

Procurement Standards

(Procurement Standards taken from Chapter 17, Historic Preservation Fund Grants Manual)

*Documentation of procurements does not have to be submitted to NPS, but must be retained in grantee's files for audit purposes.

A. Applicability.

This Chapter provides standards and guidelines applicable to procurement of supplies, equipment, construction work, and other services supported with HPF grant funds. These standards are designed to ensure that such materials and services are obtained efficiently and economically and in compliance with applicable Federal laws, and OMB Circular A-102, as codified in 43 CFR 12.76 (for States), and OMB Circular A-110, as codified in 43 CFR 12.940-948 (for the National Trust and non-profit institutions).

B. Grantee/Grantor Responsibility.

1. The grantee is responsible for the settlement of all contractual and administrative issues arising out of procurements entered into in support of a grant. These include, but are not limited to: source evaluation, protests, disputes, and claims. NPS will not substitute its judgment for that of the grantee unless the matter is primarily a Federal concern. Violations of law are to be referred to the local, State, or Federal authority having proper jurisdiction.
2. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for HPF-assisted work conform to the standards set forth in this Chapter and applicable Federal laws. Accordingly, if State or local requirements are more stringent (e.g., State regulations require that all contracts over \$10,000 be bid), the grantee must comply with those more restrictive requirements.
3. Grantees should not execute contracts or sub-grant agreements until the grant agreement against which costs will be charged has been executed by NPS, unless written NPS authorization for such preagreement costs is obtained (see Chapter 13, Item C.8).
4. Grantees shall maintain a contract administration system ensuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

C. Code of Conduct. Grantees will maintain a written code or standards of conduct which shall govern the performance of their officers, employees, or agents engaged in the award and administration of contracts supported by HPF funds. No employee, officer, or agent of the grantee shall participate in the selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved.

Such a conflict would arise when any of the following has a financial or other interest in the firm selected for award: (1) the employee, officer, or agent; (2) any member of his immediate family; (3) his or her partner; or (4) an organization which employs, or is about to employ, any of the above.

The grantee's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-grant agreements. Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors or their agents. Refer to Chapter 3, Section C. for detailed requirements involving conflict of interest.

D. Procurement Procedures.

The grantee shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by grantee officials to avoid the purchase of unnecessary or duplicative items. Consideration should be given to consolidation or breakdown as appropriate, to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease-versus-purchase alternatives and any other appropriate analysis to determine which approach is the most economical. Grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

E. Contracting with Minority Business Enterprise and Woman Business Enterprise Firms.

1. It is the Federal Government's policy to award a fair share of contracts to Minority Business Enterprises (MBEs) and Woman Business Enterprises (WBEs). The instructions regarding the reporting of MBEs/WBEs under grants and cooperative agreements awarded by the Department of the Interior (DOI) bureaus and offices are based on Executive Orders 11625, 12138, and 12432. In accordance with 43 CFR 12.76 (or 43 CFR 12.944 for nonprofit organizations), affirmative steps must be taken to assure that MBEs/WBEs are utilized when possible as sources of supplies, equipment, construction, and services. The affirmative steps shall include the following:

- Including qualified MBEs/WBEs on solicitation lists;
- Assuring that MBEs/WBEs are solicited once they are identified;
- When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum MBE/WBE participation;
- Where feasible, establishing delivery schedules which will encourage MBE/WBE participation;
- Encouraging use of the services of the U.S. Department of Commerce's Minority Business Development Agency (MBDA) and the U. S. Small Business Administration to identify MBEs/WBEs, as required;
- If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps listed above.

2. Minority Business Enterprise (MBE). An MBE is a business concern that is (1) at least 51 percent owned by one or more minority individuals, or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more minority individuals; and (2) whose daily business operations are managed and directed by one or more of the minority owners. Executive Order 11652 designates the following: (1) Black American (with origins from Africa); (2) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America); (3) Native American (American Indian, Eskimo, Aleut, or native Hawaiian); (4) Asian-Pacific American (with origins from

Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the Republic of Palau, the Republic of the Marshall Islands, and the Federated States of Micronesia, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent); or (5) Other groups whose members are U. S. citizens and are found to be disadvantaged by the Small Business Administration pursuant to section 8(d) of the Small Business Act as amended (15 U.S.C. 637(d)), or the Secretary of Commerce.

3. Women's Business Enterprise (WBE). A WBE is a business concern that is, (1) at least 51 percent owned by one or more women, or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more women; and, (2) whose daily business operations are managed and directed by one or more of the women owners. Business firms which are 51 percent owned by minorities or women, but are in fact managed and operated by non-minority individuals do not qualify for meeting MBE/WBE procurement goals.

