# CHAPTER 4
# PROCUREMENT STANDARDS


I. INTRODUCTION ..... 1

II. GENERAL PROCUREMENT STANDARDS ..... 1

III. PROCUREMENT PROCEDURES ..... 4
- A. Full and Open Competition ..... 4
- B. Geographic Preference ..... 5
- C. Written Selection Procedures ..... 5

IV. METHODS OF PROCUREMENT ..... 6
- A. Small Purchase Procedures ..... 6
- B. Procurement by Sealed Bid ..... 7
- C. Procurement by Competitive Proposals ..... 7
- D. Procurement by Noncompetitive Proposals ..... 8

V. FORCE ACCOUNT CONSTRUCTION IN LIEU OF PROCUREMENT ..... 9

VI. PROFESSIONAL SERVICE CONTRACTS ..... 9
- A. Preparing a Request for Proposals (RFP) ..... 9
- B. Soliciting Proposals ..... 11
- C. Reviewing Proposals and Selecting a Consultant ..... 12
- D. References ..... 13
- E. Preparing the Contract ..... 14
- F. Contract Administration and Supervision ..... 15
- G. Prior Commitments to Consultants ..... 15
- H. Use of Consultants Already Under Contract ..... 16

VII. OTHER FEDERAL REQUIREMENTS FOR CONTRACTING ..... 16
- A. Davis-Bacon Act and Related Acts ..... 16
- B. Contracting with Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms ..... 17
- C. Section 3 of the Housing and Urban Development Act of 1968 (12 USC 1701u) ..... 18
- D. Debarment, Suspended or Ineligible Contractors ..... 18
- E. Conflict of Interest ..... 19

VIII. PURCHASE OF REAL PROPERTY ..... 19
- A. Appraisal ..... 20
- B. Use of Eminent Domain ..... 20

IX. EXHIBITS ..... 21

# CHAPTER 4
# PROCUREMENT STANDARDS

## I. INTRODUCTION

The Office of Community Renewal (OCR) has elected to adopt the federal procurement procedures at 2 CFR 200.318 - .326 as the procurement standards applicable to the New York State Community Development Block Grant (NYS CDBG) program. If NYS CDBG funds are used to pay for a product or service in whole or in part, NYS CDBG procurement procedures apply unless the Recipient's local procurement policy is stricter.

All procurements, regardless of dollar amount, must be conducted to provide open and free competition. Many times, competition can be restricted by organizational conflict or non-competitive practices among contractors. Recipients should be alert to issues of this nature, which may adversely affect procurement practices. Before entering any agreements to purchase equipment or materials or to retain the services of a consultant or contractor, Recipients need to verify compliance with the federal procurement requirements.

## II. GENERAL PROCUREMENT STANDARDS

**A. Establish written procedures for the procurement of supplies and other expendable property, equipment, real property, and other services with NYS CDBG funds.** The written procedures must ensure compliance with federal procurement requirements in 2 CFR 200.318 - .326.

These procedures are to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. The procedures must describe how services or supplies are to be obtained. The procedure policy should address at a minimum the following:

1. Procurement reviews to avoid unnecessary and duplicate purchases.

2. Analysis of lease and purchase alternatives to determine which would be the most economical and practical procurement.

3. Solicitations for goods and services including:

    a. A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features that unduly restrict competition.

    b. Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

c. A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

d. The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation. Failure to include "brand name or equal" is considered sole source bidding and is specifically prohibited by 2 CFR 200.319(c), except when sole source bidding is justified under 2 CFR 200.321(f).

   Under this form of specification, clear and accurate product descriptions are developed. These descriptions shall not contain features that unduly restrict competition. It may be necessary to describe technical requirements for materials and equipment by referencing brand name products in order to define performance or other salient requirements. References to brand names shall be followed by the words "or equal" and a description of the item's essential characteristics so that competition is not restricted.

   Specific brand names may be used only for establishing design and quality standards and only if there is no other reasonable method of designating the required quality of the item desired. When brand names or catalog numbers are used, inform the offerors that such references establish only design or quality standard; in fact, any other products that clearly and demonstrably meet the standard are also acceptable.

e. The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

f. Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

g. All Requests for Bid, Invitations for Bid and any other bid solicitations for all public infrastructure and public facility projects must be reviewed by OCR prior to being released for public bid. Project Managers will respond with comments for any identified deficiencies or if the bids appear to be in compliance with current requirements and guidelines. Projects must allow up to thirty (30) days for review from the date of submission to OCR.

**B. Maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.** Reference the Conflict-of-Interest section in Chapter 7.

**C. Take full responsibility as the "responsible authority" regarding the settlement and satisfaction of all contractual and administrative issues**

**arising out of procurements.** This includes disputes, claims, protest of awards, source evaluation or other matters of a contractual nature.

**D. Establish protest procedures to handle and resolve disputes relating to procurement and in all instances, disclose information regarding the protest to OCR.** A protestor must exhaust all administrative remedies with the Recipient and OCR before pursuing protests with the responsible federal agency.

**E. Ensure that all procurement transactions are conducted in a manner to provide, to the maximum extent practicable, open and free competition.** In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the Recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the Recipient.

**F. Ensure that the type of procuring instruments used (i.e. fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) is appropriate for the particular procurement and for promoting the best interest of the program or project involved.** The "cost plus a percentage of cost" or "percentage of construction cost" methods of contracting shall not be used.

