

Appendix B: Procurement

PART 1: GOODS AND SERVICES COVERED BY PROCUREMENT REQUIREMENTS

When public money from the Historic Preservation Fund Program is used to procure goods and/or services for a grant project, the purchases must be made in compliance with state and federal standards for fair procurement. These standards vary in accordance with the size and nature of the purchase. Generally, the goods and/or services that must be procured fall into the following four categories:

Personal Services

Subgrantees often must hire additional staff to complete grant projects. In such cases, an open selection process must be used to ensure that qualified workers are engaged at a reasonable price. New employees hired to work on the grant project must be selected from a pool of qualified applicants located after advertising in local papers or otherwise making the position known to potential candidates. All of the subgrantee's hiring practices must be conducted in accordance with state and federal regulations prohibiting discrimination on the basis of age, sex, race, color, or disability. Workers engaged by the subgrantee on an hourly, salaried, or volunteer basis are considered to be the subgrantee's employees.

Contractual Services

In many cases, a subgrantee finds it advisable to engage a professional contractor or consultant to serve as the principal investigator on the project or to provide some other specialized service, such as construction or rehabilitation activities. These professionals and consultants are hired on a contractual basis, usually agreeing to provide a certain product or service for a fixed price. Such contractors are not considered to be employees of the subgrantee organization.

Supplies

Single items costing **less than \$300** and purchased solely for grant purposes are considered to be supplies. Subgrantees that are universities or local governments usually have in place an adequate system by which these purchases are made. All subgrantees are expected to exercise reasonable care to ensure that such purchases are made at or below fair market value. The DHPA will ordinarily not question purchases of this size, as long as the items bought are necessary and useful to the completion of the project and the costs paid are properly documented and appear reasonable. The subgrantee may be asked to justify purchases that do not meet these standards.

Equipment

Single items costing **more than \$300** are generally considered to be equipment and may be purchased only with prior written permission from the DHPA. If such permission is given, the DHPA will provide further instruction (on a case-by-case basis) regarding procurement requirements. At a minimum, these will include the gathering of several price quotations from qualified vendors. **Note** that the DHPA and the National Park Service are reluctant to allow grant funds to be used for equipment purchases, since these items often may be used for non-grant purposes later.

Procuring Goods and Services – Open and Free Competition

All procurement transactions must be conducted in a manner that provides maximum open and free competition. Procurement procedures must not restrict or eliminate competition. Examples of restriction of competition include but are not limited to: placing unreasonable requirements on firms in order for them to qualify to do business, noncompetitive practices between firms, organizational conflicts of interest, and unnecessary experience and bonding requirements. **When Historic Preservation Fund grants are used to procure contractual services, competitive sealed bids must be publicly solicited through direct invitation to bid and/or through formal advertising.** A fixed-fee price contract (lump-sum or unit price) will be awarded to the contractor whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price and is most advantageous to the subgrantee, considering the price and any discounts or transportation costs, and the contractor's experience and skill level, reputation, and ability to fulfill the contract. Note that there may be instances where a contractor is not the lowest bidder, but can guarantee higher quality work for a reasonable price. When such

situations can be documented and justified, and the difference in price is reasonable, it often makes sense to hire this bidder instead of the lowest bidder. Additional information and guidelines for the procurement process are given in the following pages of this Appendix.

Davis-Bacon and Related Labor Acts

A commonly asked question is whether HPF subgrant projects must comply with the Davis-Bacon Act and related labor acts. The Davis-Bacon and related acts apply when the U.S. government is a party to a contract for construction services. In such instances, the contract must include federally determined local prevailing wage rates for construction activities. Under the HPF Program, all contracts are between the contractor and the subgrantee; neither the federal government nor the state government is a party to these contracts. In addition, the National Park Service reports that the National Historic Preservation Act, as Amended, which governs the HPF Program, is silent on the issue of compliance with Davis-Bacon and related acts. Therefore, it has been determined that Davis-Bacon does not apply to the HPF Program.

