

# Chapter 4

## Procurement and Contracting

### Introduction

This chapter describes laws, regulations, policies, and standards for the use of Community Development Block Grant (CDBG) funds to procure supplies, equipment, construction, engineering, architectural, consulting, and other professional services for CDBG programs. This chapter only applies to Units of General Local Government (UGLG). Because CDBG funds are federal funds, compliance with the federal regulations is required. The standards described in this chapter are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable federal laws.

The standards described herein do not relieve the UGLG of any contractual responsibilities under its contracts. The UGLG is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement entered in support of a grant. These include, but are not limited to, source evaluation, protests, disputes, and claims.

This chapter further describes the policies and procedures that must be followed when entering into contractual agreements with other entities when CDBG funds are being used in whole or in part. Such entities may include sub recipients, other governmental agencies, professional services firms, construction contractors, and providers of goods and services.

In general, the procurement and contracting requirements that apply to the UGLG flow through it to any sub recipients it may engage to help operate the program and any subsequent sub recipients (i.e., sub-subcontractors) that are hired by the sub recipients themselves. Please read more on this in Chapter Three on MSF's Revolving Loan Fund (RLF).

There are significant exceptions to this general rule when the UGLG awards the CDBG funds to private developers (home/business owners) that own a piece of property and are taking on risk as they develop/rehabilitate it. In these instances, the developer/owner is not required to follow the specific policies and procedures outlined in 2 CFR Part 200 of the regulations regarding procurement and contracting, but they are required to ensure that the services they procure are obtained at a reasonable cost.

As in all financial dealings with CDBG funds, UGLGs must also ensure that there is no conflict of interest that would lead them to pay excessive or unwarranted amounts for goods or services. For instance, an UGLG may award funds to a developer or to a private firm to develop a piece of property they own as a commercial facility in order to improve services in the area and/or create jobs for low income workers. That developer need not conduct a sealed bid process to select a construction contractor (as an UGLG would) because they own the property and are taking on risk if the development fails. In fact, a developer may hire its own subsidiary to perform the construction work provided they are able to demonstrate that they are not paying an excessive amount for the work.

## Section 1 – Definition of Terms for Procurement

**Acquisition** – The acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the federal government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

**Architect-engineer services** – As defined in 40 U.S.C. 1102, means:

Professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide those services;

Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; or,

- Those other professional services of an architectural or engineering nature, or incidental services, that members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services. Change order – A modification made to the contract that is approved by the contracting officer under the authority of the contract’s changes clause. Only the specific changes permitted by the particular changes clause may be made under a change order (e.g., modify the drawings, design, specifications, method of shipping or packaging, place of inspection, delivery, acceptance, or other such contractual requirement. All change orders must be within the scope of the contract.
- **Cognizant federal agency** – The federal agency that, on behalf of all federal agencies, is responsible for establishing final indirect cost rates and forward pricing rates, if applicable, and administering cost accounting standards for all contracts in a business unit. Note: The federal Office of Management and Budget (OMB) maintains a list of those state and local agencies that are required to have their indirect cost rates approved by a cognizant federal agency, including the federal agency that has authority over them (i.e., their cognizant federal agency).
- **Contract** – A mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq.

- **Contracting** – Purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes the description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.
- **Cost analysis** – The review and evaluation of the separate cost elements and profit in an offeror's or contractor's proposal (including cost or pricing data or information other than cost or pricing data), and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.
- **Cost-reimbursement Contracts** – Provide for payment of allowable incurred costs, to the extent prescribed in the contract.
- **Firm-fixed-price contract** – Provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract.
- **Offer** – A response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called bids or sealed bids; responses to requests for proposals (negotiation) are offers called proposals. However, responses to requests for quotations (simplified acquisition) are quotations, not offers.
- **Offeror** – Bidder.
- **Price analysis** – The process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.
- **Requests for proposals (RFPs)** – Solicitations under negotiated procedures. RFPs are used in negotiated acquisitions to communicate government requirements to prospective contractors and to solicit proposals.
- **Requests for qualifications (RFQs)** – Solicitations under negotiated procedures and are used in negotiated acquisitions to procure the services of an engineering or architectural firm.
- **Sealed bid** – An offer in response to invitations for bids (sealed bidding).
- **Sealed bidding** – A method of contracting that employs competitive bids, public opening of bids, and awards.
- **Sole source acquisition** – A contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.
- **Solicitation** – Any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called invitations for bids. Solicitations under negotiated procedures are called RFPs. Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.
- **Subcontract** – Any contract as defined above contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract, or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

- **Subcontractor** – Any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

## Section 2 – Procurement Policy

UGLGs must write and adopt a procurement policy. To be compliant with the CDBG regulations, this policy must be written and adopted prior to securing any contract services with CDBG funding. The procurement policy must meet all of the requirements contained in 2 CFR 200.317. If a procurement policy is already in place, the UGLG must determine whether it includes all federal requirements. If the policy does not contain all federal requirements (and the UGLG intends to use CDBG funds to secure such services), the policy must be amended accordingly. A sample procurement policy is included as Form 4-A. Note: MSF may choose to impose an earlier date than prior to securing contract services (e.g., prior to having its Part 2 application approved).