**G. Ensure contracts are made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement.**

**H. Upon request, make available to OCR for review, pre-award, and procurement documents, such as requests for proposals or invitations for bids and independent cost estimates,** when any of the following conditions apply:

1. A Recipient's procurement procedures or operation fail to comply with the federal procurement standards.

2. The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently $150,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

3. The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

4. The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under sealed bid procurement.

5. A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

**I. Conduct a cost or price analysis and document it in the procurement files in connection with every procurement action.**

**J. Maintain procurement records. Files for purchases in excess of the small purchase threshold shall include the following at a minimum: (a) basis for contractor selection; (b) justification for lack of competition when competitive bids or offers are not obtained; and (c) basis for award cost or price.**

**K. Maintain a system for contract administration to ensure contractor conformance with the terms, conditions, and specifications of the contract and to ensure adequate and timely follow up of all purchases.**

**L. Ensure that all contracts include all required provisions that define a sound and complete agreement. Refer to Exhibit 4-1 Contact Provisions.**

## III. PROCUREMENT PROCEDURES

### A. Full and Open Competition

All procurement transactions should be conducted in a manner that provides full and open competition. Procurement procedures should avoid any provisions that would restrict or eliminate competition. Some of the situations considered to be restrictive of competition include:

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

2. Requiring unnecessary experience and excessive bonding.

3. Noncompetitive pricing practices between firms or between affiliated companies.

4. Noncompetitive awards to consultants that are on retainer contracts.

5. Organizational conflicts of interest.

6. Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance of other relevant requirements of the procurement; (Refer to II (A) (3)(d) above; and

7. Any arbitrary action in the procurement process.

**To maintain an open and fully competitive process, Recipients must solicit bids by mail and public notices in large circulation daily newspapers, large regional papers and/or special trade publications.**

## B. Geographic Preference

As recipients of federal funds, NYS CDBG Recipients should conduct procurement in a manner that avoids the use of administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals. Including criteria in a request for proposals such as “knowledge of community” or “experience with community” would be considered to “unduly restrict competition” and are discouraged.

## C. Written Selection Procedures

NYS CDBG Recipients should have written selection procedures which provide, at a minimum, that all solicitations:

1. Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. The description should not 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, describe those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.

2. Avoid, if possible, detailed product specifications. 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 to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offerors must be clearly stated.

3. Identify all requirements that the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

Recipients will ensure that all pre-qualified 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. Recipients will not preclude potential bidders from qualifying during the solicitation period.

## D. Procurement of Rehabilitation Contractors

For all owner-occupied housing rehabilitation activities, the homeowner is considered the responsible entity for the purposes of procurement of contractor rehabilitation services and is therefore not subject to the requirements of 2 CFR Part 200.317-327.

The Local Program Administrator (LPA) or Unit of General Local Government (UGLG), on behalf of the homeowner, shall facilitate:

- Compiling bidder lists
- Developing a scope of work, technical specifications, and in-house cost estimate
- Soliciting, receiving, and comparing bids
- Resolving disputes between the contractor and homeowner
- Any other administrative tasks that may arise during the term of assistance to that household

Open and fair competition shall be demonstrated by soliciting at least 3 bids for all contracts. The LPA/UGLG, contractor, and homeowner must enter into a tri-party agreement for the rehabilitation work to be performed. Homeowners wishing to contract with other than the lowest responsible bidder must pay the cost difference between the accepted bid and lowest bid received.

## IV. METHODS OF PROCUREMENT

Of the four methods of procurement, Recipients should select the most appropriate method based upon need and the nature of the services required. The following is a summary of the four basic selection alternatives and the requirements associated with each:

### A. Small Purchase Procedures

Small purchase procedures are relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold, currently $150,000 in the aggregate. Price or rate quotations shall be obtained from an adequate number of qualified sources. This should not be used for retaining the professional services of an architect, auditor, engineer or consultant for your NYS CDBG project without prior approval from OCR. Recipients utilizing this procedure should:

1. Record the rate or quote received along with other identifying information (name, address, and telephone numbers) and document the questions asked.

2. Follow prudent purchasing practices and receive competitive telephone or written quotations for all small purchase procurements. In all cases, the local government should obtain price or rate quotations from a minimum of two qualified sources.

3. When price quotations are obtained orally, written supportive documentation, such as detailed notes describing telephone contacts (who, what, when etc.), must be maintained in the files.

4. If the local government small purchase procedures are more restrictive than those described above, the local government procedures must be used.

## B. Procurement by Sealed Bid

Bids are publicly solicited, and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest price. The sealed bid method is the preferred method for procuring construction when the following conditions exist:

1. A complete, adequate and realistic specification or purchase description is available.

2. Two or more responsible suppliers are willing and able to compete effectively for the business.

3. The procurement lends itself to a firm fixed-price contract (a specified price to be paid when the items or services are delivered); and

4. Selection of the successful bidder can appropriately be made principally on the basis of price.

## C. Procurement by Competitive Proposals

The phrase “procurement by competitive proposals” is often used interchangeably with the frequently used term “Competitive Negotiation.” This method of procurement is generally used when conditions are not appropriate for the use of sealed bids. The method for soliciting competitive proposals is the publication of a Request for Proposal (RFP). Procurement by competitive proposals is the appropriate procurement procedure for retaining professional services such as an architect, auditor, or engineer for your NYS CDBG project.

