

Ohio | Department of Development

Procurement for Local Governments
2010 Community Development Conference
Salt Fork Lodge

Ohio
The Heart of Productive Business

Welcome



- Betsy Giffin, Training and Technical Assistance Manager
- Don Gregory, Attorney in the law firm of Kegler, Brown, Hill, & Ritter.
- Mr. Gregory is chair of the firm's Construction, Litigation and Mediation Services practice areas, primarily represents subcontractors, suppliers, architects, owners, contractors and others in the construction industry.

Ohio
The Heart of Productive Business

What We Will Cover Today

- Basic Procurement Requirements per 24 CFR Part 85
- Competitive Construction Bidding
- Competitive Proposals
- Small Purchases
- Noncompetitive Proposals
- Administrative Services
- Professional Services
- Interagency Agreements
- Force Account
- Contract Provisions

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Procurement Regulations

- Layered
- Federal (24 CFR Part 85)
 - State (Ohio Revised Code)
 - Local



Procurement Standards

- Grantees use their own Procedures
- Provided they conform to:
 - Applicable Federal Law
 - Standards identified in 24 CFR Part 85



Code of Conduct

- Must be written procedures
- Governs employees employed in the award or administration of contracts



Code of Conduct



- Identify Conflict of Interests
- Standards for Procurement and Contracting
- Financial Management and Recording Systems
- Cost Allowability
- Program Monitoring



Contracts



- Award to contractors with demonstrated ability to perform successfully under the terms and conditions
- Evaluate:
 - Integrity
 - Compliance with public policy
 - Record of past performance
 - Financial and technical resources



Contractors

- Grantees must not make any award or permit any award to any party that is **debarred, ineligible, or suspended.**
- Check the Excluded Parties List System (EPLS)
<https://www.epls.gov/>



Written Documentation

- Rationale for
 - method of procurement
 - Selection of contract type
 - Contractor selection and rejection
 - Basis for contract price



Protest Procedures



- Grantee will have protest procedures to handle and resolve disputes



Full, Open and Free Competition

- All procurement
- Fair and open competition is a basic tenet of public procurement.
- Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically.



Avoid Situations considered to be Restrictive



- Unreasonable qualification requirements
- Unnecessary experience and excessive bonding
- Noncompetitive pricing practices between firms
- Noncompetitive awards to consultants on a retainer contract



Avoid Situations considered to be Restrictive

- Organizational Conflicts of Interest
- Specifying only a "Brand Name" product
- Any arbitrary action in the procurement process



Geographic Preferences



- Prohibit the use of in-state or local geographic preferences in the evaluation of bids or proposals
- Except where applicable Federal statutes expressly mandate or encourage geographic preference e.g. Section 3 preference



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

- Grantee is required to take affirmative steps to assure minority and women based businesses, and labor surplus area firms are used.



Affirmative Steps Include:

- Place Qualified businesses on Solicitation List
- Assure they are Solicited
- Divide contracts into smaller tasks when economically feasible
- Establish delivery schedules which encourage participation



Affirmative Steps Include:

- Use services of Small Business Administration and Minority Business Development Agency of the Department of Commerce
- Require the Prime Contract to take Affirmative Steps when Subcontracting



Brand Name

- The specific features of the named brand which must be met by offerors shall be clearly stated
- Identify all requirements which the offerors must fulfill and all other factors to be used in the evaluation.



Prequalification Lists

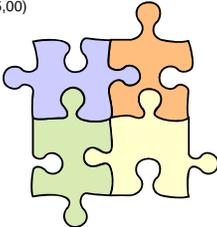


- Grantee prequalification lists
 - Current
 - Include enough qualified sources to ensure maximum open and free competition



Four Methods of Procurement Identified in 24 CFR Part 85

- Small Purchases (less than \$25,000)
- Sealed Bids (\$25,000 or more)
- Competitive Proposals
- Noncompetitive Proposals



Methods of Procurement

- Competitive Sealed Bidding
- Competitive Sealed Proposals
- Small Purchases
- Sole Source Procurement
- Emergency Procurements
- Special Procurements
- Architectural and Engineering Services
- Administrative Services, etc.



