreement.

- **Suspension and Termination** - In accordance with 2 CFR Part 200, suspension or termination may occur if the Subrecipient materially fails to comply with any terms of this Agreement, and that the Agreement may be terminated for convenience.
- **Ethics, Accountability and Campaign Reform Act of 1991** - All provisions of this Act have been and will be complied with by the parties to this agreement regarding actions and expenditures of funds related to the CDBG project giving rise to this agreement.
- **Standard Provisions** - The Subrecipient Agreement Standard Provisions attached to the agreement are an integral part of the agreement. These provisions are subject to change from time to time as federal laws and regulations are promulgated. The subrecipient will be notified in writing if any changes occur.

The following referenced forms can be downloaded from the Forms section of the cdbgSC.com website:

- Sample Subrecipient Agreement
- CDBG Subrecipient Agreement Special Provisions

Subrecipient Procurements and Contracting

Where a grantee (or a subrecipient) has hired a contractor under State procurement regulations to carry out an activity or service for the grantee, the grantee must ensure that CDBG requirements, where applicable, are followed.

For instance, Davis-Bacon wages would need to be paid to laborers working for a contractor building a workforce center. **Contracts which are let between subrecipients and a contractor are required to be submitted to the State for review prior to execution.**

Those contracts will be monitored for compliance with regard to the procurement guidelines as outlined in this chapter. Additionally, the regulations do not prohibit a grantee from imposing additional or stricter requirements upon a contractor or subrecipient if the grantee deems it appropriate.

– Chapter 7: Procurement and Contracting – Forms/Documents

*Forms/documents referenced below are found on the State CDBG web site under Forms/Procurement & Contracting *

Contracts and Change Orders

- Sample Advertisement for Bids
- CDBG Contract Special Provisions
- CDBG Recommended Contract Checklist – Construction Only
- Notice of Intent to Award
- Notice to Proceed
- Construction Contract Review Checklist
- CDBG Contract Transmittal Form (C-1)
- CDBG Contract Change Order Transmittal Form (C-2)
- Contractor Illegal Immigration Certification

Professional Services Contracts

- Sample Professional Services Contract
- Sample Professional Services Evaluation
- Sample Review Panel Selection Summary

Contract Notices and Certifications

- Architect/Engineer's Certification
- Debarment Certification
- Design/Build Checklist

Subrecipient and Intergovernmental Agreements

- Sample Intergovernmental Agreement
- Subrecipient Agreement
- Subrecipient Agreement Standard Provisions

Section 3

- Section 3 Information Sheet (for Businesses & Contractors)
- Section 3 Business Self-Certification form
- Section 3 Worker Self-Certification form
- Targeted Section 3 Self-Certification form

- Section 3 Labor Hours Tracking form

Section 102

- CDBG Section 102 Disclosure Report and Instructions for Section 102 Disclosure Report

SAM Registration for Contractors and Subs

- HUD Flowchart – SAM.gov registration for Contractors and Subcontractors

Section 10 - Appendices

Appendix A: Professional Services Contract Approval

The State must approve professional contracts over $5,000 prior to award/execution, regardless of the method. The following procedures must be followed in order to obtain State approval:

Professional contracts, not including A/E Services, must meet the requirements of Small Purchase Procedures described in Section 4 of this chapter.

1. Prepare a Professional Services Contract including:

- Effective and specific date of contract period;
- Time for performance and completion of contract services, including project milestones, if any, and any other performance measures;
- Specification of materials or other services to be provided by both parties (e.g., maps, reports, printing, etc.); and
- Provisions for compensation for services including fee and/or payment schedules and specification of maximum amount payable under contract.
    - Cost schedules must be directly related to the scope of services. Any additional costs or reimbursable expenses must be specified in the agreement and be subject to written pre-authorization by the owner.

Do not submit proposed contracts for the State review and approval prior to obtaining proposals.

CDBG Contract Special Provisions must be incorporated into the contract document. A list of the *CDBG Contract Special Provisions* is included in the attachments to this chapter.

2. The grantee must provide the State:

- Copy of the solicitation of qualifications and/or proposals which must clearly define the items or services needed for the offerors to properly respond to the invitation.
- Copy of proposal tabulation sheet (sample *Professional Services Evaluation* and *Review Panel Selection Summary* forms are available in the pop-up box and the attachments to this chapter).

- Copy of the advertisement's proof of publication and offeror's list or other documentation, as may be requested, as to how responses were solicited.
- Method of evaluation of responses which include all significant factors and the relative weights used in making an award.
- Minutes of interviews, if appropriate.
- A copy of the proposed contract.
- Verification that the contractor is not on the Excluded Parties list accessed at www.sam.gov.
- A *Debarment Certification Form*.
- Verification that the contractor is not on the State Suspensions and Debarments list accessed at http://procurement.sc.gov/PS/legal/PS-legal-suspend-debar.phtm.
- An updated *CDBG Section 102 Disclosure Form* indicating all contractors, services and the amount of the contract (only for HUD grants received by the unit of local government which exceed $200,000 in a fixed year).
- The *CDBG Contract Transmittal Form* (C-1) which certifies that the grantee has included all applicable provisions in the contract. The C-1 must be signed and dated by an official in charge of procurement for the grantee.