When a Recipient receives only one response to a competitive solicitation, the procurement process should be reviewed by OCR to determine whether it was unduly restrictive or tailored to a contractor or supplier. The burden of proof will be on the Recipient to demonstrate that it made reasonable efforts to assure maximum open and free competition and that its procurement procedures did not have the effect of unnecessarily restricting competition.

## D. Procurement by Noncompetitive Proposals

Noncompetitive negotiation is procurement through solicitation of a proposal from only one source or, after solicitation of several sources; competition is determined to be inadequate.

Procurement by noncompetitive proposals may be used only when the award of a contract is unfeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

1. The items or services required are only available from a single source.

2. A public emergency exists such that the urgency will not permit a delay beyond the time needed to employ one of the other authorized procurements methods.

3. After solicitation from several sources, competition is determined to be inadequate, and OCR authorizes the noncompetitive method. In all cases, noncompetitive negotiation which will involve NYS CDBG funds must have prior approval from OCR. Recipients must contact their OCR Community/Economic Developer.

A cost analysis must be provided including the projections of the data, and the evaluation of the specific elements of costs and profits.

## E. Procurement of Rehabilitation Contractors

For all owner-occupied housing rehabilitation activities, the homeowner is considered the responsible entity for the purposes of procurement of contractor rehabilitation services and is therefore not subject to the requirements of 2 CFR Part 200.317-327.

The Local Program Administrator (LPA) or Unit of General Local Government (UGLG), on behalf of the homeowner, shall facilitate:

- Compiling bidder lists
- Developing a scope of work, technical specifications, and in-house cost estimate
- Soliciting, receiving, and comparing bids
- Resolving disputes between the contractor and homeowner
- Any other administrative tasks that may arise during the term of assistance to that household

Open and fair competition shall be demonstrated by soliciting at least 3 bids for all contracts. The LPA/UGLG, contractor, and homeowner must enter into a tri-party agreement for the rehabilitation work to be performed. Homeowners wishing to contract with other than the lowest responsible bidder must pay the cost difference between the accepted bid and lowest bid received.

## V. FORCE ACCOUNT CONSTRUCTION IN LIEU OF PROCUREMENT

The preferred method for accomplishing construction development is by soliciting for competitive bids and then selecting the lowest responsive and responsible bid (where the contractor has adequately responded to the terms, conditions, and specification of the bid and has the capability to satisfactorily perform the contract). However, some grantees may wish to accomplish construction using their own work force. This is commonly referred to as “force account” construction.

Use of force account labor for CDBG activities must be approved in writing by OCR before the grantee undertakes activities. Approval will be conditioned on the grantee providing justification that:

- It will be cost effective over competitive procurement - a summary cost comparison between using force account and contract construction must be provided.
- Skilled personnel are available to accomplish the work.
- The grantee can provide proper supervision and management control (including materials, personnel and payment) to serve as its own general contractor; and
- The grantee will comply with applicable Federal and state labor standards (including Davis-Bacon, if applicable)

## VI. PROFESSIONAL SERVICE CONTRACTS

Recipients have the option of administering the NYS CDBG program themselves or contracting with another entity such as a consultant.

Recipients are reminded that all applicable procurement procedures must be followed if the consultant is paid with NYS CDBG funds. Before a Recipient enters an agreement with a consultant, a competitive method must be used to procure professional services. This process entails a Request for Proposals or a Request for Qualifications and a review process.

### A. Preparing a Request for Proposals (RFP)

Although the RFP process may appear time consuming, taking the time to make sure that a competent engineer or other consultant is hired will, in the long term, save money and prevents problems.

A single Request for Proposals (RFP) for NYS CDBG administrative services including housing, public works and economic development is not consistent with federal procurement requirements. That is, an RFP of such broad scope would place unreasonable requirements on firms for them to qualify to do business. Therefore, OCR restricts three-year contracting to specific specialty areas. A

single RFP to carry out all NYS CDBG housing-related activities or all NYS CDBG economic development-related activities is acceptable.

An RFP is a written announcement that invites consultants to compete for the provision of services. The RFP should include:

1. **The name of the local government issuing the RFP.**

2. **A brief description of the project including location, purpose, time frame, and present status.** The RFP should be concise and to the point, containing all the important information needed for the firms to respond in a factual manner. However, do not overdo the RFP; include only the necessary information. A wordy or unclear RFP will unnecessarily increase the time each firm spends preparing their response and your time in reviewing the proposals. Recipients should, however, be sure to specify any services or equipment the consultant will be expected to provide, such as requiring that they open a local office or provide secretarial or financial management services. These can significantly affect how the consultant will budget his or her time and resources. The RFP should also describe any unique problems involved in the project and any previous studies that would be available for their review.

3. **A general description of the scope of the services to be provided by the consultant. The entire project scope should be included in the RFP. For instance, engineering services for the planning, design and construction phases of the project should be specifically listed in the RFP and be addressed by the responding firms.** Recipients can always change engineering firms, but if they are hired to do the facility plan (planning phase) only, and later the Recipient wants to use the same firm for the design, Recipients must go through this same procurement process again.

   Recipients should not go into precise detail about the scope of the services the consultant is expected to perform. Recipients must be careful to tell what they want done and not how to do it. The response should not be a repeat of the RFP.

   The RFP should allow the consultant to demonstrate his knowledge and experience by filling in the details of how he would approach the problem and the alternatives that should be considered.

4. The amount budgeted for the proposed scope of service. Recipients may want to consider including the amount budgeted for architectural, engineering, or grant administration services in the RFP. Knowledge of the available budget will also help the consultant to fit the proposal to the financial resources available, making sure that time and resources are used most efficiently.