Methods of Procurement

- With competitive sealed bidding as a starting point, procurement officials are able to choose an appropriate source selection method to meet the circumstances of each procurement.



Questions



Break

- 15 minutes
- Return with Mr. Don Gregory
- Construction Bidding



Small Purchases

- Simple and informal method
- Lower of less than \$25,000, local policy, or charter
- Price or rate quote must be obtained from adequate number of qualified sources
- May require written specifications
- Written documentation



Sealed Bids

- \$25,000 or more



Competitive Proposals



- Used when conditions are not appropriate for the use of sealed bids
- More than one qualified source is available
- Fixed price or cost reimbursement type of contract is awarded



Competitive Proposal Requirements

- Request for Proposal (RFP) will be publicized and identify all evaluation factors and their relative importance
- RFP will be solicited for adequate number of qualified sources



Competitive Proposal Requirements

- Grantees will have a method from conducting technical evaluations of proposals for selecting awardees
- Awards will be made to the responsible firm whose proposal is most advantageous, with price and other factors considered



Competitive Proposal Requirements



- Grantees may use competitive proposal procedures for qualification based procurement of architects and engineers.
- Refer to Ohio's Design Professional Selection Law ORC 153.65 - .71



Noncompetitive Proposals



- Solicitation of proposals from only one source, or after solicitation of a number of sources, competition is determined inadequate



Noncompetitive Proposals

- Can only be used when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals, and



Noncompetitive Proposals

- ... Item is available from only one source
- A public emergency exists and will not permit a delay resulting from competitive solicitation
- After solicitation from a number of sources, competition is determined inadequate



Noncompetitive Proposals



- Cost analysis is required, i. e. verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs



Design Professional

- Ohio's Design Professional Selection Law (ORC 153.65 -.71) is consistent with federal requirements
- See Handout: Ohio Qualifications-Based Selection (QBS Manual): *A guide to selecting the highest qualified architecture/engineering firm*



Ohio's Design Professional Selection Law

- Sections 153.66 to 153.70 do not apply to any of the following:
 - Any project with an estimated professional design fee of less than twenty-five thousand dollars;
 - Any project determined in writing by the public authority head to be an emergency requiring immediate action including, but not limited to, any projects requiring multiple contracts let as part of a program requiring a large number of professional design firms of the same type;
 - Any public authority that is not empowered by law to contract for professional design services.



Architect and Engineering Under \$25,000

- Use competitive proposal process



Interagency Agreements

- Interagency agreement (IAA) is a written transaction that allows one agency to obtain supplies, services, personnel, material, equipment, and facilities from another agency.



Interagency Agreements Content

IAAs should include:

1. A description of the supplies, services, etc. to be obtained by the grantee or provided to a receiving agency;
2. Payment or funds transfer terms;
3. Cancellation or termination provisions;
4. The effective period; and,
5. Terms of performance and delivery



Force Account

- Before constructing or reconstructing a road, or constructing, reconstructing, improving, maintaining, or repairing a public improvement by force account, the jurisdiction is required to “first cause to be made an estimate of the cost of such work,” using the force account project assessment form developed by the Auditor of State under R.C. 117.16.



Force Account

- The Auditor of State is authorized by R.C. 117.16 to require a community who is estimating the cost of road, bridge, or culvert work under R.C. 5543.19 to use a “safe harbor rate” for the cost of overhead or justify the use of a different rate.



Force Account

- A community may, as the general contractor of a force account project, acquire material and equipment pursuant to contract, and may subcontract part of the work undertaken by force account, so long as the contracts for material and equipment and the subcontracts are let in compliance with its competitive bidding requirements.



