

## CHAPTER 6. SEALED BIDS

### 6.1 General

For all PHA contracting requirements above the small purchase threshold, competitive procurements are conducted by inviting sealed bids or by requesting competitive proposals. Both methods are effective ways of satisfying the PHA's contractual requirements. The requirements for sealed bidding are discussed in this chapter and requirements for competitive proposals are discussed in Chapter 7. This chapter only applies to contracts in excess of the Federal small purchase threshold.

### 6.2 Description

Under sealed bids, the PHA publicly solicits bids 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. Sealed bidding is the preferred method for procuring construction, supply, and non-complex service contracts in excess of the Federal small purchase threshold. However, PHAs may use competitive proposals for construction contracts.

### 6.3 When to Use Sealed Bids

Sealed bidding should be used whenever the requirements in **24 CFR 85.36(d)(2)(i)** can be met.

### 6.4 Alternate Bids

PHAs should not request alternate bids, i.e., two different systems or types of projects. Instead, when necessary because of limited available funding, a PHA may specify the most expensive system as the base bid and list deductive alternates in inverse priority order. Thus, in the case of limited funding, deductive alternates may be taken in numerical order as listed until the award can be made within available funds.

Example: If the full-scope base bid included complete repainting and cleaning of 75 apartments, Deduct Alternate #1 might delete cleaning of 25 apartments and Deduct Alternate #2 might delete all cleaning. In this way, PHAs can maximize the amount of work to be completed within a limited budget. Without alternates the project may have to be re-bid if the full-scope price exceeds the available budget.

### 6.5 Invitation for Bids (IFB) (24 CFR 85.36(d)(2))

The IFB is the entire package of information necessary for potential bidders to submit a bid. The IFB includes a description of the supplies or services being purchased, any unique technical information, time and place of bid opening, time and place of site inspections or pre-bid conferences, a form for stating the bid price, and any required forms, as outlined below.

- A. **IFB Package.** The IFB packages for supplies, services, or construction are quite similar. The major difference is the length and complexity of the specifications or scope of work and the variety of attachments. All IFBs must be in writing. The basic documents to be included in an IFB package are:

1. **Cover Page with Table of Contents.** States the name, address and phone number of the PHA, a person to contact for information regarding the solicitation, the project name and solicitation number, and a table of contents for the complete solicitation package. A sample IFB cover page is shown at **Appendix 4**.
  2. **Bid Form.** This is the form on which bidders enter their bid or price(s). The form must be clear, accurate, and unambiguous.
  3. **Specification and Statement of Work.** Description of the work or items required. See Chapter 9.
  4. **Form HUD-5369, Instructions to Bidders for Contracts, Public and Indian Housing Programs** (construction) or **form HUD-5369-B, Instructions to Offerors Non-Construction.**
  5. **Form HUD-5369-A, Representations, Certifications, and Other Statements of Bidders, Public and Indian Housing Programs** (construction) or **form HUD-5369-C, Certifications and Representations of Offerors Non-Construction Contract.**
  6. **Form HUD-5370, General Conditions of the Contract for Construction or form HUD-5370-C, General Conditions for Non-Construction Contracts,** along with any appropriate Davis-Bacon or HUD wage decision for construction and maintenance work.
- B. Method of Solicitation.** While any of the following methods can be employed, the Contracting Officer should choose the method, which, considering matters of economy, provides for full and open competition.
1. Advertising in newspapers or other print mediums of local or general circulations. A sample advertisement is provided in **Appendix 3**.
  2. Advertising in various trade journals or publications.
  3. E-Procurement. PHAs may conduct their public procurements through the internet using e-procurement systems. However, all e-procurements must otherwise be in compliance with **24 CFR 85.36**, State and local requirements, and the PHA's own procurement policy. Steps must be taken to meet the requirements for full and open competition to avoid potential protests.
- C. Time Period for Solicitation.** The solicitation must be run for a period sufficient to achieve effective competition, which, in the case of paid advertisements, should generally be run not less than once each week for two consecutive weeks. State or local law may impose additional advertising requirements.

## 6.6 Amendments

If a change to the IFB, e.g., specifications, plans, date or time for bid opening, etc., becomes necessary after it has been issued, the change must be accomplished by issuing a written amendment, sometimes called an addendum. The amendment must indicate the IFB

number, project title, issue date of the original IFB, and formally detail each change. Each amendment must be noted on the PHA's solicitation log. A copy of the amendment should be mailed to each prospective bidder who was provided the initial IFB package with acknowledgement required. If an amendment needs to be issued just before the scheduled bid opening date, the bid opening should be postponed for an adequate period of time to permit the potential bidders to fully analyze the change and to submit timely bids. A sample solicitation amendment is included at **Appendix 5**.