5. The method of payment to be used.

6. The time frame for performing the work, including any major milestones or deadlines involved.

7. Information required of each respondent to make the selection, including consultant qualifications, related experience on similar projects, current and projected workloads, capability to meet time and budget requirements, and identity of and qualifications of professional personnel to be assigned to the project.

8. The methods and criteria to be used in evaluating the proposals, and the relative weight of each of the criteria. The RFP should not only describe the criteria to be used in evaluating the proposals but also the relative weight attached to each criterion. This is important for the consultant to better understand the priorities of your concerns and how to respond to them.

9. The name and telephone number of a local person who can be contacted for further information regarding the RFP. The RFP should also include the names and phone numbers of people that will be available and knowledgeable enough to answer questions about the RFP. Do not just list the chief elected official if that person is not likely to be available during normal business hours.

   Consultants interested in responding will usually contact you before they decide to submit a proposal. OCR recommends that you be frank in answering the consultant's questions. Consultants should be allowed to review your NYS CDBG application so that they can gain a better understanding of what your community hopes to accomplish through the project.

10. Directions for submitting a response to the RFP. The directions for submitting the RFP should specify the date and time of the submittal deadline and the number of copies required. Since proposals are sometimes hand delivered, be sure to include an office address where someone will be available to accept them.

## B. Soliciting Proposals

Recipients should be able to document those proposals were solicited from an adequate number of qualified sources and that full and open competition took place prior to selection of a consultant. Encouraging adequate competition is of obvious interest and benefit to Recipients in terms of retaining the most qualified consultant at a reasonable cost. The more responses, the better the community's chance of hiring the best qualified firm.

At a minimum, the Recipient must advertise the RFP at least once in the newspaper of general circulation used for its regular legal advertising. OCR's concern in reviewing local procurement procedures is that the Recipient can

demonstrate reasonable efforts to solicit from an adequate number of qualified sources. If the RFP is advertised in a small-town newspaper with only local distribution, the effort may be open to question. **Therefore, the OCR strongly recommends that Recipients also advertise at least once in a newspaper with regional distribution in their area of the state, in addition to local advertising.**

Advertising RFPs does not mean that the entire text of the RFP must be included in a legal advertisement. The advertisement can briefly announce that the community is requesting proposals, that a copy of the detailed RFP is available upon request and M/WBE firms are encouraged to submit. This approach, in lieu of publishing the entire text of the RFP, might substantially reduce advertising costs. However, it will mean that the Recipient must allow additional time for persons or firms to request and receive a copy of the RFP and to respond.

Additionally, OCR requires recipients to perform outreach to Minority-and-Women-Owned-Business-Enterprises. This must be accomplished through direct outreach to MWBE's by email, letter or fax and other affirmative efforts such as posting to NYS Contract Reporter or an MWBE specific outlet. Documentation of these efforts must be provided.

Recipients should send copies of the RFP to firms that have previously indicated an interest in submitting a proposal. You can also contact other firms directly and ask them to submit proposals. By retaining copies of the letters sent to these firms Recipients will have clear documentation of efforts inviting competitive proposals if Recipients receive a limited number of responses.

**You should allow at least four weeks for responses to your RFP.** OCR considers three weeks the very minimum to allow for a reasonable time for a firm to prepare an adequate response. Less time for response would unnecessarily restrict competition. If time is too limited, some very qualified potential respondents may either be eliminated or may not be allowed sufficient time to prepare a quality proposal.

## C. Reviewing Proposals and Selecting a Consultant

Recipients may wish to consider appointing a committee of three to five people to review the responses to the RFP. Members of the committee should be familiar with the RFP and work to be accomplished through the contract. It may also be helpful to have a member of the committee with technical knowledge or experience appropriate to the project. Recipients should have a method for conducting technical evaluations of the proposals received and for selecting awardees.

The committee should try to keep to a minimum the time between the proposal deadline, evaluation of the proposals, and the final selection of the consultant. Forty-five days is a reasonable period. It is not necessary to interview many consultants to demonstrate adequate competition. Responding to an RFP can

involve a significant amount of time and expense for responding firms. It would be unfair to ask a consultant to also take the time and to incur travel expenses if they are unlikely to be selected. If you receive many responses, try to limit the number of consultants to be personally interviewed to the top contenders (five should be the maximum). At a minimum, however, Recipients should interview more than one of the firms or persons that submitted responses before selecting, in order to demonstrate that adequate competition took place.

The review committee should interview the finalists separately. Do not allow other firms to sit in on any firm's presentation. The consultants should describe their qualifications, the way they would handle the work tasks, and respond to any questions regarding the content of their proposals. The individual who will be principally responsible for doing the work on your project day-to-day should be present at the interview. Allow adequate time for formal presentations and questions from the committee.

Standard questions should be asked during the interview to allow comparison of the responses. Ask the same questions of each firm. Provide each person on the selection committee a sheet listing the questions to be asked during the interview. Each member of the selection committee should note the consultant's answer to each question and should rate the answer using a predetermined scoring method.

After ranking the responses in order of their scores on the evaluation factors and checking references, the committee will make their recommendation. Once it has reached a final decision, the Recipient should notify all the respondents of the results in writing, as soon as possible.

