

should ensure that their use does not restrict competition (i.e., the use of geographic preference leaves only one or two qualified firms to bid on the contract).

- Licensing. A state may enforce its licensing requirements, provided that those requirements do not conflict with Federal law.
- Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in an area affected by a major disaster or emergency.
- Section 418 of the fiscal year (FY) 2015 Appropriations Act and Section 415 of the Consolidated Appropriations Act, 2016, Public Law 114-113 (FY 2016 Appropriations Act) prohibit FTA from using FY2015 or FY2016 funds to implement, administer, or enforce the prohibition of geographic preferences under 49 CFR 18.36(c)(2) (now 2 CFR 200.319(b)) for construction hiring purposes. “Construction hiring purposes” means hiring of the construction labor workforce for a construction project. Section 418 applies to all FTA awards, including awards funded under the Hurricane Sandy Emergency Relief and Transportation Investment Generating Economic Recovery (TIGER) programs. Recipients are asked to provide the FTA Regional Office notice of using local hiring preferences on construction projects.
- The Department of Transportation Appropriations Act, 2019, Pub. L. 116-6, §191, allows geographic, economic, and other hiring preferences if the recipient makes certain certifications regarding available unemployed workforce, displacement of workers, and added costs of using preferences.

Section 25019 of the Infrastructure Investment and Jobs Act, Pub. L. 117-58, authorizes all recipients to implement a local or other geographical or economic hiring preference relating to the use of labor for construction of a project, including prehire agreements, subject to any applicable State and local laws, policies, and procedures.

Prequalification Lists:

Except for purchases below the simplified acquisition threshold, proposals or bids must be publicly solicited from an adequate number of sources. Recipients are prohibited from restricting competition in federally supported procurement transactions. Recipients are not required to prequalify potential bidders. However, recipients that place such a requirement on potential bidders must adhere to federal requirements. If a recipient requires prospective bidders to prequalify, it must ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Recipients must permit potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step and qualifications-based procurements.

FLEXIBILITIES AND ADMINISTRATIVE RELIEF

Eligible Operations or Maintenance Expenses

Under the authority of the Emergency Relief program to set the necessary terms and conditions of an award (49 USC 5324 (d)(1)), FTA permits funds to be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. The procurement of any new contracts would need to follow all Federal requirements.

Full and Open Competition

There are some flexibilities permitted under OMB Memo M-20-17 to allow recipients to waive the procurement requirements regarding geographical preferences [2 CFR 200.319(c)] and contracting small and minority businesses, women's business enterprises, and labor surplus area firms [200.321]. FTA recipients should document any procurement decisions made in response to the COVID-19 public health emergency and may be asked to provide that information in the future. This flexibility is for procurement activity from March 1, 2020 through March 1, 2021. As required under 2 CFR part 200, when procuring property and services under a federal award, states must follow the same policies and procedures it uses for procurements from its non-federal funds, including any provisions for emergency situations.

INDICATORS OF COMPLIANCE

- a. *Does the recipient restrict competition by applying unreasonable requirements, requiring unnecessary experience or excessive bonding, by specifying brand names only, or by not reviewing planned procurements for organization conflicts of interest?*

- b. *Does the recipient include prohibited geographic preferences in procurements?*

- c. *If the recipient uses prequalification lists for any of its procurements, does it do so properly?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, request and review the recipient's written procurement policies for discussion of the requirements in the above indicators. Obtain and review the listing of FTA-funded procurements.

During the site visit:

- Review procurement files, particularly legal notices and solicitation documents, to determine whether procurements were unreasonably restrictive. If a procurement only received one or two responses, did the specifications include non-essential requirements that only a single manufacturer can meet? Did potential bidders submit pre-submission questions regarding compliance with the specifications or other contract requirements? Examine any bid protests and any questions and answers to solicitations to determine if there are any perceived restrictions from potential bidders.

- When using outside sources, the recipient should take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor's judgment or would result in unfair competitive advantage. Through review of procurement procedures and interviews with the recipient, determine if there is a process to mitigate organizational conflicts of interest. Review selected procurement files to determine if there were any potential organizational conflicts of interest and how the recipient mitigated the conflict.

- Review procurement files for use of geographic preferences outside of the allowable exceptions. Examine any bid protests and any questions and answers to solicitations to determine if there are any potential geographic preference issues. These may include bid/evaluation preferences for, or restricting competition to, in-state or local firms. In-state licensing requirements do not constitute geographic preference. When contracting for A&E services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

- Review procurement files, particularly legal notices and solicitation documents, to determine whether responses to procurements are limited to pre-qualified firms. If a recipient requires prospective bidders to prequalify, determine if it has documented that it has ensured that all prequalification lists include enough sources to ensure full and open competition. Determine if the recipient permitted potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date).