4. Grantees are encouraged to procure goods and services from labor surplus areas.

F. Types of Contracts.

The types of contracts which are allowable when Federal funds are involved include cost reimbursement contracts, firm fixed-price contracts, fixed-price incentive contracts, or cost-plus-a-fixed-fee contracts. Other types of special contracts may be acceptable, depending upon the individual circumstances. However, cost-plus-a-percentage-of-cost and percentage-of-construction-cost contracts may not be used under any circumstances, and costs incurred under these types of contracts are unallowable.

G. Selection Procedures.

1. All procurement transactions, regardless of whether by sealed bids or by negotiation, and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this Chapter. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business, (2) noncompetitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience and bonding requirements.

2. The grantee shall have written selection procedures which stipulate that:

a. Solicitations of offers, whether by competitive sealed bids or competitive negotiation, shall:

1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured but which does not unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. (Detailed product specifications should be avoided.) When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used. The specific features of the named brand which must be met by offers shall be clearly stated.

- 2) Clearly set forth all requirements which offers must fulfill and all other factors to be used in evaluating bids or proposals, such as a deadline for completion of project work.
 - b. Contract awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of proposed procurement. Contractor integrity, compliance with public policy, record of past performance, and financial and technical resources should be considered. (Note: evidence of default, adverse record of past performance, or related factors are necessary to demonstrate lack of responsibility.)
 - c. Contract awards shall not be made to a former employee, contractor or professional who has developed or has drafted bid specifications, requirements, a statement of work, an invitation for bids, and/or a request for proposals for a particular procurement. Project records must include evidence of an analysis by the SHPO that the solicitation or specifications were nonrestrictive.
3. Consultants. States shall apply State government policies with respect to use and payment of consultant services, shall ensure that those policies apply equally to the use of consultants paid for by HPF grant funds and by other matching funds, and shall ensure that these will include, at a minimum, the standards described below. They do not apply to the use of consultants whose fees are treated as an indirect cost.
4. Written Agreements. Written agreements between the parties shall be executed which detail the responsibilities, standards, and fees. The grantee shall ensure that the agreement includes the following provisions pertaining to consultant conduct:
 - a. A consultant shall not use his/her position for the actual or apparent purpose of private gain other than payment for services rendered for himself/herself or another person, particularly one with whom he/she has family, business, or financial ties (see Chapter 3, Section C.).
 - b. A consultant shall not convey inside information that has not become part of the body of public information and that would not be available upon request, directly to any person for the purpose of private gain for himself/herself or another person, particularly one with whom he/she has family, business, or financial ties.
 - c. A consultant shall not, either for or without compensation, engage in teaching, lecturing, or writing that is dependent on information obtained as a result of his/her employment with the grantee, except when that information has been made available to the general public or will be made available upon request, or when the SHPO gives written authorization for the use of non-public information on the basis that the use is in the public interest.

H. Methods of Procurement.

Procurement under HPF grants shall be made by one of the following methods: 1) small purchase procedures; 2) competitive sealed bids (formal advertising); 3) competitive negotiation; 4) noncompetitive negotiation. (See Section J, below, concerning required documentation and Chapter 24, for information relating to retention of procurement records.)

1. Small purchase procedures. Small purchase procedures are simple, informal methods (i.e., imprest funds, purchase orders, blanket purchase agreements) used for a

procurement of services, supplies or other property, costing in the aggregate not more than \$100,000. Grantees shall comply with State or local small purchase dollar limits if they are lower than the Federal Threshold of \$100,000. If small purchase procedures are used for a procurement under a grant, price or rate quotations shall be obtained from an adequate number of qualified sources to assure competition.

2. Competitive sealed bids. In competitive sealed bids (formal advertising), sealed bids are publicly solicited, and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price, and is most advantageous to the grantee, considering price, discounts, transportation costs, taxes, and the contractor's ability to fulfill the contract.
 - a. In order for formal advertising to be feasible, the following conditions must be present:
 - 1) A complete, adequate and realistic specification or purchase description is available, which avoids unnecessarily restrictive specifications or requirements which might unduly limit the number of bidders.
 - 2) Two or more responsible suppliers are willing and able to compete effectively for the grantee's business.
 - 3) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.
 - b. If formal advertising is used for a grant procurement, the following requirements apply:
 - 1) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. (The period allowed for bids to be submitted should generally be at least 20 to 30 calendar days.) In addition, the invitation shall be publicly advertised.
 - 2) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.
 - 3) All bids shall be opened publicly at the time and place stated in the invitation for bids.
 - 4) A firm-fixed-price contract award shall be made by written notice to that 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 shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the grantee indicates that such discounts are generally taken.
 - 5) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the program. If all bids are rejected as too costly, and the scope of work is then substantially altered, the work must be re-advertised.

