



Effective Procurement

Fulfilling Requirements & Avoiding Conflict of Interest

March 18, 2024

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Disclaimer



Information provided in this training may or may not be true on your specific projects.



You should do your due diligence when making any decision related to public works procurement and understand the parameters of your project and contract.

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Key Issues



Conflict of Interest



Minimal Bid Responses



Documenting Compliance



Insufficient Construction Mgmt Experience

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Conflict of Interest

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REQUEST FOR EXCEPTION TO CONFLICT OF INTEREST

Upon written request by the local government recipient of Community Development Block Grant Program (CDBG) funds through the **STATE GRANTEE NAME (XXX)**, the **XXX** may grant on a case-by-case basis an exception to the conflict-of-interest provisions involving an employee, agent, consultant, officer or elected official or appointee of the unit of local government. Exceptions may be granted provided the local government fully documents the request in compliance with all requirements of paragraph 24 CFR 570.489(h)(4) including the local government's position with respect to each factor at paragraph (h)(5). All supporting documentation shall be attached, and the request shall be made available for review by the public and HUD.

An exception may be granted if it is determined that such an exception will serve to further the purpose of the Act and the effective and efficient administration of the project or program of **XXX** or the local government as appropriate.

An exception may be granted only after the local government has provided all the following:

1. The name, title, and classification of the person, and a brief description of the person's position as it relates to the CDBG assisted project or contract award. **Name, Title, Classification, Description of person's position relative to the CDBG project**
2. A disclosure of the nature of the Conflict of Interest. **Explain the nature of the conflict**
3. Proof that the disclosure has been made public. ☐ Proof of disclosure is attached. **Explain any comments from the public**
4. A legal opinion from the local government's attorney stating there would be no violation of federal or state law if the exception were granted. ☐ Legal opinion is attached.

In determining whether to grant an exception, **XXX** will consider the cumulative effect of the following factors (24 CFR 570.489(h)(5)):

1. Will the exception provide a significant cost benefit or an essential degree of expertise to the project which would otherwise not be available? **Explain how**
2. Was the opportunity for open competitive bidding or negotiation provided? **Explain how**
3. Is the person an eligible beneficiary of the CDBG assisted activity? **Explain how**
4. What mechanisms will be put in place to ensure that the person will only receive the same benefits as are being made available to other beneficiaries of the project or program? **Explain how**
5. Has the affected person withdrawn from their functions or responsibilities, or the decision-making process with respect to the specific assisted activity in question? **Explain how, including date of withdrawal**
6. Was the project or program in place before the person was in their position as an employee, agent, consultant, officer or elected official of the grantee or sub-recipient of CDBG funds? **Explain, giving dates**
7. Would undue hardship result either to the local government, recipient or the person affected when weighed against the public interest served by avoiding the prohibited conflict? **Explain, be specific**
8. Are there any other relevant issues that HCD should be aware of? **Explain**

The Chief Elected Official of the local government shall sign this request to be submitted to **XXX Contact Name and Information.**

Chief Elected Official

Date

For internal use only _____

Exception: ☐ Granted ☐ Denied

Reason for denial: _____

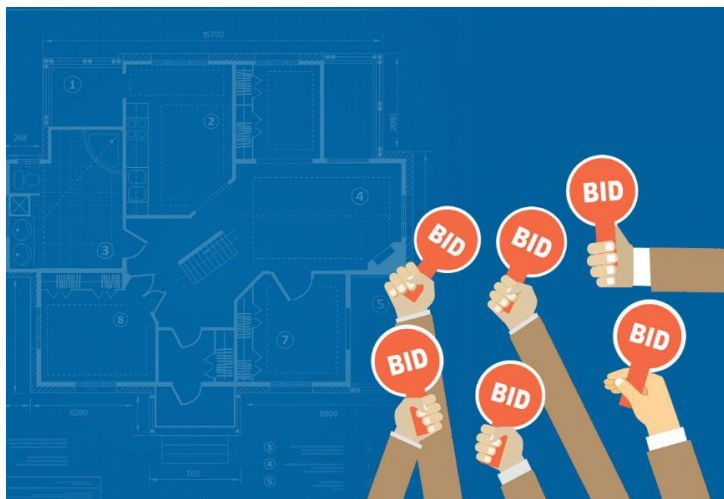
By:

