

5101:9-4-07 Procurement requirements.

To be effective: September 12, 2005

The written acquisition standards established by the county family services agency and workforce development agency pursuant to rule 5101:9-4-02 of the Administrative Code shall include the following requirements governing acquisitions.

(A) Applicable requirements

(1) Unless applicable local requirements are more restrictive, acquisitions that are made in whole or in part with federal funds, including instances where state or county funds are used as a match for state/federal funds, county family services agencies and workforce development agencies, shall follow the federal requirements set forth in paragraphs (B) to (F) of this rule. The only federal funding source excluded from the requirements of this chapter is Title XX social services block grant (SSBG).

(2) Section 307.86 of the Revised Code exempts acquisitions made under section 329.04 of the Revised Code, exemptions consist of family services duties, including those which are financial and administrative, and workforce development activities. It is important to note that acquisitions exempt from state competitive bidding requirements are not exempt from all federal requirements as referenced in paragraph (A)(1) of this rule.

(B) Small purchase procedure

(1) For purchases where price is the overriding factor and which involve standardized products or services (e.g., office equipment and supplies) and where the aggregate acquisition costs do not exceed the small purchase threshold (currently set at one hundred thousand dollars for purchases involving U.S. department of health and human services and U.S. department of labor funds and U. S. department of agriculture food and nutrition service funds), county family services agencies and workforce development agencies may use relatively simple and informal procurement methods by obtaining price or rate quotations from an adequate number of qualified sources but not less than three sources. For relatively simple and straight forward purchases which do not cost more than the small purchase threshold, where price is not the overriding factor and where relative quality and performance must be evaluated (e.g. consultant services), county family services agencies and workforce development agencies shall seek proposals from an adequate number of qualified sources, but not less than three sources if available. County family services agencies shall maintain a list of qualified sources from which to solicit proposals and the list shall include qualified sources which have expressed an interest in providing products or services to the county family services agency or workforce development agency. The request for proposals must identify the evaluation factors and their relative importance and awards will be made to the responsible source whose proposal is most advantageous to the program, with price and other factors considered.

(C) Competitive sealed bidding

(1) County family services agencies and workforce development agencies shall use competitive sealed bidding (formal advertising) under the following conditions:

(a) A complete, adequate, and realistic specification or purchase description is available;

(b) Two or more responsible bidders are willing and able to compete effectively for the business; and

(c) 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.

(2) County family services agencies and workforce development agencies shall adhere to the following procedural requirements in administering competitive sealed bidding (formal advertising):

(a) The invitation for bids (ITB) will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids.

(b) The ITB which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond.

(c) All bids will be publicly opened at the time and place prescribed in the invitation for bids.

(d) 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 costs and life cycle costs shall 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 and any or all bids may be rejected if there is a sound documented reason.

(D) Competitive proposals

(1) County family services agencies and workforce development agencies shall use competitive proposals when the conditions are not appropriate for the use of competitive sealed bidding, small purchases, or non-competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, either a fixed price or cost reimbursement type contract is awarded, and the following conditions are met:

(a) The complex and technical nature of the procurement cannot be described in bid specifications;

(b) It is logical to award a contract on factors other than price.

Evaluation factors other than price can only be used when they are clearly explained in the purchasing agency's bid specifications called a request for proposal (RFP).

(2) County family services agencies and workforce development agencies shall comply with the following procedural requirements in administering competitive proposal procurements, commensurate with the scope and complexity of the acquisition:

(a) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical.

(b) Proposals will be solicited from an adequate number of qualified sources.

(c) County family services agencies and workforce development agencies will have a method for conducting technical evaluations of the proposals received and for selecting awardees. A technical evaluation is a review to verify that the technical requirements contained in the request for proposals are met.

(d) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.

(e) County family services agencies and workforce development agencies may use competitive proposal procedures for qualification based procurement of architectural/engineering (A/E) professional services whereby competitor's qualifications are evaluated and the most qualified competitor 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 are a potential source to perform the proposed effort.