The UGLG's procurement policy must adhere to the following:

- A code of conduct that prohibits elected officials, staff, or agents from personally benefiting from CDBG procurement must be included. The policy should prohibit the solicitation or acceptance of favors or gratuities from contractors or potential contractors. Sanctions or penalties for violations of the code of conduct by either UGLG officials, staff or agents, or by contractors or their agents must be identified 2 CFR 200.318(c).
- Proposed procurements should be reviewed by staff to avoid unnecessary and duplicative purchases and to ensure costs are reasonable [2 CFR 200.318 (d-f)].
- Affirmative efforts must be undertaken to hire women-owned business enterprises, minority firms and labor surplus firms, both by the UGLG and the project's prime contractor [2 CFR 200.321].
- The method of contracting outlined in the policy should be acceptable (fixed price, cost reimbursement, purchase orders, etc.). Cost plus a percentage of cost contracting must be specifically prohibited if CDBG funds are involved [2 CFR 200.323] and percentage construction cost.
- Procedures to handle and resolve disputes relating to procurement actions of the UGLG must be included [2 CFR 200.318].
- All procurement transactions, regardless of dollar amount, must be conducted so as to provide maximum open and free competition [2 CFR 200.319 (a-b)]. Some of the situations considered to be restrictive of competition include, but are not limited to:
  - Placing unreasonable requirements on firms in order for them to qualify to do business.
  - Requiring unnecessary experience and excessive bonding.
  - Noncompetitive pricing practices between firms or between affiliated companies.
  - Noncompetitive 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.
- Any arbitrary action in the procurement process.
- Methods of procurement to be followed must be described [Sections 6 through 10 below and 2 CFR 200.320.

## Section 3 – Procurement Procedures

### Selection Procedures

Selection procedures for procurement transactions must be written prior to securing contract services [2 CFR 200.318]. These procedures must ensure that all solicitations:

- Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured.
- List all requirements that the offerors must fulfill.
- Describe all other factors used in evaluating bids or proposals.

### Preparing Contracting Procedures to Meet Equal Opportunity Requirements

CDBG recipients must make affirmative efforts to use small-, minority-, and woman-owned firms when possible. 2 CFR 200.321 Regulations recommend the following:

- Maintain a list of qualified small-, minority-, and woman-owned businesses and place qualified firms on solicitation lists. The Michigan Economic Development Corporation maintains a directory of woman- and minority-owned businesses that can be used by UGLGs, The directories are available at:

#### Contractor Requirements

- A. Minority Owned Business Directory
- B. Women Owned Business Directory

#### **MBE, WBE, DBE List**

- Divide total requirements into smaller tasks.
- Establish delivery schedules that encourage participation.
- Use Small Business Administration and Minority Business Development Agency services.
- Require prime contractors to take affirmative steps.

A description of the equal opportunity provisions and their applicability are located in Chapter 9: Fair Housing and Equal Opportunity.

## Section 4 – Conflict of Interest

An organizational conflict of interest means that, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Conflicts of interest in the award and/or administration of contracts must be avoided. “No employee of the UGLG shall participate in selection, or in the award or administration of a contract supported by federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when the employee, any member of his or her immediate family, his or her partner has a financial or other interest in the firm selected for award” [2 CFR 200.318 (C)]. Other federal regulations with which the UGLG must comply are the conflict of interest requirements in 24 CFR 570.611, which are included as Form 4-C, Conflict of Interest.

Conflicts of interest may also be governed by local conflict of interest policies. The UGLG should follow the more stringent of the federal, local or state laws concerning compliance with conflict of interest provisions.

**Note:** HUD considers the awarding of an engineering contract and an administrative contract to the same firm as a conflict of interest. Contracts for both services to the same firm are prohibited.

## Section 5 – Contract Administration and Records

2 CFR 200.318 (i-k) requires that UGLGs and sub grantees maintain records sufficient to detail the significant history of a procurement. These records must include, but are not limited to:

- Rationale for the method of procurement.
- Selection of contract type.
- Contractor selection or rejection.
- The basis for the contract price.

UGLGs must also maintain a contract administration system to monitor the contractor's performance against the terms, conditions, and specifications of their contracts or purchase orders.