- c. Guide to Formal Advertising. Formal advertising, with adequate purchase descriptions, sealed bids, and public openings will be the required method of procurement unless negotiation is necessary to accomplish sound procurement. Procurements of \$100,000 or less need not be formally advertised unless otherwise required by State or local law or regulation.

Formal advertising includes placing the "Invitation to Bid" in a major newspaper that covers the area affected by the project. Notices should be published at least three times (which can be either three successive times in one publication, or published one time simultaneously in three different publications). Use of pre-selected bid lists, posting in public places, and publication in trade journals and magazines are legitimate steps to ensure free and open competition and reflect prudent administration of Federal funds if used in conjunction with newspaper and other mass media announcements. Minimum documentation of formal advertising for audit purposes consists of a copy of the actual advertisement run in appropriate newspapers with an invoice showing the dates published.

The formal advertisement must state that Federal funds are involved and that compliance with all applicable Federal, State, and local laws, rules, and regulations is required. After all bids are received, they should be tabulated and summarized in a manner that will facilitate comparison of the relative advantages and disadvantages of each bid. In awarding contracts which include additive and deductive bid items, the award procedures should include a disclosure of the selection priority for these items. This tabulation and/or summary should be signed and dated to provide documentation as to the basis for awarding the bid.

It is not always necessary to award the contract to the lowest bidder simply because it is the lowest. There may be important considerations that obviate such action, such as State or local laws and regulations which make provisions for implementation of socioeconomic programs giving priority to the disabled, small business, or minority-owned contractors. However, the justification for doing so should be documented in writing. NPS should be consulted when there is: (1) failure to receive a sufficient number of bids; (2) great disparity in bid quotations; or (3) intent to award a contract to other than the low bidder.

If no bid or no acceptable bids are received, a contract can be negotiated for the same scope of work if each bidder is given notice of this intent and a reasonable opportunity to negotiate. In such circumstances, notices concerning negotiations should be sent to all bidders, if any, by certified mail with "signed receipt requested" to provide documentation of compliance. Any material change in the invitation to bid, including changes in specifications, would necessitate re-advertising.

In accordance with OMB Circular A-110, nonprofit grantees may select the most appropriate procurement procedure without prior concurrence by NPS, unless a sole source procurement in excess of \$100,000 is involved. However, nonprofit grantees must maintain procurement records for all purchases in excess of \$100,000 which shall include the following: (1) basis for contractor selection; (2) justification for lack of competition when competitive bids or offers are not obtained; and (3) basis for award cost or price.

3. Competitive negotiation. In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is distributed to several prospective bidders, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may only be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

- a. Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposals shall be publicized (distributed to several prospective bidders; it does not require publication) and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.
- b. The Request for Proposals shall identify all significant evaluation factors, including price or cost where required and their relative importance.
- c. The grantee shall provide mechanisms for technical evaluation of the proposals received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award.
- d. 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 should be notified promptly.
- e. Grantees must use competitive negotiation procedures for procurement of architectural/engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. Resumes, references, and past work experience will be evaluated to assess professional qualifications for procurement of professional services.

4. Noncompetitive negotiation. Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising), or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

- a. The item is available only from a single source (which is often best documented after no responses are received from a preliminary formal advertising);
- b. Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;
- c. NPS authorizes in writing noncompetitive negotiation because of compelling special circumstances; or
- d. After solicitation of a number of sources, competition is determined inadequate.

I. Cost or Price Analysis.

Grantees shall perform some form of cost or price analysis in connection with every procurement action, including contract modifications. Costs or prices based on estimated costs for contracts under grants shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. In particular, a change order must not be used to increase the cost of a contract which was deliberately underbid to get the award. Change orders to adjust the cost of the contract without an increase in scope may be adjusted for materials and labor costs only. The fixed fee profit amount must remain the same.

