



## Chapter 5: Procurement

### Overview

This chapter describes the policies and procedures that must be followed when entering into contractual agreements with other entities. Services often procured by Grantees to complete CDBG projects include professional grant administrators, engineers, architects, and construction contractors.

This chapter discusses the requirements, imposed by Federal laws and regulations, in the following sections:

- 5.1 CDBG Procurement Requirements
- 5.2 Overall Procurement Requirements
- 5.3 Economic Opportunities (Section 3)
- 5.4 Conflicts of Interest
- 5.5 Methods of Procurement
- 5.6 Other Procurement Issues
- 5.7 Procurement of Professional Services
- 5.8 Pre-bidding Requirements
- 5.9 Procurement of Construction Services
- 5.10 Contract Development
- 5.11 Contract Requirements
- 5.12 Intergovernmental MOU's and Cooperative Agreements

### Section 5.1 CDBG Procurement Requirements

HCD uses the procurement requirements found in 2 CFR 200.317 for its own procurement under the CDBG and other federal programs. The below requirements found in 2 CFR 200.318-26 apply to the procurement conducted by local jurisdictions participating in the state CDBG and other federal programs.

[2 CFR Part  
200.318](#)



All procurements funded in whole or in part with CDBG funds must comply with the applicable federal requirements found in 2 CFR Part 200. The goal in using these procurement procedures is to achieve maximum open and free competition.

[CDBG Procurement – Federal Requirements and Best Practices Webinar](#)

Each Grantee (and subrecipient) shall adopt and abide by the CDBG Procurement requirements set forth in this chapter, which shall apply only to procurements funded with CDBG dollars, as authorized in 2 CFR 200.318 – 200.324. The CDBG Procurement requirements include:

- A code of conduct to govern the performance of the Grantee's officers, employees or agents in contracting with CDBG funds and to ensure adherence to the conflict of interest and disclosure requirements (outlined in [Chapter 4: Grantee Requirements](#)); and
- A requirement that positive efforts be made to use small, female-owned, Section 3 owned, and businesses owned by people of color; and
- A requirement that contracts be awarded, to the greatest extent feasible, to businesses that provide economic opportunities for low and very low-income persons residing in the project area; and
- A requirement that cost estimate has been determined in advance of contract bidding, per 2 CFR 200.324(a). See Section 8.6 Cost Reasonableness below for more information on this process.

[2 CFR 200.324\(a\)](#)

## Section 5.2 Overall Procurement Requirements

### Environmental Review and Bidding beginning with funding obligations from FY2024 CDBG funds

As stated in [Chapter 3: Environmental Review](#), HUD requires that the environmental review process be completed prior to bidding to allow for an unprejudiced decision about the action and to allow for any modifications or project cancellation based upon the environmental review.

### Excluded Parties

Grantees must not award any contract to any organization that is debarred or suspended or is otherwise excluded from or ineligible for participation in federally assisted programs. This applies to any CDBG-assisted contract at any tier in the process. Documentation proving verification of contractor eligibility will be checked at monitoring.



- Prior to contract execution, the Grantee must check the organizations name against the federal System for Award Management (SAM). [System for Award Management \(SAM\)](#)
- The Grantee must document that the organization (including all subrecipients, contractors, and subcontractors) are not excluded from participating in federal contracts. Documentation includes:
  - Screenshots of Active status for SAM.gov registered entities.
  - Screenshots showing entities with SAM.gov issued Unique Entity Identifier (UEI) are not listed as debarred.
  - Signed certification by entity that they are not excluded from participation in federal contracting. (See sample language in [Appendix 5.8](#))

The General Services Administration has released a YouTube video with detailed instructions on searching Exclusions on SAM.gov.

[GSA Searching Exclusions on SAM.gov](#)

## Minority Business Enterprises/Women Business Enterprises (MBE/WBE)

### **Background**

The regulations at 2 CFR Part 200.321 requires Grantees to take affirmative action to contract with small and minority-owned firms and women-owned business enterprises. HCD does not require set asides or participation quotas, but Grantees are expected to make special efforts to award contracts to MBE and WBE firms.

[2 CFR 200.321](#)

### **Requirements**

The Grantee must make good faith efforts to see that Minority Businesses and Women Business Enterprises are provided opportunities as a result of Small Cities funding. Grantees are expected to solicit MBE/WBE businesses utilizing CDBG funds when possible. Grantees may be subject to more stringent requirements when soliciting disadvantaged businesses based on state or local law and funding sources.

### **Suggested Outreach**

It is the Grantee's job to ensure the MBE/WBE firms are notified of any contracts ready for bid. Other specific measures a Grantee may take to meet M/WBE goals include:

- Assuring that small businesses and MBE/WBEs are solicited whenever they are potential sources.
- Including MBE and WBE firms on solicitation lists and sending them an Invitation to Bid.
- When economically feasible, dividing total requirements into smaller tasks or



quantities so as to permit maximum participation by small businesses and MBE/WBEs.

- Where the requirements permit, establishing delivery schedules which will encourage participation by small businesses and MBE/WBEs.
- Provide support mechanisms such as webinars and Q&A sessions.
- Require the prime contractor to take the above affirmative steps when procuring subcontracts.
- Setting aside a percentage of CDBG funds to be awarded to MBE/WBEs.
- Including MBE/WBE criteria with additional points in selection criteria for professional services procurement.

**NOTE: Economic equity in the procurement realm means engaging a new and more diverse set of vendors and contractors. For more information about addressing barriers to participation for MBE/WBE entities see Appendix B: Equity and Belonging Toolkit.**

## Section 5.3 Economic Opportunities (Section 3)

### Background

Section 3 of the Housing and Urban Development Act of 1968, as amended, ("Section 3") requires that economic opportunities generated by certain U.S. Department of Housing and Urban Development (HUD) financial assistance for housing and community development programs be directed to low and very low-income persons. The priority of assistance should be to those who are recipients of government assistance for housing, and business concerns which provide economic opportunities to low and very low-income persons.

The Section 3 program was created to ensure that persons living in communities where HUD-assisted programs were being funded could economically benefit from the resources being spent. This would improve the overall socioeconomic condition of not only the community, but also the low and very low-income residents that reside within the neighborhoods.

The implementing regulation for Section 3 can be found at 24 CFR Part 75.

[24 CFR Part 75](#)

### Applicability

Whenever any portion of CDBG funding is invested into projects involving housing construction, demolition or rehabilitation, commercial/private improvements for economic development, or other public construction (e.g., roads, sewers, community



centers, and public facilities), the requirements of Section 3 may apply, based on the guidance provided below.

Section 3 requirements that apply to CDBG funded Projects:

Section 3 applies to all projects that receive \$200,000 or more in CDBG, or other HUD assistance, including projects that are financed in conjunction with state, local or private matching or leveraged funds, provided that the Section 3 monetary threshold requirements are met. In particular:

- Section 3 applies to recipients of CDBG funding, as well as its subrecipients, contractors and sub-contractors; and
- Professional service contract labor hours (construction contract oversight, engineering, architectural, environmental and property evaluation, construction progress and construction draw inspection and prevailing wage labor compliance) are not required to be reported. However, if professional services are completed by Section 3 workers their hours can be used to meet established benchmarks
- If a contract covers both professional services and other work and the recipient or contractor or subcontractor chooses not to report labor hours from professional services, the labor hours under the contract that are not from professional services must still be reported.