The full lists of required procurement and contract documents that must be maintained are included in Chapter 13: Grant Close-Out Process. The procurement records should:

- Allow an auditor or other interested party to track the nature of the goods or services bought with public funds.
- Track the entire process used to purchase those goods and services.
- Show that the public body obtained high quality goods and services at the lowest possible price through an open, competitive process.

Procurement Type	Cost Methodology Reasonableness	Contract Type	Solicitation Method	Applications	Dollar Thresholds if applicable
Small Purchase (see Section 7)	Price Analysis	Purchase Order Fixed Price	Quotations Submitted Bids	Produced Items Single-Task Service Supplies	\$150,000 or less for produced items  \$150,000 or less for non-construction services
Sealed Bid Formal Advertising (see Section 8)	Price Analysis Cost Analysis	Fixed Price	Submitted Bids	Construction Items Produced or Designed Items	All construction contracts-including less than \$150,000  Produced or designed Items over \$150,000
Competitive Proposals (see Section 9)	Price Analysis Cost Analysis	Cost Reimbursement Fixed Price Time & Materials	Submitted Proposals	Professional Services Multi-Task Services Designed Items	Professional Services and/or; Multi Task Services over \$150,000  Designed Items over \$150,000 when Sealed Bid is not appropriate
Noncompetitive Proposals (see Section 10)	Cost Analysis	Cost Reimbursement Fixed Price Time & Materials	Submitted Proposals	Produced Items Single-Task Service Professional Services Multi-Task Services Designed Item	No particular threshold, but may only be used when other methods are not feasible

## Section 6 – Methods of Procurement Overview

The procurement process must be in accordance with the federal requirements of 2 CFR 200.320 (b-f).

The nearby table outlines the four procurement methods that the grantee must use to procure materials, supplies, construction and services based on the type of procurement.

In developing the appropriate procurement process to be used in conjunction with a CDBG-funded project, the UGLG must follow the accepted CDBG procurement structure as outlined in the above table and as described in the following chapters. Before selecting the kind of procurement process and then executing the procurement itself, the UGLG must first obtain approval from the MSF. This approval will be a condition of disbursement of funds. Once an UGLG has received approval of its process and the particular documents it proposes to use, it may proceed to execute the procurement process as outlined in its approved plan. However, it must obtain approval from MSF before selecting a contractor.

### Cost Reasonableness

When determining the appropriate procurement method to use, the UGLG must either use price analysis (price competition) or perform a cost analysis to determine reasonableness of costs.

## Price Analysis

Price analysis means that the UGLG requests several bids, proposals, or quotes for the materials, supplies, or service being procured. The winning offeror is the firm that offers the most competitive price for the requested materials, supplies, and services.

## Cost Analysis

A cost analysis is the review and evaluation of the separate cost elements and profit in an offeror's or contractor's proposal (including cost or pricing data and information other than cost or pricing data), and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. A cost analysis is verifying that the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits are reasonable. A cost analysis is always required when the noncompetitive proposals method is used. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established. Form 4-D, Format for Cost Analysis, contains a sample format that can be used to perform the cost analysis.

**Example:** The architect's proposal includes a cost of \$50 per hour for the services of an administrative assistant and \$4,000 for blueprint publication. Cost estimates for these two elements should be obtained by calling employment firms and printing companies. The contractor requests a change order for the cost of constructing an additional window in a façade project. This will only increase the total contract amount by 10 percent. The reasonableness of the cost can be determined by contacting other contractors or comparing the cost with bids submitted for a similar construction project.

UGLGs should make an independent cost estimate before receiving bids, proposals or contract modifications. This helps ensure that the actual cost of the product or service is reasonable. Although the method of the cost or price analysis may vary according to the circumstance of a particular procurement, UGLGs should have solid estimates for large items and construction based on research during the application process. Catalog or market price of products sold to the general public can suffice for cost estimates, when applicable.

A written cost analysis is required when:

- The bidder is required to submit elements of the estimated cost (e.g., professional, consulting, engineering, or architectural services).
- There is inadequate competition.
- The sole-source procurement method is used (to include change orders or contract modifications).

Profit must be negotiated as a separate element when there is no price competition and when a cost analysis is performed. Consideration should be given to the complexity of the work, any risk assumed by the contractor, the contractor's investment, the amount of subcontracting involved, the contractor's past performance record, and industry profit rates.

Cost-plus contracts are illegal and prohibited by HUD. Cost plus a percentage of cost and percentage of construction costs methods of contracting shall not be used, §570.489(g), Procurement. Contracts that allow payment of a set amount plus costs incurred over that set amount or require payment based on a percentage of the construction costs are considered cost-plus contracts.