The following forms are available here and in the attachments to this chapter:

- Sample Professional Services Contract
- Sample Professional Services Evaluation
- Sample Review Panel Selection Summary
- CDBG Contract Special Provisions
- Debarment Certification Form
- CDBG Section 102 Disclosure Form

3. The State will notify the grantee in writing regarding contract approval. No contracts may be awarded/executed until the State has given contract approval. Failure to adhere to this policy could result in disallowed costs.

During the State's review of the procurement process, if mathematical errors are discovered in the review committee's score sheets and overall ranking is affected, the Grantee will be required to re-advertise.

4. Submit the contract to the governing body for action according to standard local procedure. Award and execute the contract.

Appendix B: Contractual Agreements Between a Grantee and a Public Agency

Grantees are permitted under Title I to designate public agencies to assist in carrying out eligible activities on behalf of the grantee. Such designation is a non-procurement action by which the grantee may obtain services through non-competitive negotiations with another public agency (e.g., an area-wide planning agency).

Grantees must maintain the following documentation on the non-competitive procurement action:

- The rationale for the method of procurement used, i.e., the non-competitive negotiation is expected to be the most cost effective and efficient because… (give reasons).
- The reasoning behind the selection of contract type, i.e., fixed-fee or cost reimbursable, maximum amount specified.
- A cost or price analysis used to judge the suitability and reasonableness of costs to be charged.
- Once the negotiations are complete, a contractual agreement must be executed. This agreement designates the scope of services, roles and responsibilities of each party, the time of performance and cost for such services. The contract must be submitted to the State for review and must also contain the CDBG Contract Special Provisions (found in the attachments to this chapter), the updated Section 102 Disclosure Form (if applicable) and the Debarment Certification.
- A summary of the direct and indirect charges to be reimbursed under the contract and the basis on which these charges are calculated must be provided to the grantee with each request for reimbursement. Time sheets documenting staff time spent on the project must also be maintained.

Appendix C: Intergovernmental and Cooperative Agreements

Intergovernmental and Cooperative Agreements can be used by local jurisdictions to assist in the development, operation, and/or management of CDBG programs and projects.

An **Intergovernmental Agreement** typically involves two or more units of local governments who enter into an agreement to apply jointly for CDBG funding. The agreement must be approved prior to execution by the State, and at a minimum must:

- State that the parties have agreed to cooperate in undertaking the project.
- Delineate the responsibilities and authorities of each party with respect to the administration of the grant.
- Authorize one of the parties to be the grantee of the funds and have primary administrative responsibility.

A sample agreement is included in the attachments to this chapter.

A **Cooperative Agreement** is often used when a local governmental entity applies for a grant to construct public facilities or improvements and decides to have another government entity own, operate and/or maintain the improvements once they are completed. The agreement must be approved prior to execution by the State, and at a minimum must:

- State that the parties have agreed to cooperate in undertaking the project.
- Delineate the responsibilities and authorities of each party with respect to the administration of the grant and continuing ownership, operation and maintenance of facilities if applicable.
- Authorize one of the parties to be the grantee of the funds and have primary administrative responsibility.

Appendix D: Definitions

Actual Cost – The costs to the mortgagor of the improvements involved. These costs include:

- amount paid for labor;
- materials, construction contracts;
- land planning;
- engineers' and architect's fees;
- surveys;
- taxes;
- interest during development;
- organizational and legal expenses; and
- other items of expense incidental to development which may be approved by the State.

Conflict of Interest – Occurs when one's private interest and public duties overlap, resulting in a real or perceived lack of independence or impartiality.

Invitation to Bid – A written or published solicitation issued by an authorized procurement officer for bids to contract for the procurement or disposal of stated supplies, services, information technology, or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.

Lump Sum Bids – A bid that proposes an agreement of a predetermined cost for total construction.

Offeror – Contractors who place a bid in response to the grantee's invitation to bid.

Pre-Bid Conference – A conference with prospective contractors to discuss the project requirements and details of the Invitation to Bid held before bids are due.

Pre-Construction Conference – A conference that takes place prior to the commencement of any physical work wherein the parties that reviews all contract clauses and discusses the administration of the contract.

Prime Contractors – A contractor who is contracted with the grantee and is registered in the System for Award Management (SAM). A Prime Contractor manages any subcontractors, if any, and are responsible for ensuring that the work is completed as defined in the contract.

Project Engineer – The independent engineer or firm of engineers selected by the grantee to perform engineering functions regarding the project.

Request for Proposals (RFP) – A written or published solicitation issued by an authorized procurement officer for proposals that asks offerors to submit both qualifications and cost information.

Request for Qualifications (RFQ) – A written or published solicitation issued by an authorized procurement officer used for purchasing architecture and engineering services. It only asks for information on the offeror's expertise/experience and not on cost, subject to a negotiation of fair and reasonable compensation.

Section 3 Project - A HUD-assisted public construction project with funding of $200,000 or more that provides housing and/or community development must comply with Section 3 of the Housing and Urban Development Act of 1968.