FLEXIBILITIES AND ADMINISTRATIVE RELIEF

Discuss with the recipient if it has used geographic preferences in procurements due to the COVID-19 public health emergency. If yes, determine if the transaction occurred within the allowed time period of March 1, 2020, through March 1, 2021.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has conducted a procurement without providing for full and open competition. Examples of failure to provide for full and open competition include impermissible or unnecessary restrictive requirements in specifications or on prospective bidders in any of the procurement files reviewed, or unmitigated organizational conflicts of interest.

DEFICIENCY CODE P7-1: Lacking full and open competition for one or more methods of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must submit procurement procedures that ensure full and open competition in all procurement transactions. Recipient must provide training to its procurement staff on its procedures for ensuring full and open competition in all procurements.

The recipient is deficient if it has improperly included geographic preferences in its procurements.

DEFICIENCY CODE P7-2: Improper use of geographic preferences

SUGGESTED CORRECTIVE ACTION: The recipient must cease using inappropriate geographic preferences in FTA-funded procurements and submit documentation of a revised procurement process that prohibits the improper use of geographic preferences. For the next procurement, the recipient must submit documentation that the required process was implemented.

The recipient is deficient if its prequalification lists do not include enough qualified sources to ensure maximum full and open competition or it has precluded potential bidders from qualifying during the solicitation process.

DEFICIENCY CODE P7-3: Inadequate prequalification criteria

SUGGESTED CORRECTIVE ACTION: The recipient must provide documentation demonstrating that deficiencies identified in its prequalification process have been corrected. For the next procurement, submit documentation that the required process was implemented.

GOVERNING DIRECTIVE

49 U.S.C. 5325(a) Contract requirements

(a) Competition. Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary.

49 U.S.C. 5325(h) Contract requirements

(h) Grant prohibition. A grant awarded under this chapter or the Federal Public Transportation Act of 2015 may not be used to support a procurement that uses an exclusionary or discriminatory specification.

Infrastructure Investment and Jobs Act, Pub. L. 117-58, § 25019. Local Hiring Preferences for Construction Jobs.

“(a) AUTHORIZATION.—(1) IN GENERAL.—A recipient or subrecipient of a grant provided by the Secretary under title 23 or 49, United States Code, may implement a local or other geographical or economic hiring preference relating to the use of labor for construction of a project funded by the grant, including prehire agreements, subject to any applicable State and local laws, policies, and procedures.

(2) TREATMENT.—The use of a local or other geographical or economic hiring preference pursuant to paragraph (1) in any bid for a contract for the construction of a project funded by a grant described in paragraph (1) shall not be considered to unduly limit competition.”

2 CFR 200.319 Competition

(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and § 200.320.

(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(c) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(d) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which 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, must set forth 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 equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(e) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

Frequently Asked Questions (FAQ) Regarding Coronavirus Disease 2019 (COVID-19), CE2

Under the authority of the Emergency Relief program to set the necessary terms and conditions of a grant (49 USC 5324 (d)(1), FTA will permit funds to be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. Any new contracts would need to follow all federal requirements.

Office of Management and Budget Memorandum M-20-17, March 19, 2020

Awarding agencies may waive the procurement requirements contained in 2 CFR § 200.319(c) regarding geographical preferences and 2 CFR § 200.321 regarding contracting small and minority businesses, women's business enterprises, and labor surplus area firms.

P8. Did the recipient appropriately use each method of procurement as described in its policies and procedures and in compliance with 2 CFR Part 200?

BASIC REQUIREMENT

The non-Federal entity must appropriately use one of the following methods of procurement: micro-purchase, simplified acquisition, sealed bid, competitive proposals or non-competitive proposals.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

Micro-purchases may be made without obtaining competitive quotations if the recipient determines that the price to be paid is fair and reasonable. These purchases must be distributed equitably among qualified suppliers to the extent practicable, and must not be split to avoid the requirements for competition above the micro-purchase threshold.

Simplified acquisition procedures require that price or rate quotations be obtained from an adequate number of qualified sources (at least two). The solicitations and quotations may be either oral or written, but must be evidenced in the recipient's records.

For procurements exceeding the Federal simplified acquisition threshold (currently \$250,000), sealed bids or competitive proposals are generally required.

