
Chapter 3 – Procurement Standards

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CHAPTER 3

PROCUREMENT STANDARDS

I. OVERVIEW

This chapter provides guidance to grant recipients regarding the State and federal requirements that govern the procurement of supplies, equipment, construction, and professional or other services with CDBG funds. The principal focus of this chapter is the procedures required for the selection of consultants to provide architectural, engineering, audit, or project management services.

The procedures required for the selection of contractors for public facilities or building construction are discussed in detail in Chapter 9, Construction Management: Public Facilities and New Housing Construction.

Local officials should carefully review this chapter before entering into any agreements to purchase equipment or materials or to retain the services of a consultant or contractor.

A. PROCUREMENT STANDARDS

All procurement of supplies, equipment, and professional or other services must conform to procedures set out in the HUD "Administrative Requirements for Grants" 2 CFR Part 200 and appropriate attachments as well as procedures established by Montana law.

B. REQUIREMENTS

1. All contracts entered into by grantees must contain certain Montana Department of Commerce (MDOC) CDBG-required clauses to assure compliance with all applicable State laws and regulations. This chapter identifies the required clauses.
2. All contracts must be reviewed and approved by MDOC before they are executed.
3. Prior to contract award, the names and addresses of all tentatively-selected contractors (whether for construction or professional services such as engineering, architectural design, or grant administration) must be submitted to MDOC for comparison with the General Service Administration's List of Parties Excluded from Federal Procurement or Non-procurement Programs.
4. Grantees must retain written documentation regarding the procurement procedures used for each contract.
5. Grantees must establish procedures to assure ongoing review of contractor performance and contract expenditures during the term of any CDBG-funded project.

II. APPLICABLE REQUIREMENTS

A. FEDERAL

1. HUD "Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally-Recognized Indian Tribal Governments". All CDBG recipients must follow the "Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally Recognized Indian Tribal Units". A copy of this document is available upon request from the Montana Department of Commerce (MDOC) CDBG staff.

2. 2 CFR Part 200 govern the procurement procedures for all CDBG program compliance.

B. STATE

Title 7, Chapter 5, Parts 23 and 43, MCA also govern the procurement of construction and purchasing contracts by CDBG local government grantees. These laws must always be followed by these entities, regardless of their participation in the CDBG grant program.

CDBG grantees should be prepared to provide information to the Department about how they intend to procure or procured grant administration, professional services and construction services in accordance with the procurement laws applicable to them, including but not limited to the list of vendors to be or that were solicited, a copy of any advertisements, a copy of the request for proposals, or the information detailing the scope of work if price is the only consideration.

All executed contracts or agreements for grant services to be paid for in whole or in part by CDBG funds must be submitted to the Department. Additional guidance on procurement procedures can be found on the CDBG Toolkit webpage.

Architectural, Engineering, and Land Surveying Services

Section 18-8-201 to 212, MCA, establishes a qualifications-based selection procedure for architectural, engineering and surveying services costing \$20,000 or more which are funded by state and local public agencies (state agencies, local governments, school districts, special districts, or authorities of local governments).

Montana Public Notice Requirements.

Requirements for publication of notices for municipalities are set forth in Section 7-1-4127, MCA, Publication of notice–content–proof.

Requirements for publication of notices for counties are set forth in Section 7-1-2121, MCA, Publication and content of notice–proof of publication.

Grant recipients should be aware that Section 18-8-203, MCA, dealing with the procurement of architectural, engineering, and land surveying services, states that units of state and local government must publish a notice of their need for these services. However, because Section 18-8-203, MCA does not establish a specific timeframe or method of publication, it can be read in conjunction with Sections 7-1-4127, MCA, Publication of notice–content–proof (for municipalities); and 7-1-2121, MCA, Publication and content of notice– proof of publication for counties for further guidance regarding publication timeframes.

The publication requirements contained in the statutes listed in the chart below apply to the procurement of architectural, engineering, and land surveying services. In all cases, MDOC strongly recommends that recipients publish their notices in the appropriate regional newspapers, in addition to advertising in local newspapers. This practice will help assure greater competition, lower costs and provide a better selection of choices for the local government. This helps CDBG grant recipients document outreach to disadvantaged business enterprises.

Summary of Notice Requirements in Montana Statutes				
Statute	Title of Statute	Counties	Municipalities	NOTES

18-8-203, MCA	<i>Public notice of agency requirement</i>	X	X	Sets forth requirements regarding when agencies must publish notice for professional services.
7-1-4127, MCA	<i>Publication of notice</i>		X	Sets forth requirements related to type of media and newspapers acceptable for publication purposes.

5. Rules of Conduct for Public Officials and Employees (Sections 2-2-104 and 2-2-121, MCA). These sections of Montana law set out the Code of Ethics for state and local officials and employees.