J. Grantee Procurement Records.

Grantees shall maintain records sufficient to detail the history of a procurement. These records shall include, but are not necessarily limited to the following information: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

K. Contract Provisions.

In addition to provisions defining a sound and complete procurement contract, any recipient of Federal grant funds shall include the following contract provisions or conditions in all grant-related contracts and subcontracts:

1. Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanction and penalties as may be appropriate.
2. All contracts in excess of \$100,000 shall contain suitable provisions for termination by the grantee, including the manner by which it will be effected and the basis for settlement.
3. All construction contracts in excess of \$100,000 awarded by grantees and their contractors or subgrantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity", as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60). (See Chapter 18.)
4. All contracts and subgrants for construction or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). This Act provides that each contractor or subgrantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to NPS.
5. The National Historic Preservation Act is silent about and therefore does not require compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7). Therefore State law and administrative procedures govern whether all construction contracts in excess of \$2,000 awarded by grantees and subgrantees shall include a provision for compliance with the Davis-Bacon Act.

However, HPF grantees should be aware that the provisions of the Davis-Bacon Act are applicable when: Community Development Block Grant (CDBG) monies are used as the nonfederal share of an HPF grant; or supplemental funding is provided through a Federal

program to which the Davis-Bacon Act applies (see Chapter 14, Section L, Use of Federal Funds).

6. The National Historic Preservation Act is silent about and therefore does not require compliance with the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330). Therefore State law and administrative procedures govern whether all contracts awarded by grantees and subgrantees in excess of \$2,000 for construction contracts, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers shall include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act regarding overtime pay and safe working conditions.
 7. The contract shall include notice of NPS requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental, or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of NPS requirements and regulations pertaining to copyrights and rights in data (see Chapter 19).
 8. All negotiated contracts awarded by grantees (except those awarded by small purchase procedures) shall include a provision to the effect that the grantee, the Department of the Interior, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcription. Grantees shall require contractors to maintain all required records for 3 years after grantees make final payments and all other pending matters are closed.
 9. Contracts, subcontracts, and subgrants of amounts in excess of \$100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h)), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15), which prohibit the use under non-exempt Federal contracts, grants, or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the grantor agency (NPS) and to the EPA Assistant Administrator for Enforcement.
 10. Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-165). NPS may require changes, remedies, changed conditions, access and record retention, and suspension of work clauses approved by the Office of Federal Procurement Policy.
- L. Bonding and Insurance. Grantees are to follow their own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those over \$100,000 NPS may accept the grantee's procedures if NPS determines that the Federal Government's interests are adequately protected (see 43 CFR 12.76 or 43 CFR 12.948(c)).
1. Definitions.
 - a. Bid guarantee. A bid guarantee is a firm commitment, such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the

bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

- b. Performance bond. A performance bond is a bond executed in connection with a contract to secure fulfillment of all the contractor's obligations under the contract.
- c. Payment bond. A payment bond is executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract.

2. Contracts for Construction.

- a. Bids and contracts of \$100,000 or less. Except as otherwise required by law, the grantee shall follow its own regular requirements and practices relating to bid guarantees, performance bonds, and payment bonds.
- b. Bids and contracts exceeding \$100,000. The recipient may follow its own regular policy and requirements if NPS has determined that the Federal Government's interest will be adequately protected. If this determination has not been made, the minimum requirements shall be as follows:
 - 1) A bid guarantee from each bidder equivalent to 5 percent of the bid price;
 - 2) A performance bond on the part of the contractor for 100 percent of the contract price; and
 - 3) A payment bond on the part of the contractor for 100 percent of the contract price.

- 3. Sources of Bonds. Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties (31 CFR 223). A list of these companies is published annually by the Department of the Treasury in its Circular 570 (the current list can be accessed at <http://www.fms.treas.gov/c570/c570.html>). The Department of the Treasury Circular 570 may also be obtained from the Government Printing Office, 732 North Capitol St. NW • Washington, DC 20401 (202) 512-1800.

M. Record keeping and Access to Contractor Records.

43 CFR 12.76 and 43 CFR 12.948 both require grantees (and subgrantees) to include in specified kinds of contracts a provision for access to the contractors' records by the grantee and by the Federal Government. The following applies to the provision:

- 1. The provision must require the contractor to place the same provision in any subcontract which would have to have the provision were it awarded directly to the subgrantee.
- 2. The provision must require retention of records for 3 years after final payment is made under the contract or subcontract and all pending matters are closed. The provision must also require that, if an audit, litigation, or other action involving the records is started before the end of the 3-year period, the records must be retained until all issues arising out of the action are resolved or until the end of the 3-year period, whichever is later.

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3. In contracts and subcontracts under a subgrant, the provision must require that access to the records be provided to the grantee as well as the subgrantee and the Federal Government.