PROCUREMENT UNDER GRANTS

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- Grant Agreement Terms and Conditions
- Federal Grant Procurement Regulations
  - 4 Acceptable Methods
  - Cost and Price Analysis
  - Allowable Contract Types
  - Required Contract Clauses
  - What to Submit to EPA for Review
  - What Procurement Records to Keep

Procurement

Key Cause of:

- Delay in awards
- Disallowance of cost before or after award
- Delay in work progress
- Delay in construction start
- Withholding payment or other sanctions by EPA
- Delay in grant closeout
- Audit findings

Procurement For Engineering and Other Professional Services

- The costs of professional Engineering and any other professional services contracts procured in compliance with the minimum standards for procurement under grants (See 40 CFR 31.36) are allowable costs for reimbursement with grant funds. No grant funds may be used to reimburse the federal share of any engineering or other professional services contract(s). (note: all project expenditures are deemed to include both the federal and nonfederal shares).

- The recipient agrees to conduct all procurement for engineering and other professional services in compliance with 40CFR 31.36(b)-(k).

Procurement for Construction

- The costs of construction contracts procured in compliance with the minimum standards for procurement under grants (See 40 CFR 31.36) are allowable costs for reimbursement with grant funds. No grant funds may be used to reimburse the federal share of any construction contract(s) found to be in compliance with the grant procurement regulations. (note: all project expenditures are deemed to include both the federal and nonfederal shares).
- The recipient agrees to conduct all procurement for engineering and other professional services in compliance with 40CFR 31.36(b)-(k).

Suspension and Debarment

- Recipient shall fully comply with Subpart C of 40 CFR Part 32, entitled "Responsibilities of Participants Regarding Transactions." Recipient is responsible for ensuring that any lower tier covered transaction, as described in Subpart B of 40 CFR Part 32, entitled "Covered Transactions," includes a term or condition requiring compliance with Subpart C. Recipient is responsible for further requiring the inclusion of a similar term or condition in any subsequent lower tier covered transactions. Recipient acknowledges that failing to disclose the information required under 40 CFR 32.335 may result in the delay or negation of this assistance agreement, or pursuance of legal remedies, including suspension and debarment.
- Recipient may access the Excluded Parties List System at http://epls.gov.
- Don't Forget to submit the "Disclosure of Lobbying Activities" Form

GRANT PROCUREMENT REGULATIONS:

- ESTABLISHES MINIMUM STANDARDS & PROCEDURES FOR PROCUREMENT/PURCHASING OF :
  - CONSTRUCTION
  - EQUIPMENT
  - SUPPLIES
  - SERVICES

- **Who is responsible for procurement compliance?**

  The g**rantee/recipient**

  - This responsibility cannot be delegated to another party- particularly consultants, contractors and/or 3rd party organizations (unless an independent 3rd party organization is hired for this purpose).

- **Who is at risk?**

  The **grantee/recipient**

  - If you have already entered into an agreement or contract with any private sector organization, contractor, consultant, law firm, etc.
  - **All** procurement transactions must be found to be in compliance with the minimum standards of the federal grant procurement regulations.

- **Can this (procurement & compliance with regulations) be done prior to application or grant award?**
  - Yes - **provided** you have the documentation to support compliance. Congressional earmark grantees must submit this for EPA compliance assistance review (not *approval* review), or it is on file and available for review by EPA or an audit agency.

Grant Procurement Regulations:

- The regulation (40 CFR 31.36) gives the standards and procedures for procurement/purchasing under federal grants. The 1st question to consider is: do I have a procurement system? You either have one or you don't (most do not).

- If you believe you have an adequate procurement system, the 2nd question would be: what level of confidence can I have, if I follow my own procurement standards, that the procurement transactions for the grant funded project will be found to be in compliance with the federal requirements?

- Most SPAP recipients read/follow the grant procurement regulations (in folder)

- To be found in compliance, all procurement transactions (construction, equipment, supplies and services) Must be conducted in a manner that provides free and open competition and must not be restrictive of competition.

- **What is Restrictive of Competition?**

  These are listed in the grant procurement regulations - "include but not limited to…"

1. Placing unreasonable requirements on firms in order for them to qualify for them to do business with you;

   (e.g. evaluation factors used in the competitive proposal method such as:

   - "knowledge of our system" & all variations of this,
   - "experience with projects funded by federal grants," etc.

