

## STAG Earmark Grant Procurement

### A. General

Procurement is used to obtain services (engineering and legal), equipment, and construction. The type of procurement is determined by the service or item being purchased and its cost.

Disadvantaged Business Enterprise (DBE, also known as MBE/WBE) applies to all procurement actions. The grantee and the prime contractor need to follow the six affirmative steps, as stated in the regulations 40 CFR Part 33, and the contractor must include completed EPA Forms 6100-03 and 04 with their bid package. The DBE effort needs to be documented before we can consider the contract work for eligibility. However, the amount of documentation and effort will vary, depending upon the type and complexity of the procurement. It would be unreasonable to expect the same level of effort for a \$10,000 pump station rehabilitation contract as for a \$10,000,000 wastewater treatment plant expansion contract.

Code of conduct needs to be maintained by the grantee which governs the performance of employees engaged in the award and administration of contracts. No employee or agent of the grantee shall participate in the selection, or award or administration of a contract if a conflict of interest, real or apparent, would be involved.

Use of value engineering clauses is encouraged in construction contracts of sufficient size to offer reasonable opportunities for cost reduction.

All procurement will be conducted in a manner providing full and open competition. Some of the situations considered to be restrictive of competition include:

- § Placing unreasonable requirements on a firm in order to allow them to qualify;
- § Requiring unnecessary experience and excessive bonding;
- § Noncompetitive pricing practices between firms (bid rigging);
- § Noncompetitive awards to consultants that are on retainer contracts;
- § Organizational conflict of interest;
- § Restrictive specification brand name without A or equal and describing non-salient performance specifications as relevant requirements;
- § Any arbitrary action in the procurement process.

### B. Method of Procurement

1. **Small Purchase** Federal regulations define a purchase less than \$100,000

to be a small purchase. If the state procurement laws and/or regulations use a lower threshold amount, the state's small purchase limit applies.

- a. Small purchases must comply with the DBE requirements.
- b. Several solicitations or published prices needed for cost comparison.
- c. Breaking down a larger contract into small purchases to avoid procurement requirements is unallowable.
- d. Small purchase procedures are for relatively simple and informal procurement of services, equipment and supplies.

2. **Sealed Bid** (formal advertising) used for construction contracts

This method of procurement requires that the contract documents be advertised, and the bids be opened at a specific time and place. The lowest responsible and responsive bidder is awarded the contract. Because of the competitive nature of sealed bid procurement, the bid price is assumed to be reasonable, and a detail cost review is not necessary. Further information on sealed bid is presented under the pre-advertisement of contracts section.

If only one bid offer is received, the grantee may either reject the bid offer and re-advertise the bid documents or follow the non-competitive procurement procedures to negotiate a reasonable price and profit for the construction work. State restrictions may prohibit a negotiated construction contract.

3. **Competitive** used for engineering, legal and other services.

- a. Request for proposals will be publicized and identify all evaluation factors and their relative importance.
- b. Proposals will be solicited from an adequate number of qualified sources.
- c. Grantees will have a method for evaluating the proposals.
- d. Awards will be made to responsible firm with the best proposal when considering price and other factors (experience, location, initial ideas, etc.).
- e. Qualifications-based procurement is limited to A/E services. A fair and reasonable compensation must be negotiated.

4. **Non-Competitive** sole source

May be used only when procurement under small purchase, sealed bids or competitive is infeasible and special circumstances apply. Since competition is not being used to assure the reasonableness of the contract

cost, a comprehensive cost analysis is required. And, you may require the grantee to submit cost documentation and justification for approval prior to the award of the contract. Additional information about sole source procurement is presented under the pre-advertisement of contracts section.

### C. Method of Compensation

1. **Lump Sum**, also called fixed price, is used for a well defined scope-of-work. The contract cost is fixed for a specific scope-of-work and the cost should not be increased to complete that given amount of work. Lump sum contracts are used for sealed bid construction contracts and engineering services. Lump sum contracts should not be used when the work's cost and time is indeterminate. Building a sewer system is an inappropriate type of work for a lump sum contract.
2. **Cost-Plus-Fixed-Fee**, also called a reimbursement contract, is used for competitive and non-competitive procurement. This method of compensation lends itself to indeterminate scope-of-works. The fixed fee (profit) remains the same for a given service, whereas, the cost may vary. The contract must specify a not-to-exceed cost ceiling. The cost ceiling may be increased with proper justification. Also, the fixed fee may be increased if additional scope-of-work is being added to the project such as a significant amount of sewer replacement is added to the project.
3. **Unit Price** is used for sealed bid procurement. The grantee may negotiate a new unit price if the actual quantities vary from the estimated quantities by more than 15%—this is a rule of thumb based on CG policy, not a current regulation.
4. **Time and Material** is to be used only when no other eligible method of compensation is suitable, and the contract must have a cost ceiling that a contractor exceeds at his own risk. An example would be to use a time and material to grout an unforeseen sinkhole which is under the foundation of a tank.
5. **Cost Plus a Percentage of Cost (Cost Multiplier) and Percent of Construction Cost (PCC)** are ineligible methods of compensation. Any work compensated by either of these methods will be ineligible for Federal participation. A contractor may use cost plus a percentage of cost as a method to calculate interim payment requests for a cost-plus-fixed-fee contract as long as the fixed fee and cost ceiling control the final payment request.
6. For competitively and non-competitively procured contracts, profit (fixed fee) must be negotiated as a separate cost element and determined to be

reasonable.