PART 2: AN OVERVIEW OF THE PROCUREMENT PROCESS

The following requirements apply to **all** grants:

- The subgrantee must seek qualified bidders through an **open selection process** that includes at a minimum:
 - a. Preparation of a **bid proposal** specific enough to allow a vendor to prepare an appropriate bid. The proposal must include information on the work to be performed, qualifications that must be met, deadlines, compliance with certain standards and regulations, and the involvement of federal grant funds.
 - b. Submission of all bid documents and contracts to the DHPA for approval. **Note** that bid documents and contracts may not be distributed without prior written approval of these documents from the DHPA.
 - c. Advertising the opportunity through direct invitation to bidders and/or by formal advertisements placed in local and statewide newspapers. The bid period must span a minimum of fourteen (14) days. **Note** that newspaper advertisements are required only for procurements of goods or services expected to cost near or over \$100,000; newspaper advertisements are optional for procurements of goods or services expected to be less than \$100,000.
- The subgrantee must provide evidence that:
 - a. The fee for services rendered is appropriate considering the qualifications of the contractor, their normal charges, and the nature of the services to be provided; and
 - b. No contractor of equal qualifications, experience and skill level, and reputation is available for a lesser amount.
- After the open selection process, the DHPA must approve the qualifications of the contractor before the hiring process is completed. Consultants must meet the requirements of **36 CFR 61, Appendix A**, when required (**see Appendix K: Federal Requirements for Principal Investigators**). Contractors who have failed to perform adequately on past preservation projects may be rejected (whether the project was funded by the DHPA or the project was reviewed by the DHPA in the course of administering state and federal preservation programs in Indiana). **The grant recipient is cautioned not to make commitments to any parties prematurely as this may constitute a violation of fair procurement standards.**
- The grant recipient **may not** sign contracts with consultants, suppliers, or contractors for any aspect of project work until ALL of the following steps have been completed:
 - a. They have received written notification from the DHPA that the project application has been approved for funding by the State Historic Preservation Review Board and the National Park Service; and
 - b. They have been notified of the project start date – entering into a contract prior to project approval constitutes pre-arrangement costs, which may not be allowable or reimbursable;
 - c. They have received written approval from the DHPA of drafts of the bid documents and contracts; and
 - d. They have submitted a formal “request to hire” letter, accompanied by the appropriate procurement documentation, and have received written approval of their choice of consultant or contractor from the DHPA.

PART 3: INITIATING PROCUREMENT

Preparing the Bid Documents

Bids must be solicited from an adequate number of known consultants, suppliers, or contractors for a minimum period of **fourteen (14) calendar days**.

The bid documents (and subsequently the contract documents) **MUST** include the seven following parts:

- 1. A clear and accurate description of the technical requirements** for the materials, products, or services to be procured, and a **clear definition or description of the work items or services being sought**. However, such description must not contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured, and will set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. (For example, the work must meet *Secretary of the Interior's Standards and Guidelines for the Treatment of Historic Properties*.) Included in this section should be references to any **specifications and pertinent attachments** (such as Preservation Briefs, Tech Notes, or samples of similar products).
- 2. A list of all requirements that bidders must meet** and all other factors to be used in evaluating bids or proposals, such as prior experience working with slate roofing, previous experience in completing National Register historic district nominations, etc.
- 3. A payment schedule** for the reimbursement of contracted work. The DHPA normally withholds the final 15% of the total grant amount until the Program Area Staff has reviewed the completed project and found it to be in compliance with the applicable *Secretary of the Interior's Standards and Guidelines* and all other state and federal requirements. As a precautionary measure, subgrantees are urged to adopt a similar measure (15% contract retention until work is approved by the DHPA) to help guarantee that contract work will be completed successfully and in compliance with all of the project requirements, and that any necessary remedial work will be completed in a timely manner.
- 4. A deadline for the submission of bids.**
- 5. A deadline for the completion of work.**
- 6. A termination for breach of contract clause**, which explains how the subgrantee may enact it, and the administrative, contractual, or legal remedies available to the subgrantee. Such language must describe the conditions under which the contract may be terminated for default, as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor. The following wording is only a sample of such a clause, and this wording may not be appropriate for all projects. Subgrantees are strongly encouraged to modify the following language as they see fit for their particular project and to seek legal advice for appropriate wording.