III. GRANTEE RESPONSIBILITIES

The Montana statutes cited above and the HUD "Administrative Requirements for Grants" provides the basic framework of requirements for the procurement of all supplies, equipment, construction, and services using CDBG funds by local governments and any subrecipient. The key requirements are summarized in the following sections. If local officials have any questions regarding these requirements, they should contact MDOC CDBG staff for guidance.

A. CODE OF ETHICS

In Title 2, Chapter 2, Part 1, MCA, the Montana Legislature established a Code of Ethics for all officers and employees of State and local government and sets out state policy on conflicts of interest for state and local public officials.

Montana's Code of Ethics for public officials and employees (cited above in section A) includes similar conflict of interest regulations that also apply to procurement activities for any local CDBG project. In some circumstances, the State of Montana conflict of interest provisions may be even more restrictive than the federal prohibitions. Sections 2-2-201 and 7-3-4367, MCA, prohibit any municipal or county employee from entering into a contract with his or her employer.

B. CONFLICTS OF INTEREST

HUD conflict of interest regulations apply to all situations involving a potential conflict of interest found in 2 CFR Part 200.112, 24 CFR Part 570.489(h), and 24 CFR Part 92.356.

The general conflict of interest rule is as follows: no persons covered by the conflict of interest provisions who exercise or have exercised any functions or responsibilities with respect to activities assisted with HUD-funded projects administered by the Montana Department of Commerce (Commerce) CDD or who are in a position to participate in a decision-making process or gain inside information with regard to these activities may obtain a financial interest or financial benefit from the HUD-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to the HUD-assisted activity, or the proceeds from such activity, either for themselves or those with whom they have business or immediate family ties, during their tenure or for one year thereafter.

Persons Covered are defined as an employee, agent, consultant, officer, or elected or appointed official of the recipient or of any designated entities receiving HUD funds provided by CDD.

Any circumstances that may result in a real or perceived conflict of interest must be remedied by considering factors for exceptions, publicly disclosing the conflict, and an opinion of the local government grantee's attorney that the interest for which the exception is sought would not violate state or local law.

Upon the written request of a local government grantee, Commerce may grant an exception to the conflicts prohibited on a case-by case basis when the local government grantee has satisfactorily met the threshold requirements, taking into account the cumulative effects of the factors to be considered for exceptions. Commerce will consider an exception only after the grantee has provided the following documentation:

1. A disclosure of the nature of the conflict, accompanied by documentation of a public disclosure of the conflict and a description of how the public disclosure was made;
2. An opinion of the local government grantee's attorney that the interest for which the exception is sought would not violate state or local law; and
3. Documentation demonstrating that the cumulative effect of the required factors to be considered justifies an exception.

Commerce will review the following factors when determining whether to grant an exception to the prohibited conflicts:

1. Whether the exception would provide a significant cost benefit or an essential degree of expertise to the program or project that would otherwise not be available;
2. Whether an opportunity was provided for open competitive bidding or negotiation;
3. Whether the person affected is a member of a group or class of low- or moderate-income persons intended to be the beneficiaries of the assisted activity, and the exception will permit such person to receive generally the same interests or benefits as are being made available or provided to the group or class;
4. Whether the affected person has withdrawn from his or her functions or responsibilities, or the decision-making process with respect to the specific assisted activity in question;
5. Whether the interest or benefit was present before the affected person was in a position as described in paragraph (b) of this section;
6. Whether undue hardship will result either to the recipient or the person affected when weighed against the public interest served by avoiding the prohibited conflict; and
7. Any other relevant considerations.

Local government grantees should provide Commerce with relevant information relating to the above factors. For example, the local government grantee requesting an exception should report and document whether or not an opportunity was provided for open competitive bidding or negotiation (see factor number 2) with their request for an exception or shortly thereafter.

A frequently-asked question regarding "conflict of interest" is whether the same firm may be selected to provide both engineering services and grant administration services. According to HUD policy, a conflict generally exists in situations where a local government awards a contract to a firm to manage or administer its CDBG project while at the same time the firm is to provide a service or product under the community's CDBG project.

HUD regulations require that a grantee's financial management system provide for effective control over and accountability for all funds. The regulations prohibit arrangements where a firm would, in effect, be reviewing its own work. Under no circumstances would it be appropriate to have an engineering consultant directly involved in managing CDBG funds for the project or placed in a position which they would in effect, be signing off for their own work.

