

## 4.

# FHWA CONTRACTING REQUIREMENTS

*49 CFR 18.36(a)*  
*49 CFR 18.37(a)*  
*23 CFR 710.201(g)*  
*23 CFR Part 200*  
*23 CFR 1.33*

### REFERENCES

The regulations contained in 49 CFR 18.36(a) and 18.37(a) are primary and govern how States and Local Public Agencies (LPAs) are to procure right-of-way contractual services. Regulations contained in 23 CFR Part 200 cover Title VI, Civil Rights, requirements. Conflict of interest is covered in 23 CFR 1.33.

States and LPAs have their own contracting requirements which they must follow. LPAs should obtain from their STD the procurement procedures, requirements and guidelines appropriate for their work.

### 4.1 STATES

The procurement procedures followed by a State when executing right-of-way service contracts on Federal-aid projects are the same policies and procedures used for procurement with non-Federal funds. However, the State must ensure that every purchase order and contract includes clauses required by Federal statutes and implementing regulations, as well as State requirements. State contracting officials will be able to assist in delineating the appropriate clauses that each contract must contain.

***States can use the same procurement procedures on Federally funded right-of-way service contracts that they use on non-Federally funded projects. Contracting requirements for sub-grantees (LPAs) must follow the State's procedures, unless the State has approved the sub-grantee to use its own procedures.***

### SUMMARY

## 4.2 LPAs

49 CFR 18.37(a) requires the State to administer sub-grants to local governments in accordance with the State's own procedures. Therefore, local government sub-grantees (LPAs) are to follow the procurement procedures specified by the State, unless the State approves the sub-grantee's use of its own procurement procedures.

## 4.3 CONTRACTING FOR SERVICES GUIDELINES

### 1. Selecting the Contracting Method

There are many types of contracts that are acceptable and currently used for right-of-way services contracts:

a. Competitive Proposals. Under this technique more than one source submits an offer and either a fixed-price or cost reimbursement contract is usually awarded. If this method is used, the following usually apply:

- C Requests for proposals are publicized and identify all significant evaluation factors and their relative importance.
- C Proposals are evaluated.
- C Awards are made to the responsible firm whose proposal will be most advantageous to the program, with price and other factors considered.

b. Noncompetitive Proposals. This technique allows solicitation of a proposal from only one source. This sometimes occurs when, after solicitation of proposals from a number of sources, competition is determined inadequate. Procurement may be subject to cost analysis by the agency or pre-award review. States in which contractors are paid by billable hours use pre-award audits where overhead rates are agreed upon prior to the notice to proceed with work. Care is used when reviewing contractor billings to assure that charges accurately reflect contractor progress toward project completion.

This method is usually used when the award of a contract is not feasible under small purchase procedures, sealed bids, or competitive proposals and one of the following applies:

- ! Selecting the Contracting Method*
- ! Pre-qualifying Contractors*
- ! Soliciting and Selecting Proposals*
- ! Writing the Contract*
- ! Administering Contracts*
- ! Avoiding Problems*

### **CONTRACTING FOR SERVICES**

- C The item is available only from a single source.
- C Public need will not permit the delay resulting from competitive solicitation.
- C After solicitation of a number of sources competition is inadequate.

c. **Small Purchase Procedures.** These are relatively simple procurement methods for securing services, supplies, or other property that often do not cost more than a specific dollar threshold. Often when small purchase procedures are used, price or rate quotations are usually obtained from an adequate number of qualified sources.

d. **Sealed Bids.** Under this technique bids are publicly solicited and a fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid conforms with the material terms and conditions of the invitation for bids and is lowest in price.

e. **Qualifications-based Procedures.** Using this method, the best qualified contractor is selected and the price is negotiated.

## **2. Pre-qualifying the Contractor**

Do a thorough pre-qualification screening. Check with previous customers as to quality and timeliness of the work product. It is important to know whether the contractor has had previous highway right-of-way experience or at least experience with federally funded projects administered under Uniform Act requirements. Check backgrounds and references.

Often acquiring agencies (because of political considerations) will want specific firms to do the work. Important things to remember are:

- a. Is the contractor qualified for the job?
- b. Governing procurement procedures must be followed.

## **3. Soliciting and Selecting Proposals**

Once contractors have been pre-qualified, a request for proposal (RFP) may be prepared and a proposal requested. When all proposals for a particular job are received, an evaluation process is undertaken. The evaluation process involves analysis of price, staff, as well as the general capability to do the job.

## **4. Writing the Contract**

In general, contracts contain the following. Item 4n, non-discrimination clauses, is a requirement of the governing regulations.

- a. Date of the agreement.

- b. Complete name and address of each party to the agreement whether it is an individual, partnership, firm or corporation. If a corporation is one of the parties, identify the State in which it is incorporated.
- c. Description of the work, showing the nature and scope of services to be performed.
- d. Specifications as to the how work is to be performed, the content and format of needed reports, timeliness, accuracy and acceptability of work.
- e. Provision for court testimony when necessary.
- f. Provision for revision or correction of work required as the result of contractor failure to comply with contract specifications.
- g. The basis of progress payments for services as completed.
- h. Provision for the renegotiation of the contract for mutual acceptance of major changes in the scope, character, or estimated total cost of the work to be performed, if such change become necessary.
- i. Provision to terminate the contract by the agency in the event the contractor is not complying with the terms of the agreement, the progress or quality of the work is unsatisfactory, or for other stated reasons. A provision covering the ownership of work completed, or partially completed, and the basis of payment in the event of termination of the agreement by the acquiring agency, should be included.
- j. Provision for resolving contract disputes.
- k. Prohibition against subletting or transfer of any of the work, except as is otherwise provided for in the agreement, or approved by the agency.
- l. Provision for compliance with applicable laws, regulations and Agency procedures.
- m. Indemnification of the Agency.
- n. Inclusion of all required non-discrimination provisions.

***A sample of current contracts, requests for proposals, and general guidance is available on the FHWA Office of Real Estate Services website:***

***[www.fhwa.dot.gov/realestate/](http://www.fhwa.dot.gov/realestate/)***

***At that site, you will find several examples, including the following:***

- < ***[Current contract used by Colorado DOT](#)***
- < ***[Request for proposal, sample 1](#)***
- < ***[Request for proposal, sample 2](#)***
- < ***[Generic fill-in-the-blank contract](#)***
- < ***[Contractor performance evaluation form](#)***