Termination For Breach of Contract

If the contractor fails to perform the work in an acceptable manner, the owner may give notice in writing to the contractor and his surety of such failure or refusal, specifying the same and directing what action shall be taken. Any one of the following will be considered sufficient justification for such notice:

1. Failure to begin the work under the contract within the time specified.
2. Failure to perform the work with sufficient supervision, workmen, staffing, equipment, and materials to insure the prompt completion of said work.
3. Unsuitable and/or unsatisfactory performance of the work.
4. Neglecting to or refusing to remove/replace defective materials and workmanship, or failure to perform anew such work as may have been rejected by the owner.
5. Discontinuing the prosecution of the work or any part of it.
6. Inability to finance the work adequately.
7. If, for any other reason, the contractor fails to carry on the work in an acceptable manner.

If the contractor, or his surety, within a period of ten (10) days after such notice does not proceed in compliance therewith, then the owner shall have full power and authority, without violating the contract, to take the prosecution of the work out of the hands of said contractor, to appropriate or use any and all materials and equipment on the grounds as may be suitable and acceptable, and may, at his option, turn the work over to the surety, or enter into an agreement with another contractor for the completion of the contract according to the terms and provisions thereof, or he may use such other methods as, in his opinion, shall be required for the completion of said contract in an acceptable manner. All costs of completing the work under the contract shall be deducted from any monies due or that may become due of said contractor. In case the expense so incurred by the owner may be less than the sum that would have been payable under the contract if it had been completed by said contractor, then said contractor shall be entitled to receive the difference, but in case such expense shall exceed the sum that would have been payable under the contract, then the contractor and his surety shall be liable and shall pay to the owner the amount of said excess. By taking over the prosecution of the work, the owner does not forfeit the right to recover damages from the contractor or his surety for his failure to complete the work within the time specified.

7. Required federal language. The bid documents (and subsequently the contract documents) must include the following language verbatim:

- This project is funded in part by a grant from the U.S. Department of the Interior, National Park Service's Historic Preservation Fund Program and is being administered by the Indiana Department of Natural Resources, Division of Historic Preservation and Archaeology. Compliance with all applicable federal, state, and local laws, rules, and regulations is required.
- Compliance with the applicable *Secretary of the Interior's Standards and Guidelines* is required.
- The Indiana Department of Natural Resources, the Indiana State Auditor, the U.S. Department of the Interior, the Comptroller General of the United States, or any of their duly authorized representatives, will have access to any books, documents, papers, and records of the contractor that are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcription. Such records must be maintained for three (3) years after closeout of the contract.
- No part of the money appropriated by any enactment of Congress will, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of the U.S. Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this will not prevent officers or employees of the United States or its Departments or Agencies or employees of the State of Indiana from communicating to Members of Congress at the request of any Member, or to Congress through the proper official channels, requests for legislation or appropriations that they deem necessary for the efficient conduct of public business.
- The project must be carried out in compliance with the Copeland Anti-Kickback Act (18 USC 874) as supplemented in Department of Labor regulations. This act provides that each contractor will be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation of which he or she is otherwise entitled.
- The project must be carried out in compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor Regulations (41 CFR 60).

Development Projects must also include the following federal language:

- The project must be carried out in compliance with mandatory standards and policies relating to energy efficiency that are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

- All contractors participating in projects receiving federal assistance must take the necessary steps to insure themselves and their personnel, and to comply with the applicable local, state, or federal safety standards including those issued pursuant to the National Occupational Safety and Health Act of 1970.
- Minimum standards for facilities to be used by the disabled are to be included in the project specifications to the maximum extent possible for any historic preservation construction grant (consistent with the *Secretary of the Interior's Standards for Rehabilitation*), as required by the Architectural Barriers Act of 1968, as amended (Public Law 90-480, 42 USC 4151 et. seq.), and Section 502 of the Rehabilitation Act of 1973 (Public Law 93-112, as amended, 29 USC 792).

Development Projects with ANY painting activities must also include the following federal language:

- The project must be carried out in compliance with Section 401 of the Lead-Based Paint Poisoning Prevention Act (Public Law 91-695, 84 Stat. 2078, as amended by Public Law 93-151, 48 USC 4801 et. seq.), which prohibits the use of lead-based paint in residential structures constructed or rehabilitated with federal assistance.