C. GENERAL PROCUREMENT POLICIES

Under the HUD "Administrative Requirements for Grants", CDBG recipients are:

- required to review proposed procurements to avoid purchase of unnecessary or duplicate items;
- required to consider consolidating or breaking out procurement to obtain a more economical purchase;
- required to analyze the alternatives of lease versus purchase, where appropriate, and perform any other appropriate analysis in order to determine the most economical procurement approach;
- encouraged to enter into state and local inter-governmental agreements for procurement or use of common goods and services to achieve greater economy and efficiency, where feasible;
- encouraged to use federal and state excess and surplus property in lieu of purchasing new equipment and property whenever it is feasible and reduces project costs;
- required to make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration must be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources;
- required to maintain records sufficient to detail the significant history of a procurement. These records must include, but are not necessarily limited to, rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price;
- permitted to use "time and material" type contracts only in very limited situations:
 - a. after a determination is made that no other contract is suitable; and
 - b. if the contract includes a ceiling price that the contractor exceeds at his/her own risk.

- responsible for, in accordance with good administrative practice and sound business judgment, the settlement of all contractual and administrative issues arising out of procurement activities; and
- required to have protest procedures to handle and resolve disputes relating to procurement, and in all instances disclose information regarding the protest to the Montana Department of Commerce.

D. CONTRACTING WITH DISADVANTAGED BUSINESS ENTERPRISES

Disadvantaged Business Enterprises (DBEs), is a term used to collectively refer to both women-owned business enterprises, and minority-owned business enterprises. CDBG grantees are required to take affirmative steps to assure that DBEs are utilized when possible, as sources of supplies, equipment, construction and professional and other services.

Grantees should encourage the prime contractors on their projects to utilize qualified DBE firms to the maximum extent possible. Please see Chapter 5, III. Grantee's Responsibilities, C. Contractor Affirmative Action for full description of requirements.

E. PROCUREMENT PROCEDURES

1. 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. Grant recipients may choose to combine the procurement of services in order to reduce procurement costs and time. As an example a local government can procure for more than just grant administration in one procurement process; a local government could combine the services for grant administration, planning, or other services so long as the procurement allows for "and/or" language to encourage all types of services providers the ability to respond. Additionally, local governments can combine their efforts by designating a lead local government to conduct the procurement on behalf of a larger group to provide services to more than one governmental entity.

Some of the situations considered to be restrictive of competition include:

- placing unreasonable requirements on firms in order for them to qualify to do business;
- requiring unnecessary or unreasonable levels of prior experience and excessive bonding;
- non-competitive pricing practices between firms or between affiliated companies;
- non-competitive awards to consultants that are on retainer contracts;
- organizational conflicts of interest;

- 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; and
- any arbitrary action in the procurement process.

2. **Geographic Preference**

As a federally funded program, 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.

3. **Written Selection Procedures**

CDBG recipients should have written selection procedures that provide, at a minimum, that all solicitations:

- a. 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.

Detailed product specifications should be avoided if at all possible. 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 as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors or must be clearly stated.

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

F. SELECTING THE METHOD OF PROCUREMENT

The HUD "Administrative Requirements for Grants" permits five procurement methods. CDBG recipients should select the most appropriate method based upon the recipient's needs and the nature of the services required. The following is a summary of basic selection alternatives and the requirements associated with them. If local officials have any questions regarding these requirements, they should consult the MDOC CDBG staff assigned as liaison for their project.

1. ***Procurement by micro-purchases***

- acquisition of supplies or services generally no greater than \$3,000. Contact your CDBG liaison for additional details,

2. **Procurement by small purchase procedures**
 - securing supplies, services, or other property that do not cost more than \$100,000, additional details below,
3. **Procurement by sealed bids**
 - formal, firm fixed price contracts, generally construction contracts further discussed below and in Chapter 9 of this manual
4. **Procurement by competitive proposals**
 - Fixed price contract or cost-reimbursement type contract such as professional services, typically a Request for Proposal or Request for Qualification, and
5. **Procurement by noncompetitive proposals**
 - Solicitation of a proposal from only one source, also called Sole Source procurement, additional details below.

Procurement by HUD's Small Purchase Procedures:

HUD's "Small Purchase Procedures" can be used where the procurement will not cost more than \$100,000 in the aggregate, and where the procurement is relatively simple and informal procurement for services, supplies, or other property. Can be used for grant management or other consulting services.

As you procure services using HUD's Small Purchase Procedures, keep in mind:

- a. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources. In all cases, the local government should obtain price or rate quotations from a minimum of two qualified sources. However, the grant recipient would determine the number of adequate qualified sources to speak with.
- b. This process would need to be documented to demonstrate that procurement procedures were carried out and the service, property or supply selected was done so according to proper procurement procedures. If a local government's procurement policy is more restrictive than MDOC procedures, the local government's policy will govern the procurement procedures to be followed.
 1. The Grantee needs to record the rate or quote received along with other identifying information (name, address, and phone) and document the questions asked.
- c. The grant recipient may ask other questions, so long as price or rate quotes were included. The questions must be asked equally and fairly to all firms and the notes or documentation of the firms contacted and questions asked would need to be provided as documentation and then a determination of which firm was selected.
- d. The local government also needs to advertise for Section 3 compliance and contact DBE/MBE/WBE firms as well in coordination with the small purchase procurement procedures.
 1. For DBE/MBE/WBE firms contact the Montana Department of Transportation (MDT) to obtain a list of Disadvantaged Business Enterprises (DBEs) certified firms within the region that appear in MDT's directory in order to invite proposals from qualified DBE firms.