- Sealed Bids/IFB – Bids are publicly solicited and the award is made to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.
- Competitive Proposals/RFP – Proposals are publicly solicited from an adequate number of sources and the award is made to the responsive and responsible proposer whose offer is most advantageous to the recipient, with price and other factors considered. Requests for proposals must be publicized and identify all evaluation factors and their relative importance.

Non-competitive procurements: There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

- Micropurchase: The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see above).
- Sole source. The item is available only from a single source. This may occur, for example, when only one offeror owns certain patent or restricted data rights necessary to the recipient; or the award is a follow-on contract for the continued development or production of a major system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in substantial duplication of cost to the recipient that is not expected to be recovered through competition, or unacceptable delays in fulfilling the agency's requirements.
- Exigent circumstances. The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation. Generally, this exception to competition will allow a recipient to procure only the goods or services needed to deal with the exigency or emergency. (For example, in the case of a leaking roof, a contract for temporary repairs may be sufficient to "get past" the exigency, as compared to a procurement for an entire roof replacement.)
- Federal authorization. The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the recipient.
- Inadequate competition. After solicitation of a number of sources, competition is determined inadequate.

While professional services can be procured on a sole-source basis if justified, in general, a competitive environment does exist for professional services and the recipient needs to provide for competition when FTA funds are used to pay for these services.

With a single bid, the documentation should include a cost analysis, as well as an explanation as to why only a single bid was received. Upon receiving a single bid or proposal in response to a competitive solicitation, the recipient should determine if its solicitation was unduly restrictive. This could include actions such as a review of the specifications for undue restrictiveness, a survey of potential sources that chose not to submit a bid or proposal, or other actions.

Time-and-materials contracts are a restricted type of procurement. They are contracts in which the contractor charges a single rate that includes overhead and profit for labor, and materials are billed at cost. Generally, the total value of a time and materials type contract is an indeterminate amount. As such, recipients are not permitted to use FTA funds for time-and-materials type contracts unless it determines that no other type of contract is suitable for the procurement. If time-and-materials type contracts are used, recipients must specify a ceiling price that the contractor shall not exceed, except at its own risk.

FLEXIBILITIES AND ADMINISTRATIVE RELIEF

Eligible Operations or Maintenance Expenses

Under the authority of the Emergency Relief program to set the necessary terms and conditions of an award (49 USC 5324 (d)(1), FTA permits funds to be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. The procurement of any new contracts would need to follow all Federal requirements.

Methods of Procurement

Federal procurement standards established in 2 CFR part 220.318-327 permit the use of a noncompetitive procurement when the circumstances of an emergency (or public exigency) would not permit a delay resulting from competitive solicitation.

INDICATORS OF COMPLIANCE

- a. *If the recipient used micro-purchase procedures, was it done in accordance with requirements?*

- b. *If the recipient used simplified acquisition procedures, was it done in accordance with requirements?*

- c. *If the recipient used sealed bid procedures, was it done in accordance with requirements?*

- d. *If the recipient used competitive proposal procedures, was it done in accordance with requirements?*

- e. *Did the recipient include written justification of any non-competitive or sole source procurements in the procurement file?*

- f. *If the recipient had awarded a contract to a single bidder, did it appropriately determine that the item was available only from a single source?*

- g. *If the recipient awarded any time-and-materials type contracts during the review period, did it determine that it was the only method suitable and was a ceiling price set?*

INSTRUCTIONS FOR REVIEWER

Review the recipient's policies and procedures for dollar thresholds and procedures for micro-purchase, simplified acquisition, sealed bid, competitive proposals or non-competitive proposals/sole source procurements, as applicable.

Review the list of FTA-funded procurements to determine which types of procurements were used.

Micro-purchase: Review selected procurements to determine if:

- This method was only used for procurements \$3,500 or less awarded prior to June 20, 2018, or \$10,000 or less for contracts awarded after June 20, 2018 (or such other threshold permitted up to the self-certified limit of \$50,000 for the recipient as indicated under 2 CFR 200.320(a)(1)(iv) and (v)),
- the procurements were distributed equitably if there was more than one qualified supplier,
- the recipient documented its determination that the price was reasonable with a description of how that determination was made, and
- there is no evidence that procurements were split to avoid procurement requirements for purchases above the micro-purchase threshold (such as repeated purchases of the same item(s)).