APPROVING POSITION NAME/TITLE

Date

XXX General Counsel

Date



Increasing Bid Responses

Publicizing the Bid/RFP/RFQ

- Utilize online plan rooms and bidding platforms
 - OpenGov.com
 - BidnetDirect.com
 - ConstructionBidSource.com
 - PlanHub.com
 - CaliforniaBids.com
 - GeorgiaBids.net
 - MaineBids.com
 - New York State Contract Reporter (www.nyscr.ny.gov)

Publicizing the Bid/RFP/RFQ

- | | |
|---|--|
| <ul style="list-style-type: none">• Utilize trade publications<ul style="list-style-type: none">• Contractor Directories• Trade Unions• Valley Contractors Exchange (CA)• Builders Exchange of Tennessee• Associated General Contractors of New Hampshire | <ul style="list-style-type: none">• Utilize social media<ul style="list-style-type: none">• FaceBook• LinkedIN• UGLG Website |
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Direct Solicitation of Bid/RFP/RFQ

- Directly solicit firms to expand bidder pool
 - State MBE/WBE lists
 - State Veteran Business lists
 - State Department of Transportation lists
 - Entitlement lists

Bidding in Separate Divisions

- Breaking up bids into separate divisions
 - Multi-family Housing Projects
 - General Construction, Electrical, Plumbing, Concrete (parking & sidewalks)
 - Water Projects
 - Water Tower, Distribution Lines, Well Drilling, Treatment Facility
 - Sewer Projects
 - Lift Stations, Sewer Lines, Treatment Plant
 - Stormwater Projects
 - Infrastructure, Landscaping
 - Parks
 - Equipment, Installation

Packaging Small Projects Together

- Single family housing rehab projects
- Downtown façade improvements projects

Real Life Stories
from the Front
Lines



What happens if there is only 1 bidder??



Approving Single Response

When only one bid is received in response to an invitation for bids, such bid may be considered and accepted if the Contracting Officer makes a written determination that:

- a. The specifications were clear and not unduly restrictive;
- b. Adequate competition was solicited, and it could have been reasonably assumed that more than one bid would have been submitted;
- c. The price is reasonable (must have a documented cost analysis); and
- d. The bid is otherwise in accordance with the invitation for bids.

Based on this review, it may be concluded that the work should be re-bid, or that it is appropriate to accept the one bid received. Such a determination shall be placed in the file.

State Policy for Approving Single Response

- Factors for Evaluating:
 - Documentation that Independent Cost Estimate was completed prior to Bidding
 - Documentation of adequate bid advertising/solicitation
 - Documentation of feedback solicited from potential bidders
 - Documented Cost Analysis to determine reasonableness

Independent Cost Estimate

In developing the ICE, Grantee's may use:

- Price last paid for similar procurement
- Catalog price, or other advertised offers
- Comparison of previous bid prices
- Personal experience
- Other historical information
- Detailed analyses

Advertising the Bids

Documentation of Solicitation for Bids:

- IFB package
- Publishers Affidavit for newspaper ads
- Receipts for submission to trades and online publications
- Verification of delivery of direct solicitation to MBE/WBE/VBE
- Screenshots of IFB on local website

Solicitation of Feedback

Documentation of Solicitation for Bids:

- Who did they solicit for feedback?
- What were the reasons for not bidding?
- Were the bid requirements considered too restrictive?
 - If yes, they must revise and rebid
 - If no, the solicitation is considered competitive and may be awarded