CONTACT:
 Montana Department of Transportation (MDT)
 2701 Prospect Ave.
 P.O. Box 201001

Helena, MT 59620-1001
Phone: 406-444-6337
Website: <http://www.mdt.mt.gov/business/contracting/civil/dbe.shtml>

- e. MDOC recommends that local governments follow prudent purchasing practices and receive competitive telephone or written quotations for all small purchase procurement. According to MCA 7-5-4302 advertisement is required for equipment purchases over \$80,000. Fax quotations are an acceptable form of written documentation.
- f. When price quotations are obtained orally, adequate written documentation, such as detailed notes describing telephone contacts (who, what, when, etc.), must be maintained in all local CDBG files.

Procurement by HUD's Sealed Bid Procedures

Competitive sealed bidding is the standard procurement process followed for construction activities involved in CDBG public facility and new housing construction projects.

Chapter 9 (Construction Management: Public Facilities and New Housing) includes a detailed step-by-step discussion of the procedures involved in selecting a construction contractor and the requirements that are applicable to CDBG-funded construction contracts. Grantees should also refer to the current applicable provisions of Montana law for advertising requirements (Section 7-5-2301, MCA, for county governments and Section 7-5-4302, MCA, for municipalities) when the competitive sealed bid method is used.

Procurement by competitive sealed bids (after formal advertising) is used when the following conditions exist:

- a. A complete, adequate and realistic specification or purchase description is available;
- b. Two or more responsible suppliers are willing and able to compete effectively for the business;
- c. The procurement lends itself to a firm fixed-price contract (a specified price to be paid when the items or services are delivered); and
- d. Selection of the successful bidder can appropriately be made principally on the basis of price.

Bids are publicly solicited (advertised in newspapers) and kept in confidence until there is a public bid opening. A firm-fixed price contract is awarded to the responsible bidder whose bid, conforming to all material terms and conditions of the invitation for bids, is lowest in price. When using formal advertising, the following requirements apply:

- 1. The invitation for the bids must be publicly advertised and bids must be solicited from an adequate number of known suppliers or contractors, providing them sufficient time prior to the date set for opening the bids.
- 2. The invitation for bids, including specifications and attachments, must clearly describe the items or services required in order for the bidders to properly respond.
- 3. All bids must be opened publicly at the time and place stated in the invitation for bids.

4. A firm-fixed price contract award must be made in writing to the lowest responsive and responsible bidder.
5. Any or all bids may be rejected if there is a sound documented reason.

Procurement by HUD's Competitive Procedures

1. Requests for Proposals (RFPs) are:

- required for any services over \$100,000,
- recommended for procurement actions under \$100,000 that are complex and/or where qualifications and desired work products cannot easily be handled by telephone rate quotation; and
- Can be used for grant management or other consulting services.

2. Procurement of Architectural, Engineering, or Surveying services -- Use the Request for Qualifications (RFQ) Process

Under Montana law (18-8-201, MCA), the selection of a consultant for architectural, engineering, or surveying services requires a competitive solicitation and negotiation process (usually called the Request for Qualifications process, RFQ) for projects for which the fees are estimated to exceed \$50,000.

Procurement by Competitive Proposals

The phrase "procurement by competitive proposals" is often used interchangeably with the term "Procurement by RFP" (Requests for Proposals), but there is also a method called "Procurement by RFQ" (Request for Qualifications).

These methods of procurement are generally used when conditions are not appropriate for the use of sealed bids. An RFQ/RFP is a written announcement that invites consultants to compete for the provision of services to your local government.

Procurement by competitive proposals via the RFQ method is the procurement procedure required by Montana law (Section 18-8-212, MCA) for retaining professional services such as an architect, surveyor, or engineer for your CDBG project. The law applies to state agencies, local governments, special districts, "or any other entity or authority of local government, in corporate form or otherwise." It therefore applies to all procurement of these professional services by CDBG recipients.

Grant recipients should be aware that section 18-8-203, MCA, dealing with the procurement of architectural, engineering, and land surveying services, states that units of state and local government must publish a notice of their need for these services.

Because the retention of consultant services for engineering or project management is a major concern for most CDBG recipients during the start-up phase of their project, the following discussion will cover the issues involved in this method of procurement in greater detail.

