



5 Procurement Guide for Subrecipients and Subgrantees

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5 Procurement Guide for Subrecipients and Subgrantees

5.1 Background

CDBG-DR subrecipients procuring goods and services with their grant funds must ensure that they are following all program procurement statutory and regulatory requirements. The urgency in post disaster recoveries often leads state and local officials to work to quickly restore infrastructure and public services and help private companies and citizens make repairs. However, grantees and subrecipients that do not follow all CDBG-DR program requirements may be forced to repay federal funds.

This chapter establishes standards and guidelines for procurement of supplies, equipment, construction, engineering, activity administration, architectural, consulting, and other professional services for CDBG-DR programs. Subrecipients are required to follow the federal procurement requirements found in 2 CFR 200.318 through 200.326 and should have their procurement policies reflect these requirements.

The following standards and guidelines are being furnished to ensure that subrecipients of CDBG-DR funds procure materials and services in an efficient and economical manner that complies with the applicable provisions of federal and state laws and executive orders.

The foregoing standards do not relieve CDBG-DR subrecipients of any contractual responsibilities under its contracts or local, state, or federal law. Subrecipients are responsible, with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement entered into in support of the grant.

5.2 Application of Federal Regulations

OHCS administers CDBG-DR funding received from HUD. Any activity financed in whole or in part with funding from these federal programs are subject to compliance with 2 CFR 200.318 through 2 CFR 200.327 and any other applicable federal or state requirements for the CDBG-DR programs. Contracting entities including subrecipients must follow the provisions as described in 2 CFR 200.318 through 2 CFR 200.327.

OHSC policies and procedures for subrecipients implement requirements of 24 CRF 570.489(g) for its subrecipients including:

- Full and open competition

- Identification of methods of procurement and their applicability
- Prohibition of cost plus a percentage of cost
- Assurance that all purchase orders and contracts include any clauses required by federal statutes, executive orders, and implementing regulations
- Subrecipient and contractor determinations in accordance with the standards in 2 CFR 200.331

At a minimum, the subrecipient must understand and adhere to the current regulations and associated advisories governing procurement when utilizing CDBG-DR funds.

5.3 Procurement Policies Requirements

Subrecipients should determine whether their procurement policies and procedures comply with all federal requirements contained in 2 CFR 200.318-326. If the policy does not contain all federal requirements (and the subrecipient intends to use CDBG-DR funds to pay for such services), the policy must be amended accordingly. The subrecipient must design a policy that meets requirements as prescribed in 24 CFR Part 570.489 and State of Oregon Procurement laws.¹

Administration and Oversight: Subrecipients must conduct administration and maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

Standards of Conduct: Every subrecipient must maintain written procedures covering conflicts of interest and governing the actions of its employees, agents, consultants, and elected officials engaged in the selection, award and administration of vendor contracts, the award of CDBG-DR assistance, or the management of federally assisted or purchased property.

Conflict of Interest: For the procurement of goods and services, no employee, officer, or agent of the subrecipient may participate in the selection, award, or administration of a vendor contract supported by a federal award if he/she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, agent, any member of his/her immediate family, his/her partner, or an organization that employs or is about to employ any of the parties indicated herein have a financial or other interest in a tangible personal benefit from a firm considered for a vendor contract. For more

¹If Oregon procurement regulations and requirements are more stringent or have additional conditions not required by federal procurements standards at §200.318-326, then the state may utilize its own procurement requirements.

information on conflict of interest, see page 16 at 2 CFR 200.318(b) 2 2 CFR 200.318(c)(1) (24 CFR 570.489(g), 2 CFR 200.318(c) (1))

Gifts and Gratuities: The officers, employees, or agents of the subrecipient may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. The standards of conduct must also provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the subrecipient.

Avoidance of Unnecessary or Duplicative Items: Subrecipients' procurement procedures must avoid the acquisition of unnecessary or duplicative items by considering consolidating or breaking out procurements to obtain a more economical purchase.

Value Engineering Clauses: Subrecipients are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

Awarding to Responsible Contractors: Subrecipients must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Record Keeping: Subrecipients must maintain records sufficient to detail the history of procurement. These records shall include, but are not limited to, the following:

- Rationale for the method of procurement
- Selection of contract type
- Independent cost estimate
- Request for proposals/quotations/bids
- Documentation of distribution of opportunity
- Responses to procurement
- Bid evaluations
- Contractor selection or rejection
- The basis for the contract price

Time and Materials Contracts: Subrecipients may use these types of contracts only when no other contract is suitable, and the contracts includes a ceiling price that the contractor exceeds at its own risk. (2 CFR 200.318(j))

Dispute Resolution: Subrecipients alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement.