NOTE TO REVIEWER: State or local law or recipient policies/procedures may set a micro-purchase threshold lower than the federal threshold. In such cases, recipients must follow state or local law. However, if the state or local micro-purchase threshold is higher than the Federal threshold, the recipient is constrained by the Federal threshold for FTA-funded contracts.

Simplified acquisition: Review selected procurements to determine if:

- this method was only used for procurements of \$150,000 or less, awarded prior to June 20, 2018, or \$250,000 or less for procurements awarded after June 20, 2018.
- price or rate quotations were obtained from an adequate (at least two) number of qualified sources, and
- there was no evidence that procurements were split to avoid procurement requirements for purchases above the simplified acquisition threshold (such as repeated purchases of the same item(s)).

NOTE TO REVIEWER: State or local law or recipient policies/procedures may set a simplified acquisition threshold lower than the Federal threshold. In such cases, recipients must follow state or local law. However, if the state or local simplified acquisition threshold is higher than the Federal simplified acquisition threshold, the recipient is constrained by the Federal threshold for FTA-funded contracts.

Sealed bid: Review selected procurements to determine if:

- bids were solicited from an adequate number of known suppliers,
- if the recipient is a local or tribal government, the invitation for bids was publicly advertised,
- the invitation for bids defined the items or services in order for the bidder to properly respond,

- bids were opened at the time and place prescribed in the invitation for bids, and, if the recipient is a local or tribal government, the bids were opened publicly,
- a firm fixed price contract (lump sum or unit price) was awarded to the lowest responsive and responsible bidder, and
- any or all bids were rejected only if there was a sound, documented reason.

Competitive proposal: Review selected procurements to determine if:

- requests for proposals were publicly advertised in accordance with State and local laws,
- evaluation criteria and their relative importance were identified,
- proposals were solicited from an adequate number of qualified sources,
- there was a written method for conducting technical evaluations of the proposals received and for selecting recipients, and
- contracts were awarded to the responsive and responsible firm whose proposal is most advantageous, with price and other factors considered.

For A&E procurements, the recipient must use qualifications-based procurement methods. These procurements are reviewed in the following question.

Non-competitive procurement: Review selected procurements to determine if one or more of the following conditions was met:

- The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see paragraph (a)(1) of this section);
- The item is available only from a single source;
- The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;
- The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or
- After solicitation of a number of sources, competition is determined inadequate.

Determine if the recipient included a written noncompetitive procurement justification in its procurement file.

Single bidder: Ask the recipient to provide information on recipient's requirements for advertisement/dissemination of solicitation. Review any advertisement/dissemination procedures in the recipient's procurement policies. Review selected procurements to determine if the procurement files include an explanation as to why a single bid was obtained and if the recipient's determination of adequate competition included a review of the specifications for undue restrictiveness. Reviewing a solicitation for undue restrictiveness may include a survey of potential sources that chose not to submit a bid or proposal, and a review of whether the solicitation was adequately advertised and open for a sufficient period of time given the complexity of the project.

Time and materials: Prior to the site visit, examine the procurement listing provided by the recipient to determine if any time-and-materials type contracts were awarded during the review period. If so, during

the site visit, examine at least one time-and-materials procurement file to determine if there was information noting that this was the only suitable type of procurement and that a ceiling price was included.

FLEXIBILITIES AND ADMINISTRATIVE RELIEF

Discuss with the recipient if it used Supplemental funds to reimburse expenses for any operations or maintenance contracts. Ascertain whether the contracts met all Federal requirements. If not, advise the recipient that any new contract for operations or maintenance for which it will use Federal funds to reimburse expenses, must meet Federal requirements, including, but not limited to, procuring the services through full and open competition, confirming vendor responsibility, incorporating the required clauses, and obtaining signed certifications.

Discuss with the recipient if it used the non-competitive procurement method as a result of the COVID-19 public health emergency. If it did, review the sole source justification to ensure it meets the requirements.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it made any procurements reviewed using micro-purchase procedures but used this method for procurements over \$3,500 for contracts awarded \$10,000 for contracts awarded, or up to the \$50,000 self-certified amount authorized pursuant to 2 CFR 200.320(a)(1)(iv) and (v), did not make reasonable price determinations, did not distribute purchases equitably if applicable, and/or if there was evidence of splitting procurements to be within the micro-purchase threshold.

DEFICIENCY CODE P8-1: Improper micro-purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence that it has updated its procurement process to correctly implement micro-purchase procedures. For the next micro-purchase, submit documentation that the required process was implemented.