2. Requiring unnecessary experience and/or excessive bonding;

3. Non-competitive pricing practices between firms or affiliated companies;

4. Non-competitive awards to consultants that are on retainer contracts;

5. Organizational conflicts of interest; (see last 2 slides)

6. Specifying only a “brand name” in lieu of allowing an “or equal;”

7. Any arbitrary action in the procurement process

- **What Method or Procedures of Procurement are Allowable for Procurement Under Grants?**

Four Authorized Methods:

1. Small Purchases

2. Sealed Bids

3. Competitive Proposals

4. Non-Competitive Proposals

1. Small Purchases

If the total contract price will be less than $100,000 - you must obtain price or rate quotations from an adequate number of qualified sources (public notice is not required, unless your local procedures require this - also an adequate number is always more than 2 & the more the better); AND

- you chose the lowest quotation or have documented reasons to justify the selection; AND

- you performed and documented the 6 affirmative steps for MBE/WBE participation in the work. (periodic report requirement)

Note: Contracts less than $100K should be fixed price or not to exceed with assurance that the work can be completed for the fixed price amount. Contracting for less than $100K and amending the contract one or more times over $100K will not be viewed as in compliance with the procurement regulations.

2. Sealed Bid/Formal Advertising: (For Construction Contracts)

- Bids are publicly advertised and solicited from an adequate number of suppliers
- Sufficient time is given prior to opening bids (normally not less than 30 days)
- Invitation will define items or services
- Bids will be publicly opened at time and place identified in bid advertisement
- Firm fixed fee contract awarded to responsive and responsible low bidder (includes lump sum and fixed unit price/estimated quantities with NTE ceiling)
- 6 affirmative MBE/WBE steps are performed and documented (periodic report requirement)

3. Competitive Proposals:

(use for professional services contracting, e.g., legal , engineering, scientific, accounting/financial management, etc., when more than one source submits an offer and either a fixed price or cost reimbursement type contract is awarded - used when conditions are not appropriate for sealed bids method)

- Form a Committee to be responsible for the public advertising, evaluation factors, technical ranking, interviewing, recommending award to highest ranked firm, negotiating contract terms and conditions (must ensure committee members do not have conflict of interest, real or apparent)

- Request for Qualifications and/or Request for Proposals are published (generally 30 days or more) and all evaluation factors are included with their relative importance (weights) identified. (Remember - don't use factors restrictive of competition AND **price** should be an evaluation factor*)

Competitive Proposals - cont'd

- Solicited from an adequate number of qualified sources
- Have method of conducting the technical evaluation (committee/scoring sheets & document results)
- Awards are made to the firm whose proposal is most advantageous to the program with price* and other factors considered
- Use only allowable type contracts with required clauses (next slides)
- 6 affirmative MBE/WBE steps are performed and documented (periodic report requirement)

When buying services using competitive proposal procedures for qualifications based procurement whereby competitors' qualifications and technical proposals are evaluated, and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation -* **price *is* **not** *a mandatory evaluation factor* **only** *when buying Architectural/Engineering services.*

Competitive Proposals Method – Common Noncompliance Findings:

- Not including relative importance of evaluation factors in RFQ/RFP
- Using restrictive evaluation factors
- Unsigned/undated score sheets
- Missing cost/price analysis documentation
- Missing negotiated profit documentation
- Missing required clauses in contracts

4. Noncompetitive Proposals (sole source):

- Allowed only as a last resort - when procurement is infeasible under either the small purchase, sealed bids or competitive proposals methods (rarely have we ever seen one of these infeasible - why, because the types of goods or services typically needed for EPA grant projects are available from multiple sources)

- If approved for noncompetitive procurement, grantee must perform and document a cost analysis, i.e. "Verifying the proposed cost data, and the evaluation of the specific elements of costs and profit, is required" to determine that the proposed price is fair and reasonable, and the basis for that determination.

- 6 affirmative MBE/WBE steps are performed and documented (periodic report requirement)

Contract Cost and Price Analysis

- You must perform and document a **cost** or **price** analysis on all procurement actions where price competition is inadequate (including contract amendments/modifications/change orders, etc.)
- How was it determined that the price of the goods or services was **fair** and **reasonable**?
- Cost Analysis – detail breakout of each item of proposed costs is required under the competitive proposal method (engineering, legal, consulting, other professional services proposed contracts)
- Price Analysis - used in all other instances to determine the reasonableness of the proposed contact price. (sealed bidding is a form of price analysis)

Cost and Price Analysis - cont'd

- Profit - must be negotiated (and documented) as a separate element of cost:
  - When there is no price competition (A/E services option under the competitive proposal method); and
  - In all cases where cost analysis is performed (A/E services option under competitive proposals, other legal or professional services, noncompetitive procurement, contract amendments, modifications and change orders)

- Major area of noncompliance…….