## D. References

**Before you make your final selection of a consultant, there is no step that is more important than to thoroughly check references.** Always request a list of prior clients, including their name, description of the work performed, address, and the name and phone number of a person to contact. A list of their most recent projects is usually best. Recipients should contact several references for each respondent being considered. Some useful questions might be:

1. Were you satisfied with the quality and timeliness of the work?

2. Was the consultant knowledgeable about funding programs and related requirements?

3. Was the consultant willing and able to work closely and effectively with local staff?

4. Were the costs or charges reasonable in relation to the work performed?

5. Did you experience any problems that would discourage you from hiring them again?

Also, check to see if the work done for these clients is similar to what you want the consultant to do. The ability to write a grant application, for example, does not mean that the same consultant has the capability to assist you with the management of a grant. Sometimes the person or firm you are interested in will be a new firm with few, if any, client references. New, small firms can sometimes be just as good as well-established, large firms, so instead of asking for client references, you would ask for employer references.

Checking references prior to selecting a consultant is the most important action you can take to avoid becoming involved with an unsatisfactory consultant.

## E. Preparing the Contract

The grant Recipient's negotiation with the selected consultant will include the scope of services, timetable, contract cost, and payment terms. In most cases, the Consultant will prepare a draft scope of services based on the proposal submitted in response to the RFP. This should include detailed descriptions of the services to be provided, along with a work schedule indicating the timeline for completion of the more significant tasks and identify the products or services to be provided.

### Put It in Writing

The community should insist that any "understanding" between the consultant and the local government be written into the contract. "Gentlemen's agreements" can cause problems, even when involving apparently minor issues. The more time that is spent on describing who will be doing what, when, and for what fee, the smoother relations will be later. Several points that should be clarified in the contract to protect the community's interests are:

1. State that only those key individuals who are identified in the firm's proposal for specific tasks are permitted to charge their time and expenses to the job. This should not apply to clerical and support staff whose costs were not specified in the consultant's original proposal.

2. All commitments stated in the contract must be honored unless changes are approved in writing.

3. It is important that the contract allow a fair and reasonable profit for the consultant. The basis for this could be previous experience, contacts with other municipalities, or published professional guidelines.

Preparation of the contract itself is relatively simple once these issues have been agreed upon. It is the Recipient's responsibility to include provisions related to all applicable NYS CDBG requirements in any contract or agreement through which NYS CDBG funds are passed on to a contractor or subcontractor.

## F. Contract Administration and Supervision

Recipients should establish and maintain procedures to monitor contractor performance to ensure that they are performing in accordance with the scope of services, timetable, and any other terms and conditions specified in their contracts or purchase orders. Ongoing monitoring of the contractor's performance and progress in completing contracted work tasks will prevent problems which may affect the quality, timely completion, or cost of the contract for your overall NYS CDBG project.

**All payment requests must be carefully reviewed before they are approved, to make sure that costs are reasonable and are consistent with the terms of your contract or purchase order. Recipients should require narrative progress reports with each billing. The consultant should be requested to report on each separate product specified in the budget. Billing should list hours spent on each budget category by employee type. If you do not understand an item on an invoice or believe a charge is not adequately documented, you should contact your consultant and resolve the question before payment is approved.**

Some communities have found that their relationship with a consultant goes more smoothly if a specific person is assigned to act as a day-to-day liaison with the consultant and to review progress reports and requests for payment.

## G. Prior Commitments to Consultants

A Recipient may have contracted with a consultant, architect, or engineer to prepare the original NYS CDBG application. This contract cannot be renewed or extended without further competition unless it can be clearly documented that the original hiring process met all federal and state requirements and included a scope of services that included the activities proposed and that could extend beyond grant writing at the Recipient's discretion.

Professional services provided for a longer period than originally procured must be re-advertised. The original consultant may respond to the Recipient's RFP, and it is perfectly legitimate to consider that consultant's prior performance when making the selection. The RFP process does not preclude you from hiring an engineer that has previously worked for you and who performed well. It does mean that you must give other qualified firms a reasonable opportunity to submit a proposal.

A community may receive a proposal for what is called a loss-leader-arrangement, where the consultant offers to prepare or assist with a grant application at cut rates or for no cost in return for favorable consideration in the selection process for a project manager, architect or engineer. No such arrangement, whether based on an oral or written agreement, can be valid or binding on the Recipient since it clearly violates federal requirements mandating "full and open competition." Also, using an evaluation criterion such as "familiarity with project or community" or "has previously worked with the community," for example, would be considered as restricting competition because it would favor a consultant or firm that had worked with the community previously and could possibly discourage competition by other consultants.

### H. Use of Consultants Already Under Contract

If the Recipient has a consultant under a pre-existing, multi-year contract, it is permissible to use that consultant if the activity to be carried out was outlined in the original scope of work used to procure the consultant and the process used to procure the consultant met federal requirements. Please note that multi-year contracts should be limited to three years and to one specialty area, such as housing, public works or economic development.

## VII. OTHER FEDERAL REQUIREMENTS FOR CONTRACTING

There are other federal requirements that relate to contracting. While these requirements are mentioned below as they must be included in procurements, additional details on compliance regarding these requirements are in Chapter 5 of the Manual. The required clauses for contracts subject to these requirements are attached to this chapter as Exhibits 4-1 and 4-2.

### A. Davis-Bacon Act and Related Acts

All laborers and mechanics employed by the contractors and subcontractors in the performance of construction work financed in whole or in part with Community Development Block Grant assistance shall be paid wages at rates no less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended.