Procurements Less Than \$100,000

Any contract for goods and/or services that is expected to be less than \$100,000 may be handled by direct invitation to bid sent to a minimum number of qualified bidders. After approval of the bidding documents by the DHPA Grants Staff, the invitation to bid must be mailed to a MINIMUM of five (5) qualified bidders. Invitations to bid should be sent by certified mail with a return receipt card. This return receipt will provide the proof that the invitation to bid was mailed in the event that the invited contractor does not respond. In order to satisfy state and federal fair procurement standards, it is important to be able to document that an acceptable minimum number of qualified bidders was included in the bidding opportunity. If fewer than five (5) bidders respond, fair procurement standards are satisfied so long as the subgrantee can prove that it made a good faith effort to secure at least five (5) bids. Therefore, it is imperative to maintain documentation of the invitation to bid mailing by return receipt cards. Grant recipients are strongly encouraged to send direct invitations to bid to more than five (5) potential bidders whenever possible because this increases the chances of finding a qualified contractor for a price that is within the project budget.

If the subgrantee anticipates that a contract for goods and/or services may be close to \$100,000, it is usually best to formally advertise the bidding opportunity in the newspaper (as explained below) and also send direct invitations to bid (as described above). If no newspaper advertisements are placed and all responses to direct invitations yield bids in excess of \$100,000, the bidding is void and must be rebid with formal advertisements in newspapers. Obviously, this could delay initiation of the project.

Procurements Greater Than \$100,000

Any contract for goods and/or services that is expected to equal or exceed \$100,000 must be formally advertised by placing an "Invitation to Bid" in a major newspaper that covers the area affected by the project. Notices should be published at least **three** times (either three successive times in one publication, or published one time simultaneously in three different publications). The DHPA recommends also advertising in a minority newspaper serving a similar area, although this is not strictly required. Contact the DHPA for a listing of the appropriate newspapers in which to place public advertisements. The ads must be placed **at least fourteen (14) days prior to the bid date**, and **must** include the required federal language given below. Minimum documentation of formal advertising for audit purposes consists of a copy of the actual advertisement run in the appropriate newspapers or a publisher's affidavit and invoice showing the dates that the advertisements were published. Note that the costs of newspaper advertisement are reimbursable under the grant, although these costs may not have been written into the original project budget.

Although newspaper advertisement is mandatory for procurements over \$100,000, subgrantees are strongly encouraged to supplement the newspaper advertisements by also sending out direct invitations to bid. This will help ensure that the bidding opportunity is brought to the attention of qualified local contractors who might not learn of the project through the newspaper advertisement. However, there is no minimum number of contractors that must be invited in this instance.

Federal Language for Use in Newspaper Advertisements ONLY

Formal advertisements must state that federal funds are assisting with the project and that compliance with all applicable federal, state, and local laws, rules, and regulations is required. In an effort to keep newspaper advertising costs to a minimum, the bid advertisement prepared for newspapers does not require the full version of the federal language outlined above, but **MUST** include the following paragraph:

- This project is funded in part by a grant from the National Park Service's Historic Preservation Fund Program administered by the Indiana Division of Historic Preservation and Archaeology. Compliance with all applicable federal, state, and local laws, rules, and regulations is required, including: federal and state audit requirements, prohibition on lobbying activities, the Copeland Anti-Kickback Act, the Energy Policy and Conservation Act, the National Occupational Safety and Health Act, the Lead-Based Paint Poisoning Prevention Act, the Architectural Barriers Act, and Executive Orders and Department of Labor regulations regarding Equal Employment Opportunity.

Notices for newspaper advertisement must be submitted to the DHPA Grants Staff for review and approval **before** publication. They can be submitted by fax (317) 232-0693 or by email (**see** contact information on page 1).

PART 4: COMPLETING PROCUREMENT

Preparing the Contract Document

Once the bidding opportunity has been made public through direct invitations to bid and/or newspaper advertisements, it is a good idea to begin preparing the contract document. This will help save time later when the DHPA has approved the subgrantee's request to hire a contractor. The contract **MUST** contain all of the same project requirements and required state and federal language as did the invitation to bid, as well as the deadline for the completion of work, the termination for breach of contract clause, and the payment schedule. Once the bidding document has been approved, the subgrantee may simply revise it to create a contract document. The subgrantee will need to insert the subgrantee organization's name and a space for the contractor's name, a space for the fee to be paid for the goods and/or services to be provided, and lines for signatures. The DHPA must review and approve the draft contract document before it is released for signature.