5.4 Procurement Procedures and Standards (2 CFR 200.318-326)

Subrecipients must have written procedures for procurement transactions that ensure that all solicitations align with federal requirements. Subrecipients should incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, set forth minimum essential characteristics and standards to which it must conform to be satisfactory. Detailed product specifications should be avoided if at all possible.

When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used as a means to define the performance or other important requirements of procurement. The specific features of the named brand that must be met by offerors must be clearly stated.

Clearly set forth all requirements which the offerors must fulfill:

- The procurement must identify the source(s) of funds being used for the project (e.g., CDBG-DR).
- Subrecipient should identify all other factors to be used in evaluating bids or proposals.
- Awards shall be given only to responsible contractors who possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration must be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also § 200.214.

In order to ensure objective contractor performance and eliminate unfair competitive disadvantage, contractors who develop or draft specifications, requirements, statements of work, or invitations for bids or request for proposals must be excluded from competing for such procurements.

Free and open competition should be encouraged by utilizing the following best practices:

- Avoid use of “brand names” in procurement.
- Avoid geographic preferences.
- Avoid use of retainer vendors that have not been specifically procured for this project.
- Post opportunity in newspaper of general circulation on grantee and subrecipient website.
- Provide response time that is sufficiently long to provide for adequate responses (30 days is typical minimum).

Some situations considered to be restrictive of competition include, but are not limited to, the following:

- Placing unreasonable requirements on firms for them to qualify to do business
- Requiring unnecessary experience and excessive bonding
- Non-competitive pricing practices between firms or between affiliated companies
- Non-competitive contracts to consultants that are on retainer contracts
- Organizational conflicts of interest
- Specifying only “brand name” products instead of allowing an equal product to be offered and describing the performance or other relevant requirements of the procurement
- Any arbitrary action in the procurement process

When using prequalified lists, subrecipients must ensure that all lists of persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, subrecipients must not preclude potential bidders from qualifying during the solicitation period.

Proposed procurement actions must be reviewed by subrecipient officials to avoid purchasing unnecessary or duplicative items. Where appropriate, an analysis must be made of lease and purchase alternatives to determine which would be the most economical practical procurement. Consideration should be given to consolidating or breaking out to obtain a more economical CDBG-DR project.

To foster greater economy and efficiency, grant recipients are encouraged to enter into state and local intergovernmental agreements for procurement or use of common goals and services.

Regulation 2 CFR 200.323 indicates that cost plus the percentage of cost method of contracting shall not be used. In addition, contracts with other public agencies will only allow actual cost to be paid. No profit is allowable when contracting with other public agencies.

Recipients must perform an independent cost analysis in advance of procurement. This includes contract modifications and change orders. Only allowable costs may be included.

Recipients must maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase order.

5.4.1 Time and Materials Contracts

The non-federal entity may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at his/her own risk. Time-and-materials type contract means a contract whose cost to a non-federal entity is the sum of:

- The actual cost of materials
- Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit

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

Subrecipient's are also encouraged to take the following steps to further open and fair competition and cost savings:

- Use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.
- Use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

5.4.2 Separation of Duties

One of the checks and balances to limit fraud in procurement is through the separation of duties of staff. The person delegated to order the goods or manage the procurement process should be different from the person receiving and accepting the goods and the person paying for the order. When this is not possible due to the limited size of staff, additional rules should be used, such as limiting dollar authorizations and periodic reviews by an independent individual. The grantee should ensure that only designated individuals have the authority to make binding contracts.

Procurement procedures should outline:

- The positions involved in the procurement process and the responsibilities of each person
- A formal system of authorization and review
- Separation of duties

The rule of thumb should be that if an employee touches the money, mail, or goods purchased, he/she should not touch the books.

5.4.3 Public Website

In recent appropriations acts, Congress has required that a website be developed and maintained that provides information to the public on proposed purchasing with CDBG-DR funds and the status of those actions. This provides transparency to the public and allows for maximum accountability for the work performed, contractor selected, and status of the work.

The types of information that should be available on the website include:

- The grantees procurement policies
- The status of procurements projected, underway, and completed
- A copy of the solicitation
- A copy of the executed contract that grantees have procured directly
- A standard contract template as a good tool to maintain and keep current on the public website

5.5 Methods of Procurement²

Procurement Type	Solicitation Method	Cost Methodology Reasonableness	Contract Type	Applications	Dollar Thresholds - Federal
Micro-Purchase Requirements	No solicitation required	Price analysis	1. Fixed Order 2. Fixed Price	Supplies, Produced Items, Single Task Service	Under \$2,000 for construction, Under \$10,000 for all other purchases
Small Purchase	Price or rate quotations - an adequate number (at least 3) Submitted bids	Price analysis	1. Fixed Order 2. Fixed Price	Supplies, Produced Items, Single Task Service	\$250,000 or less for produced items, 150,000 or less for non-construction services
Sealed Bid Formal Advertising	Submitted bids	Price analysis, Cost analysis	Fixed Price	Construction Items, Produced or Designed Items	All construction contracts including less than \$150,000, Produced or designed items over \$150,000

² The table breaks down thresholds by type of procurement. Refer to [2 CFR 200.320](#) and the [Federal Acquisition Regulation \(FAR\)](#) for details.