The regulations should not be construed to mean that recipients are required to hire Section 3 Workers or award contracts to Section 3 Business Concerns other than what is needed to complete covered projects and activities. If the expenditure of funding for an otherwise covered project and activity does not result in new employment, contracting, or training opportunities, reporting is still required.

### Section 3 Benchmarks

HUD has established Section 3 benchmarks for Section 3 workers and Targeted Section 3 workers through a document published in the Federal Register. Current benchmarks for projects meeting the threshold are:

[24 CFR Part 75.13](#)

- 25% of all labor hours are performed by Section 3 Workers
- 5% of all labor hours are performed by Targeted Section 3 Workers

HUD will update the benchmarks through a document published in the Federal Register, subject to public comment, not less frequently than once every 3 years.

HCD's Grantees, developers and contractors will be required, to the greatest extent feasible, meet the current benchmarks published by HUD at the time of contract with HCD.

[HUD Section 3 Benchmark Notice](#)

Please ensure you are using the current benchmark when setting up a project.



More information on Section 3 can be found on the [HUD Section 3 Publications and Regulations](#) website.

## Definitions

### **Section 3 Worker**

HUD defines a Section 3 worker as a worker that meets one of the following requirements:

- The worker's income is below the income limit of a household of 1 (no matter the worker's family size) established by HUD, based on the workers place of residence.
- The worker is employed by a Section 3 business concern.
- The worker is a YouthBuild participant

[Appendix 5-1: Section 3 Worker and Targeted Worker Certification Form](#)

### **Targeted Section 3 Worker**

A Targeted Section 3 worker includes any worker who is employed by a Section 3 business concern; or a Section 3 worker who is:

- Living within the service area or neighborhood of the project; or
- A YouthBuild participant.

### **Section 3 Business**

To be considered a Section 3 Business Concern a business must meet one of the following criteria:

- At least 51% or more owned by Section 3 Workers, or
- Over Seventy-five percent (75%) of the labor hours performed by the business are performed by low- or very low-income persons, or
- It is a business at least 51 percent owned by current public housing residents or residents who currently live in Section 8-assisted housing.

[Appendix 5-2: Section 3 Business Certification Form](#)

Businesses seeking Section 3 preference shall certify or submit evidence verifying that they meet the definitions provided above. Grantees are allowed discretion to determine the required documentation to verify a Section 3 Business. At the time of monitoring, HCD will check that documentation has been received and is in the file, not for a specific type of documentation.

## Responsibilities

A local government that receives CDBG funding has the responsibility to comply with



Section 3 requirements. The Grantee is also required to “ensure compliance” of their contractors and sub-contractors.

This responsibility includes:

1. Notifying Section 3 Workers and business concerns about jobs and contracts generated by Section 3 covered assistance so that they may submit bids/proposals for available contracts and job openings with the Grantee;
2. Notify potential contractors of their responsibilities under Section 3;
3. Include Section 3 language in all applicable contracts;
4. Require subrecipients, contractors, and subcontractors to meet the requirements of §75.19, regardless of whether Section 3 language is included in recipient or subrecipient agreements, program regulatory agreements, or contracts.
5. Collect information to document compliance with the HUD benchmarks listed above (HCD has provided [Appendix 5.1](#), [Appendix 5.2](#) and [Tool 5.10](#) and [Tool 5.11](#) to assist Grantees in documentation collection).
6. Document all qualitative efforts by the Grantee and all contractors and subcontractors.
7. Respond to Section 3 complaints; and
8. Submit required Section 3 reporting as a component of the final close-out report in eCivis.

## Documentation

The status of workers on the Section 3 project should be documented by one of the following methods:

1. **Worker income self-certification:** the use of certification forms provided to contractors and subcontractors working on the project. Each worker on the project must complete the provided certification form (or equivalent) to be kept in the grant record for reference when tracking and aggregating labor hours worked.
2. **Worker is employed by a Section 3 Business Concern:** The contractor or subcontractor is able to provide documentation that it qualifies as a Section 3 Business Concern. All employees of a qualifying business will be considered Section 3 workers.
3. **Worker is a Youthbuild participant:** Verifiable documentation must be provided by the worker or the employer showing the worker is participating in a Youthbuild program.
4. **Employer wage record:** The employer is able to provide certified documentation that the worker's income from that employer is below the income limit for the workers county of residence when based on an employer's calculation of what the worker's wage rate would translate to if annualized on a full-time basis.





## Best Practices

- Publication of opportunities in newsletters or other local newspapers, including those targeted to Limited English Proficient populations.
- Use of signage at the project site and flyers posted in the project area.
- Notification of potential training or employment opportunities to neighborhood and nonprofit groups, including Public Housing Authorities, servicing low- and very low-income persons.
- Communicate opportunities to employment agencies and career centers.
- Have contractors identify all current Section 3 worker and Targeted Section 3 workers anticipated to work on the project;
- Provide assistance to contractors in their search for potential qualified Section 3 workers and targeted Section 3 workers that can perform the duties required under the contract;
- Encourage the use of HUD's Opportunity Portal to search for Section 3 workers;
- Provide assistance to contractors in their search for potential Section 3 business concerns qualified for the contract; and
- Review the benchmarks with contractors and subcontractors to ensure that requirements are understood. It is not intended for contractors and subcontractors to terminate existing employees but to the greatest extent feasible provide opportunities to low- and very low-income individuals and businesses who qualify for the work necessary to be performed.

## Qualitative Efforts

Grantees with covered projects funded after November 30, 2020 are required to meet current HUD Section 3 Worker and Targeted Worker benchmarks prior to project closeout with HCD. Grantees who do not meet the benchmarks will be required to document all qualitative efforts undertaken, including those of their contractors, during the course of the CDBG project prior to closeout.

Although Grantees are only required to report qualitative efforts if Section 3 Benchmarks are not met, Grantees should begin documenting qualitative efforts at the beginning of a CDBG funded project. This will: 1) increase the likelihood of ensuring Section 3 benchmarks are met, and 2) reduce unnecessary delay at the time of closeout if benchmarks are not met. Such qualitative efforts may include, but are not limited to the following:

- Engaged in outreach efforts to generate job applicants who are Targeted Section 3 workers.
- Provided training or apprenticeship opportunities.





- Provided technical assistance to help Section 3 workers compete for jobs (e.g., resume assistance, coaching).
- Provided or connected Section 3 workers with assistance in seeking employment including: drafting resumes, preparing for interviews, and finding job opportunities connecting residents to job placement services.
- Held one or more job fairs.
- Provided or referred Section 3 workers to services supporting work readiness and retention (e.g., work readiness activities, interview clothing, test fees, transportation, childcare).
- Provided assistance to apply for/or attend community college, a four-year educational institution, or vocational/technical training. Assisted Section 3 workers to obtain financial literacy training and/or coaching.
- Engaged in outreach efforts to identify and secure bids from Section 3 business concerns. Provided technical assistance to help Section 3 business concerns understand and bid on contracts.
- Divided contracts into smaller jobs to facilitate participation by Section 3 business concerns.
- Provided bonding assistance, guaranties, or other efforts to support viable bids from Section 3 business concerns.
- Promoted use of business registries designed to create opportunities for disadvantaged and small businesses.
- Outreach, engagement, or referrals with the state one-stop system as defined in Section 121(e)(2) of the Workforce Innovation and Opportunity Act

More information and useful tools for implementing Section 3 requirements can be found on the CDBG Grants Management Manual webpage and [HUD's Section 3 Publications and Regulations webpage](#).