This requirement applies to projects which involve construction contracts in excess of $2,000, except for rehabilitation of residential property designed for use by less than eight families). It applies to the rehabilitation of residential property only if such property contains not less than 8 (eight) units.

Recipients must include a copy of the prevailing wage rate determination and the federal labor standards provisions (HUD 4010) in any solicitation or invitation to bid. Wage Determinations may be downloaded at SAM.gov. Recipients may only award construction contracts to eligible contractors and subcontractors that agree to complete with these provisions.

In addition, contracts for construction with CDBG funding are subject to:

- Contract Work Hours and Safety Standards Act
- Copeland Act (Anti-Kickback Law)

## B. Contracting with Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms

Recipients are required to take affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible. Recipients shall take all the following steps to further this goal:

- Ensure that small businesses, minority-owned firms, and women's business enterprises are used fully practicable.

- Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

- Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

- Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

- Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

Recipients should obtain a list of Minority and Women-owned Business Enterprises (MBE/WBE) certified firms by contacting the, ESD Division of MWBD, Albany, NY 12245, (518) 292-5250 or utilize the website-based retrieval process at http://www.esd.ny.gov/MWBE.html.

## C. Section 3 of the Housing and Urban Development Act of 1968 (12 USC 1701u)

In accordance with the requirements under Section 3 of the Housing and Urban Development Act of 1968, as amended, Recipients shall ensure that employment and other economic opportunities generated using NYS CDBG funds shall, to the greatest extent feasible, be directed to low- and very-low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns that provide economic opportunities to low- and very low-income persons. Assistance covered by Section 3 includes the expenditure of NYS CDBG funds for work arising about housing rehabilitation, housing construction, or other public construction projects.

Section 3 requirements are applicable to NYS CDBG grants that exceed $300,000, and recipients must include Section 3 provisions in all construction contracts.

Contract provisions for Section 3 are attached to this Chapter as Exhibit 4-2.

## D. Debarment, Suspended, or Ineligible Contractors

Persons who have been declared debarred or suspended from participation in federally funded programs, by a federal government agency, are ineligible for participation in the NYS CDBG program. Excluded Parties include contractors that have been found in serious violation of federal labor standards or other requirements, and therefore have been debarred, suspended, or otherwise declared ineligible for participation in federally assisted construction projects.

Excluded Parties may be identified through the System for Award Management or SAM. To determine if any parties are excluded:

- Search Records for both company and key individuals, looking for those marked as Exclusions.
- For purpose of maintaining procurement documentation, Print Screen results to document that procured parties have been searched and are not excluded from participation.

In addition to the federal debarment list, the State also has a list of firms and persons who have been declared debarred or suspended from participation in New York State public works projects by the Bureau of Public Works are listed in the NYS Debarred List. The list and searchable database can be accessed online. Any person(s) on this list is ineligible for participation in the New York State CDBG Program.

Recipients must maintain evidence of compliance with this requirement by retaining a copy of the lists in their program files.

### E. Conflict of Interest

Perceived or actual conflicts of interest may arise when certain individuals have access to inside information regarding the award of a contract or property assistance or have undue influence on the process by which a contract or property assistance is awarded. To avoid such situations, recipients and subrecipients must have a formal, written Conflict of Interest policy that specifies which parties are covered and what measures will be taken to allow eligible parties access to program benefits while avoiding actual and perceived conflicts of interest.

For more information, please reference GAM Chapter 7, Other Federal Requirements.

### F. Build America, Buy America (BABA)

The Build America, Buy America Act (BABA) requires that all iron and steel, construction materials, and manufactured products used in federally funded infrastructure projects are produced in the United States. This requirement, known as the "Buy America Preference" (BAP), is detailed in the Infrastructure Investment and Jobs Act, Pub. L. 117-58 and 2 CFR 184.

All NYS CDBG funded projects subject to BABA must complete a CDBG Funds BABA General Waiver Statement and a BABA Materials Certification.

## VIII. PURCHASE OF REAL PROPERTY

Federal rules apply to the acquisition of real property, easements (permanent or temporary), property donations and leases in excess of 50 years in projects funded in whole or in part with Community Development Block Grant funds, even when no CDBG funds are used directly for the acquisition.

Properties are to be acquired and conducted in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended January 4, 2005 (Uniform Act or URA), which covers all HUD assisted program/projects as required by 49 CFR Part 24 and 24 CFR Part 570.

Generally, acquisitions for CDBG assisted projects will require an appraisal of the property before negotiations, a written offer of just compensation and a summary of what is being acquired, notices to seller and occupants, and reimbursement of expenses resulting from the transfer of title such as recording fees, prepaid real estate taxes, or other expenses. Tenants are also entitled to protections related to displacement and relocation.

HUD Handbook 1378, Tenant Assistance, Relocation and Real Property Acquisition, and Part V of the Department of Transportation regulation located at 49 CFR Part 24

updated January 4, 2005, provides the information necessary to addresses any type of acquisition and contains detailed guidance on the URA requirements. Before proceeding with any acquisition, click here to obtain a current copy of the Handbook.

The Uniform Act applies to donations. Recipients must not accept or negotiate donations of real property or easements unless the specific provisions of URA are followed. However, donated property does not have to be appraised if the requirements of URA are met.

## A. Appraisal

In most cases, URA will require the recipient to obtain an independent appraisal of the property, permanent easement or temporary construction easement prior to negotiating a sale with the property owner. Independent appraisals are necessary as documentation that acquisition costs are "reasonable and necessary" per federal regulations. An exception to this requirement may be allowed for small, uncomplicated acquisitions with low fair market values of $10,000 or less.