Generally accepted guidelines for procurement by competitive proposals include:

- Requests for Qualifications (RFQs) are publicized which identify all evaluation factors and their relative importance.
- Any response to publicized requests for proposals is honored to the maximum extent practical.
- Proposals must be requested from an adequate number of qualified sources.
- CDBG recipients must have a method for conducting technical evaluations of the proposals received and for selecting awardees.
- All proposals received should be evaluated according to written criteria established in advance which describe the significant factors to be used to determine the contract award.

The contract award is made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered

PREPARING A REQUEST FOR QUALIFICATIONS OR REQUEST FOR PROPOSALS

Although the RFQ/RFP process may appear time-consuming, taking the time up front to make sure that your community hires a competent engineer or architect, or other consultant will, in the long term, likely save money and prevent problems. The RFQ/RFP should include:

- the name of the local government issuing the RFQ/RFP;
- a brief description of the project including location, purpose, timeframe, and present status;
- a general description of the scope of the services to be provided by the consultant;
- the amount budgeted for the proposed scope of services;
- the method of payment to be used;
- the timeframe for performing the work, including any major milestones or deadlines involved, this could include longer periods of time as it relates to services request. As an example: an engineer may be procured for a service that would last for a term longer than a single task under a service so long as the procurement meets the minimum federal requirements;
- 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;
- the methods and criteria to be used in evaluating the proposals, and the relative weight of each of the criteria;

- the name and telephone number of a local person who can be contacted for further information regarding the RFQ/RFP; and
- directions for submitting a response to the RFQ/RFP.

The entire project scope should be included in the RFQ/RFP. For instance, engineering services for the planning, design and construction phases of the project should be specifically listed in the RFQ/RFP and be addressed by the responding firms. You can always change engineering firms, but if you hire them to do the facility plan (planning phase) only, and later want to use the same firm for the design, you would need to go through this same procurement process again.

You should not go into precise detail about the scope of the services the consultant is expected to perform. You do not want the response to be just a repeat of your RFQ/RFP. Allow the consultants to demonstrate their knowledge and experience by filling in the details of how they would approach the problem and the alternatives that you should consider.

The RFQ 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 RFQ/RFP document; include only the necessary information. A wordy or unclear RFQ/RFP will unnecessarily increase the time each firm spends preparing their response and your time in reviewing the proposals.

You 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 RFQ/RFP should also describe any unique problems involved in the project and any previous studies that would be available for their review.

CDBG recipients may want to consider including the amount budgeted for architectural, engineering, or grant administration services in the RFQ/RFP.

This may help a consultant decide whether to go to the effort of responding. Knowledge of the available budget will also help the consultant fit the proposal to your financial resources to make sure that time and resources are used most efficiently.

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

The directions for submitting the RFQ/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.

Your RFQ/RFP document should also include the names, telephone and fax numbers, and Internet addresses (if available) of people that will be available and knowledgeable enough to answer questions about the RFQ/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. MDOC recommends that you be frank in answering the consultant's questions.

Consultants should be allowed to review your CDBG application so that they can gain a better understanding of what your community hopes to accomplish through the project. MDOC retains extra copies of funded applications for review by the public or consultants.

Chapter 3 exhibits contain *sample* formats for an RFP for grant management services and an RFQ for engineering services. Both provide only the outline for the content of an RFP/RFQ; each must be carefully adapted to reflect the unique activities and considerations involved in your CDBG project.

Non-competitive or Sole Source Procurement (Requires Prior CDBG Approval)

Sole source procurement (also known as “procurement by noncompetitive proposals”) is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined to be inadequate. The only circumstances under which a contract funded with CDBG monies may be awarded by sole source procurement negotiation are when at least one of the following applies:

- a. sole source procurement would be permissible under Montana law; and
- b. the items or services required are available only from one source;
- c. a public emergency exists such that the urgency will not permit a delay beyond the time needed to employ one of the other authorized procurement methods described above; or
- d. after solicitation from a number of sources, competition is determined to be inadequate.

Housing and Urban Development procurement requirements found in 2 CFR Part 200 make clear that sole source procurement is permissible only when at least one of the above conditions applies and procurement by other procedures is not feasible. CDBG recipients proposing sole source procurement must provide cost data to demonstrate that proposed costs are reasonable and appropriate.

An example of a situation where MDOC would approve a sole source procurement would be where an engineering firm has been selected for a prior phase of a federally-funded public facility project and where CDBG funds will be used to complete a pre-existing and continuing project. In such cases, the original procurement of the engineering services must have been done in compliance with the procurement regulations of the federal funding agency involved.

The fact that a contractor is currently performing other consultant services for the CDBG grant recipient is not an adequate justification alone for a noncompetitive negotiated contract award. In all cases, noncompetitive negotiation which would involve CDBG funds must have prior approval from MDOC.