Cost Analysis for Single Response

2 CFR 200.323

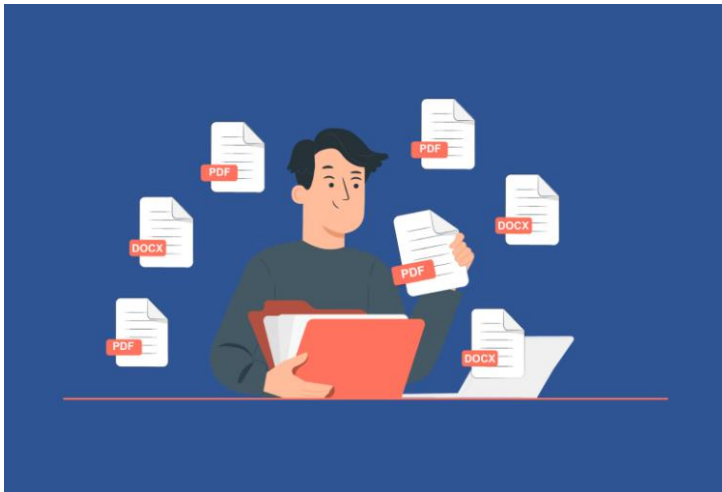
- Evaluation of the separate elements that make up a total cost proposal or price (e.g., labor, materials, etc.) for both new contracts and modifications to determine if the costs are allowable and reasonable
- When performing a cost analysis, consider the:
 - Accuracy of the information submitted—is the cost allowable, allocable, and reasonable?
 - Necessity of the proposed cost items
 - Actual costs of previous contracts for the same or similar work
 - Engineering estimates of costs to complete the scope of work for the same or similar work
 - Application of audited or pre-negotiated indirect cost rates, labor and fringe benefit rates, or other factors
 - Additional factors including size, ownership, and in-house resources

Cost Analysis for Single Response

2 CFR 200.323

- When analyzing or negotiating profit, consider the:
 - Complexity of the work to be performed (i.e. the more difficult the work, the more profit a contractor may be reasonably entitled to)
 - Contractor's risk (i.e., the higher the risk, the higher the reward)
 - Oversight needs for contracts with many subcontracts vs. a contract where the contractor is self-performing most of the work
 - Level of complexity of the work
 - Quality of the contractor's past performance
 - Industry profit rates in the surrounding geographical areas for similar work
 - Fact that some business owners require a higher profit margin due to size or systemic exclusion from equitable participation in the economy*

* HCD Equity and Belonging Toolkit



Documenting Small and Micro Purchase

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Documenting Micro-Purchase 2 CFR 200.320(a)(1)

- Documented price *comparisons* not required if costs are reasonable.
 - Document at least one price quotation (verbally or in writing)
 - Research, experience, previous purchase history, or other used to determine reasonableness
- Purchases may not be “split” (placing two orders for the same goods or services instead of one) to stay under the \$10,000 threshold.
- To *maximum extent practicable* distribute purchases equitably
- State or local government may have *lower thresholds*

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Documenting Micro-Purchase 2 CFR 200.320(a)(1)

Requirement	Status	Supporting Documentation
Is the price fair and reasonable?	Yes <input type="checkbox"/>	Evidence of market research <input type="checkbox"/>
When practicable, divide micro-purchases equitably among qualified suppliers.	No <input type="checkbox"/>	Short narrative on letterhead <input type="checkbox"/> Other (ex: receipt, invoice, etc.) <input type="checkbox"/>

"..the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly."

Micro-Purchase Threshold 2 CFR 200.320(a)(1)(4)

- Non-Federal entity may increase to the micro-purchase threshold up to \$50,000.
- Self-certify on an annual basis and maintain documentation.
 - 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.

Documenting Small Purchase 2 CFR 200.323

- Price or rate quotation must be obtained from *adequate* number of qualified sources *as determined by the non-federal entity*
 - To document that price quotes have been obtained, include the e-mails or catalogue clippings in the file.
 - If they did not select the lowest price quote, briefly note what other relevant factors were considered when determining what quote offered the best overall value.
 - If UGLG was not able to obtain three price quotes, briefly describe why not.