Procurement Type	Solicitation Method	Cost Methodology Reasonableness	Contract Type	Applications	Dollar Thresholds - Federal
Competitive Proposals	Submitted proposals	Price analysis, Cost analysis	1. Cost Reimbursement 2. Fixed Price 3. Time and Materials	Professional Services, Multi-Task Services, Designed Items	Professional services and/or multi-task services over \$150,000 Designed items over \$150,000 when sealed bids are not appropriate
Non-Competitive Proposals	Submitted proposals	Cost analysis	1. Cost Reimbursement 2. Fixed Price 3. Time and Materials	Professional Services, Single Task Service, Multi-Task Services, Designed Items	No particular threshold, but may only be used when other methods are not feasible

5.5.1 Informal Procurement Methods

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

5.5.1.1 Micro-purchases

- **Distribution.** The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (varies depending on item to be procured, consult state policy for most recent amount). To the maximum extent practicable, the non-federal entity should distribute micro-purchases equitably among qualified suppliers.
- **Micro-purchase awards.** Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-federal entity considers the price to be reasonable based on research, experience, purchase history, or other information and documents accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved pursuant to their policy by the subrecipient.
- **Micro-purchase thresholds.** See chart above for applicable micro-purchase thresholds.

5.5.1.2 Small Purchases

- **Small purchase procedures.** The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-federal entity.
- **SATs.** The non-federal entity is responsible for determining an appropriate SAT based on internal controls, an evaluation of risk, and its documented procurement procedures, which must not exceed the threshold established in the Federal Acquisition Regulation (currently \$250,000). When applicable, a lower SAT used by the non-federal entity must be authorized or not prohibited under state, local, or tribal laws or regulations.

5.5.2 Formal Procurement Methods

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

The following formal methods of procurement are used for procurement of property or services above the SAT or a value below the SAT the non-federal entity determines to be appropriate.

5.5.2.1 Sealed Bids

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

- In order for sealed bidding to be feasible, the following conditions should be present:
 - A complete, adequate, and realistic specification or purchase description is available.
 - Two or more responsible bidders are willing and able to compete effectively for the business.
 - The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.
- If sealed bids are used, the following requirements apply:
 - An independent estimate of cost must be provided by qualified staff of the procuring agency or an outside third party that will have no role in the contract to be awarded, in advance of the award.
 - Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised.
 - The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond.

- All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly.
- A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.
- Any or all bids may be rejected if there is a sound documented reason.

5.5.2.2 Request for Proposals (RFPs)

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

- An RFP must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical.
- An independent cost estimate must be provided in advance of the award. This can be done by qualified staff of the procuring agency or a qualified third party. No one involved in the development of the independent cost estimate (ICE) or the RFP may participate in the awarded contract. Development of the ICE is preferably done in advance of procurement.
- The non-federal entity must have a written method for conducting technical evaluations of the proposals received and making selections. Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-federal entity, with price and other factors considered.
- The non-federal entity may use competitive proposal procedures for qualifications-based procurement referred to as a request for qualifications (RFQ) for architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort.

5.5.2.3 Non-competitive Procurement

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

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

Independent cost estimates are still required for non-competitive procurements and the procurement files must be well documented with the rationale for selecting this type of procurement.

5.6 Phases of Procurement

There are phases of procurement that include pre-award through post award and reporting and administration. So, before buying goods and services with CDBG-DR to assist in recovery efforts, subrecipients should keep the following in mind:

1. Contractor versus subrecipient determination
2. Subrecipient agreement/subgrantee/intergovernmental agreements
3. Environmental review clearance
4. Authority to use grant funds
5. Use of funds
6. Price and cost analysis
7. Profit negotiation
8. Written system of contract administration
9. Pre-qualified contractor or vendors
10. Suspension and debarment

5.6.1 Contractor/Subrecipient Determination Form

Subrecipients must document prior to procurement that a determination has been made that the relationship into which they will enter is contractual. See example of Determination Form.

5.6.2 Subrecipient Agreement, Subgrantee Agreement, and Intergovernmental Agreements

Subrecipients must have fully executed agreement with required federal and state provisions prior to the starting procurement action and/or executing any project.