G. SOLICITING PROPOSALS

CDBG recipients should be able to document that proposals were solicited from an adequate number of qualified sources and that full and open competition took place prior to its selection of a consultant. Encouraging adequate competition is of obvious interest and benefit to CDBG 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.

For the procurement of architectural, engineering, and land surveying services, recipients should refer to the Montana Public Notice Requirements discussed at the beginning of this chapter.

The CDBG recipient must be able to demonstrate reasonable efforts to solicit from an adequate number of qualified sources. If the RFP/RFQ is advertised in a newspaper with only local distribution but can be can also be advertised at least once in a newspaper with regional distribution in their area of the State, in addition to local advertising.

Advertising the local government's request for proposals does not mean that the entire text of the RFP/RFQ must be included in an advertisement. The advertisement can briefly announce that the community is requesting proposals and that a copy of the detailed RFP/RFQ is available upon request. This approach, in lieu of publishing the entire text of the RFP/RFQ, could substantially reduce advertising costs. However, it will mean that the grant recipient may need to allow additional time for persons or firms to request and receive a copy of the RFP/RFQ and to respond. A reasonable amount of time can be determined by implementing standard practices at the local level, however, less time for response may unnecessarily restrict competition.

H. PRIOR COMMITMENTS TO CONSULTANTS

A CDBG grantee may have contracted with a consultant, architect, or engineer to prepare the original 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 could extend beyond grant writing at the grantee's discretion. Professional services provided for a longer period than originally procured must be re-advertised.

The original consultant may respond to the grantee's new RFP/RFQ, and it is perfectly legitimate to consider that consultant's prior performance when making the selection. The RFP/RFQ 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 make a proposal a project.

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 grantee since it clearly violates federal requirements mandating "full and open competition."

Also, using an evaluation criterion such as "*familiarity with project or community*", for example, would be considered to be *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.

I. REVIEWING PROPOSALS AND SELECTING THE CONSULTANT

The local government should appoint a committee of three to five people to review the responses to the RFP/RFQ. Members of the committee should be familiar with the RFP/RFQ and work to be accomplished through the contract. Try to include a person who is very familiar with the problems of the public facility or with the new housing construction project, such as the local public works supervisor or a local housing construction expert.

It may also be helpful to have a member of the committee with technical knowledge or experience appropriate to the project. 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 time period.

Grantees should have a method for conducting technical evaluations of the proposals received and for selecting awardees. Documentation of the procurement conducted is required to be retained for CDBG compliance. Grant recipients rank the proposals according to the evaluation factors listed in their RFP/RFQ and assign points to each, based on a pre-established number of points for each evaluation criterion which is consistent with their relative importance as described in the RFP/RFQ. Under State law, the ranking criteria for selection of engineers, architects and surveyors must include, at a minimum:

- the qualifications of the professional personnel to be assigned to the project;
- the consultant's capability to meet time and project budget requirements;
- location;
- present and projected workloads;
- related experience on similar projects; and
- recent and current work for the entity issuing the RFP/RFQ.

Ask the same questions of each firm. 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 local government should notify all of the respondents of the results in writing, as soon as possible.

J. CHECKING REFERENCES

Before you make your final selection of a consultant, the grant recipient may request a list of prior clients, including their name, description of the work performed, addresses, and the name and phone number of a person to contact. A list of their most recent projects is usually best. You should contact several references for each respondent being considered. Some useful questions might be:

- Were you satisfied with the quality and timeliness of the work?
- Was the consultant knowledgeable about funding programs and related requirements?
- Was the consultant willing and able to work closely and effectively with local staff?
- Were the costs or charges reasonable in relation to the work actually performed?
- 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.

K. MDOC DEBARMENT / ELIGIBILITY CHECK OF CONTRACTORS AND REVIEW OF PROCUREMENT PROCEDURES USED

The name of the firm, principals of the firm, and address of the firm or consultant that has tentatively been selected must be provided to the CDBG Program Specialist assigned to your project – who will conduct a Federal and State debarment check of the firm and its principals. Once the check has been completed, the specialist will notify the grantee of the firm’s status.

- ✓ This debarment check must be completed prior to issuance of a contract award; therefore, this debarment check should take place before local officials spend substantial time negotiating with a firm that has tentatively been selected.
- ✓ Before the community enters into a contract, local officials must send their assigned CDBG Program Specialist a copy of the advertisement used to publicize the RFP/RFQ, a copy of the RFP/RFQ itself, and a summary of the procedures followed to select the consultant, including copies of the evaluation forms used to compare the responses. MDOC can then review the procurement practices used by the CDBG recipient to assure that they are in compliance with federal and state requirements.
- ✓ CDBG recipients must retain all documentation in their CDBG project files to demonstrate the basis for selection or rejection of consultants, consultant qualifications, contract specifications, and scope of work.