## **6.7 Pre-Bid Conference**

After the IFB is issued and before bids are due, the Contracting Officer may hold a pre-bid conference with prospective contractors to discuss the project requirements and details of the IFB. The conference should be attended by the Contracting Officer and supporting technical staff. A pre-bid conference is normally conducted for large or complex procurements. Notice of any scheduled conference should be included in the IFB. The timing of the conference should allow bidders enough time to review the IFB before the conference and adequate time to prepare or revise their bids before the bid opening. At the conference, the Contracting Officer should state that nothing said at the conference will change any of the terms of the IFB unless a subsequent written amendment to the solicitation is issued. A written summary of the conference should be made available to anyone requesting it. The summary should also be provided to all those who submitted IFBs or solicitations, not just those who attended the pre-bid conference. Attendance by offerors at the pre-bid conference, while desirable, should not be mandatory, and non-attendees should not be deemed non-responsive. The PHA should consider the need for all potential bidders to attend. Attendance may not be necessary for firms familiar with the work and others may be unable to schedule a representative to attend, although they may be well qualified to do the work at a reasonable price. To impose a requirement to attend a pre-bid conference could unnecessarily limit competition.

## **6.8 Canceling an IFB**

- A. The PHA may cancel IFBs when necessary or when otherwise considered to be in the best interest of the PHA. A common reason for canceling an IFB is that the low bid significantly exceeds the PHA's budget (note, this is a good reason to consider the use of deductive alternate bids) or when the scope of work or specifications are found to be ambiguous or flawed, e.g., by the submission of wildly different bids or offer prices. Cancellations must be done in accordance with the PHA's written procurement policy and procedures. While it is not prohibited, the repeated cancellation of a single IFB or cancellation of multiple IFBs only serves to create a lack of confidence in the PHA's bidding process. Such actions may create the appearance that either the PHA does not really know what it wants, or that the PHA may be seeking a particular bidder or bidders.
- B. The Contracting Officer or designated procurement official shall document the procurement file with the reasons and supporting facts for canceling the IFB (24 CFR 85.36(b)(9)).

## **6.9 Bid Opening (24 CFR 85.36(d)(2))**

The bid opening process shall be carried out as follows:

- A. **Time and Place Certainty.** Each bid must be dated and time-stamped immediately upon receipt by the PHA. Sealed bids should be stored in a locked bid box, cabinet,

or safe to ensure that they are not opened or mishandled prior to the bid opening. A PHA staff person should standby just before the deadline to see that bids received at the proper location are date- and time-stamped expeditiously. Sealed bids received after the time specified in the IFB should be recorded as a late bid and kept unopened in the contract file. A late bid received before the award is made may only be considered in accordance with the procedures listed in the form HUD-5369, Item 5, or form HUD-5369-B, Item 6.

- B. **Public Bid Opening Process.** To ensure fairness in the award process, anyone is permitted to attend the bid opening. Bids shall be publicly opened on the scheduled date and time shown in the solicitation. The bid opening official (usually the Contracting Officer) reads aloud the bidders' names and the bid prices. This information is recorded and may be made available for public inspection. No commitment or statement regarding contract award should be made to any bidder at the bid opening.
- C. **Recording the Bids.** As bids are publicly opened and read aloud, an abstract (sometimes referred to as a tabulation) of all bids is prepared showing the name of each bidder and their bid prices including alternates, if any. This abstract becomes part of the official contract file. The abstract is public information and a copy may be sent to interested parties when requested.

#### **6.10 Mistakes in Bids**

- A. **General.** Correction or withdrawal of bids requires careful consideration. The integrity of the competitive bidding system must be maintained, fairness ensured, and delays avoided. While bidders must be bound by their bids (the "firm bid rule"), circumstances may arise where correction or withdrawal of bids is proper and may be permitted.
- B. **Mistakes Before Bid Opening.** Unless otherwise prohibited by State or local law, bidders shall be permitted to withdraw or modify their bids by written or facsimile notice prior to bid opening (see form HUD-5369, Item 5, and form HUD-5369-B, Item 6).
- C. **Review of Bids for Mistakes.** After the bid opening, the Contracting Officer should carefully review all bids to ensure that the bidders have not made any obvious mistakes in their bids, e.g., the sum of individual bid line items does not equal the total bid price. An item-by-item recalculation of the bid costs will often reveal the miscalculation or error. If a bidder appears to have made a mistake, the Contracting Officer should immediately notify a bidder of any apparent mistake in his/her bid and request verification of the bid as submitted. If the bidder is not present at bid opening, or if the Contracting Officer performs the bid review after opening takes place, the Contracting Officer should notify the bidder by phone. PHAs are strongly advised to confirm phone notifications with a follow-up letter containing the information communicated by phone. The Contracting Officer should place a copy of the letter or otherwise document the procurement file.
- D. **Mistakes after Bid Opening.** In general, bidders should not be permitted to change a bid after bid opening. In rare cases, the Contracting Officer may permit the revision of a bid if the bidder is able to present clear and convincing evidence,