## Guidelines for Conducting a Cost Analysis

A cost or price analysis must be performed in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation. An independent estimate must be made before receiving bids or proposals if one of the following applies:

- When evaluating competitive proposals.
- When there is a sole source (or non-competitive) proposal.
- When only one bid is received after soliciting bids, the UGLG does not have sufficient data on costs to establish price reasonableness (such as prior purchases of similar nature), and the UGLG is considering making an award to the sole bidder.
- When negotiating modifications to contracts that impact the price or estimated cost.
- When terminating a contract and the contractor is entitled to payment of reasonable costs incurred as a result of termination.
- When awarding a cost-reimbursement contract.

The following lists the basic steps in conducting a cost analysis.

- Verify cost and price information, including:
  - The necessity for, and reasonableness of, the proposed cost.
  - Technical evaluation or appraisal of the proposed direct cost elements.
  - Application of audited or pre-negotiated indirect cost rates, direct labor rates, etc.
- Evaluate the effect of the offeror's/contractor's current practices on future costs.
- Compare costs proposed by the offeror/contractor with the following:
  - Actual costs previously incurred by the same firm.
  - Previous cost estimates from the same firm or other firms for the same or similar items.
  - The methodology to be used to perform the work (are the costs consistent with the technical approach being proposed?).
  - The independent cost estimate.
- Verify that the offeror/contractor's cost proposal complies with the appropriate cost principles.
- Verify that costs are allowable, allocable, and reasonable.

The major categories of costs are:

- Direct Costs, which include:
  - Direct Labor (personnel)

- Equipment
- Supplies/
- Travel and Per Diem
- Subcontractors
- Other Direct Costs
- Indirect Costs, which includes:
  - Overhead
  - General and Administrative Expenses
  - Profit (or Fee)

In the process of analyzing costs, profit should be analyzed separately. In analyzing profit, consideration should be given to:

- Complexity of the work to be performed.
- Contractor's risk in performing the contract.
- Contractor's investment in the contracted effort.
- Amount of subcontracting.
- Contractor's record of past performance.
- Industry profit rates in the general area for similar work.

The objective is to establish overall cost reasonableness and not individual components. A sample format for performing a Cost Analysis is attached as Form 4-D.

## Contract Type

### **Purchase Order**

Supplies, single-task services, and produced items procured through the small purchase method will require a purchase order.

### **Fixed Price**

A fixed price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties. Firm fixed-price contracts are suitable for acquiring commercial items (including construction) or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications and when the contracting officer can establish fair and reasonable prices at the outset.

## Cost Reimbursement

A cost reimbursement contract provides for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer. Cost-reimbursement contracts will be used when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

## Time and Materials

A time and materials contract provides for payment of direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and actual cost for materials. This contract type should be used only after a determination is made that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk.

## Solicitation Methods

### Quotations

The UGLG should obtain at least three quotations (quotes) from qualified sources to procure items, supplies, or a single task service using the small purchase method. Note: HUD has issued verbal guidance that the response of “not interested” does not qualify as a quote.

### Submitted Bids

When using the procurement by sealed bids method, the UGLG is required to provide a complete, adequate, and realistic specification or purchase description via publicly advertised invitation for bids. A submitted bid is a response to the UGLG’s invitation for bids. See Section 8, below, for additional information regarding the bids package process.

### Submitted Proposals

Submitted proposals are the responses to a UGLG’s RFP or RFQ. This type of solicitation method is used when the competitive proposal or noncompetitive proposal procurement method is used. See Section 9, below, for additional information regarding the RFP and RFQ process.

## Section 7 – Procurement by Small Purchase

Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (supplies or non-construction services costing \$150,000 or less). This method of procurement is typically used to purchase commodities such as equipment or other materials. If small purchase procedures are used, price or rate quotations shall be obtained from at least three qualified sources. The UGLG can request quotes from qualified sources via telephone, fax, email, mail, or any other reasonable method. The UGLG should maintain written documentation on the names of the businesses contacted and how they were contacted; the prices that were quoted; and the basis for selecting one firm over the other(s).

The small purchases procedures should not be used to acquire construction contractors. It is recommended that these acquisitions use the sealed bid approach discussed below.

## Section 8 – Procurement by Sealed Bids (formal advertising)

Sealed bids should be used for goods costing more than \$150,000 and all construction contracts bids are publicly solicited and a firm fixed-price contract (lump sum or unit price- see below) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions below apply.

In order for sealed bidding to be feasible, the following conditions should be present:

- A complete, adequate, and realistic specification or purchase description is available.
- Two or more responsible bidders are willing and able to compete effectively for the contract.
- The procurement lends itself to a firm fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.

If sealed bids are used, the following requirements apply:

- The invitation for bids will be publicly and locally advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time, generally 30 days, prior to the date set for opening the bids.
- The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond.
- All bids will be publicly opened at the time and place prescribed in the invitation for bids.
- A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.
- Any or all bids may be rejected if there is a sound documented reason.