Earmark Grant Audits

- Several OIG audits have determined that earmark recipients did not follow federal procurement regulations and the funds had to be reimbursed to the Federal Government

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Why We Did This Review

The U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG) conducts reviews of earmarked grants known as Special Appropriation Act Projects issued to State and tribal governments. The City was selected for review.

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

- Costs claimed under EPA Grant # XP12345678 awarded to the Town of Last Stop, California are unallowable and must be returned to the Federal Government.

- July 14, 2010

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

- During our review of the grantees procurement practices, we found that that the grantee did not perform a cost analysis or negotiate a fair and reasonable profit as a separate element of the contract price as required by under Title 40 Code of Federal Regulations (CFR) 31.36(f). AS a result we questioned $1,755,157 in unsupported architectural and engineering (A&E) costs claimed. The grantee also did not have its own written procurement procedures and did not maintain records sufficient to detail the procurement of the A&E contract.

- RECOMMENDATION:
- We recommend that Region 9 require the grantee to provide documentation demonstrating that they performed an adequate cost analysis for the A&E contract. If unable to provide such documentation, EPA should recover the $1,755,157 of federal funds from the grantee.

Types of Contracts & Required Clauses:

- Allowable:

  Firm Fixed Price (lump sum)

  Cost Reimbursable with NTE ceiling

- Unallowable:

  Percentage of Construction Cost

  Cost Plus a Percentage of Cost

  (includes multiplier forms of compensation)

- Preferred:

  Firm Fixed Price based on price competition and/or where price is used as an evaluation factor

Contract Clauses: (prime or lead and subcontracts) 40CFR 31.36(i)

1. Access to records & record retention	All
2. Remedies	All
3. Termination for Cause and Convenience	All
4. Equal Employment Opportunity	All over $10,000
5. Compliance with Copeland ("Anti-Kickback" Act)	All Construction
6. Compliance with Sec 103 & 107 of Contract Work Hours and Safety Standards Act	All Construction
7. Copyrights & Rights in Data	All
8. Compliance with Clean Air & Clean Water Act	All over $10,000
9. Changes	All
10. Changed Conditions	All Construction
11. Records Retention	All

Bonding Requirements 40 CFR 31.36(h)

- EPA may accept the bonding policy and requirements of the grantee – CAUTION – MANY LOCAL GOV'TS FOLLOW STATE LAW ON BONDING AND SOME STATES' BONDING LAWs DO NOT MEET THE FEDERAL MINIMUM.

- Minimum requirements are:

  - Bid guarantee from each bidder equivalent to 5% of bid price
  - Performance bond on the part of the contractor for 100% of the contract price
  - Payment bond on the part of the contractor for 100% of the contract price

Maintain procurement history files & records:

- Consulting/Professional Services:
  - Advertisement/solicitation – the RFQ/RFP and evidence of publication in a legal organ of general circulation
  - Brief narrative of the procurement process including how M/WBE utilization was/will be handled
  - Ranking Factors and relative importance of each
  - Score Sheets – ranking committee evaluations & results
  - Written evidence of a cost or price analysis
  - Proposed or signed contract

Maintain procurement history files & records:

- rationale for the method of procurement
- selection procedure results: public notice, evaluation criteria, ranking/scoring results/bid evaluations
- MBE/WBE 6 affirmative steps documentation
- selection of contract type
- contractor selection or rejection
- the basis for the contract price
- documented cost and/or price analysis
- contract document with original signatures of all parties
- contract modifications/amendments/change orders with original signatures of all parties

Conflict of Interest

- No employee, officer or agent of the grantee shall participate in the selection, or in the award or in the administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved.

- The grantee's employees, officer, agents, family members, and/or partners will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors or parties to sub-agreements.

- To the extent permitted by state or local law or regulation, such code of standards or conduct will 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.

Conflict of Interest - cont'd

- A conflict of interest would arise when:
  - The grantee's employee, officer or agent; and/or
  - Any member of his/her family; and/or
  - His or her partner, or
  - An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.