**CAUTION: Compliance with Section 3 does not supersede other applicable laws and regulations. Section 3 regulations specifically state that the requirements shall be consistent with federal, state, and local laws and regulations. Therefore, the federal procurement standards cannot be violated to comply with Section 3.**

## Section 5.4 Conflicts of Interest

### Background

Nothing is more detrimental to a successful procurement operation than to have the



relationship between the Grantee and the contractor questioned regarding real or apparent conflicts of interest. Conflict of interest issues deal with the relationship between the parties and financial gain. Those that could be judged to have conflicts include local officials, employees, consultants, family members, and business partners. Also, see [Chapter 4: Grantee Requirements](#) for information on conflict of interest.

## Section 5.5 Methods of Procurement

Grantees must select from one of five methods of procurement based on the type of products and/or services being procured and their cost. Grantees must ensure that they are following the stricter of the federal, state or local requirement. Many Grantees will be required to utilize a lower threshold for procurement types than the federal requirements at 2 CFR 200.318.

[2 CFR 200.318](#)  
[California Uniform Public Construction Cost Accounting Act \(CUPCCAA\)](#)

### Micro Purchase Procedures

Procurement by micro-purchase is the acquisition of supplies and services, the aggregate dollar amount of which does not exceed the micro-purchase threshold, currently defined as \$10,000. To the extent practicable, the municipality must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the municipality considers the price to be reasonable. Micro-purchases require need and rationale documentation, cost reasonableness documentation, and documentation of best efforts to use MBE/WBE firms when possible.

[2 CFR 200.320\(a\)\(1\)](#)  
[48 CFR 2.101 "Micro purchase threshold"](#)

### Small Purchase Procedures

Small purchase procedures entail a relatively simple and informal process that can be used when the cost of **supplies** or **services**, in the aggregate, do not exceed the current simplified acquisition threshold, currently defined as \$250,000. Under this process, the Grantee must:

[2 CFR 200.320\(a\)\(2\)](#)  
[48 CFR 2.101 "Simplified acquisition threshold"](#)

- Obtain price or rate quotations either by phone or in writing from an adequate number of qualified sources (at least two sources).
- For construction projects and services, complete an Independent Cost Estimate/Cost Analysis
- Maintain documentation regarding the businesses contacted and the prices quoted.



- Make the award to the lowest responsive and responsible source.
- If applicable, prepare and sign a contract formalizing the scope of work and the terms of compensation.
- Maintain need and rationale documentation, cost reasonableness documentation, and documentation of best efforts to use MBE/WBE firms when possible.

## Competitive Sealed Bid

The Competitive Sealed Bid method is the required method for procuring CDBG-funded construction work with a total cost of \$250,000 or more. (See [Chapter 7: Labor Standards](#) for detailed information on preparing construction bid documents. See [Appendix E: Housing Activities](#) for detailed information on procuring construction services for single-family rehabilitation.) The following requirements apply to the competitive sealed bid procurement process:

[2 CFR 200.320\(b\)\(1\)](#)

- Competitive sealed bids are initiated by publishing an Invitation for Bid (IFB).
- The IFB must be advertised in the newspaper of daily general circulation at least one time not less than fourteen days before the date set for the opening of bids. The Grantee may also be required to publish in non-English newspapers based on their Language Access Plan.
- The IFB should be distributed to all relevant trade publications (construction services).
- The IFB must be advertised in as wide a geographic area as is necessary to ensure enough bids are received to be deemed a competitive process. For example, it may need to be posted in multiple newspapers are trade publications beyond the immediate locality of the work to be completed. The Grantee may also be required to publish in non-English newspapers based on their Language Access Plan.
- The IFB must also be distributed to MBE/WBE businesses listed on the Supplier Clearinghouse providing related services.
- The IFB will include specifications that define the services or items required in order for the bidder to properly respond.
- [2 CFR Part 200.326](#) requires a bid guarantee from each bidder equal to at a minimum of (5%) of the bid price. California law requires a bid guarantee of no less than 10%. This guarantee serves as an assurance that the chosen contractor will execute the contract within the time specified.

[The Supplier Clearinghouse](#)

[Cal. Public Contract Code § 20483](#)



- Bid guarantees can be in the form of a Bond or Cashier's check that are returned to the unsuccessful bidders.
- All bids must be publicly opened at the time and place stated in the Invitation for Bids.
- The bids must be tabulated and reviewed.
- The contract is awarded to the lowest, responsible and responsive bidder.
- Preparation and signing of a contract formalizing a scope of work and the terms of compensation is required.
  - The contract must be a firm-fixed-price contract (lump sum or unit price with a maximum amount identified).
- If alternates (additives or deducts) will be taken, the bid documents must be clear as to the priority order in which those alternates will be applied.

## Competitive Negotiation

This method of procurement is used if the selection can be based on factors other than cost, such as experience and capacity. Procurement of architectural, engineering, planning and administrative services fall under this category. Grantees shall seek permission from HCD prior to using competitive negotiation for contracts other than architectural, engineering, planning or administrative services. Only fixed-price contracts or hourly contracts with a not-to-exceed figure may be awarded.

**Caution: Cost plus a percentage of cost contracts are not acceptable. This means that standard architectural and engineering contracts cannot be used without changing the fee structure that is based on a percentage of costs.**

Competitive negotiations are initiated by publishing a Request for Proposals (RFP) or Request for Qualifications (RFQ). The RFP is used when price is a factor in selection; the RFQ is used when price is considered after selections (RFQ may ONLY be used for architectural or engineering services). In both the RFP and RFQ, all significant evaluation factors and their relative importance should be clearly stated. In addition, the Grantee should provide or make available any materials such as reports, maps, and site plans to assist interested firms in preparing responsible submissions.

The following requirements apply to the competitive negotiation procurement process:

- The RFP or RFQ must be advertised in a newspaper of daily general circulation in the area at least one time not less than fourteen days before the date set for the opening of proposals. The Grantee may also be required to publish in non-English newspapers based on their Language Access Plan.



- The RFP must be advertised in as wide a geographic area as is needed in order to ensure enough bids are received to be deemed a competitive process. For example, it may need to be posted in multiple newspapers and trade publications beyond the immediate locality of the work to be completed.
- If an RFP is used, it should specify the scope of services to be provided and the type of contract to be used: fixed price, or an hourly rate with a not to exceed figure.
- An RFP should also:
  - Specify that cost and pricing data is required to support the proposed cost;
  - State anticipated start and completion dates; and
  - List evaluation criteria that will be used in ranking proposals.
- All proposals received must be reviewed and ranked according to the selection criteria, and the review must be documented in writing. [Appendix 5-5](#) provides a sample Professional Services Evaluation.
- For both RFPs and RFQs, selection is made on the basis of the most responsible offer or price with consideration given to the factors identified in the Request for Proposal or Qualifications.
- For RFQs, an invitation is then made to one or more respondents to negotiate a price or fee. Document the reason the firm is chosen and that the price established is reasonable.
- The Grantee must maintain documentation for all services and reasons for selection.
- The Grantee must send an award letter to the selected contractor and document the file with it.
- The Grantee must prepare and sign a contract formalizing a scope of work and the terms of compensation.
- The Grantee should promptly notify unsuccessful bidders in writing and document the file with the rejection letters.