Selecting a Bidder

It is not always necessary to award the contract to the lowest bidder. There may be instances where a contractor is not the lowest bidder, but can guarantee higher quality work for a reasonable price. When such situations can be documented and justified, it often makes sense to hire this bidder instead of the lowest bidder. For example, a roofing contractor that deals primarily with slate roofs would be preferable to a lower bidding contractor with no experience working with slate roofs, assuming a modest cost difference between the two bids. Remember that a contract for any aspect of project work cannot be entered into without the prior written approval of the DHPA.

If unusual circumstances arise surrounding the awarding of contracts, the DHPA should be consulted. Examples of unusual circumstances are failure to receive a sufficient number of bids, great disparity in bid quotations, or intent to award a contract to someone other than the lowest bidder. The subgrantee must maintain adequate records to document any procurement. These records will include, but are not necessarily limited to, information pertinent to the following: rationale for the method of procurement, selection of contract type, all bids received, contractor selection or rejection notices, and the basis for the cost or price of the goods and/or services to be provided.

Preparing the "Request to Hire" Packet

Once the subgrantee has selected a bidder, written approval of this selection must be obtained from the DHPA before a contract for services is signed. The subgrantee should send the DHPA a formal "request to hire" packet consisting of an explanatory cover letter and supporting documentation.

The cover letter must include all of the following parts:

- A brief history of the procurement process that indicates which contractors received direct invitations to bid and which newspapers (if any) ran advertisements of the bidding opportunity;
- A list of all bidders with their bid price;
- An explanation of bidding irregularities, if any;
- A justification for hiring someone other than the low bidder, if applicable;

- A statement formally requesting to hire one contractor for a given fixed-fee amount, specifically noting any alternates, deducts, or voluntary in-kind donations that are to be accepted on top of the base bid.

The supporting documentation attached to the cover letter must include the following items:

- Copies of certified mail receipts from direct invitations to bid;
- Copies of newspaper advertisements or publisher's affidavits, if any;
- Copies of all bids received, or excerpts of extremely lengthy bids, showing the contractor's name and price, including any alternates, deducts, or voluntary in-kind donations.

It is highly recommended that the subgrantee include a draft of the contract document with the request to hire packet, if they have not already submitted this document to the DHPA for review and approval.

Contract awards will be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of acceptable past performance, and financial and technical resources available. Contract awards will not be made to any contractor or professional that has developed or drafted, on behalf of the subgrantee, bid specifications, project requirements, statement of work, invitation for bids, and/or request for proposals for a particular procurement as any of these situations would constitute a conflict of interest.

Signing the Contract

After the DHPA provides written approval of the contractor selection AND the contract document, the contract may be signed and work may proceed on the project. Once executed, a photocopy of the signed contract must be provided to the DHPA for the project file.

Changes to the Contract

In some cases, as a project progresses, the contract may require a "change order" or other revision or addendum. These must be submitted to the DHPA for review and approval prior to being accepted. If change orders are accepted by the subgrantee without first being approved by the DHPA, the DHPA reserves the right to refuse reimbursement for these work items.

A Final Note on Procurement

Because the procurement process can be very time consuming, and because this is a critical part of initiating any project, the DHPA Grants Staff will make every effort to review bid and contract documents as quickly as possible. Bid and contract documents may be mailed, faxed, or e-mailed to the Grants Staff for review. If faxing documents, it is recommended that subgrantees call the Grants Staff to alert them to the incoming fax. If the Grants Staff knows to watch for an incoming fax, they can often review the documents that same day and then provide a quick response to the subgrantee. Verbal approval of bid and contract documents is often given over the telephone and followed with written notification. This approach can save many days over sending documents back and forth through the mail. Procurement documents may also be submitted to the Grants Staff electronically via e-mail (in MSWord format). **After reviewing these guidelines, do not hesitate to contact the DHPA Grants Staff with any questions about procurement.**