5.6.3 Environmental Review Clearance

Environmental review responsibilities are a general condition of all CDBG-DR grants and must be completed prior to the implementation and committal (obligation) of any funds for the approved project to align with the National Environmental Policy Act requirements. Any funds committed, awards made, contracts executed, or projects started (implemented) prior to the completion and approval of the environmental review and receipt of Authorization to Use Grant Funds (AUGF) is considered a “choice limited action.”³ For more information on the process for completion of the environmental review, subrecipients should refer to the Environmental Review Chapter of the subrecipient manual.

5.6.4 Authority to Use Grant Funds

The subrecipient must have received authority to use grants funds from the grantee. This must be on file. Once the Part 58 environmental requirements have been met, the responsible entity (for subrecipients and units of general local government this is the state)

³ HUD defines a choice limiting action as one that may have an adverse impact on the environment or limit the choice of reasonable alternatives. A choice limiting action may include, but is not limited to, signing a lease agreement, real property acquisition, rehabilitation, repair, demolition, disposition, or new construction. Real property acquisition, new construction, disposition, and demolition are not eligible Emergency Solutions Grant (ESG) Program costs; however, for the purposes of environmental review, projects are based on the aggregation of all activities that are included in the scope of the environmental review. So even if ESG Program funds are only used to pay for a portion of the overall project, recipients and subrecipients should still be aware of the non-ESG eligible activities involved that are considered choice limiting actions. Activities listed at [24 CFR 58.35\(b\)](#) that are Categorically Excluded Not Subject To 58.5 (e.g., Tenant-Based Rental Assistance, provision of services) are not choice limiting actions.

the state will issue an “Authorization to Use Grant Funds” (AUGF). This means that an entity can enter into a procurement action.

In no event should a “**choice limiting action**” be entered into prior to receiving the AUGF. Entering into any contract, announcing the selection of a contractor and entering into an unconditional purchase agreement would be examples of “choice limiting actions.” Taking this form of action has the potential for tainting a procurement, requiring the procurement be redone, or it can disqualify the entire project for CDBG-DR funding. Environmental reviews must be completed and approved by the certifying entity. For more information on the process for completion of the environmental review, subrecipients should refer to the Environmental Review Chapter of the subrecipient manual.

5.6.5 Use of Funds

Use of funds must respond to need. Subrecipients must first identify and document a need for goods and services before undertaking procurement. CDBG-DR subrecipients need to make clear the connection between disaster relief, recovery, and related investments in housing, infrastructure and those made to businesses in support of the local economy. Subrecipient agreements should detail the project to be undertaken, the national objective(s) to be achieved, the eligible uses of CDBG-DR funds, and any other funding anticipated for the project.

5.6.6 Independent Cost Estimate

HUD and 2 CRF Part 200 require that the procuring entity conduct an independent cost estimate **in advance of procurement**. This is an estimate of goods/services to be acquired under a contract or a modification. It serves as a yardstick measure in determining price/cost reasonableness, for budgetary purposes, and to help determine procurement method.

It is prepared **before** solicitation (or modification) and may not be necessary for micro-purchases (< \$10,000). If a significant period of time elapses or market conditions change between the time ICE was prepared and offers received, the ICE may need to be updated.

In developing the ICE, the procuring entity may use:

- Price last paid for similar procurement
- Catalog price or other advertised offers
- Personal experience
- Other historical information

- Detailed analyses performed by qualified party

These estimates may be developed in-house or using outside parties (or both). Depending on the type of project to be undertaken, this independent cost estimate can be done by any individual or entity with the proper certifications relevant to the procurement. Appendix A of this document has a sample form that can be utilized for cost estimates.

For a multifamily project or an infrastructure project, this can be an architect or engineer. For single family rehab, a widely recognized cost estimating software (Xactimate or RS Means) can be used. Entities with engineers on their staff may use a staff engineer to provide the independent cost estimate.

When using outside parties *avoid conflicts of interest* and ensure that the outside party does not obtain a competitive advantage from advance knowledge of the cost estimate. For this reason, it is important that the entity providing the independent cost estimate be **precluded from bidding** on the contract and have no financial interest or involvement in the firm ultimately selected.

5.6.7 Price and Cost Analysis

As specified in 24 CFR 85.36(f), a cost analysis or price analysis must be performed for every procurement action, including contract modifications (e.g., "change orders"). The degree of detail required varies with the procurement method and contracting circumstances. These are addressed below.

5.6.7.1 Price Analysis

Price analysis is a review and evaluation of a proposed price without evaluating separate cost elements. It must be used in all cases where a cost analysis is not performed.

5.6.7.2 Cost Analysis

Cost analysis is a review and evaluation of the separate elements of cost that make up the contractor's cost proposal.