**NOTE: Consultants must not assist the Grantee with procurement if they intend to respond to the solicitation for services.**

## Non-Competitive Negotiations

Non-competitive negotiation is procurement through solicitation of a proposal from one source and is often referred to as sole source procurement. A contract may be awarded by noncompetitive negotiation **only** when the award is infeasible under small purchase procedures, competitive sealed bids, or competitive negotiations and one of the



following circumstances applies:

- There is some public emergency that will not permit delay resulting from competitive solicitation (the Grantee must declare an emergency as authorized by law); or
- The results of the competitive negotiations are inadequate; or
- The product or service is available only from a single source.

**Caution:** The use of the non-competitive negotiation procurement method must be authorized in advance by HCD. Additionally, Grantees must have justification that meets federal standards for using the non-competitive negotiation process.

The following requirements apply to the non-competitive negotiation procurement process:

- Negotiations must be conducted with the selected company regarding a scope of work and price; and
- Preparation and signing of a contract formalizing a scope of work and the terms of compensation is required.

## Section 5.6 Other Procurement Issues

### Buy America, Build America Act

The Build America, Buy America Act (BABA) requires that all iron, steel, manufactured products, and construction materials used for federally funded infrastructure projects are produced in the United States, unless otherwise exempt or subject to an approved waiver. This requirement is known as the “Buy America Preference (BAP)” and the specific requirements are codified in 2 CFR § 184.

[2 CFR Part 184](#)

### **Products Covered Under the BABA Act**

**Iron and Steel:** Items that consist completely or predominantly of iron, steel, or a combination of both. “Predominantly” means the cost of the iron and steel content exceeds 50% of the total cost of all the item’s components. All manufacturing processes, starting from the initial melting stage and continuing through the application of coatings, must occur in the United States.

**Construction Materials:** Articles, materials, or supplies used for construction activities that consist of only one of the items described below. For the purposes of the HUD Phased Implementation Waiver timeline described below, construction materials are divided into two categories: specifically listed construction materials and not listed construction materials. Specifically Listed Construction Materials: Items include (1) non-



ferrous metals; (2) lumber; and (3) plastic- and polymer based composite building materials, pipe, and tube. Not Listed Construction Materials: Items include (1) all other plastic- and polymer-based materials (such as polymers used in fiber optic cables), (2) glass, (3) fiber optic cable, (4) optical fiber, (5) engineered wood, and (6) drywall. Construction Material Standards (2 CFR 184.6) All manufacturing processes for the construction material must occur in the United States.

Manufactured Products: Manufactured products include articles, materials, or supplies that have either been: 1. Processed into a specific form or shape, or 2. Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. A manufactured product may include components that are construction materials or iron and steel products unless the manufactured product also meets the definition of iron and steel or construction materials. In such instances, the product should be re-categorized in the appropriate category. Manufactured products must meet two production requirements. First, the final product must be manufactured in the United States. Second, at least 55% of the cost of the components making up the manufactured product must be associated with components that were mined, produced, or manufactured in the United States.

Covered Product	Obligation Date
<b>Iron and Steel</b>	The BAP applies to the purchase of iron and steel for infrastructure projects beginning with funding obligations from FY2023 CDBG funds.
<b>Specifically Listed Construction Materials</b> (non-ferrous metals; lumber; and plastic-and polymer-based composite building materials, pipe, and tube)	The BAP will apply to the purchase of specifically listed construction materials beginning with funding obligations from FY2024 CDBG funds, as well as iron and steel.
<b>Not Listed Construction Materials</b> (all other plastic – and polymer-based products, glass, fiber optic cable, optical fiber, engineered wood, and drywall)  <b>Manufactured Products</b>	The BAP will apply to the purchase of not listed construction materials and manufactured products beginning with funding obligations from FY2025 CDBG funds, as well as specifically listed construction materials, iron, and steel.

**BABA Applicability on CDBG Projects**

The Buy America Preference references that all infrastructure projects are included, an infrastructure project is defined broadly as any project that includes Construction, Maintenance, Alteration, or Repair (applies even if the primary purpose is not infrastructure).





**Examples of CDBG-funded activities that may be subject to the BAP:**

- Rehabilitation of buildings and real property
- Construction of public facilities and improvements, such as streets, sidewalks, neighborhood centers, and the conversion of buildings for eligible purposes
- Utility installation or improvements
- Water systems (drinking water and wastewater)

**Examples of CDBG-funded activities that may NOT be subject to the BAP:**

- Acquisition of real property
- Relocation and demolition
- Public services
- Shelter or public facility operating expenses

**General Waivers**

HUD issued a public interest waiver for exigent circumstances, “Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance”.

[Public Interest Waiver](#)

This waiver applies when there is an urgent need by a CPD grantee to immediately complete an infrastructure project because of a threat to life, safety, or property of residents and the community. (Effective until November 23, 2027, or such shorter time as HUD may announce via Notice.)

HUD also issued a public interest de minimis, small grants, and minor components waiver titled “Public Interest De Minimis and Small Grants Waiver of Build America, Buy America Provisions as Applied to Certain Recipients of HUD Federal Financial Assistance”.

[HUD De Minimis and Small Grants Waiver](#)

This waives the BAP for all infrastructure projects whose total cost (from all funding sources) is equal to or less than the simplified acquisition threshold at 2 CFR 200.1 which is currently \$250,000. This Notice also waives the application of the BAP for a de minimis portion of an infrastructure project, meaning a cumulative total of no more than five percent of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million. (Effective until November 23, 2027, or such shorter time as HUD may announce via Notice.)

To facilitate a smooth transition to the BAP requirements, HUD established a Phased Implementation Waiver for its programs based on the date when funds are obligated to the State. All CDBG Formula Grants and Recovery

[HUD Phased Implementation](#)

Housing Program Grants funded in FY 2024 that meet BABA requirements and involve



the use of Iron and Steel and Construction materials listed (i.e.(1) non-ferrous metals; (2) lumber; and (3) plastic- and polymer based composite building materials, pipe, and tube). Starting in FY 2025, all projects that meet BABA requirements and involve construction materials not listed and manufactured products will be applicable to BAP.

### **Certifications**

The prime contractor and all subcontractors must comply with the requirements of the BABA Act, 41 USC 8301 note, and all applicable rules and notices, as may be amended, as applicable to the Community Development Block Grant (CDBG) and Recovery Housing Program (RHP) infrastructure projects. Pursuant to the U.S. Department of Housing and Urban Development’s (HUD’s) notice, “Public Interest Phased Implementation Waiver for FY2022 and 2023 of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance” (88 FR 17001), any funds obligated by HUD on or after the applicable listed effective dates, are subject to BABA requirements, unless excepted by a waiver.

A “**Buy America Certification**” (Appendix 5-9) **must be submitted with the bid package**. Certifications will need to be submitted to HCD with the closeout package at the time of closeout.

[Appendix 5-9: Buy America Certification](#)

**NOTE:** If it is determined that the project meets the requirements for a General Waiver, the Grantee must submit written notification to HCD that justifies the decision for the Department’s review and approval.

### **HUD Project Specific Waivers**

Project/product-specific waivers are available on a **limited, case-by-case basis**, after HCD and HUD’s review, a public comment period, and final approval from the Office of Management and Budget’s Made In America Office (MIAO). A waiver should **ONLY** be requested from HCD if an extenuating circumstance occurs that meets one of the following criteria: 1. Public interest: Adhering to the BAP would be inconsistent with the public interest. 2. Non-availability: Covered materials are not produced in the USA in sufficient and reasonably available quantities or of a satisfactory quality. 3. Unreasonable cost: Inclusion of domestically produced covered materials will increase the cost of the overall project by more than 25 percent. If more than one Federal agency is funding an infrastructure project, project-specific waivers will require coordination among those Federal agencies prior to a determination by the MIAO.