Force Account

- A community who is estimating the cost of a public work must include in the estimate the cost of materials and equipment that would be acquired by contract, and the cost of work that would be performed pursuant to a subcontract, if the project were undertaken by force account. If the total exceeds the applicable force account limit, as set forth Ohio Revised Code, the whole project must be competitively bid.



Memorandum of Understanding (MOU)

- When two or more agencies wish to express an intent or expectation to cooperate, they may execute a MOU. The MOU is often preliminary to, but not a requirement of, an IAA. A MOU may not be used to transfer funds or obligate work to be performed.



Memorandum of Understanding (MOU)

- It may say that the agencies expect to commit funds to some purpose, but it shall also state that authorized officials from the participating agencies must confirm such action by execution of a formal IAA. The MOU may serve as the formal agreement for non-monetary cooperation (e.g., two agencies might agree via a MOU to collaborate on a program evaluation.)



Contract Cost and Price

- Grantees must perform a cost and price analysis for every procurement including contract modifications
- Grantees must make independent estimates before receiving bids or proposals



Contract Cost and Price



For Professional, Engineering, and Architectural Services, offeror is required to submit the elements of his estimated costs



Contract Cost and Price

- For contract modifications, a price analysis must be conducted to determine reasonableness of costs
- In cases where there is no price competition, grantees must negotiate profit as a separate element of price



HUD Quick Guide to Cost and Price Analysis

- <http://www.hud.gov/offices/cpo/grantees/cstprice.pdf>



Cost Plus a Percentage of Cost Contract Prohibited

- An agreement on a construction project in which the contractor is provided a specified percentage profit over and above the actual costs of construction.



Cost Plus a Percentage of Cost Contract Prohibited

- These contracts are considered poor business practice because the contractor has little incentive to hold down costs. A cost-plus-fixed-fee contract is a better approach.



Time and Material Contracts

- Grantees will use time and material type contracts only—
 - (i) After a determination that no other contract is suitable, and
 - (ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.



Bonding Requirements



- For construction or facility improvements contracts exceeding \$100,000, but Ohio's threshold is \$25,000
- The purpose of the bonds is to adequately protect the public's interest



3 Types of Bonds Required

- Bid Bond (guarantee)
- Performance Bond
- Payment Bond




Bid Guarantee

Bid Guarantee in the form of:

- Bid Bond for 100% of the bid
- Certified or Cashier's Check
 - 10% of the bid price (federal says 5%)
- Letter of credit pursuant to Chapter 1305
 - 10% of the bid price (federal says 5%)



Form of Bid Guarantee

- Prescribed in Ohio Revised Code at:
- ORC 153.571
- Refer to <http://codes.ohio.gov/orc/>



Bid Guarantee

- is to accompany the Bid
- Purpose of the Bid Guarantee is to assure the bidder will upon acceptance of the bid, execute the contract and within the time specified



Performance Bond

- from the contractor for 100% of the Contract Price
- Purpose of the Performance Bond is to secure fulfillment of all of the contractor's obligations under the contract



Payment Bond

- from the contractor for 100% of the Contract Price
- Purpose of the Payment Bond is assure payment to all persons supplying labor and material for the execution of the work provided for in the contract.
- In Ohio, the form of the Performance Bond incorporates both the Performance and Payment Bond



Form of Performance Bond

- Prescribed in the Ohio Revised Code at:
- ORC 153.57
- Refer to <http://codes.ohio.gov/orc/>



Contract Provisions

Each contract and subcontract must contain these provisions:

- Administrative, contractual or legal remedies for contractor's violation or breach of contract terms (Contracts other than Small Purchases)



Contract Provisions

- **Termination for Cause** and for Convenience, including manner by which it will be effected and the basis for settlement (for contracts over \$10,000)
- Compliance with Executive Order 11246; **Equal Employment Opportunity** (for all Construction contracts over \$10,000)