7. Cost analysis needs to be performed for all contracts to determine if the cost is reasonable. Comparison between an engineer's cost estimate and the low bid is used for sealed bids. Other type of contracts use EPA's cost summary form, SF 5700-41, to assist a cost analysis.

**D. Procurement Review for Engineering Agreements:**

1. Is the scope-of-work consistent with the grant?
2. Is the cost reasonable? Check the distribution of labor and the estimated hours of work. Is the indirect cost rate reasonable?
3. Was profit negotiated as a separate cost element?
4. Is the type of procurement appropriate for the agreement?
5. Is the method of compensation allowable?
6. Has a period of performance been set?
7. Are the standard conditions (access of records for EPA, EEO, etc.) included?
8. Is the grantee using the same engineer for design and/or construction that was used for planning the project? Did the request for proposals for the planning portion of the project state that the selected engineer may be retained for design and/or engineering construction services?
9. For a design/build contract, the planning engineer is forbidden to bid because of potential conflict of interest and an apparent unfair advantage.
10. Was the selection of the engineer consistent with the procedures described in the request for proposals.

**E. Impact of DBE (MBE/WBE)**

**Grantee's Responsibilities**

1. Adopt the fair share objectives of the state revolving loan fund agency, or conduct an Availability Analysis of local DBE resources and negotiate fair share objectives with EPA Region 9, Management and Technical Services Division, attn: Joe Oschab.

Loan or grant recipients which receive a loan or grant of \$250,000 or less are exempt from adopting fair share objectives. This exemption from adopting fair share objectives does NOT exempt a loan or grant recipient from any of the other DBE responsibilities.

2. Include a copy of Appendix A from the DBE regulations in each contract with a prime contractor (for construction, engineering, equipment purchases, etc.) which is fully or partially funded with a SAAP grant.
3. Apply the six Good Faith Efforts during procurement of construction, equipment, services, and supplies which is fully or partially funded with a SRF loan subject to the DBE requirements or a SAAP grant.
4. Require the prime contractor to complete all applicable items on the following Lists of Prime Contractor's Pre-Award and Post-Award Responsibilities. Also, the request for proposals/bids should define which items need to be included in the bid opening envelope and, if necessary, a time frame for submitting additional forms to complete the bid package. State procurement laws and policies may define the bidding requirements that need to be followed by the recipient.
5. Report semiannually DBE participation achievements by using EPA Form 5700-52A. Only the information from certified DBE firms shall be reported. Reports are required even if they are negative reports. Reports are due no more than 30 days after March 31 and September 30. Reports must be submitted until the final grant payment is made.
6. Maintain records documenting compliance with the DBE requirements, including documentation related to the six Good Faith Efforts of prime contractors. Documents to be maintained include solicitation lists, evidence (copies of letters, telephone memos, e-mails) of contacts with DBE firms, explanation of decisions, EPA Forms 6100-3 and 6100-4, bidders list for designated SRF projects, copy of advertisements, and copies of EPA Form 5700-52A.

#### **Prime Contractor's Responsibilities (Pre-Award)**

1. Apply the six Good Faith Efforts, if the prime contractor awards subcontracts.
2. Continue to apply the six Good Faith Efforts even if the prime contractor has achieved the fair share objectives of the SRF loan recipient or SAAP grantee.
3. Provide EPA form number 6100-2 – *DBE Program Subcontractor*

*Participation Form* and form number 6100-3 – *DBE Program Subcontractor Performance Form* to each DBE subcontractor selected. These forms may be downloaded from EPA’s Office of Small Business Programs website: <http://www.epa.gov/osbp/grants.htm>. EPA Form 6100-3 must be completed by each selected DBE subcontractor and submitted back to the prime contractor so the form can be included in the bid package.

4. Complete EPA form number 6100-4 – *DBE Program Subcontractor Utilization Form*. This form may be downloaded from EPA’s Office of Small Business Programs website: <http://www.epa.gov/osbp/grants.htm>. EPA Form 6100-4 must be completed by the prime contractor and included in the bid package.
5. Submit DBE forms 6100-3, and 6100-4 to loan recipient with bid package or proposal.

#### **Prime Contractor’s Responsibilities (Post-Award)**

1. Pay subcontractors for satisfactory performance no more than 30 days from the prime contractor’s receipt of payment from the SRF loan/SAAP grant recipient.
2. Notify the SRF loan/SAAP grant recipient in writing prior to termination for convenience of a DBE subcontractor.
3. Employ the six Good Faith Efforts whenever soliciting a replacement subcontractor after a DBE subcontractor fails to complete work under the subcontract for any reason.
4. Semiannually inform the SRF loan/SAAP grant recipient of DBE participation achieved for their required reporting.
5. Maintain records documenting compliance with the requirements of the DBE rule, including documentation of the contractor complying with the Good Faith Efforts.