The recipient is deficient if it made any procurements reviewed using simplified acquisition procedures for procurements over \$150,000 or less, for contracts awarded \$250,000 or less, for contracts awarded , price or rate quotations were not obtained from an adequate number of qualified sources, and/or if there is evidence of splitting procurements to be within the simplified acquisition threshold.

DEFICIENCY CODE P8-2: Improper simplified acquisition procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence that it has updated its procurement process to correctly implement simplified acquisition procedures. For the next simplified acquisition, submit documentation that the required process was implemented.

The recipient is deficient if it made any procurements reviewed using sealed bid procedures but bids were not adequately solicited or publicly advertised, items or services were not defined, bids were not publicly opened, a fixed price contract was not awarded to the lowest responsive and responsible bidder, and/or sound reasons were not documented for rejected bids.

DEFICIENCY CODE P8-3: Improper sealed bid procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence that it has updated its procurement process to correctly implement sealed bid procedures. For the next sealed bid, submit documentation that the required procedures were followed.

The recipient is deficient if it made any procurements using competitive proposal procedures but requests for proposals were not publicly advertised and solicited, evaluation criteria and their relative importance were not identified in the solicitation documents, there was no written method for conducting technical evaluations, and/or price and other factors were not considered in the award.

DEFICIENCY CODE P8-4: Improper competitive proposal procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence that it has updated its procurement process to correctly implement competitive proposal procedures. For the next competitive proposal, submit documentation that the required procedures were followed.

The recipient is deficient if, for any procurements reviewed, it made noncompetitive procurements but does not have a justification in its procurement files, and/or if its justification does not include at least one of the conditions permitting the use of a noncompetitive procurement.

DEFICIENCY CODE P8-5: Lacking required justification(s) and documentation for noncompetitive award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence of an implemented policy to ensure that future noncompetitive procurements are properly conducted and documented. Where contracts are ongoing, confer with the FTA regional office to determine if the recipient should be directed not to exercise any options. For the next procurement, submit documentation that the required process was implemented.

The recipient is deficient if it does not have the appropriate justification for any single-bid awards reviewed.

DEFICIENCY CODE P8-6: Lacking required justification(s) and documentation for single-bid award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence of an implemented policy to ensure that future single bid procurements are properly documented. For the next applicable procurement, submit documentation that the required process was implemented.

The recipient is deficient if FTA funds were used for any time-and-materials contract reviewed and the files do not support the recipient's decision or the contract does not specify a ceiling price.

DEFICIENCY CODE P8-7: Improper time-and-materials contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence that it has updated its procurement process to include procedures for the proper use of FTA-assisted time-and-materials contracts. The recipient must obtain prior FTA regional office approval before entering into the next time-and-materials contract.

GOVERNING DIRECTIVE

2 CFR 200.318 (j)

(j)(1) The non-Federal entity may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a non-Federal entity is the sum of:

- (i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

2 CFR 200.320 Methods of procurement to be followed.

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§ 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or subaward.

(a) Informal procurement methods. When the value of the procurement for property or services under a Federal award does not exceed the simplified acquisition threshold (SAT), as defined in § 200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:

(1) Micro-purchases -

(i) Distribution. The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of micro-purchase in § 200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.

(ii) Micro-purchase awards. Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved by the non-Federal entity.

(iii) Micro-purchase thresholds. The non-Federal entity is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro-purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations. Non-Federal entities may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.

(iv) Non-Federal entity increase to the micro-purchase threshold up to \$50,000. Non-Federal entities may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The non-Federal entity may self-certify a threshold up to \$50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with § 200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

(A) A qualification as a low-risk auditee, in accordance with the criteria in § 200.520 for the most recent audit;

(B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,

(C) For public institutions, a higher threshold consistent with State law.

(v) Non-Federal entity increase to the micro-purchase threshold over \$50,000. Micro-purchase thresholds higher than \$50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved.

(2) Simplified acquisitions-

(i) Simplified acquisition procedures. The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If simplified acquisition procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-Federal entity.

(ii) Simplified acquisition thresholds. The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures which must not exceed the threshold established in the FAR. When applicable, a lower simplified acquisition threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations.

(b) Formal procurement methods. When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used in accordance with § 200.319 or paragraph (c) of this section. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate:

(1) Sealed bids. A procurement method in which bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction, if the conditions.

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

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) 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.

(ii) If sealed bids are used, the following requirements apply:

(A) Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;

(B) 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;

(C) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;

(D) 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 cost, and life cycle costs must 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; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(2) Proposals. A procurement method in which either a fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

(i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(ii) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and making selections;

(iii) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-Federal entity, with price and other factors considered; and

(iv) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror 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. It cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort.