Federal regulations prohibit grantees and sub-recipients from making any contract award or permit any contract award to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs (Executive Order 12549).

The System for Award Management (or SAM, website: <https://www.sam.gov/portal/public/SAM/>) consolidates the debarment lists used by individual federal agencies. Use of the list is required for all HUD-funded programs.

It is also a state requirement to check for debarments through the listing of the State of Montana Debarred Vendors. The state requires that agencies may not enter into contracts with these vendors until the debarment period has expired. (See Section 18-4-241, MCA and ARM 2.5.402.) In addition, participants in contracts associated with a CDBG project must certify that neither they nor their principals, contractors, subcontractors, or subrecipient entities are debarred, suspended, voluntarily excluded, or otherwise ineligible.

When a grant recipient receives only one response to a competitive solicitation, the procurement process may be reviewed by MDOC to determine whether it was unduly restrictive or tailored to a particular contractor or supplier. The burden of proof will be on the local government 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.

L. CONTRACT PRICING AND METHOD OF COMPENSATION

A response to an RFP/RFQ should not be confused with a competitive bid.

- A **bid** is an estimate of cost in response to detailed specifications such as for construction projects where selection can be made principally on the basis of price.
- A **response to an RFP/RFQ** is a description of how a consultant proposes to approach solving your problem.

Communities should not choose an engineer or architect only on the basis of cost. The main focus in selecting the consultant is to evaluate the quality of the proposal and the consultant's "demonstrated competence and qualifications for the type of professional services required."

In an RFP process, competition is primarily on the basis of qualifications, not on the basis of cost.

Specific costs should be discussed only after the consultant has been selected. It is well worth spending a little extra to get a qualified engineer or architect who will design a sound project that will provide cost-effective service for years to come.

Once the local government has made the final selection of a consultant, the next step is to negotiate the terms for compensation for the consultant's services at a "fair and reasonable" cost. Montana's law in regard to selection of architects, engineers, and surveyors, requires the local government to "negotiate a contract with the most qualified firm . . . at a price which the agency determines to be fair and reasonable."

The community needs to have a good sense of what a reasonable rate for a service is. Local officials can consult the professional engineering and architectural associations -- such as the **Consulting Engineers Council of Montana** (629 Ave. D, Billings, MT 59101; telephone: 259-7300) or the **AIA Montana/American Institute of Architects** (P.O. Box 20996, Billings, MT 59104; telephone: 259 7300) -- to determine what "fair and reasonable" rates would be.

For other types of consulting services, local officials can also consider comparative prices in the area for similar services. Ask the consultant to briefly explain the firm's estimated fee and basis of charges or billing. Make sure you understand exactly what services will be provided. Is there a distinction between basic services and additional services? What circumstances could significantly change the estimate?

If the local government and the selected respondent cannot come to agreement on the scope of services and a mutually satisfactory fee, local officials should formally terminate the negotiations in writing and repeat the process of negotiating a scope of services and negotiating terms with the second-ranked respondent.

Once an overall price is negotiated that is fair and equitable to both parties, grantees should negotiate payment terms. Most consultants will prefer to receive payments in installments during the term of the project, rather than in one lump sum at the end of work activities.

Whenever possible, the grant recipient should assure that reimbursement is on the basis of the accomplishment of measurable objectives, such as key tasks or milestones in the scope of services or implementation schedule rather than an incremental time-payment basis in order to give the local government adequate control over contractor performance.

Cost Reimbursable Contracts and Specified Ceiling

In order to be eligible for CDBG reimbursement, contractors will be required to submit itemized invoices describing services furnished, total hours worked to accomplish each item, amount

being billed for each item, a description of any other eligible reimbursable expenses incurred during the billing period, and total amount being billed. In addition, a narrative description in sufficient detail must be submitted to justify the amount claimed on invoices.

MDOC will require itemized billing for professional services in order to provide adequate documentation of services rendered for projects using public funding. The CDBG program has authority to grant exceptions to this requirement.

For many years, MDOC policy for CDBG project administration allowed "fixed price contracts" for consulting services. In recent years, both local officials and staff from other state and federal funding programs have expressed concern about the use of fixed price contracts for professional services because of the lack of accountability and cost control this method provides, particularly when a project includes multiple federal and state funding sources. The reality is that the true costs for completing work tasks associated with the management of community projects are highly variable, depending upon the type of project and the unique issues that are involved.

Cost reimbursable contracts with a specified ceiling for compensation (as described above) are required by MDOC as the basis for project management contracts since the amount of funding available for administration is usually limited by the budget submitted in the community's original grant application.

Compensation for management services and architectural and engineering services must be on an hourly basis, not to exceed a specified amount, for each work element to be performed under the contract's scope of services.