acceptable to the Contracting Officer, of a mistake and the intended bid price. Allowing changes to bids without appropriate evidence may compromise the integrity of the public bid process and serve to undermine public confidence in the PHA's bidding process. Therefore, the Contracting Officer should request as much evidence as he or she deems necessary. Examples of evidence may include: original work papers, bids from suppliers and subcontractors used to develop the bid, bonding or insurance evidence supporting a different bid price, etc. Failure or refusal by a bidder to provide adequate evidence shall result in the original bid remaining unchanged. PHA personnel should consult with their legal counsel before allowing a change in bid. If justified, a low bidder can be replaced with the next lowest bidder.

- E. **Withdrawal of Bids.** Withdrawal of a bid is permissible if there is an obvious error in the bid such as a math error, but the mistake must be readily apparent from the bid itself. A bidder may be permitted to withdraw a low bid if a mistake is clearly evident on the face of the bid document, but the intended correct bid is not similarly evident. A bidder may also be permitted to withdraw a low bid if the bidder submits written evidence that clearly and convincingly demonstrates that a mistake was made. The PHA should require written supporting evidence before allowing withdrawal by the bidder. If the PHA allows withdrawal, the bid bond should be returned to the bidder upon verification of the error. In cases of alleged mistakes or requests for withdrawal, the decision to allow a correction or withdrawal should only be made after consultation with the PHA's legal counsel.

#### **6.11 Bonds/Guarantees (24 CFR 85.36(b); 24 CFR Part 1000)**

This section describes the specific bonding requirements for construction contracts of more than the Federal small purchase threshold. While PHAs may use sealed bidding for other types of materials and service contracts, the same bonding requirements do not apply. PHAs may adopt bonding requirements for these other sealed bidding contracts as they deem appropriate.

- A. **General.** In sealed bid construction contracts, three types of bonds or guarantees are required: a bid bond or guarantee, a performance bond, and a payment bond. The purpose of these bonds is to ensure bidders will honor their bids, complete work as contracted, and pay their subcontractors and suppliers.

#### **B. Definitions**

- 1. **Bid Bonds/Guarantees.** A bid bond or guarantee is included in the bid package submitted by each bidder. The bonds or guarantees ensure that if awarded the contract, the bidder will accept and perform the work under the contract. It also ensures that the bidder will not attempt to withdraw or otherwise not fulfill the contract. Finally, the bid bond ensures that the bidder will execute the contractual documents that are required within the time specified in the solicitation, or forfeit all or part of the guarantee. A certified check, bank draft, U.S. Government Bonds at par value, bid bond secured by an acceptable surety company, or other negotiable instrument may be accepted as a bid guarantee. If the successful bidder refuses to sign the contract after award, the bid bond is forfeited and award will go to the next lowest responsive, responsible bidder. If there is not a responsive and responsible next lowest bidder, the procurement should be re-bid. If a bid bond or guarantee is not submitted with the bid, the

PHA should reject the bid as non-responsive. The PHA should not return any bid bonds until the contract has been awarded and the required performance and payments bonds have been furnished, until all bids have been rejected, or the time specified for acceptance of bids has expired.

2. **Performance Bonds.** Performance bonds are means to ensure that the contract is successfully completed. The performance bond guarantees that if the contractor is unable to complete the contract, the surety company will step in to finish the work. In the case of a letter of credit or cash escrow, the PHA may use these funds to complete the contract work.
3. **Payment Bonds.** The payment bond is a method of ensuring that the contractor pays the subcontractors and suppliers. By requiring payment bonds, the PHA avoids becoming entangled in disputes concerning payment of subcontractors and suppliers by the general contractor. The surety underwriting the payment bond ensures the contractors and suppliers will be paid. Often, performance and payment bonds are combined into a single document. Failure to pay subcontractors for work performed in commercial contracts may often lead to the subcontractor filing a mechanic's lien against property owners to obtain payment for services rendered. PHA contracts require payment bonds to prevent this problem and ensure that no liens will be filed against any PHA building or lot of ground. Clause 24 of form HUD-5370, General Conditions of the Contract for Construction, clearly forbids the placement of liens and is binding on any contractor, subcontractor, and material supplier.