All appraisals must meet the minimum appraisal requirements of the Uniform Act. Note that URA requires an appraisal to be current. This means the appraisal should no more than one year (12 months) old at the time the offer of just compensation is made.

Once the appraisal has been completed, a review of the appraisal is necessary to assure that it meets applicable appraisal requirements. The review appraiser needs to determine that the appraiser's documentation, including valuation data and the analyses of that data, demonstrates the soundness of the appraiser's opinion of value.

The fair market value for properties "subject to" the requirements cannot be exceeded, unless there is clear evidence the acquisition will go to eminent domain proceedings, and the additional cost above fair market value plus the cost of completing eminent domain proceedings is more than the negotiated price.

## B. Use of Eminent Domain

Since FY2006, the Congress has prohibited CDBG funds from supporting any Federal, State, or local project that uses the power of eminent domain, unless that power is sought for certain public uses.

"Public use" does not include economic development that primarily benefits private entities. However, the statute made the following uses specifically eligible as public uses:

- Mass transit, railroad, airport, seaport, or highway projects.

- Utility projects which benefit or serve the general public (including energy related.
- Communication-related, water-related, and wastewater-related infrastructure);
- Structures for use by the general public or which have other common-carrier or public utility functions that serve the general public and are subject to regulation and oversight by the government; and
- Projects that involve the removal of an immediate threat to public health and safety or the removal of brownfields

HUD issued a Federal Register Notice on July 17, 2006, to provide guidance to CDBG administrators (Federal Register, 7/17/06, pp. 40634 – 40636.)

If eminent domain will be a part of any CDBG project assisted in whole or in part with CDBG funds for non-public purposes, the project will not be eligible for assistance from the CDBG program and all expended grant funds must be repaid to the State.

## IX. EXHIBITS

4-1 Contract Provisions

4-2 Section 3 Rider

## CHAPTER 4
## PROCUREMENT STANDARDS

## EXHIBIT 4-1
## Required Federal Contract Provisions

| | |
|---|---|
| Firm Name/Contractor | |
| Bid Due Date | |

1. **Equal Employment Opportunity** – This construction contract has been awarded in excess of $10,000 and is in compliance with Executive Order 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. **Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)** – This construction and any subcontracts in excess of $2,000 for construction or repair are in compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). Furthermore, the Recipient agrees to comply with the Copeland Anti-Kick Back Act (18 US 874 et seq.) and its implementing regulations of the US Department of Labor at 29 CFR 5. The Act provides that each contractor or subrecipient 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. All suspected or reported violations shall be reported to the Federal awarding agency.

3. **Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)** – 40 USC, Chapter 3, Section 276a-276a-5; and 29 CFR Parts 1, 3, 5, 6 and 7 are triggered when construction, renovation or repair work over $2,000 is financed in whole or in part with CDBG funds. It requires that workers receive no less than the prevailing wages being paid for similar work in the same area. Davis-Bacon does not apply to the rehabilitation of residential structures containing less than eight (8) units or force account labor (construction carried out by employees of the Subrecipient). The subrecipient shall maintain documentation that demonstrates compliance with hours and wage requirements. Such documentation shall be made available to the Corporation for review upon request.

4. **Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330)** – This construction contract(s), if awarded in excess of $300,000 is in compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1 ½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is

applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous on federal and federally financed and assisted construction projects. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. **Patent Rights to Inventions Made Under a Contract or Agreement** – This construction contract and agreements for the performance of experimental, developmental, or research work shall provide for the patent rights of the Federal Government and the Recipient in any resulting invention in accordance with 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

6. **Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et sea.), as amended** – This construction contract and subcontracts of amounts in excess of $100,000 are in compliance with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq,). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. **Section 3 12 U.S.C. 1701u of The Housing and Community Development Act of 1968, as amended** – This construction contract, if in excess of $300,000 is in compliance with Section 3 and the contractor shall include the clause set forth at 24 CFR 135.38 as provided in the Section 3 Rider.

8. **Additional Contract Provisions** - The following provisions are also included.

   a. This construction contract, if in excess of the most restrictive small purchase threshold (Federal/State/Local) contains contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances by which a contractor violates or breaches the contract terms and provides for such remedial actions as may be appropriate.
   Location of clause_____.

   b. This construction contract, if in excess of $10,000 contains suitable provisions for termination by the Recipient, including the manner by which such termination shall be affected and the basis for settlement.
   Location of clause_____.

   c. Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the Recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract

exceeds $150,000. For those contracts or subcontracts exceeding $150,000, the OCR may accept the bonding policy and requirements of the Recipient, provided the OCR has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

i. A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of this bid, execute such contractual documents as may be required within the time specified.
Location of Bid Bond _____.

ii. A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
Location of Performance Bond _____.

iii. A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.
Location of Payment Bond _____.

iv. Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

d. The Recipient or subrecipient, the OCR, 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 a specific program for the purpose of making audits, examinations, excerpts and transcriptions.
Location of clause_____.