### Creating, Advertising, and Opening Bids

2 CFR 200.320 provides specific requirements that must be followed when bid packages are created and advertised, as well as the required steps to take to conduct bid openings.

#### Creating the Bid Package

- Write the technical bid specifications:
  - Usually written by the UGLG’s architect or engineer on the basis of prepared plans or working drawings.
  - Provide a clear and accurate description of technical requirements for materials and products and/or services to be provided on the project.
  - Must be sealed by an architect or engineer registered in Michigan.

- If the project falls under the jurisdiction of another State agency the plans and specifications must be approved by the cognizant State agency prior to construction.
- For fire stations/garages and buildings that are being constructed with CDBG assistance and will be accessible to the public, the architect or engineer must certify that handicap-accessible design standards will be achieved, or specify any reasons for exemption. Such certification is to be co-signed by an UGLG official, filed in the contract documents file, and a copy sent to the State.
- The base bids should include all components of the approved project. The base bids must not include any items that were not included in the approved MEDC application.
- Obtain all lands, rights-of-way, and easements necessary for carrying out the project (this can only take place after the environmental review has been completed, a signed grant agreement is in place and the UGLG has been given written permission to incur project costs).
- If the UGLG's construction project involves real property acquisition, the UGLG should make sure the acquisition is undertaken according to the provisions of the Uniform Relocation Act (URA). See Chapter 6 on acquisition for additional acquisition and URA guidance.
- When preparing the plans and specifications for the bid package, the following requirements pertaining to service connection line and hookup fees must be kept in mind:
  - As stated in Section 24 CFR 570.202(b) (6) of the Housing and Community Development Act of 1974, as amended, the "financing of costs associated with the connection of residential structures to water distribution lines or local sewer collection lines" is an eligible cost. However, unlike the cost of the public portion of water lines, which are eligible as public infrastructure, the portion of the construction that involves individual homes is only eligible as residential rehabilitation and consequently will only be able to meet the LMI National Objective if the owners of the home are a LMI household. Moreover, any such work must be considered as an integral part of the overall sewer or water project.
  - Develop cost and pricing formats.
  - Generally the street, water, sewer, utility and landscaping projects will be unit price contracts, while building type contracts will be lump sum.
  - For fixed-price contracts with unit cost pricing, the bid specifications should delineate each type of item, estimated quantity, unit price, and total cost.

## Bid Process

The UGLG must ensure that the bid process is in compliance with federal, state and local statutes. These statutes are continually being amended, revised, and superseded; therefore, it is the UGLG's responsibility to assure compliance with the most recent and current regulations. The following steps must be taken prior to advertising for bids:

- For infrastructure projects, submit the final plans, specifications, and cost estimate to the MSF for review prior to disbursement of funds.
- The UGLG will be notified by the MSF that they may advertise for bids.

- For projects that involve the development of plans and specifications, bids must be solicited by local and public advertising after approval to advertise is received from MSF. Advertisement for any contract for public works shall be published at a minimum once in a newspaper in the locality or the closest metropolitan area and shall appear at least 25 days before the opening of bids for construction projects. For materials purchases, the advertisement shall be published at a minimum once in a newspaper in the locality or the closest metropolitan area and shall appear at least 15 days before opening of the bids.
- Plans and specifications shall be available to bidders on the day of the first advertisement and shall be available until 24 hours before the bid opening date.
- The advertisement must call the bidders attention to the conditions of employment and requirements of federal prevailing wage rates, Segregated Facility, Section 3 of the HUD Act of 1968, Section 109 and Equal Opportunity.
- If the UGLG amends the bid documents during the advertisement period, addenda must be sent to all prospective bidders who have received bid documents.
- No public entity shall issue or cause to be issued any addenda modifying plans and specifications within a period of 72 hours prior to the advertised time for the opening of bids, excluding Saturdays, Sundays, and any other legal holidays. However, if the necessity arises to issue an addendum modifying plans and specifications within the 72-hour period prior to the advertised time for the opening of bids, then the opening of bids shall be extended for at least seven days, but not to exceed 21 days, without the requirement of re-advertising the project. The addendum shall state the revised time and date for the opening of bids. A copy of each addendum shall be submitted to the MSF at the time the addendum is issued, including addenda solely pertaining to federal wage rate decisions. All bids received prior to the opening of bids must remain sealed and in a secure place until the bid opening.
- A copy of the publicized bid advertisement, including the publication date, must be submitted to the Program Specialist who is assigned to the grant once the required advertisement has been published.