Contract Provisions

- Compliance with the **Copeland Anti-Kickback Act** (for all construction and repair contracts)
- Compliance with **Davis-Bacon Act** (for all construction contracts over \$2,000 and housing construction or repair projects over 8 units in the project for CDBG funds or 12 units assisted with HOME funds)



Contract Provisions

- Compliance with Sections 103 and 107 of the **Contract Work Hours and Safety Standards Act** (for all construction contracts over \$2,000 and for other contracts which involve the employment of laborers or mechanics)
- Notice of any **reporting requirements**



Contract Provisions

- Notice pertaining to **Patient Rights**
- HUD and the State of Ohio reserve a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, to authorize others to use regarding **copyrights and rights in data**



Contract Provisions

- **Access** by the grantee, State of Ohio, HUD, Comptroller General of the United States, or designee to any books, documents, papers, and **record of the contractor** for the purpose of making audit examination, excerpts, and transcripts



Contract Provisions

- **Retention of all records** for 3 years after final payments and all pending matters are closed
- Compliance with section 306 of the **Clean Air Act**, section 508 of the **Clean Water Act**, and **Executive Order 11738, Environmental Protection Agency** Regulations at 40 CFR Part 15 (for contracts in excess of \$100,000)



Contract Provisions

- Mandatory standards and policies relating to **energy efficiency** are contained to the state energy conservation plan



Contract Clauses

- Various contract forms available, e. g. American Institute of Architects, Association of General Contractors of America (ACG), Engineers Joint Contract Documents Committee (EJCDD), OHCP boiler plate, etc.,
- Must include clauses required by federal statutes, executive orders, and implementing regulations



Contract Provisions

- The construction contract includes
 - the basic contract form and separate or incorporated general conditions, which define the responsibilities of the parties,
 - the procedures to be followed,
 - the liabilities assumed by each party,
 - and other project-specific requirements



Important Provisions

- Clear scope of work
- Clear definition of the Contract Documents
- Contract Sum
- Time to commence work and duration of work (ORC 153.19)
- Liquidated damages provisions if contract is not performed by the identified completion date



Important Provisions (cont)

- Schedule requirements
- Payment application procedures and required documentation
- Lien Waivers, and requirement that contractor bond off any lien asserted against contract funds



Important Provisions (cont)

- Retainage requirements (ORC 153.12 and .14) 8% of the contract price until the project is 50% complete; 8% of materials and equipment until installed and accepted by owner
- Warranty requirements
- Insurance coverage – define amounts and types of coverage



Important Provisions (cont)

- Insurance coverage – define amounts and types of coverage
- Federal requires (previously discussed)
- Default Provisions – what are the bases for default by the contractor and the owner
- Termination for Cause and Convenience – what notes are required and how will payment due as of the date of the default be determined and payment made in the event of default



Important Provisions (cont)

- Close-out procedures and requirements
- Final Payment and Release of Retainage
- Reduction of Bond
- Warranty Documentation
- Training of staff
- Systems testing
- Dispute resolution – on-site, informal, mediation, litigation



Important Provisions (cont)

- Coordination responsibilities when there are multiple prime contractors or of a prime contractor for its subs
- Notice provisions – time and form
- Changes – how requested, when compensated, how project schedule is affected



Important Provisions (cont)

- Risk of loss to stored materials
- Disposition of construction debris
- Responsibility for scheduling and attending project progress and coordination meetings



Multiple Prime Contracts

- ORC 153.50 – 52 set forth the Ohio requirements for multiple prime contractors on competitively bid public works projects
- Separate prime contracts (HVAC, electrical, plumbing, and general) are required for any public works project estimated to cost more than \$50,000



Multiple Prime Contracts

- A combined bid may be awarded if the combined bid is less than the aggregate of the low individual bids. Also, if the estimate for an individual prime contract is \$5,000 or less, it need not be separately bid.



Retainage Escrow Account

- Retainage funds are for use when a lien affidavit (mechanic's lien) has been alleged



Questions