The "costs plus a percentage of costs" system of compensation is prohibited by federal law. Similarly, "percentage of construction costs" methods (contingent fees) are usually prohibited for any publicly funded contract.

Use of Retainages

In negotiating payment terms for management services contracts, communities can provide for a retainage or holdback of a percentage of the contract funds (typically about five percent) pending completion of conditional project closeout and the resolution of any monitoring findings which may be related to the consultant's performance. The retainage concept might also be applied to an architectural contract by retaining some CDBG funds until a building constructed with CDBG funds has been inspected and approved for building code compliance.

For public facilities, the final payment of the engineering fee could be retained until the "as built" construction drawings have been submitted to the Department of Environmental Quality and, if applicable, an operation and maintenance manual has been provided to the grantee.

See exhibits in this chapter and Chapter 9 for additional guidance on retainages.

M. 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 draft scope of services should include detailed descriptions of the services and products to be provided, along with a work schedule indicating the time line for completion of the more significant tasks, services and products that will be provided.

Grant recipients negotiating scopes of services for project management can review the sample management plans in this manual to get an idea of the activities that can be included in a scope of services.

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 on.

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. MDOC has prepared a *sample* professional services agreement which includes the standard "boilerplate" language used in such contracts and the clauses required for CDBG-funded contracts found in this chapter's exhibits. This *sample* is a stand-alone contract and includes all CDBG required clauses. It is the grantee's responsibility to include provisions related to all applicable CDBG requirements in any contract or agreement through which CDBG funds are passed on to a contractor or subcontractor.

Chapter 3 exhibits include the CDBG required supplemental conditions to be included in an architect's, engineer's, or grant administrator's standard contract for professional services -- if they prefer to use their existing contract format. In both sample formats, the required clauses have been noted with an asterisk. These required clauses cover issues such as procedures dealing with breach of contract and termination, patents and copyrights, and access to and retention of records.

Chapter 3 exhibits include a checklist of required clauses for professional services contracts.

The grant recipient's attorney should be involved in the preparation of the contract to assure that all applicable requirements have been addressed and that the community's interests are represented.

The draft contract must be submitted to MDOC for review and approval prior to signing to make sure that all required CDBG contract conditions and clauses have been included and there are no other CDBG issues that need attention.

N. RECORD KEEPING REQUIREMENTS

All CDBG recipients must maintain records regarding any procurement that will be funded by CDBG. Regardless of the method of procurement used, CDBG recipients must develop and retain adequate documentation to demonstrate their reasons for choosing the method of procurement, the basis for selection or rejection of consultants, consultant qualifications, contract specifications, and scope of work.

This documentation should include copies of the RFP or RFQ, legal advertisements, affidavits from newspapers verifying publication, and other related consultant selection materials. Your CDBG procurement files must also document the basis for the contract or purchase price.

When a grant recipient receives only one response to a competitive solicitation, the procurement process may be reviewed by MDOC to determine whether it was unduly restrictive or tailored to a particular contractor or supplier. The burden of proof will be on the local government 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 restricting or eliminating competition.

Financial information in support of any contract payments must also be maintained. This documentation includes vouchers, invoices, contracts, checks, budget transfer memoranda, and other transaction documentation. The recipient must also be able to document that vouchers and invoices were reviewed to verify financial and contractual compliance before payment was made.

O. CONTRACT ADMINISTRATION AND SUPERVISION

CDBG 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 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. Local officials 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 questions before payment is approved. Please refer to Section M (Contract Pricing and Method of Compensation) of this Chapter regarding CDBG's requirements for invoices for professional services. This policy should help ensure adequate documentation for services rendered on publicly funded projects.

Some communities have found that their relationship with a consultant goes more smoothly if a specific person, such as the mayor or clerk, is assigned to act as day-to-day liaison with the consultant and to review progress reports and requests for payment. A common frustration of consultants is that too often no one is available to give them direction or feedback on issues involving the project. Communication with the consultant can also be improved by having regular meetings with the town council or an advisory group to keep local officials and residents up to date on project progress and to invite their suggestions regarding any problems that might be encountered.

If grant recipients are encountering problems with nonperformance by a contractor, they should contact MDOC CDBG staff for guidance. All contracts should include provisions for termination.

CHAPTER 3 EXHIBITS

Sample Format for an RFP for Management Services

Sample Format for an RFQ for Engineering Services

Sample Format for Advertising the Availability of a Request for Proposals or a Request for Qualifications

Sample Format for a Professional Services Contract

Sample Format for CDBG Supplemental Conditions to Standard Contracts For Architectural, Engineering, And Grant Administration Services

Checklist of Required Contract Clauses for Engineering, Architectural, and Grant Administration Services Contracts

Procurement Checklist

Sample Consultant's Invoice

Compensation