## Public Bid Opening

All bid openings must be conducted according to the following:

- The bids should be read aloud during bid opening and the apparent low-bidder should be determined during the bid opening.
- Bids must be reviewed for both technical and legal responsiveness of bids.
- The bidders must be evaluated as having the capacity to furnish products and/or services required.
- Minutes of the bid opening, along with a tabulation of bids, should be placed in the contract file and sent to MSF.

After the bid opening, the UGLG must take action within 45 days to either award a contract to the lowest responsible bidder or to reject bids. The UGLG and the lowest responsible bidder may, by mutual written consent, agree to extend the deadline for award by one or more extensions of 30 calendar days. Please contact MSF for any exceptions. A public entity may reject any and all bids for just cause. Also, a contract

cannot be awarded with an incorrect federal wage decision. Make sure the UGLG has verified the proper choice of the federal wage decision per the process described in Chapter 10: Construction Management and Labor Standards.

## Section 9 – Procurement by Competitive Proposals

Competitive proposals are used to purchase professional services where the total cost will exceed \$150,000. The UGLG must publish a written request for submissions and then review these submissions based on established selection criteria. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

- RFPs will be publicized and made available on the internet for a minimum of 14 days, except in situations where it would be in the best interest of the local government or state and approved and documented by the MSF. Requests for proposals will identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent possible.
- Proposals will be solicited from at least three qualified sources.
- UGLGs and sub-grantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees.
- Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.
- UGLGs and sub-grantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. This qualifications-based approach to the competitive proposals method may not be used to purchase other than A/E services.
- If only one bid or proposal is received, the UGLG must provide an explanation and receive approval from the MSF.

### Request for Proposals

RFPs are used to procure professional services **except** for A/E professional (design) services when the competitive negotiation method is used. RFPs are also required to procure Certified Grant Administrators (CGAs). RFQs are used to procure A/E professional services. RFPs for competitive acquisitions shall, at a minimum, describe the:

- UGLG's requirement;
- Anticipated terms and conditions that will apply to the contract;
- The solicitation may authorize offerors to propose alternative terms and conditions;

- When alternative terms and conditions are permitted, the evaluation approach should consider the potential impact on other terms and conditions or the requirement (e.g., place of performance or payment and funding requirements);
- Information required to be in the offeror's proposal; and,
- Factors and significant sub-factors that will be used to evaluate the proposal and their relative importance. **Cost must be a factor considered.**

A sample advertisement for an RFP to provide administrative consulting services is included as Form 4-E. A sample RFP for a professional consultant is included as Form 4-F.

## Requests for Qualifications – Architectural/ Engineering Services

Requests for Qualifications (RFQs) are used to procure the professional (design) services of an engineering firm or architectural firm when using the competitive negotiation method. Qualification statements cannot be used to procure any other service. Cost is not a factor in RFQs. See Form 4-G for a sample of an RFQ for procuring architectural/engineering services.

A selection is made based on the competitors' qualifications, subject to negotiation of fair and reasonable compensation. The qualification statements must be evaluated by the selection criteria identified in the RFQ. The UGLG should negotiate costs with the top-ranked firm.

RFQs cannot be used to procure project management or construction management services. These types of services must be procured using an RFP (See Chapter 4, Section 9).

## Review of Responses

One of two procedures can be used to review responses to an RFP or an RFQ. The procedure chosen must be identified in the advertisement, and the procedure cannot be changed once the procurement process is initiated.

- Establish a predetermined competitive range of points for proposals that would be considered to qualify for the job. All firms whose proposals scored within that range would be invited to an oral interview and asked to submit a "best and final offer." The proposals would be re-evaluated and the highest scoring firm would be chosen.
- Evaluate the proposal(s) according to the selection criteria and award the contract to the highest scoring firm.

## Section 10 – Procurement by Noncompetitive Proposals

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 inadequate. **UGLGS MUST OBTAIN APPROVAL FROM THEIR PROGRAM SPECIALIST PRIOR TO USING THIS PROCUREMENT METHOD.** A letter should be submitted to the CDBG program specialist requesting to use this procurement method. Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and one of the following circumstances applies:

- The item is available only from a single source.
- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.
- The awarding agency authorizes noncompetitive proposals.
- After solicitation of a number of sources, competition is determined inadequate.
- Cost analysis (i.e., verifying the proposed cost data) the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

## Section 11 – Developing Procedures for When Bids Exceed Cost Estimates

In some cases the lowest bid received will exceed the amount of funds allocated for the project. When this happens, the Program Specialist should be consulted to determine the best option to proceed. Procedures should be developed to execute the following available options:

- Reject all bids received.
- Rework the specifications within the bid package.
  - Consult with the Program Specialist as to any proposed changes to the plans and/or specifications.
  - Once authorized by the Program Specialist, re-advertise the project.
- Make up the difference between the available funds and the amount of the lowest bid through the reallocation of funds.
- Make up the difference between the available funds and the amount of the lowest bid with other sources of funding such as local funds.
- Enter into a contract with the low bidder for the amount of the bid and subsequently, execute change orders to bring the project within the allocated funds. See Chapter 10, Section 10 if this process may result in the execution of change orders.