e. To the fullest extent permitted by law, the Recipient and Subrecipient shall and hereby agrees to hold harmless, defend (with counsel acceptable to the Housing Trust Fund Corporation) and indemnify the Housing Trust Fund Corporation and each and all of its successors, affiliates, or assigns, and any of their employees, officers, directors, attorneys, consultants, agents, managers, and affiliates, from and against any and all damages, costs, attorneys' fees, claims, expenses, injuries, property damage, causes of action, violations of law, violations of this Agreement, and losses of any form or nature arising from or related to the conduct of Subrecipient in the performance of the efforts called for in this Agreement. This

indemnity shall expressly include, but is not limited to, the obligation of Subrecipient to indemnify and reimburse the Housing Trust Fund Corporation for any and all attorneys' fees and other litigation or dispute resolution costs incurred or to be incurred in the Housing Trust Fund Corporation's enforcement of this Agreement or any portion thereof against Subrecipient or otherwise arising in connection with Subrecipient including but not limited to Subrecipient's breach, violation, or other non-compliance with this Agreement. This clause shall survive indefinitely the termination of this Agreement for any reason.
Location of clause_____.

f. This construction contract and all subcontracts acknowledge that all parties shall are bound by, and will comply with all applicable Federal, State, and local laws and regulations, including but not limited to 2 CFR Part 200 Appendix II (Contract Provisions for non-Federal Entity Contracts Under Federal Awards) and 24 CFR Parts 570.
Location of clause_____.

9. **Anti- Job Pirating 24CFR 570.210** - All Economic Development, Small Business, and Microenterprise contracts shall contain a provision acknowledging that Community Development Block Grant Funds will not be used to assist directly the relocation of any industrial or commercial plant, facility, or operation, from one area to another area, if the relocation is likely to result in a significant loss of employment in the labor market area (LMA) from which the relocation occurs. For additional information, see the HUD CDBG Memorandum on Job Pirating Activities (https://www.hudexchange.info/resource/2219/cdbg-memorandum-job-pirating-activities/) and 24 CFR 570.210.
Location of clause_____.

10. **Build America, Buy America Act BABA) (Pub. L. No. 117-58, §§ 70901-70953, and 2 CFR Part 184) –** Pub. L. No. 117-58, §§ 70901-70953, and 2 CFR Part 184 require that all iron, steel, manufactured products, and construction materials used for federally funded infrastructure projects be produced in the United States unless these materials are otherwise exempt or subject to an approved waiver. This requirement, known as the "Build America Preference (BAP)", applies to all federal financial assistance as defined in **2 CFR § 200.1** in which funds are appropriated or otherwise made available and used for an infrastructure project, regardless of whether or not the project is funded through the Infrastructure Investment and Jobs Act (IIJA). For additional information, go to Build America, Buy America Act - HUD Exchange.
Location of clause_____.

# CHAPTER 4
# PROCUREMENT STANDARDS

## EXHIBIT 4-2

## SECTION 3 RIDER

Contractor must comply with and must ensure that the following language is included in all applicable subcontracts for work related to this Contract (the term “Contractor” as used herein shall also be deemed to mean “Subcontractor”). The required contract clause is available here: https://hcr.ny.gov/S3ContractClause.

## Exhibit 4-3

## Bid Packet Review Guidance and Checklist

| | |
|---|---|
| **Municipality** | |
| **Project #** | |
| **Date** | |
| **Prepared by** | |

### Bid Package Review

These items must be addressed to the satisfaction of the OCR prior to going out for bid.

☐ Submitted to OCR Project Manager at least 30 days prior to release for bid
☐ Required contract provisions Exhibit 4-1
☐ Bid date in publication
☐ Bid receipt deadline
☐ Location of bid opening
☐ Date / time of bid opening
☐ Bid bond requirements clearly stated
☐ Section 3 Rider, Exhibit 4-2
☐ Reference to Buy America Build America (BABA) as it applies to infrastructure and facility-related projects
☐ The Town/City/Village/ County strongly encourages MWBE's to apply
☐ The Town/City/Village/ County encourage Section 3's to apply
☐ Specify minimum qualifications for bidder to be considered (length of time in business, experience doing comparable work, etc.)
☐ Describe items / services to be purchased without preference to specific brand (unless used as an example of function or quality)
☐ Sole source bidding, cannot specify single source, or must identify as equivalent to or equal to…)
☐ Statement of work
☐ Davis-Bacon Wage determination at the start of construction
☐ Davis-Bacon Wage determination at time of solicitation
☐ Approximate start/end dates of project suggest; or maximum date complete project
☐ Project sign, unless being created by the municipality
☐ Debarment list

### Invitation for Bid

☐ IFB is published in local newspaper
☐ Bid due date is clearly stated in publication
☐ Adequate period of time to submit response (3-4 weeks)
☐ Location of bid opening is clearly identified
☐ Date and time of bid opening is clearly identified
☐ IFB incudes statement that clearly encourage MWBE's and Section 3 firms to apply
☐ Reference to Buy America Build America (BABA) as it applies to infrastructure and facility-related projects
☐ Buy America Build America (BABA) waivers, if applicable
☐ Other efforts to solicit bids (NYS Contract Reporter, Builders Exchange)
Identify other efforts:

**Post Bid Submission**

☐ Maintain Plan holders
☐ Maintain bid submission list
☐ Documentation of bid review
☐ Acceptance of bid
☐ Notice of award of contract (Confirm with OCR that Release of Funds has been approved prior to issuance)
☐ Schedule Pre-Construction Conference (OCR Project Manager must be invited)
☐ Executed Contract between recipient and contractor with required contract provisions 4-1 and, Section 3 Rider
☐ Exhibit 6-4 Contractor's Receipt of Required Program Materials