#### **C. Bonding Companies**

An acceptable surety (bonding) company is one that is authorized to do business in the State where the project is located and acceptable to HUD and the PHA. The surety must be listed on the most recently published U.S. Treasury Circular 570 (often referred to as the T-List). Individual sureties are not permitted. Circular 570 is available from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, Room 262C, 401 14th Street, S.W., Washington, D.C. 20227. The T-List may also be accessed on the Internet at: <http://www.fms.treas.gov/c570/index.html>.

#### **D. HUD Bonding Requirements for PHAs**

1. In order to encourage participation by a broad range of competitors, including small and minority firms, HUD has provided for alternate bid and contract guaranties. These apply to all construction projects greater than \$100,000, whether development or modernization, funded pursuant to the U.S. Housing Act of 1937, as amended. As a result, the contractors for all construction projects shall be required to submit the following bid and contract guaranties. Please note that only the bid bond is required at time of bid; however, one of the purposes of the bid bond is to provide the PHA with assurance that the successful bidder will indeed obtain the necessary performance and payment bonds. (There are no bonding requirements for non-construction projects; PHAs should only require bonds for non-construction where consistent with good business practice.) State or local laws or regulations may require a higher level

of guarantees. Required bonds include a bid guarantee from each bidder, equivalent to 5% of the bid price, and one of the following:

- A performance and payment bond for 100% of the contract price;
  - Separate payment and performance bonds each for 50% or more of the contract price;
  - A 20% cash escrow; or
  - A 25% irrevocable letter of credit.
2. The Contracting Officer, via form HUD-5369, has the option to select any one of the above contract guarantees. Careful consideration should be given to the selection, as the options vary greatly in degree of security provided to the PHA versus cost and degree of difficulty in obtaining by the contractor.
- E. **Inadequate Surety.** If the low bidder fails to provide an acceptable assurance of completion (payment and performance bonds) after award of the contract, the PHA should consider the bid guarantee forfeited and notify the surety company. The contract is then terminated for default. The amount to be recovered from the bid bond or guarantee should equal at least the difference between the defaulted bid and the next higher acceptable bid or the amount by which the bid accepted by re-soliciting exceeds the defaulted contract.

## **6.12 Contract Award (24 CFR 85.36(d)(2)(ii)(D))**

The following steps should be used in awarding a contract based on the sealed bids method of procurement:

### **A. Evaluate Bids & Any Alternates**

1. The apparent low bid should be evaluated according to the procedures outlined in the paragraphs below. If the apparent low bid exceeds the project budget, any deduct alternates should be applied to the bid prices, one at a time, to identify the bidder whose resulting price falls within the budget. If the first deduct alternate does not produce an acceptable bid, then the second alternate should be applied, and so on, until an acceptable price and bidder is identified.
2. If alternates are employed, and the apparent low bid falls below the available budget, a similar process of applying the alternates one at a time may be employed to identify the low bidder who includes the greatest number of alternates within the available funding.
3. The PHA should not use alternate prices as a way to select a preferred bidder.

### **B. Determining Responsiveness & Contractor Responsibility.** The next step in the contract award process is to review the low bid for responsiveness.

1. **Responsiveness (24 CFR 85.36(b)(8)).** To be considered responsive, a bid must conform to the material requirements of the IFB. The Contracting Officer must examine the low bid to be sure that the bidder did not alter the specifications or other terms and conditions (e.g., delivery schedules, payment terms, etc.) or

attempt to impose different terms and conditions. If the bid does not conform to the solicitation, it must be rejected and the next lowest bid examined for responsiveness. Allowing a bidder to alter the material requirements of a solicitation gives the bidder an unfair advantage over the other bidders and destroys the integrity of the sealed bidding process. It also limits the PHA's rights in the contract. The Contracting Officer shall document his/her findings regarding the low bidder's responsiveness in the procurement file. Minor informalities (see paragraph D) are not grounds for determining a bid to be non-responsive.

