



Department of Energy
Washington, DC 20585

EECBG PROGRAM NOTICE 10-014
EFFECTIVE DATE: June 23, 2010

SUBJECT: GUIDANCE FOR ENERGY EFFICIENCY AND CONSERVATION BLOCK GRANT RECIPIENTS ON USE OF PROCUREMENT METHODS.

PURPOSE

To provide guidance to Department of Energy's (DOE's) Energy Efficiency and Conservation Block Grant (EECBG) Program Grantees on methods of procurement to be followed.

SCOPE

The provisions of this guidance apply to recipients of EECBG funds, pursuant to Formula Grant or the American Recovery and Reinvestment Act of 2009 (Recovery Act).

LEGAL AUTHORITY

Title V, Subtitle E of the Energy Independence and Security Act of 2007, as amended, authorizes DOE to administer the EECBG Program. All grant awards made under this program shall comply with applicable law, including the Recovery Act, and other procedures applicable to this program.

GUIDANCE

This guidance clarifies the provisions in the DOE Financial Assistance Rules (10 C.F.R. Part 600) concerning methods of procurement to be followed by EECBG Grantees and sub-grantees (collectively, "Grantees"). All EECBG Grantees are required to follow 10 C.F.R. § 600.236 (Procurement), which prescribes regulations for state and local governments entering into procurements for property and services under federal financial assistance programs. Certain Grantees have asked DOE whether they may use non-competitive procurement (including sole sourcing), and this guidance clarifies the agency's position on permissible procurement activities.

Procurement Policies and Procedures

States: When procuring property and services under a grant, States are directed to follow the same policies and procedures used for procurements from their non-Federal funds. States will ensure that every purchase order or other contract includes any clauses required by Federal statutes, executive orders, and implementing regulations. 10 C.F.R. § 600.236(a).

Non-States: All other EECBG Grantees and sub-grantees must follow paragraphs (b) through (i) in 10 C.F.R. § 600.236. These Grantees are directed to use their own procurement procedures which reflect applicable State and local laws and regulations, *provided that the procurements conform to applicable Federal law and the standards identified in Section 600.236*. 10 C.F.R. § 600.236(b).

Please refer to Section 600.236(b)-(i) for a complete description of the procurement responsibilities of non-States.

Methods of Procurement

All procurement transactions must be conducted in a manner providing full and open competition. The Financial Assistance Rules provide example situations considered to be restrictive of competition (*e.g.*, placing unreasonable requirements on firms in order for them to qualify to do business; non-competitive awards to consultants that are on retainer contracts; organizational conflicts of interest). Please see the complete list of examples at 10 C.F.R. § 600.236(c)(1).

EECBG Grantees' procurement procedures must conform to the following methods: (1) procurement by small purchase procedures; (2) procurement by sealed bids (formal advertising); (3) procurement by competitive proposals; or (4) procurement by non-competitive proposals. 10 C.F.R. § 600.236(d).

Procurement by Small Purchase Procedures: This method of procurement covers relatively simple and informal procurement methods for securing services, supplies, or other property not exceeding \$100,000 in cost. With this method, price or rate quotations must be obtained from an adequate number of qualified sources.

Procurement by Sealed Bids: This is the preferred method for procuring construction. Under this method, bids are publicly solicited and a firm fixed-price contract is awarded to the responsible bidder whose bid is the lowest in price (provided it conforms with all material terms and conditions of the invitation for bids). There are several conditions that must be present in order for sealed bidding to be feasible. These conditions are listed at 10 C.F.R. §600.236(d)(2)(i)(A)-(C).

Competitive Proposals: Procurement by competitive proposals is normally conducted with more than one source submitting an offer, with either a fixed-price or cost-reimbursement type contract being awarded. The following requirements apply for competitive proposals:

- (1) Requests for proposals (RFPs) will be publicized and identify all evaluation factors and their relative importance. Any response to publicized RFPs shall be honored to the maximum extent practical;
- (2) Proposals will be solicited from an adequate number of qualified sources;
- (3) Grantees and sub-grantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;
- (4) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
- (5) Grantees and sub-grantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

Non-Competitive Proposals: Procurement by non-competitive proposals is procurement through solicitation of a proposal from only one source or, if after solicitation of a number of sources, competition is determined inadequate. *Procurement by non-competitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals,* and one of the following circumstances apply:

- (1) The item is available only from a single source;
- (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- (3) The awarding agency authorizes non-competitive proposals; or
- (4) After solicitation of a number of sources, competition is determined inadequate.

A cost analysis (verifying the proposed cost data, the projections of the data, and the evaluation of specific elements of costs and profits) is required for non-competitive proposals. 10 C.F.R. §§ 600.236(d)(4)(ii). Grantees must on request make available to DOE the proposed procurement documents for pre-award review, if the procurement is expected to exceed the \$100,000 threshold and be awarded without competition or only one bid or offer is received in response to a solicitation. 10 C.F.R. §§ 600.236(d)(4)(iii), 600.236(g)(2).

Grantee Compliance with Procurement Requirements

States: State Grantees are expected to use the same policies and procedures they use for procurements from their non-Federal funds.