It requires that the cost principles be used to determine the allowability and reasonability of costs. A cost analysis is required when:

1. The competitive proposal method of contracting is used (see 24 CFR 85.36(d)(3)), (e.g., acquisition of professional, consulting, A/E services). For procurement of these services, offerors are required to submit cost proposals breaking down the elements of their proposed costs.

2. You are negotiating a contract with a sole source, as justified under 24 CFR 85.36(d)(4). You must request a complete cost breakdown and use these cost principles to establish a fair and reasonable price or established cost.
3. After soliciting sealed bids, you receive only one bid in response, which differs substantially from your independent estimate. If you find that bid unreasonable and you elect not to seek further competition, then you may cancel the solicitation and negotiate a contract price with the sole bidder. If so, you must request a cost breakdown of his/her price and use the cost principles to determine price reasonableness.
4. You are negotiating a modification (including change orders) to any contract that changes the work previously authorized and impacts the price or estimated cost, upwards or downwards. You must request a cost breakdown of the contractor's proposed cost. NOTE: Modifications that change the work beyond the scope of the contract must be justified as a non-competitive action per 24 CFR 85.36(d)(4).

If none of those conditions apply, the work must be procured competitively.

The only circumstances under which you do not need to conduct a cost analysis when adequate price competition is lacking is if the price can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or the price is set by law or regulation. (An item is “sold in substantial quantity” when the quantities regularly sold are sufficient to constitute a real commercial market. For services to be sold in substantial quantities, they must be customarily provided by the contractor, using personnel regularly employed and equipment (if any is necessary) regularly maintained solely to provide the services).

5.6.8 Conducting a Price and Cost Analysis

Subrecipients should include the following in their analysis:

- Check the accuracy of the prices submitted.
- Evaluate the necessity of the proposed cost items.
- Evaluate the separate elements of cost.
- Review proposal for potential cost overruns, taking into consideration the vendor’s past performance.
- Compare proposed prices to the subrecipient’s independent cost estimate.
- Compare proposed prices to previous cost estimates or actual costs incurred for similar work.

5.6.9 Profit Negotiation

Subrecipients must negotiate profit as a separate element of the price for each contract in which there is no price competition and, in all cases, where cost analysis is performed. All of the following criteria must be considered when negotiating profit:

- Complexity of the work to be performed
- Amount of risk the contractor may be exposed to (performance and/or cost)
- Contractor’s investment and resources dedicated to performing the contract (e.g., labor, oversight)
- Use of subcontractors by the prime contractor and the nature of the work to be performed
- Quality of the contractor’s past performance for similar work
- Industry profit rates in the surrounding area for similar work

Subrecipients are responsible for maintaining records and any documentation used to support the profit negotiation.

5.6.10 Written System of Contract Administration

Subrecipients must have a system of contract administration in place, which will be based upon the management of federal funds but may reflect additional state and local laws and regulations.

5.6.11 Pre-Qualified Contractors or Vendors

If there is a list of pre-qualified contractors or vendors, preferably, subrecipients have created these lists prior to any federal appropriation to accelerate procurement. Subrecipients should open the list again when they have received notice of CDBG-DR appropriations to allow additional qualified vendors to join the list.

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

Even with such a list, the non-federal entity must accept proposals from qualified bidders not listed in addition to ensuring compliance with federal requirements such as Section 3,

Historically Underutilized Businesses, Small Minority Businesses, and Women Business Enterprises. The subrecipient must take additional affirmative steps.

Affirmative steps must include:

- Placing qualified small and minority businesses and women's business enterprises on solicitation lists
- Assuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources
- Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises
- Establishing delivery schedules, where the requirement permits, that encourage participation by small and minority businesses and women's business enterprises
- Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the U.S. Department of Commerce as well as HUD's Section 3 Business Registry

5.6.12 Suspension and Debarment

Subrecipients are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180. These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in federal assistance programs or activities.

Subrecipients must ensure, **prior to award**, that all contractors receiving CDBG-DR funds have met all the eligibility requirements outlined in state and federal law. At a minimum, the following steps must be taken to ensure contractor eligibility for all services procured.

All contractors, including professional consulting and engineering firms, must be cleared via a search of the Federal System of Award Management (SAM) to ensure that the contractor is in good standing and has not been debarred. The SAM portal can be found here: <https://sam.gov>. A copy of the SAM search result must be kept in the subrecipient's file on that contractor/vendor.

Subrecipients must notify the selected prime contractors that it is the sole responsibility of the prime contractor to verify subcontractor eligibility based on factors such as past performance, proof of liability insurance, possession of a federal tax number, debarment, and state licensing requirements. It should be noted that if any of the above-listed parties

are deemed ineligible to receive CDBG-DR funds after award of contract, the contract will be immediately terminated. The matter must be reported to the OHCS for further action.