2. **Responsibility.** After determining the responsiveness of the low bid, the Contracting Officer shall determine if the bidder is responsible. See Chapter 10, paragraph 10.2.A, for detailed guidance on assessing responsibility.
- C. **Equal Bids.** In the rare case when two or more low bids are equal in all respects, the award should be decided by drawing lots or other random means of selection. Authority to use this method should be included in the PHA's Procurement Policy and stated in the IFB.
- D. **Minor Informalities.** The Contracting Officer may waive minor informalities or allow the bidder to correct them. Minor informalities are matters of form rather than substance. They are insignificant mistakes that can be waived or corrected without prejudice to the other bidders and have little or no effect on price, quantity, quality, delivery, or contractual conditions. Examples include failure to: return the number of signed bids required by the bid package; sign the bid, provided that the unsigned bid is accompanied by other documents indicating the bidder's intent to be bound (e.g., a signed cover letter or a bid guarantee); complete one or more certifications; or acknowledge receipt of an amendment or addendum, provided that it is clear from the bid that the bidder received the amendment/addendum and intended to be bound by its terms, or the amendment/addendum had a negligible effect on price, quantity, quality, or delivery.
- E. **Rejection of Bids (24 CFR 85.36(b)(9)).** Rejection of any bid during the evaluation process shall be fully documented, including all reasons for the rejection. Minor informalities in the bid may be waived, as described above. Any bid may be rejected if the Contracting Officer determines that the price is unreasonable. Determining a bid price to be unreasonable includes not only the total price of the bid, but the prices for individual items as well. Any bid may be rejected if the prices for any of the items are materially unbalanced (such as bidding a high price for the first items to be provided and then low prices for subsequent items). A bid is materially unbalanced if and when there is a reasonable doubt that the bid would result in the lowest overall cost to the PHA, even if it is the lowest bid, or if the bid is so grossly unbalanced that accepting it would amount to an advance payment.
- F. **Award to the Lowest Responsive and Responsible Bidder (24 CFR 85.36(d)(2)(ii)(D)).** After the Contracting Officer evaluates each bid, the responsive and responsible bidder that submits the bid whose dollar value is lowest overall and meets all specified requirements shall be awarded the contract. A sample contract award letter is included in **Appendix 6**. Unsuccessful bidders also should be notified in writing of the contract award. A sample notice is shown as **Appendix 7**.

### 6.13 Bid Protests (24 CFR 85.36(b)(12))

Protests against the award of contracts shall be handled as described in Chapter 10, section 10.4.

### 6.14 Multi-Step Bids

PHAs may use two-step or multi-step sealed bidding procedures where appropriate and if permitted by their procurement policy. The two-step procedure is designed to obtain the benefits of sealed bidding by awarding a contract to the lowest responsive, responsible bidder. Simultaneously, this procedure is designed to obtain the benefits of the competitive proposals method through soliciting technical offers and conducting discussions that evaluate and determine the acceptability of technical offers. Under the two-step sealed bidding process, technical proposals alone are requested first. Then the proposals are evaluated for acceptability and negotiations or discussions held, if necessary.

In the second step, the normal sealed bid process is followed except that only bidders with acceptable technical proposals may bid, and each bidder's price is based on its own technical proposal. An example of this method would be equipment contracts with performance specifications rather than detailed design specifications, where the PHA needs a certain level of performance but is not specifying how this performance is achieved.

These procedures offer certain advantages. First, two-step sealed bidding encourages competition for contracts since contractors who might not have competed on the basis of strict specifications under sealed bidding may participate in the first step of two step sealed bidding because alternative approaches to the project or the design specifications are encouraged. Second, because of the price competition of step two, the general aims and benefits of price competition are achieved. Third, step one allows the PHA to take full advantage of the industry's experience and creativity.

*Note:* Two-step sealed bidding also has significant disadvantages. The process is generally time consuming and costly for both the PHA and bidders who must draw up detailed technical proposals to meet the specifications or statement of work. In addition, the two-step procedure may result in the procurement of a product or service that is not necessarily the best or most cost effective overall. In step two, bidders will generally bid on their least costly design in order to maximize their chances of success. Since the PHA is to accept the least costly proposal in step two, it may be compelled to turn down proposals which, though a bit higher priced, are superior technically to the lowest cost proposal. In addition, the flexibility and general unfamiliarity of the process lead to a greater likelihood of bid protests and contract disputes.

It is also noted here that the Federal government has issued procedures in construction contracting for using a concept known as two-phase design-build selection procedures, similar to the two-step process outlined above. The process is described in detail in the Federal Acquisition Regulation (FAR) **48 CFR Chapter 1, Part 36, Subpart 36.3**. PHA procurement is not regulated by the FAR. This reference to the direction provided in it is purely for informational purposes.