(E) Noncompetitive proposals

(1) County family services agencies and workforce development agencies may use noncompetitive proposals only when the award of a contract is infeasible under small purchase procedure, competitive sealed bidding or competitive proposals and one of the following conditions applies:

(a) The item is available only from a single source;

(b) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(c) The federal agency making the award authorizes noncompetitive proposals;

(d) After solicitation of a number of sources, competition is determined inadequate. County family services agencies and workforce development agencies shall also conduct a cost analysis in connection with any noncompetitive proposal, as is required for any acquisition in paragraph (F) of this rule. Cost analysis means to verify the proposed cost

data and projections of the data, and the evaluation of the specific elements of costs and profits.

(e) The purchases are for equipment or services where the prices are established by law for technical equipment requiring standardization and interchangeability of parts with existing equipment.

Noncompetitive proposals require the mutual discussion and arrangement of terms of a transaction or agreement for the purpose of arriving at a common understanding of contract essentials such as technical requirements, schedules, prices, and terms. From any noncompetitive proposal in excess of the small purchase threshold, a written justification must be included in the records to show why a noncompetitive proposal was used instead of competitive sealed bidding. This method may be used only when the award of a contract is infeasible under small purchase procedures, competitive sealed bidding, or competitive proposals.

(2) In cases of non-emergency, noncompetitive proposals, the county must maintain documentation of its attempts to solicit competition. Such documentation must include the following items:

(a) A copy of the public advertisement.

(b) A list of providers contacted.

(c) Copies of all letters received from prospective bidders or respondents, including those indicating a bidder's lack of interest in competing for the contract.

(d) Any other materials which would justify the agency's use of noncompetitive procurement methods.

(e) Cost analysis, the projections of the data, and the evaluation of the specific elements of costs and profit. Independent estimates must be made before receiving bids or proposals.

(F) Contract cost and price analysis

(1) County family services agencies and workforce development agencies must perform a cost or price analysis in connection with every procurement action including contract modification. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation. A cost analysis must be performed when the bidder is required to submit the elements of the estimate cost, e.g. under professional consulting and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of catalog or market price of commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) County family services agencies and workforce development agencies will 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, except that government entities are prohibited by law from receiving a profit. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne, by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles. Grantees may reference their own cost principles that comply with the applicable federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(G) Foster care purchases and child welfare service purchases

Purchases for services made by a public children services agency (PCSA) in the discharge of its duties under Chapter 5153. of the Revised Code, including services on behalf of a child in the custody of a PCSA and purchases made pursuant to rule 5101:2-47-23.1 of the Administrative Code, will generally be considered noncompetitive proposals as specified in paragraph (E) of this rule when they are purchased from a vendor that can best meet the service need presented and such is affirmatively documented by the PCSA. Where there are similar vendors in close proximity providing substantially similar services, and who are equally qualified to meet the service need presented, the PCSA must document the process of awarding the contract to the vendor was done in a manner that demonstrates that the comparative cost of the vendors has been evaluated. A PCSA may not establish an exclusive relationship with a services vendor to the exclusion of all other service vendors, unless the PCSA can document the reasons for the single source relationship with the service vendor. Such documentation must include a demonstration that the service vendor is qualified to meet the needs of all children and families who will receive services from the vendor, and must also provide assurances that no child or family will be denied services due to the single source nature of the relationship with the service vendor.

(H) Contracts funded in whole or part with federal funds and which are entered into by a county family services agency or workforce development agency with another county family services agency or workforce development agency within the county or workforce development area are not subject to the requirements contained in paragraphs (B) to (F) of this rule, providing that such contracts are documented with either a memorandum of understanding or interagency agreement between the entities.

(I) Purchases made by a county family services agency and workforce development agency through state purchasing contracts which meet all of the requirements contained

in section 125.04 of the Revised Code are not subject to the requirements contained in paragraphs (B) to (F) of this rule.

(J) The following are general procedural requirements applicable to all procurements.

(1) Non-profit and for-profit sub-grantees

County family services agencies and workforce development agencies shall inform sub-grantees of applicable procurement requirements in any contract or other applicable types of agreement used in awarding the contract or grant. Such contract or agreement shall contain reference to the applicable federal procurement requirements. The applicable procurement requirements for sub-grants awarding department of labor (DOL) funds to non-profit and for-profit organizations are located in 29 C.F.R. 95.40-95.46. The applicable procurement requirements for sub-grants awarding health and human services (HHS) funds to non-profit and for-profit organizations are located in 45 C.F.R. 74.41-74.48.