**NOTE: HCD will only submit waiver requests to HUD with substantial documentation that meets one or more of the above-listed criteria.**



## Methods of Determining Cost Reasonableness

2 CFR 200.324 requires Grantees to perform a cost or price analysis in connection with every procurement action more than the Small Purchase Threshold including contract modifications.

[2 CFR 200.324\(a\)](#)

The method and degree of analysis is dependent on the facts surrounding the procurement situation, but as a starting point, the Grantee must make an Independent Cost Estimate (ICE). **The ICE must be completed PRIOR to issuing the solicitation.**

### Independent Cost Estimates

An Independent Cost Estimate (ICE) is required for each procurement action. The ICE is an estimate of costs of the goods/services to be acquired under a project, contract, or modification. The ICE is used for project budgeting, to determine the procurement type, and as a “yardstick” in determining the cost reasonableness of the goods/services procured. **The ICE must be completed PRIOR to issuing the solicitation.**

[Appendix 5-3:  
Independent Cost  
Estimates](#)

### Price Analysis Method

A Price Analysis is a simple comparison of prices quoted by suppliers, contractors, etc., to each other and to the ICE. This method is typically used for small purchases, sealed bids, and simple competitive proposals when only the price paid is the determining factor and fair competition is present. Usually three (3) or more quotes is adequate competition. Once the Grantee determines that the prices quoted or offered in response to the solicitation are reasonable, the Grantee may award the solicitation. Price analysis can be compared in the following ways:

#### **Small Purchase Procedures are assessed by comparing the following:**

- Bids to each other,
- Bids to the ICE,
- Bids to other sources of pricing such as previous purchases, catalogs or ads,
- For purchases under \$2,000 need only compare quotes received.

#### **Sealed Bids are assessed by comparing the following:**

- Bids to the ICE if adequate offers have been received (3 or more offers)
- If insufficient competition, (less than 3 offers received), and the Grantee has received approval from HCD to proceed:
  - Prior historical prices (consider inflation)
  - Published catalogs
  - Third-party estimate



- If only a single bid is received, and the Grantee has received approval from HCD to proceed, the Grantee must use the Cost Analysis Method below.

**Simple Competitive Proposal Procedures are assessed by comparing the following:**

- Comparing proposal responses to each other,
- Proposals to the ICE

**Cost Analysis Method**

The Cost Analysis Method is a detailed evaluation of the separate elements that make up the total proposed cost or price. Each element of cost is reviewed and evaluated to determine its reasonableness, allocability and allowability. Reasonableness refers to market prices or other data. Allocability refers to distributing the cost proportionately to each category, and allowability refers to federal cost eligibility. This method is used mostly for complex competitive proposals and for noncompetitive proposals (including when only a single bid is received during the Sealed Bid process). The Grantee must negotiate profit as a separate element of the price in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

This method is required for the following circumstances:

- Price is not the determining factor for the award,
- There is no competition in the marketplace,
- There is inadequate competition and alternative means cannot be used, e.g., comparison to prior prices for the same or similar items/services or to competitive price lists/indices or to professional estimate,
- There is a contract modification that changes the scope and impacts price, or
- Prices vary widely from the ICE.



## Cost Analysis vs. Price Analysis

Factor	Cost Analysis	Price Analysis
Type of Procurement	<ul style="list-style-type: none"> <li>• RFQ/RFP</li> <li>• Sole Source/Noncompetitive</li> <li>• All Contract Modifications</li> <li>• Small Purchase</li> <li>• Factors other than Price Determining Choice of Vendor/Contractor</li> </ul>	<ul style="list-style-type: none"> <li>• Sealed Bid</li> <li>• Micro Purchase</li> <li>• Small Purchase</li> </ul>
Items Being Procured	<ul style="list-style-type: none"> <li>• Professional Services</li> <li>• A/E Consultant Services</li> <li>• Labor and Materials</li> </ul>	<ul style="list-style-type: none"> <li>• Supplies</li> <li>• Equipment</li> <li>• Construction</li> </ul>
Basis for Estimate	<ul style="list-style-type: none"> <li>• Previous proposals</li> <li>• Previous purchases</li> <li>• Estimating software</li> <li>• Federal rates</li> </ul>	<ul style="list-style-type: none"> <li>• Published prices for commercial products/services</li> <li>• Price set by law/regulation</li> <li>• Previous proposals and purchases</li> <li>• Federal rates</li> </ul>
Approach	<ul style="list-style-type: none"> <li>• <b><u>Individual line items</u></b> of a proposal or bid is reviewed and compared to the estimate, the market rate, and other quotes provided</li> <li>• <b><u>Review and analysis of profit*</u></b></li> </ul>	<ul style="list-style-type: none"> <li>• Overall or <b><u>total price of the quote</u></b> is reviewed and compared to the estimate, the market rate, and other quotes provided</li> </ul>

\* [2 CFR 200.324\(b\)](#)

### Over Budget Bids

Despite careful cost analyses and safeguards, there are occasions when all bids will exceed available project funds. This section governs the process for dealing with such a situation.

#### **Options**

The following options are available for awarding a bid following an overage:



1. Obtaining additional funds from another source and continuing with the original IFB.
2. Rejecting all bids, revising project scope and bid specifications, and issuing a revised IFB (competitive sealed bid) open to the entire public.

## Low Bids and Change Orders

To maintain the integrity of the bidding process, the change order process must only be used when (1) the change order work fits within the scope of the original project and (2) the reason for the change is something that was unanticipated or unforeseen at the time the original contract was awarded.

Change orders cannot be used for fundamental redesign of a project and cannot be used to “fix” problems in the project specifications if the municipality was aware of the problems before awarding the contract. (If your specifications have problems, it’s better to issue an addendum—if the problems were discovered before bids are due—or to re-bid the contract.) Change orders also cannot be used to take advantage of a good deal on a construction project—in other words, if you’ve awarded a contract for 500 linear feet of street paving work, you can’t then use a change order to double the number of linear feet included in the contract just because the successful bidder gave you a really great price on the original contract.

Documentation in the Grantee’s file with every change order must include:

- Documentation of Change Order Approval process as outlined in the Grantee’s Procurement Policies and Procedures
- Supporting justification which describes why the change is necessary;
- Itemized cost/unit price/quantities;
- A cost and price analysis (usually conducted by an engineer) that determines the costs are reasonable;
- Any revised plans and specifications; and
- Certification that no acquisition is necessary to complete the change order work.

The architect/engineer or project inspector usually prepares change orders; however, the Grantee must approve and authorize change orders before they are executed. The proposed change should also be verified and/or recommended for approval by the project engineer, project manager, architect or other technical support personnel. The Grantee should compare such change orders to the CDBG construction budget prior to approval.

If a change order will result in a significant change in the scope of work, a new CDBG activity, or a change in location, beneficiaries, or how the project will be carried out, a contract amendment through the eCivis Grants Network will be required. Please see the eCivis External User Manual for assistance completing this step in the Grants Network.



If the change involves a new activity not previously included in the original bid and will result in a significant cost change, then the new scope may have to be re-bid. Please contact your CDBG Program Representative for a determination. Factors to be considered include whether the change order will exceed the project budget, if the service area will change and affect national objective compliance, if the original intent of the project will be altered, the NEPA scope of work is changed, etc.