Note: It is strongly advised that the UGLG investigates how exercising this option would affect the other bidders prior to awarding a contract. Since these types of change orders affect the project's scope, they must be reviewed by the MSF prior to execution.

## Section 12 – Verification of Contractor Eligibility

UGLGs must ensure that all contractors and subcontractors receiving CDBG funds meet all eligibility requirements. The following steps should be taken to verify and document contractor and subcontractor eligibility for all services procured.

### Prime Contractor Clearance

Prior to the award of a construction contract with a **prime** contractor, the UGLG must obtain contractor clearance. To obtain clearance, the following steps should be taken:

The UGLG should search the following web site to determine whether the contractor is debarred at the federal level at [www.sam.gov](http://www.sam.gov) or the LDP list at [https://www5.hud.gov/Ecpcis/main/ECPCIS\\_List/main/ECPCIS\\_List.jsp](https://www5.hud.gov/Ecpcis/main/ECPCIS_List/main/ECPCIS_List.jsp). The UGLG must complete the Verification of Contractor Eligibility Form, (Form 4-H) and provide a copy to the MSF and maintain a copy in their project file.

Consulting and/or engineering firms who are new to the CDBG program or have not performed services associated with a CDBG program within the previous five years must also follow the same clearance steps as the prime contractors, as outlined above – they will use the Verification of Professional Services Contractor Eligibility Form, (Form 4-I).

### Subcontractor Clearance

The MSF does not clear subcontractors. The UGLGs must make prime contractors aware that it is their responsibility to verify subcontractor eligibility based on factors such as past performance, a yellow page listing, verification of liability insurance, possession of a federal identification tax number, debarment, and state licensing requirements. The prime contractor may use the web sites [www.sam.gov](http://www.sam.gov) or the LDP list at [https://www5.hud.gov/ecpcis/main/ECPCIS\\_List.jsp](https://www5.hud.gov/ecpcis/main/ECPCIS_List.jsp) to determine if a subcontractor has been debarred at the federal level.

All prime contractors engaging subcontractors should submit a signed statement attesting that they have evaluated the subcontractor for legitimacy, as noted in the previous paragraph. The prime contractor assumes responsibility for the performance of the subcontractor; therefore, the MSF urges prime contractors to closely scrutinize subcontractors. If a contractor or subcontractor is found to be ineligible after award of a contract, the contract must be immediately terminated and the matter reported to the MSF.

## Section 13 – Notice of Contract Award

Once a contractor has been selected using the appropriate solicitation method, the UGLG must submit a completed Notice of Contract Award form to the MSF for all prime contracts. This form must be received by the MSF within 30 days after award. This form, along with instructions, is provided as Form 4-J. Along with the Notice of Contract Award, the UGLG must send a certified and itemized bid tabulation for sealed bids, which is a listing of bidders and bid amounts for the project.

## Section 14 – Preparation of a Contract

An UGLG's and a sub grantee's contracts must contain provisions in 2 CFR 200.326 of the federal regulations, as provided below:

- Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold.)
- Termination for cause and for convenience by the UGLG or sub grantee, including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000.)
- Compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR Chapter 60). (All construction contracts awarded in excess of \$10,000 by UGLGs and their contractors or sub grantees.)

- Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and sub grants for construction or repair.)
- Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of \$2,000 awarded by UGLGs and sub grantees when required by federal grant program legislation.)
- Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327A 330), as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by UGLGs and sub grantees in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers.)
- Notice of awarding agency requirements and regulations pertaining to reporting.
- Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
- Awarding agency requirements and regulations pertaining to copyrights and rights in data.
- Access by the UGLG, the sub grantee, the federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.
- Retention of all required records for three years after UGLGs or sub grantees make final payments and all other pending matters are closed.
- Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act [42 U.S.C. 1857 (h)], section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and sub grants of amounts in excess of \$100,000).
- Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94A 163, 89 Stat. 871).
- Depending on the type of procurement used, the UGLG should execute the required contract type (see Section 6 above). Any standard contract shall be modified to include CDBG program requirements. The program requirements are:
  - Construction contracts shall not contain any **cost plus or incentive** savings provisions. Therefore, the contract shall not make reference to compensation adjustments for cost-plus or incentive savings provisions.
  - The method of contracting cannot be **cost plus a percentage of cost or a percentage of construction cost**. For example, the UGLG cannot add a 15 percent handling fee to process an invoice for geotechnical services.
  - The requirements within a contract depend on the type of services provided. The following sections provide guidance on these specific requirements for consulting, appraisal, A/E, and

construction services. Regardless of the services provided or templates used, all contracts must include all required CDBG compliance provisions.