Grantees and Sub-grantees: As an initial matter, for small purchases of services and property (with a cost of \$100,000 or less), Grantees and sub-grantees are able to utilize small purchase procedures, provided that they document price or rate quotes obtained from an adequate number of qualified sources.

DOE recognizes that Grantees and sub-grantees may have established written policies and procedures that permit procurement by non-competitive methods (including sole sourcing) under certain circumstances. 10 C.F.R. § 600.236(d)(4) provides that Grantees and sub-grantees may use non-competitive procurements when the award of a contract is infeasible under the small purchase procedures, sealed bids, or competitive proposals, and one of the circumstances listed in 10 C.F.R. § 600.236(d)(4)(i)(A)-(D), as listed above at (1)-(4), apply.

DOE interprets “infeasibility” broadly, such that it can apply when a Grantee cannot successfully perform or accomplish an activity or project funded with EECBG funds within the recommended timeframes if required to use competitive procurement proposals. Because of the rigorous costing and payment targets of the Recovery Act, DOE recognizes that many Grantees with limited staff and resources may not be able to carry out or achieve the objectives of the EECBG Program if compelled to undertake one or more time-consuming competitive procurement proposals. In such instances, Grantees may have to use non-competitive procurement to complete a project or program in accordance with the requirements of the Recovery Act.

If the Grantee or sub-grantee can demonstrate that it is infeasible to use small purchase procedures, sealed bids, or competitive proposals, as interpreted above, and that: (1) the item is available only from a single source; (2) the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) the awarding agency authorizes noncompetitive proposals; or (4) after solicitation of a number of sources, competition is determined inadequate, then it may use non-competitive procurements.

In addition, DOE recognizes that circumstances (1), (2), and (4) above may apply for many EECBG Grantees, under different conditions. For example:

- Under (1) (“The item is available only from a single source”), Grantees subject to Buy American’s requirements may actually be able to obtain a covered good from only a single domestic source. In other instances, Grantees may only have one available supplier for a good or service in their locality.
- Under (2) (“The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation”), Grantees may be in situations demanding urgent and immediate action to implement an eligible project or activity, and the use of competitive solicitation would create an unreasonable delay under the EECBG Program. Grantees may make a

determination that the Recovery Act targets require the urgent procurement of third-party goods and services in order to move a project forward in accordance with these timelines.

- Under (4) (“After solicitation of a number of sources, competition is determined inadequate”), Grantees may undertake competitive procurement processes only to find that there was not a sufficient response to provide for full and open competition.

When demonstrating infeasibility and the application of circumstances (1), (2), or (4) above, there is no need for Grantees to seek DOE authorization in advance of using non-competitive procurement. However, each such Grantee must document its procurement activities related to the use of any EECBG funds, account for the existence of infeasibility and additional circumstances related to the use of non-competitive proposals, and retain any records related to their procurement procedures and practices for the life of the award. Grantees must also perform the required cost analysis and retain the results. It is important that Grantees document their procurement activities in order to protect themselves from the appearance of any conflict of interest or other impermissible non-competitive action.

Only when Grantees cannot demonstrate the application of circumstances (1), (2), or (4), should they then rely on (3) above (“The awarding agency authorizes noncompetitive proposals”) to justify non-competitive procurement for DOE approval. In these instances, a Grantee must provide its Project Officer with a sufficient amount of information to demonstrate that competitive procurement was not feasible in light of the Recovery Act timelines and/or project-specific requirements, efforts that the Grantee undertook to seek competition, and any other information unique to the Grantee that would demonstrate that non-competitive procurement with EECBG funds is necessary. The Project Officer will provide the authorization request to an EECBG Program Manager for review and a determination. EECBG Program Managers have been delegated to authorize certain non-financial processes as part of the award administration process.

For those Grantees that (1) are authorized by established, internal procedures to utilize non-competitive procurement, and (2) already have used a non-competitive procurement proposal, there is no need for these Grantees to seek retroactive authorization from DOE. Instead, each such Grantee should ensure that their records sufficiently document the Grantee’s compliance with existing procurement policies and procedures for each instance of non-competitive procurement related to EECBG funds, including the required cost analysis.

Grantees that do not have established procurement procedures should refer to the appropriate procurement procedures of a similarly-situated unit of government in their region or the procedures of the State.

Additionally, any Grantees with internal, established procurement procedures that require competitive procurement must conform to those procedures for EECBG funds. Such Grantees must ensure that the requirements in the Financial Assistance Rules are satisfied with regard to the use of competitive proposals. In all cases, a Grantee's established procurement procedures should prevail.

CONCLUSION

All Grantees are encouraged to proceed with the implementation of their respective EECBG projects and activities, without delay, in order to promote the purpose and goals of the Recovery Act and the EECBG Program. DOE understands Grantees' interests in expediting the procurement of property, goods, and services for their programs. However, it is paramount that all Grantees follow the applicable procurement requirements set forth in their established procedures and the DOE Financial Assistance Rules with regard to the use of competitive and non-competitive solicitations.

If you have questions concerning your preferred method of procurement, please contact your Project Officer.



Tobias Russell
Acting Program Manager
Weatherization and Intergovernmental Program
Energy Efficiency and Renewable Energy