## Bid Alternates

Grantees are encouraged to use add and deductible bid alternates for inclusion unless doing so is not practical or not feasible. When deductible alternates are requested, the bid document issued by the Grantee must specify the method and order in which alternates will be applied in determining the low bid. Drawings must also clearly show the alternates.

For example, a project might involve the construction of a new community center that includes a portico and a small out-building to accommodate future expansion. The bidding instructions would indicate which items are to be bid as deductible alternates and the order of priority in which they are to be deducted. In this example, assume the portico and out-building are to be bid as deductible alternates, and the order of priority for deducting is first, the out-building, and second, the portico. The Grantee would go back through each bid (not just the lowest one) and first subtract the amount each bidder estimated for the out-building from the total amount she/he bid for the project. The Grantee would then check to see if any of the adjusted bids are within budget. If so, the Grantee can award the bid to the bidder with the lowest adjusted bid. If not, the Grantee would repeat the process, this time deducting the cost of the portico from the adjusted bid of each bidder. Depending on the number of deductible alternates specified, the process can be repeated until one of the adjusted bids is within budget.

It is imperative that the Grantee's IFB explicitly state the method of award, including use of any deductible alternates. Failure to be clear and precise on the procedures that will be utilized can cause confusion or disputes among bidders that could, at the very least, cause project delays.

## Grant Administration Services

### **By Contractors/Consultants**

Professional grant administrators are often procured by Grantees to undertake CDBG projects. Note that any person contracted to perform grant administration services to be paid with grant funds, must be procured following CDBG procurement requirements.

### **By Grantee Staff**

A Grantee may instead choose to perform some or all of these services with their own staff members and can be reimbursed for the time an employee spends working on the CDBG project. It is important to note that time sheets must demonstrate the time spent





solely on the CDBG project. This method requires source documentation of all costs at time of monitoring.

## Section 5.7 Procurement of Professional Services

This section describes steps that are required to help ensure Grantees comply with federal and state procurement requirements in the procurement of professional services.

### **Step 1: Prepare Independent Cost Estimate (ICE)**

The Grantee must prepare an independent cost estimate before soliciting proposals. When developing the ICE for a professional services procurement, the Grantee may use:

- Price last paid for similar procurement
- Comparison of previous bid prices
- Review of prices for similar scope of work by other municipalities
- Detailed price analyses

If the Grantee uses an outside source to develop the ICE, they must avoid any conflict of interest and the firm developing the ICE may not bid on the solicitation.

### **Step 2: Prepare the RFP/RFQ**

The Grantee must prepare an RFP or RFQ, as appropriate. The grantee must clearly define the services requested and the factors to be used in the evaluation and selection process. Examples of evaluation criteria are:

- Specialized experience or technical expertise of the firm and its personnel in connection with the type of services to be provided and the complexity of the project.
- Past record of performance on contracts with the locality and other clients, including quality of work, timeliness, cost control, and citizen's complaint resolution in a timely manner.
- Capacity of firm to perform the work within time limitations, taking into consideration the current and planned workload of the firm.
- Familiarity of the firm with the type of problems applicable to the project.
- An evaluation consideration to small, local, minority or female owned firms. These firms may be awarded extra points in order to promote the employment of these firms.

The relative importance of each of these factors should be determined beforehand by



assigning values to each (e.g., experience may be assigned 30 points out of a possible 100 points).

### Step 3: Publish RFP/RFQ

The Grantee must advertise the RFP/RFQ by publishing in local newspaper of daily general circulation. The Grantee may also be required to publish in non-English newspapers based on their Language Access Plan. Additional means of publication (e.g., on the Grantee website) is encouraged to ensure free and open competition.

[Appendix 5-4:  
Sample RFP/ RFQ  
Publication](#)

### Step 4: Solicit Responses

In order to meet the goals of MBE/WBE participation; the Grantee must use the Supplier Clearinghouse to identify and solicit responses from MBE/WBE businesses providing related professional services.

### Step 5: Establish Evaluation Committee

Appoint an evaluation team of knowledgeable members (subrecipient, town council, board of public works members, etc.) and develop an evaluation plan to rank respondents and provide guidance during the selection process. Typically, three to five people make up the Evaluation Committee. At least one of the committee members should be the Chief Elected Official (CEO) or designee. The Grantee should ensure that selected reviewers do not have potential conflicts of interest with any of the firms or individuals being reviewed. An example of a scoring criteria evaluation document is provided as [Appendix 5-5: Sample Professional Services Evaluation](#).

### Step 6: Open Responses

Proposals must be received at the address stated in the legal advertisement, logged in and marked with the date and time received prior to being opened and submitted to the Evaluation Committee for review. Any proposal not received by the date and time stated in the legal advertisement must be returned, unopened to the submitter.

[Appendix 5-5  
Sample Professional  
Services Evaluation](#)

### Step 7: Make Vendor Selection

If interviews are conducted, each member of the Evaluation Committee must complete an Interview Evaluation and Score Sheet for each vendor short listed. Each scorer must use the same scoring and weighting criteria making their best effort to score each proposal fairly and without bias. These documents will be required at monitoring.



Following the Evaluation Committee's review, the vendor whose proposal is determined to be the most advantageous to the project, based upon qualifications, price and other factors may be selected.

**Caution:** Be aware of potential conflicts of interest. Some firms have the capacity to administer projects and design buildings or public facilities systems. It is considered a conflict of interest for the firm in charge of administration to also be in the position to oversee the engineering for a project. There can also be conflicts in the areas of rehab inspection, lead based paint testing, surveying, etc. See Chapter 4, Section 4.7 of this manual for more information on Conflicts of Interest.

### **Step 8: Notify Successful and Unsuccessful Proposer(s)**

The Grantee must notify all successful and unsuccessful vendors, in writing.

### **Step 9: Prepare a Contract:**

Once a firm is chosen and the basis of selection is documented along with the reasonability of cost, it is time to start the preparation of a contract with the successful individual or firm. See Section 5.10: Contract Requirements below for information.

### **Step 10: Execution of Contract(s)**

The Grantee may execute contracts with the successful vendor after they have received Release of Funds from HCD.

## **Section 5.8 Pre-Bidding Requirements**

The first step in effective management of CDBG-funded construction projects is the preparation of a bid package. This requires the writing of the technical bid specification – usually by an architect or engineer on the basis of prepared plans or working drawings. These specifications must provide a clear and accurate description of technical requirements for materials and products and/or services to be provided in the contract. The contract must be consistent with applicable building codes. Additionally, the plans and specifications for non-residential construction must be stamped by an architect or engineer registered in the State of California. While the engineer/architect prepares the technical specifications, the Grant Administrator must determine the applicability of Labor Standards and request the necessary wage decisions.



**NOTE: The environmental review must be completed prior to publishing the bid advertisement. Please refer to [Chapter 3: Environmental Review](#) for more information.**

## Property Acquisition Issues

At this stage of the process, the Grantee must have obtained all lands, rights-of-way, and easements necessary for carrying out the project. All property to be acquired for any activity, funded in whole or in part with CDBG funds, is subject to the Uniform Relocation Assistance and Real Property Acquisitions Policies for Federal and Federally Assisted Programs (42 U.S. Code Chapter 61), also referred to as the Uniform Act or URA. Included in the definition of property, among other things, are rights-of-way and easements. If the construction project involves real property acquisition, the Grantee should contact its CDBG Program Representative very early and make sure the acquisition is done according to the provisions of the Uniform Act. See [Chapter 8: Acquisition](#) for additional information.