Prior to award, subrecipients should also check the State of Oregon debarred contactors list, which can be located at <https://www.oregon.gov/boli/employers/pages/pwr-ineligible-contractors.aspx>. Pursuant to ORS 279C.860, contractors on this list are ineligible to receive public works contracts subject to the Prevailing Wage Rate Law.

5.6.13 Conflicts of Interest

Subrecipients of CDBG-DR programs must avoid, neutralize, or mitigate actual or potential conflicts of interest to prevent an unfair competitive advantage or the existence of conflicting roles that might impair the performance of the subrecipient agreement or impact the integrity of the procurement process. Subrecipients must maintain written procedures covering conflicts of interest and governing the actions of its employees, agents, consultants, and elected officials engaged in the selection, award and administration of vendor contracts, the award of CDBG-DR assistance, or the management of federally assisted or purchased property. Subrecipients must design a policy that is at least as restrictive as prescribed in 24 CFR Part 570.489.

For the procurement of goods and services, no employee, officer, or agent of subrecipients may participate in the selection, award, or administration of a vendor contract supported by a federal award if he/she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, agent, any member of his/her immediate family, his/her partner, or an organization that employs or is about to employ any of the parties indicated herein, has a financial or other interest in a tangible personal benefit from a firm considered for a vendor contract. (24 CFR 570.489(g))

For all other cases, other than the procurement of goods and services, non-procurement conflict of interest provisions are applicable to any person or entity including any benefitting business, utility provider, or other third-party entity that is receiving assistance, directly or indirectly, under a subrecipient agreement that might potentially receive benefits from CDBG-DR awards.

In such instances (non-procurement), the general rule is that no person/entity described above who:

- Exercises or have exercised any functions or responsibilities with respect to CDBG-DR activities
- Is in a position to participate in a decision-making process

- Is in a position to gain inside information with regard to such activities may obtain a financial interest or benefit from a CDBG-DR-assisted activity, or have a financial interest in any vendor contract, subcontract, or agreement with respect to a CDBG-DR-assisted activity, or with respect to the proceeds of the CDBG-DR-assisted activity, either for themselves or those with whom they have family or business ties

In addition, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements (see 2 CFR 200.319).

For example, an administrative consulting firm that participates in developing or distributing the RFP may not then submit a proposal in response to that RFP.

Some examples of conflicts of interest:

- The same individual or firm has an interest in both a benefitting business identified in the subrecipient agreement performance statement and any consultant or construction contracts required to complete the project.
- Elected officials vote on awarding of funds to organizations where a family member is on the staff or where the elected official is on the subrecipient's board.
- Local officials enter into vendor contracts with companies they are affiliated with through employment of, or ownership by, themselves or their relatives.
- Subrecipient officials or staff have relatives who may benefit from a subrecipient's programmatic activities.

5.7 Allowable Contract Types

Types of contracts that a subrecipient can utilize include:

- Purchase orders
- Fixed priced contract
- Cost reimbursement contracts
- Time and materials contracts

5.7.1 Purchase Orders

Purchase orders are a form of contract utilized for the purchase of supplies, single task services, and produced items procured through the small purchase method.

A Purchase order should contain, at a minimum, the following:

- Agency name and address
- Agency contract or purchase order number
- Date of the order
- Term of contract (delivery period after receipt of order or beginning and end dates)
- Contractor's name, payee/vendor identification number, and address, including ZIP code
- National Institute of Governmental Purchasing class/item for each item
- Purchase code category
- List of contract documents and their order of precedence
- List of awarded items with quantity, unit of measure, and unit price with extended totals
- Signature of authorized/certified purchasing representative

5.7.2 Fixed Price Contract

A fixed price contract is suitable for the acquisition of commercial items, including construction, or for the acquisition of other supplies or services on the basis of reasonably definite functional or detailed specifications and when the contracting officer can establish fair and reasonable prices at the outset.

This contract type:

- Places maximum risk and full responsibility for costs and resulting profit loss on the contractor
- Provides maximum incentive for the contractor to control costs and perform effectively
- Imposes and minimum administrative burden upon the contracting parties

5.7.3 Cost Reimbursement Contract

A cost reimbursement contract is suitable for situations in which uncertainties are involved in contract performance that do not permit costs to be estimated with sufficient accuracy to establish a fixed contract price. These types of contracts establish an estimated total cost for the purpose of obligating funds and establishing a ceiling that contractors may not exceed (except at their own risk).