### Consulting and Appraisal Contract Requirements

The UGLG must execute its contracts according to the specific project requirements. The sample contracts included as exhibits must be modified to include the specific scope of services procured and required CDBG compliance provisions for professional services contracts. A sample contract for consulting services is included as Form 4-K.

### Architectural/Engineering Contract Requirements

The UGLG may use the standard A/E contract templates (AIA or EJCDC – Engineers Joint Contract Documents Committee) when executing a contract for professional design services with architectural and engineering firms or other contract. The contract must include all required CDBG compliance provisions for professional services contracts (see Form 4-L).

A/E fees, even those provided under either a fixed price contract or cost reimbursement contract, must be reasonable and justifiable. Sole justification that the fees are within the amount allowed by the MSF is not adequate. The funds allowed will not exceed those identified in the applicable application package. If, after a project has been funded, the scope of the project changes significantly, the MSF will make a determination of any additional amount that will be allowed. Justification for additional services should be provided to MSF.

It is understood that the amount of funds available for engineering/architectural services is contingent upon the amount of CDBG funds the MEDC allows. The firm will not be compensated from the applicable CDBG Program if the project does not receive funding.

The final plans and specifications and cost estimate must be submitted to the MEDC for review prior to advertising for bids.

### Construction Services Contract Requirements

The UGLG can use a generic construction contract, but must include the CDBG compliance provisions for construction contracts. A generic construction bid document with contract is included as Form 4-B.

Firm-fixed-price contracts used to acquire construction may be priced (1) on a lump-sum basis (when a lump sum is paid for the total work or defined parts of the work) or (2) on a unit-price basis.

Lump-sum pricing shall be used in preference to unit pricing except when:

- Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved.
- Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency.
- Estimated quantities of work required may change significantly during construction.
- Offerors would have to expend unusual effort to develop adequate estimates.

## Bonding

For construction or facility improvement contracts or subcontracts not exceeding the simplified acquisition threshold (\$150,000), the awarding agency may accept the bonding policy and requirements of the UGLG or sub grantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

- A bid guarantee from each bidder equivalent to five percent of the bid price. The bid guarantee must consist of a firm commitment, such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- 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. A sample performance bond is included in Exhibit 4-N.
- 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 law of all persons supplying labor and material in the execution of the work provided for in the contract. A sample payment bond is included in Form 4-O.

Form 4-M can be used to verify the contractor's bonding arrangement.

## Reporting

The UGLG must submit a Contract and Subcontract Activity Report to MEDC within ten days of contract signing. A copy of the Contract and Subcontract Activity Report and Instructions is included at the end of this chapter as Form 4-P.

## Section 15 – HUD Act of 1968 (Section 3) Covered Contracts Requirements

Compliance requirements of Section 3 of the HUD Act of 1968 are triggered when a recipient receives a grant award in **excess** of \$200,000. If Section 3 of the HUD Act of 1968 is triggered for the UGLG, then contractors/subcontractors whose contracts **exceed** \$100,000 must also comply. See Chapter 9 - Fair Housing and Equal Opportunity for additional information regarding Section 3 of the HUD Act of 1968. Form 4-B, Sample Bid Documents, contains the necessary Section 3 language and forms for contractors and subcontractors to complete.

## Section 16 – Davis Bacon

Many CDBG-assisted construction contracts trigger federal requirements regarding wages (including anti-kickback provisions), safety standards, and other labor practices. Chapter 10: Construction Management and Labor Standards includes a full discussion of when these provisions are applicable and what UGLGs and contractors must do to comply.

## Forms

- 4-A Procurement Policy SAMPLE
- 4-B Bid and Contract Document SAMPLE
- 4-C Conflict of Interest
- 4-D Format for Cost Analysis SAMPLE
- 4-E Advertisement for RFP for Administrative Consulting Services SAMPLE
- 4-F RFP for Administrative Consultant SAMPLE
- 4-G RFQ for Engineering Services SAMPLE
- 4-H Verification of Prime Contractor Eligibility
- 4-I Verification Professional Services Contractor Eligibility
- 4-J Notice of Contract Award
- 4-K Contract for Consultant Services SAMPLE
- 4-L Contract Special Provisions
- 4-M Verification of Contractors Bonding and Insurance
- 4-N Performance Bond, Dual Oblige, HUD-92452
- 4-O Payment Bond, HUD-92452A-OHF
- 4-P Contract and Subcontract Activity, HUD-2516
- 4-Q Section 3 Clause
- 4-R DBRA Packet, HUD-4010
- 4-S DBRA Posters