## Section 5.9 Procurement of Construction Services

This section describes certain key steps that are required to help ensure Grantees comply with federal and state procurement requirements when procuring construction services with a total cost of \$250,000 or more:

### **Step 1: Prepare Independent Cost Estimate (ICE)**

The Grantee must prepare an independent cost estimate before soliciting bids. For construction projects, the budget estimate prepared by the architect or engineer is generally considered sufficient documentation of the estimated cost for the construction services to be procured. Grantees should be aware of any significant time lapse between the creation of the cost estimate and the procurement solicitation.

### **Step 2: Obtain the Appropriate Wage Decision**

Federal regulations require that the Davis-Bacon Wage Determination in effect on the day of bid opening is the wage decision that must be used for all construction on federally funded projects. When a modification is published less than 10 days before the opening of bids, and the Grantee finds that there is not a reasonable time available before bid opening to notify bidders of the modification, a report of the finding is inserted in the contract file and the wage determination in effect 10 days prior to bid opening may be used. In order to comply with federal requirements, HCD has assigned the responsibility of obtaining the appropriate wage decision(s) for a project to the Grantee or its designee. An initial

[29 CFR 1.6\(c\)\(3\)](#)

[Davis Bacon Wage Determinations](#)



wage decision should be obtained prior to issuing the IFB and provided to the Architect or Engineer to be included in the project bid specifications. The Grantee will need to access the DOL website in order to obtain the Davis-Bacon Wage Determination for the project. The printed copy of the effective wage decision will be required at monitoring.

### **Step 3: Prepare Invitation for Bid (IFB)**

The Grantee must develop an IFB that clearly identifies the services required including: all technical specifications required, any other requirements that apply to the contract, and instructions for preparing and submitting a bid. Bid specifications may not identify a specific name brand or provider except if required to identify a piece of equipment necessary for completion of the project. In this instance, the name brand or provider must be followed with the terminology, 'or approved equals.' It is the responsibility of the Grantee to provide the bid specifications preparer with the required contract provisions, as specified in the Assistance Agreement, and the Davis Bacon or State Prevailing Wage Decision applicable to the project. The bid specifications must include a statement that the Wage Decision is subject to change and the one that is in effect on the date of the bid opening will be applicable to the total project if the contract is awarded within 90 days of bid opening. If not, the applicable Wage Decision becomes the one that is in effect on the date that contracts are signed.

### **Step 4: Publish Invitation for Bid (IFB)**

The IFB must be advertised in the newspaper of general circulation in the jurisdiction at least one time not less than 14 days before the date set for the opening of bids. This 14-day minimum bidding period is accepted by HCD but it is advised that communities give bidders more time. The IFB must state the date, time and location for submission of bids. The legal advertisement must provide information pertaining to where the project plans and specifications may be obtained or reviewed. In order to obtain the highest level of free and open competition, publishing the IFB in well-known trade journals and/or sending a copy of the IFB to the area's local contractors may increase the number of responses received. An example of an IFB advertisement is provided as [Appendix 5-6: Sample IFB Publication](#).

[Appendix 5-6:  
Sample IFB  
Publication](#)

### **Step 5: Solicit MBE/WBE Responses**

Federal CDBG regulations require Grantees to include MBE/WBE contractors to the best of their ability. To that end, HCD requires that a copy of the IFB advertisement be distributed to MBE/WBE businesses listed on the Supplier Clearinghouse. Grantees will be required to submit proof of solicitation and qualification for procurement type along with other procurement documents in the eCivis Grants Network.

[The Supplier  
Clearinghouse](#)



### **Step 6: Confirm Wage Rates**

Ten (10) days before bid opening, the Grantee must check SAM.gov to determine if there have been any modifications or revisions to the Davis-Bacon wage determination. If it is determined that there has been a modification, the Grantee must send it as an addendum to all contractors who received the original bid package.

### **Step 7: Issuing Addenda**

If the bid document is amended during the advertisement period, addenda must be sent to all bidders who have received bid documents. However, addenda may be issued only up to 72 hours of bid opening. All bidders must be sent copies of each addendum and evidence of notification must be maintained in the bid files.

### **Step 8: Conduct Pre-Bid Meeting**

HCD recommends Grantees conduct a pre-bid meeting on all sealed bid procurements. The pre-bid meeting gives the Grantee an opportunity to explain all state and federal requirements of a CDBG funded project to prospective bidders. A sample Pre-Bid Guide is attached as [Appendix 5-7: Sample Pre-Bid Guide](#).

[Appendix 5-7:  
Sample Pre-Bid  
Guide](#)

### **Step 9: Receive Bids**

As bid packets arrive, the time and date the bid was received from the vendor is written on the outside of the bid packet. Any bid received after the date and time due must be rejected and returned to submitter unopened.

### **Step 10: Open Bids**

Bids must be opened and read aloud at a public meeting, at the date, time and location stated in the legal advertisement. The bidder's name and amount of bid must be read and recorded in the minutes of the bid opening meeting. No action should be taken at the bid opening meeting except by order of the AO to take the bids under advisement. Bid opening meeting minutes and a sign in sheet of all attendees must be maintained for the project records and will be required prior to drawing down any CDBG funds for construction.

### **Step 11: Make Vendor Selection**

The Competitive Sealed Bid method of procurement requires that the construction



contract be awarded to the lowest bidder, provided that the lowest bidder is found to be a responsive and responsible bidder. If the bids received are within the project budget, the Architect or Engineer will review all bid packages to determine if each one is responsive and responsible and verify that the bonding and certification requirements outlined in the bid specifications have been included. Upon completion of these reviews, the Architect or Engineer will prepare a bid tabulation sheet, and a written statement to the Grantee or Subrecipient making a recommendation of the lowest responsive and responsible bidder. The bid tabulation must be certified (stamped) by the project Architect or Engineer. If the low bidder is found to be unresponsive or irresponsible and is not recommended by the project Architect or Engineer, the Grantee's legal counsel must be consulted prior to making the determination to reject the lowest bid and consider the second lowest bidder. A written legal opinion must accompany all procurement documents where the low bidder was not selected in case of a formal bid protest or possible litigation.

### Step 12: Award the Contract

After review of the bids, the Grantee or subrecipient must award the contract to the lowest responsive and responsible bidder if his/her bid is within the budgeted amount, preferably within 30 days of the opening.

**CAUTION:** Contracts are to be awarded within a 90-day period. If contracts are not awarded within 90 days of bid opening, any wage rate modifications that occurred within that 90-day period will apply to the contract.

[29 CFR 1.6\(c\)\(3\)\(iv\)](#)

If the contract is awarded to a bidder other than the low bidder, the Grantee must prepare a written statement for the project file explaining why each lower bidder was deemed non-responsive or non-responsive.

- To be responsive, the bidder must have submitted all required documentation. However, the responsiveness criteria must be uniformly applied to all bidders. If one bidder is rejected for failing to submit a particular document, for example, all bidders failing to submit that documentation must be rejected.
  - The Grantee must check the contractor and all subcontractors' names against the Federal Excluded Parties List System (available at <https://sam.gov/content/exclusions>). The Grantee will document that the contractors and subcontractors are not on this list.
  - The Grantee must check the contractor and all subcontractors' names against the HUD Limited Denial of Participation List (available 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 Grantee will document that the contractor and subcontractors are not on this list.