(c) Noncompetitive procurement. There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

(1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see paragraph (a)(1) of this section);

(2) The item is available only from a single source;

(3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;

(4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or

(5) After solicitation of a number of sources, competition is determined inadequate.

FTA 4220.1F Chapter VI 3. a. (2) (b) Prohibited Divisions

The recipient may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions.

FTA 4220.1F Chapter VI 3. a. (2) (c) Documentation

FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection.

FTA Circular 4220.1F Chapter VI 3. i. (1) (b) 2. Single Bid or Single Proposal

Upon receiving a single bid or single proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal. a. Adequate Competition. FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient's control. Many unrelated factors beyond the recipient's control might cause potential sources not to submit a bid or proposal. If the competition can be determined adequate, FTA's competition requirements will be fulfilled, and the procurement will qualify as a valid competitive award. b. Inadequate Competition. FTA acknowledges competition to be inadequate when, caused by conditions within the recipient's control. For example, if the specifications used were within the recipient's control and those specifications were unduly restrictive, competition will be inadequate.

Frequently Asked Questions (FAQ) Regarding Coronavirus Disease 2019 (COVID-19), CE2

Under the authority of the Emergency Relief program to set the necessary terms and conditions of a grant (49 USC 5324 (d)(1), FTA will permit funds to be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. Any new contracts would need to follow all federal requirements.

Frequently Asked Questions (FAQ) Regarding Coronavirus Disease 2019 (COVID-19), CE9

FTA has established an Emergency Relief docket (docket number FTA-2021-0001) that allows recipients in states in which the Governor has declared an emergency related to COVID-19 to request temporary relief from federal requirements under 49 U.S.C. Chapter 53 as well as the provisions of any non-statutory FTA requirements. The ER docket should only be used to request a waiver of FTA requirements.

Some federal requirements include specific provisions related to emergencies, and therefore, no FTA waiver is necessary. For example, federal procurement standards established in 2 CFR part 220.317-326 permit the use of a noncompetitive (sole source) procurement when the circumstances of an emergency (or public exigency) would not permit a delay resulting from competitive solicitation.

P9. Does the recipient procure Architectural Engineering (A&E) Services in accordance with 49 U.S.C. 5325(b)?

BASIC REQUIREMENT

If the recipient procures services for program management, architectural, engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services (collectively referred to as “A&E services”) for an FTA-funded project, it must use a qualifications-based method. This method is not to be used for procuring services other than A&E.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

A&E services include program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services. FTA guidance suggests that 49 U.S.C. Section 5325(b) authorizes the use of qualifications-based procurement procedures only for services that directly relate or lead to construction, alteration, or repair of real property. A recipient may not use qualifications-based procurement procedures to acquire non-A&E services, even if those non-A&E services will be or could be provided by an A&E firm. For design/build and similar procurements, FTA expects the recipient to use the procurement method appropriate for the services having the greater cost, even though the other necessary services would not typically be procured by that method.

When using FTA assistance to contract for A&E services, recipients, including states, are required to use competitive proposal procedures based on the Brooks Act or an equivalent qualifications-based requirement of a State adopted before August 10, 2005.

For qualifications-based procurements under the Brooks Act, price must not be considered during the selection phase of the most qualified offeror. Offerors’ qualifications are evaluated to determine the most qualified offeror. Price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the recipient determines is fair and reasonable.

Recipients may make multiple awards to cover needs for various disciplines under an “on-call” type of contract. Under this type of contract, the recipient selects the most qualified firm for each discipline (e.g., architect, seismic engineer). When the recipient has a project that needs an A&E firm, the recipient negotiates price with the most qualified firm only. On-call contracts may be suited for smaller jobs that would be too expensive (administratively) to compete individually. An on-call A&E contract means that the recipient has identified the most qualified firm and has entered into a contract with that firm for future A&E work, as needed.

A recipient is not precluded from making multiple awards for A&E services, however the selection of contractors and placement of orders must be consistent with Brooks Act qualification based selection procedures. Solicitations that will result in multiple awards should describe how orders will be assigned to the successful firms, and not leave the process undefined.

INDICATORS OF COMPLIANCE

- a. *Does the recipient have and follow a State statute prescribing a formal procedure for the procurement of A&E services, adopted prior to August 10, 2005, that it is an equivalent-qualifications-based requirement- to the Brooks Act?*