Documenting Small Purchase 2 CFR 200.323

Requirement	Status	Supporting Documentation
Is the price fair and reasonable?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Evidence of market research <input type="checkbox"/> Short narrative on letterhead <input type="checkbox"/> Other (<i>ex: receipt, invoice, etc.</i>) <input type="checkbox"/>
Have you obtained price or rate quotations from an adequate number of qualified sources?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Price or rate quotations from an adequate number of sources <input type="checkbox"/> Explanation of why 3 quotes were not received <input type="checkbox"/>



Construction Manager at Risk (CMAR)

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Compliance Concerns with CMAR

BOA STATE OF SOUTH DAKOTA
BUREAU OF ADMINISTRATION

Home Services for State Government Agencies Services for South Dakota Citizens Office Remodel Request Form

CENTRAL SERVICES STATE ENGINEER RISK MANAGEMENT FLEET & TRAVEL OBLIGATION RECOVERY CENTER

OFFICE OF THE STATE ENGINEER STACY WATERS, PE - STATE ENGINEER

PROCEDURES FOR CONSTRUCTION MANAGER AT RISK

Section 1. Purpose
In order to comply with SDCL 5-18B-44, the state shall select construction management firms to provide construction management at risk services in accordance with the following procedures.

Section 2. Definitions

MINNESOTA **CITIES** magazine

Home News & Publications Publications Minnesota Cities Magazine Nov-Dec 2022
Cities Are Now Authorized to Use Construction Manager at Risk Process

Get the Full Issue

Back to the Nov-Dec 2022 Issue

Cities Are Now Authorized to Use Construction Manager at Risk Process

Business Record

NEWS BY INDUSTRY SPECIALTY PUBLICATIONS EVENTS

Iowa now allows 'construction manager at risk' delivery method for Iowa public projects

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Compliance Concerns with CMAR


 Alabama Political Reporter

Bill To Overturn Public Works Bid Law Moves Forward

By Bill BrittAlabama Political Reporter MONTGOMERY—What do big money, big construction and no-bid public works projects have in common?

May 13, 2015



 Hartford Courant

CT auditors criticize Port Authority's contracting process

CT auditors also noted that Kiewit's dual role as construction manager and a subcontractor created other problems.

Aug 4, 2023



Compliance Concerns with CMAR



Conflicts of Interest – 2 CFR 200.318(c)



Responsible Contractors – 2 CFR 200.318(h)



Full and Open Competition – 2 CFR 200.319



Applicable Requirements for Procurement – 2 CFR 200.320



Price as a Selection Factor – 2 CFR 200.320(b)(2)

Compliance Concerns with CMAR – cont'd



Socioeconomic Affirmative Steps – 2 CFR 200.321



Economic Opportunities (Section 3) – 24 CFR Part 75



Cost/Price Analysis for All Projects – 2 CFR 200.324



Independent Cost Estimates for Projects ≥\$250k – 2 CFR 200.324



Required Contract Provisions – 2 CFR 200.327

Shared Savings

Shared Savings The sharing of savings with the Construction Manager on a percentage basis or any other basis is **not permitted**, under the HUD Construction Manager Contractual Agreement. The Construction Manager is compensated through a fee for services and the CM's management obligations require that the CM **generate the maximum savings possible for the Owner**. Additional incentives for the Construction Manager such as shared savings shall not be allowed.

Reference: HUD Hospital Mortgage Insurance Program Construction Guide, Appendix 8

Resources



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HUD Construction Procurement Guidance

- HUD Hospital Mortgage Insurance Program Construction Guide, Appendix 8
<https://www.hud.gov/sites/documents/46151X8HSGH.PDF>
- HUD Exchange Q&A
<https://www.hudexchange.info/faqs/2168/following-a-formal-sealed-bid-advertisement-an-infrastructure-project-had/>

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Other CMAR Resources

- FEMA Compliance with CMAR:
<https://www.fema.gov/fact-sheet/construction-manager-risk-cmar-contracting>
- Newmann and Monson Architects:
<https://neumannmonson.com/blog/construction-manager-at-risk-cmar-federal-projects>
- Department of Transportation FAQ:
<https://www.transit.dot.gov/funding/procurement/third-party-procurement/construction-managers-cm-risk>
- Federal Transit Administration FAQ:
<https://www.transit.dot.gov/funding/procurement/third-party-procurement/construction-managers-cm-risk>

Questions & Discussion