- The Grantee must check the contractor and all subcontractors' names against the California Debarred Parties List (available at <https://www.dir.ca.gov/dlse/debar.html>). The Grantee will document that the contractor and subcontractors are not on this list.
- Documentation must be submitted in the Grants Network prior to submission of construction claims.
- The bidder may also be determined non-responsible if, in the Grantee's judgment and the judgment of the consulting professional, the bid is so unreasonably low that the project cannot be constructed for the amount bid. This is often a problem with inexperienced contractors. The Grantee should always contact its attorney and its HCD Program Manager if the Grantee must award to other than the low bidder.

### **Step 12: Execute the Contract**

Once the bidder is accepted and the reasonability of cost is established, the Grantee may execute the contract (provided they have received authority to use grant funds from HCD) and schedule the mandatory Preconstruction Conference.

Following award of the contract, the contract documents and applicable bonding and insurance must be completed and executed. Contract documents include all the items contained in the bid package as well as the executed contract, bid proposal, contractor certifications, and bond and insurance forms. See [Chapter 4: Grantee Requirements](#).

## **Section 5.10 Contract Development**

All work and services to be accomplished for the completion of a Community Development Block Grant (CDBG) funded project must be covered by a legally enforceable, fully executed contract, regardless of the source of funds to be used for payment of the contract amount.

Before any contract may be fully executed, it is the Grantee's responsibility to ensure that the contract complies with applicable federal and state laws, provides complete and full provision of the project scope, and avoids any real or implied Conflict of Interest concerns.

Contracts paid with State and Small Cities CDBG funds must utilize a Firm, Fixed-Price Contract. A Firm, Fixed-Price Contract requires that the contractor deliver the product or service for the agreed-upon price. This type of contract is required for:

- Professional services, including Grant Administration, Labor Standards, and Environmental Review,
- Engineering or Architectural services,
- Legal fees, rate consultant, or any other type of professional services required,



and

- Construction of the project activities.

**Costs Plus Percentage of Cost** contracts are specifically prohibited by CDBG regulations for any type of work or services to be performed on CDBG funded projects.

[2 CFR 200.324\(d\)](#)

## Section 5.11 Contract Requirements

All contracts executed for performance of CDBG related activities must include a full and complete description of the federal and state requirements for contract compliance. The following documents must be physically attached to each contract as applicable:

[CDBG Procurement – Federal Requirements and Best Practices Webinar](#)

- Professional Service Contracts must include all required Federal Contract Provision as outlined in the Grantee’s Standard Agreement.
- Housing and Urban Development (HUD) Form 4010.

[Appendix 5-8: Federal Contract Provisions Checklist](#)

## Bonding Requirements

Bonds are negotiable instruments required by federal and state law from construction contractors as a form of insurance. The bonds are available to contractors from surety companies, which are then turned over to the Grantee to protect against situations that may arise. Some of these situations include:

[2 CFR 200.304](#)

- Work not completed as specified and/or the contractor refuses to finish the work without a change order or price escalation;
- Laborers or subcontractors are not being paid for work and are suing the Grantee to recover their loss; or
- Payment of liquidated damages is required, arising from labor standards violations.

Construction contracts must include the following documents either physically or by reference to the project bid specifications and any addendums:

1. Applicable Davis-Bacon and Related Acts (Davis-Bacon) Wage Decision assigned to the project.
2. Bid Bond (submitted with the bid), Payment Bond and Performance Bond obtained by contractor and provided to Grantee to insure contract fulfillment.



- The Bid Bond guarantees that the selected bidder will execute the required contract documents within the specified period of time. The Bid Bond must be equal to 10% of the bid price. [Cal. Public Contract Code § 20483](#)
  
- The Labor & Material Payment Bond is binding upon the contractor, subcontractors and their successors or assigns, for the payment of all indebtedness to a person for labor and service performed, material furnished, or services rendered. The payment bond must be for 100% of the contract price (contracts over \$25,000). [Cal. Civil Code § 9550](#)
  
- The Performance Bond ensures that the contractor will fulfill all obligations under the contract within one year of substantial completion. The performance bond must be for 100% of the contract price (contracts over \$250,000). [2 CFR 200.326\(b\)](#)
  
- If a construction manager is employed, each subcontract exceeding \$100,000 shall be bonded or a certified check required.

The bonding company issuing the bonds must hold a ‘Certificate of Authority’ as acceptable sureties.

### Insurance Requirements

Contractor's Certificate of Insurance shall be required. The Grantee is responsible for ensuring that the levels are adequate.

### Contract Contents and Provisions

All contracts for work or services on CDBG funded projects must include the HCD Federal Contract Provisions as well as the following:

[Appendix 5-8:  
Federal Contract  
Provisions  
Checklist](#)

1. Effective date of contract,
2. Detailed description of the work or services to be performed,
3. Specifications of materials or other services to be provided,
4. Time for performance and completion of contract services,
5. Method of Compensation,
6. Conditions and terms under which the contract may be terminated, and remedies for violation or breach of contract, and
7. Printed and signed names and titles of Signatories for all contract parties.



## Retainage Requirements

A retainage account may be set up to ensure the project is satisfactorily completed, all suppliers have been paid in full, and all contractors, subcontractors and suppliers have submitted lien waivers. The amount of retainage withheld may not exceed 5% of the total contract amount.

[California Public Contract Code §7201](#)

A Retainage Agreement must be reached, and included in the contract, between the Grantee and the prime contractor to establish a procedure for holding the retained funds until all parties agree that the retainage may be released to the contractor upon satisfactory completion of the project.

Retainage Account funds may be:

1. Deposited into a mutually agreed upon financial institution, in a separate account. If deposited to an interest-bearing account, any accrued interest belongs to the contractor.
2. Deducted from drawdown amounts for payments due to contractor. The State holds the retainage funds until they become due and payable to the contractor.

[California Civil Code §8810-0000](#)

If the contractor has provided Contractor's Affidavit of Release of Liens (AIA Form G706A) and lien waivers from major subcontractors and suppliers, a contractor may request the balance of retainage.

## Best Practices

- Be sure to follow your established policies
- Make sure to select the most appropriate procurement method. If the potential procurement cost is at the threshold, be conservative!
- Document each procurement, especially if it deviates from standard practices or uses a waiver or exception
- Plan for procurements as far ahead as you can, ideally at project concept. Try to incorporate all potential activity phases, full scopes of potential work, and long-term expectations
- If you want to use the same contractor/consultant throughout the project or on multiple phases, then you must procure for the full scope of work
- Use budget options or additives to get costing for the full scope of work
- Use conditions in the contract to restrict or phase the scope of work to available funds



## Section 5.12 Intergovernmental MOU's and Cooperative Agreements

MOU's and cooperative agreements can be used by local jurisdictions to assist in the development, operation, and/or management of CDBG projects. Examples of when MOU's and Cooperative Agreements can be used include, but are not limited to:

- One or more Grantees apply jointly for CDBG funding;
- A Grantee applies to construct public improvements that another government entity owns, operates, and/or will maintain the improvements once they are completed.
- At a minimum, intergovernmental MOU's and cooperative agreements should:
  - State that the parties have agreed to cooperate in undertaking the project;
  - Delineate the responsibilities and authorities of each party with respect to the administration of the grant and continuing ownership, operation and maintenance of facilities if applicable; and
  - Authorize one of the parties to be the recipient of the funds and have primary administrative responsibility.