5.7.4 Time and Materials Contract

Time and materials contracts specify the scope of a project but are open-ended. They set out prices for materials and other indirect costs (ODC's) and hourly rates for labor, and the client is billed at those rates for as many hours and as much material as is required to complete the project. All time and materials contracts must include a "not to exceed" amount. This type of contract is most appropriately used for professional services contracts.

5.7.5 Changes/Amendments to an Executed Contract

When changes to an executed contract are necessary that would result in a change to the Subrecipient Agreement, the subrecipient should request an adjustment to both the Subrecipient Agreement and the subrecipient contract. When changes to an executed construction or contract are necessary, the subrecipient must submit follow their policy on documenting the requirements for a change order or amendment. The subrecipient must ensure that all items listed on the change order are eligible and comply with the Subrecipient Agreement as outlined and all environmental review requirements. Change orders for construction contracts will require additional documented analysis of determination that added costs are necessary, reasonable, and eligible. Changes or additions to scopes of work for subrecipient agreements must also be documented.

5.7.6 Bonding Requirements and Insurance

For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of OHCS and the State of Oregon, provided the awarding agency has made a determination that the federal interest is adequately protected.

If such a determination has not been made, the minimum requirements shall be as follows:

- (1) A bid guarantee from each bidder equivalent to 5% of the bid price. The bid guarantee shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.
- (2) A performance bond on the part of the contractor for 100% of the contract price. A performance bond is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100% of the contract price. A payment bond is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract. The State of Oregon bond requirements can be found at <https://www.oregon.gov/ccb/pages/ccb%20license.aspx>. Subrecipients should comply with bond requirements as directed by OHCS.

Note: If state or local procurement policies require higher or additional bonding and insurance requirements, they must be followed for CDBG-DR procurement.

5.7.7 Required Contract Provisions (contract provisions for non-federal entity contracts under federal awards)

All contracts using federal funds must contain the following provisions:

- Specific period of performance/project schedule
- Specific amount (can be “not to exceed amount”)
- Specific milestones or deliverables
- Liquidated damages provisions
- Termination for cause or convenience (if over \$10,000)
- Records of non-federal entities
- Record retention
- HUD clauses (a complete copy of clauses can be found in Appendix D)
 - Equal Opportunity
 - Davis-Bacon Act
 - Section 3 (if construction over \$200,000)
 - Contract Work Hours and Safety Standards
 - Rights to Inventions Made under Contract or Agreement
 - Clean Air Act
 - Debarment and Suspension
 - Byrd Anti-Lobbying Amendment

- Solid Waste Disposal Act⁴

Subrecipients must ensure that contracts do not contain any cost plus or incentive savings provisions.

Please see Appendix C for clauses that should be included in every procurement, along with wage determinations, if applicable.

5.8 Procurement Documentation Requirements

Any project requiring procurement should maintain a complete procurement file for each procurement. This file must be retained consistent with the record retention requirements of the state's CDBG-DR grant and be available for review and monitoring upon request.

Each procurement record should contain the following information:

- A copy of the Authorization to Use Grant Funds
- An independent cost estimate for the project or services being procured
- A complete copy of the procurement documents, which must include as relevant:
 - A complete copy of the technical proposal
 - Evaluation criteria
 - Submission timeline and details
 - Proof of advertisements, if applicable
 - Proof that an adequate number of firms were directly contracted
 - Copy of bidding/proposal packages received
 - Copy of bid evaluations and tabulations
 - Minutes of award or hiring resolutions (if applicable)
 - Debarment verification
 - All submission requirements
 - All HUD riders
 - Davis-Bacon Act/prevaling wage determination

⁴ A non-federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

- Labor standards requirements
- Section 3 requirements
- Inclusion of a sample contract is also recommended (not required)
- Copy of notice to award

Any relevant documentation related to the communication of the procurement including responses to questions concerning the procurement must be included. This documentation can be critical especially when written rationale must be provided for extenuating circumstances.

5.9 Appendices

5.9.1 Appendix A — Form for Independent Cost Estimates

Note: This example form lends itself better to ICE for A/E, other professional services, and contracts for “Time and Materials.” For construction projects, a licensed engineer or architect can provide an ICE based on the technical specifications provided. For residential construction, a qualified inspector can provide an ICE based on nationally recognized construction cost software (e.g., Xactimate or RS Means).

Grantee Estimated Cost Sheet

Project Name	Due Date of RFP/RFQ		
Street Address			
City, State, ZIP	Total Price \$		
A. <u>Direct Labor</u> Attach a copy of the scope of services identified in the RFP/RFQ. Each task identified in the scope of services should be assigned an estimated amount of time for completion. The total			
Job Title (e.g., Architect, Draftsman,	Est. No. of Days	Daily Rate	Est. Cost
1.			
2.			
3.			
4.			
5. Total Direct Labor			
B. <u>Overhead/Indirect Costs</u>	<u>Rate</u>	<u>Base</u>	<u>Est. Cost</u>
C. <u>Other Direct Costs</u>			
Transportation	Est. # of site visits	Rate	Est. Cost
Per Diem	Est. No. of Days	Daily Rate	Est. Cost
Reproduction	Est. No. of Pages	Page Rate	Est. Cost
Other (specify)			\$
1.			\$
2.			\$
3.			\$
4.			\$
5. Total Other Direct Costs			\$
D. Subcontracts			
Type of Subcontractor(s)	Est. No. of Days	Daily Rate	Est. Cost
1.			
2.			
3. Total Subcontractor Costs			
Total Estimated Costs (Line A5+B+C5+D3)			\$
Profit			\$
TOTAL ESTIMATED PRICE			\$

5.9.2 Appendix B — Award Form



DATE:

PROJECT INFORMATION

Grant

Loan

Contract

Program Funding Name:

Service Area(s):

SUBRECIPIENT/CONTRACTOR INFORMATION

Name:

Address:

Chief Financial Officer:

**Unique Entity Identifier
(SAM.gov)**

COMMUNITY DEVELOPMENT INFORMATION

Contact Person:

Email Address:

Telephone Number:

FEDERAL FUNDS INFORMATION

Federal Award Number:

Federal Award Date:

**Catalogue of Federal Domestic Assistance
(Number):**

**Total Federal Award
Amount:**

**Total Federal Funds Award to
Recipient:**

Award for Research and Development: Yes No

Indirect Cost Rate Approved/Allowed: Yes No

GRANT/LOAN AWARD PERIOD

**Grant/Loan Award
Period:**

Length of Award Period:

FEDERAL AWARD PROJECT DESCRIPTION

5.9.3 Appendix C — Required Contract Clauses for Use when Procuring Projects Using Federal Funds (2 CFR [Part 200 — Appendix II])

- Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by [41 U.S.C. 1908](#), must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms and provide for such sanctions and penalties as appropriate.
- All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-federal entity including the manner by which it will be effected and the basis for settlement.
- **Equal Employment Opportunity.** Except as otherwise provided under [41 CFR Part 60](#), all contracts that meet the definition of “federally assisted construction contract” in [41 CFR Part 60-1.3](#) must include the equal opportunity clause provided under [41 CFR 60-1.4\(b\)](#), in accordance with Executive Order 11246, “Equal Employment Opportunity” (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at [41 CFR part 60](#), “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”
- **Davis-Bacon Act, as amended (40 U.S.C. 3141-3148).** When required by federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-federal entities must include a provision for compliance with the Davis-Bacon Act ([40 U.S.C. 3141-3144](#), and [3146-3148](#)) as supplemented by U.S. Department of Labor regulations ([29 CFR Part 5](#), “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-federal entity must place a copy of the current prevailing wage determination issued by the U.S. Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-federal entity must report all suspected or reported violations to the federal awarding agency.

- The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act ([40 U.S.C. 3145](#)), as supplemented by U.S. Department of Labor regulations ([29 CFR Part 3](#), “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must 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 to which he/she is otherwise entitled. The non-federal entity must report all suspected or reported violations to the federal awarding agency.
- **Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708).** Where applicable, all contracts awarded by the non-federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with [40 U.S.C. 3702](#) and [3704](#), as supplemented by U.S. Department of Labor regulations ([29 CFR Part 5](#)). Under [40 U.S.C. 3702](#) of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of [40 U.S.C. 3704](#) are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market or contracts for transportation or transmission of intelligence.
- **Rights to Inventions Made Under a Contract or Agreement.** If the federal award meets the definition of “funding agreement” under [37 CFR § 401.2 \(a\)](#) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of [37 CFR Part 401](#), “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements” and any implementing regulations issued by the awarding agency.
- **Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended.** Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act ([42 U.S.C. 7401-7671q](#)) and the Federal Water Pollution Control Act as amended ([33 U.S.C. 1251-1387](#)). Violations must be reported to the federal

awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

- **Debarment and Suspension (Executive Orders 12549 and 12689).** A contract award (see [2 CFR 180.220](#)) must not be made to parties listed on the governmentwide exclusions in SAM, in accordance with the Office of Management and Budget guidelines at [2 CFR 180](#) that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contain the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.
- **Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).** Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant, or any other award covered by [31 U.S.C. 1352](#). Each tier must also disclose any lobbying with non-federal funds that takes place in connection with obtaining any federal award. Such disclosures are forwarded from tier to tier up to the non-federal award.
- **Solid Waste Disposal Act.** A non-federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.