(2) Geographic preference

For purchases made in whole or in part with federal funds, or with state or local funds required for match, county family services agencies and workforce development agencies will conduct procurement in a manner that prohibits the use of statutorily or administratively imposed in-state or local geographical preferences in evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms given the nature and size of the project, to compete for the contract. When only state and/or local funds are used for a purchase, the board of county commissioners, by resolution, may adopt the model system of preferences for products mined or produced in Ohio and for Ohio-based contractors (formerly "Buy-Ohio"). The resolution shall specify the class or classes of contracts to which the system of preferences apply. While the system of preferences is in effect, no county officer or employee shall award a contract in violation of the preference system.

(3) Ohio industries for the handicapped

Before determining which method of procurement to use, the county family services agency and workforce development agency must determine whether a product or service is on the procurement list for Ohio industries for the handicapped in section 4115.33 of the Revised Code. If the product or service is on the procurement list and is available within the period required by that agency, the agency must procure the product or service at the price established by the state use committee from a qualified nonprofit agency. If the provision of the product or service cannot be made in either the time period required or in the amount specified by the agency, the county family services agency and workforce development agency may pursue the procedures outlined in Chapter 5101:9-4 of the Administrative Code.

(4) State purchasing contracts

Purchases may be made by the county under state purchasing contracts. A county cannot access state purchasing contracts when competitive bidding by the county has already occurred unless the state purchasing contract has the same terms, conditions, and specifications at a lower price.

To participate in state purchasing contracts, a certified copy of a resolution by the board of county commissioners must be filed with the department of administrative services (DAS) office of state purchasing. The resolution must request that the county be authorized to participate in the purchasing contracts, agree that the county is bound by terms and conditions set by DAS, and agree that the county will directly pay the vendor under each purchase contract.

A county family services agency and workforce development agency may also use the price contained in a state purchasing contract in other competitive selection procedures performed pursuant to this rule.

(5) Competition

All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of 45 C.F.R. 92.36 H.H.S., 29 C.F.R. section 97.36 D.O.L., and 7 C.F.R. 3016.36 F.N.S. Some of the situations considered to be restrictive of competition include but are not limited to:

- (a) Placing unreasonable requirements on firms in order for them to qualify to do business,
- (b) Requiring unnecessary experience and excessive bonding,
- (c) Non-competitive pricing practices between firms or between affiliated companies,
- (d) Non-competitive awards to consultants that are on retainer contracts,
- (e) Organizational conflicts of interest,
- (f) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of procurement, and
- (g) Any arbitrary action in the procurement process.
- (6) Written selection procedures

County family services agencies and workforce development agencies will have written selection procedures for procurement transactions.

(a) These procedures will ensure that all solicitations:

- (i) Incorporate a clear and accurate description of the technical requirements to be procured. Such description shall not, in competitive procurements, contain features which 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, shall set forth those minimum essential characteristics and standard to which it must conform if it

is to satisfy its intended use. Detailed products specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of technical requirements, a "brand name or equal" description maybe used as a means to define the performance or other salient requirements of procurement. the specific features of the named brand which must be met by bidders must be clearly stated.

(ii) Identify all requirements that the bidder must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) County family services agencies and workforce development agencies will ensure that all pre-qualified lists of persons, firms or products which are used in acquiring goods and services are current and included enough qualified sources to ensure maximum open and free competition. County family services agencies and workforce development agencies will not preclude potential bidders from qualifying during the solicitation period.

(b) County family services agency and workforce development agency procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach. Breaking out procurements should only be done to obtain a more economical price, and is not to be done to avoid procedural requirements.

(7) Debarment and Suspension

County family services agency and workforce development agency procedures must include requirements to ensure that no contracts are entered into with or purchases made from a person or entity which is debarred or suspended or is otherwise ineligible for participation in federal assistance programs under Executive Order 12549, debarment and suspension, and other applicable regulations and statutes, including 7 C.F.R. Part 3017, 29 C.F.R. Part 97, and 45 C.F.R. Part 76. Persons and entities barred or suspended are listed in the "Excluded Parties List System" which may be accessed via the internet at <http://www.ARNet.gov/epl/>. County family agency and workforce development agency procedures must also include provisions that purchases will be made in conformance with section 9.24 of the Revised Code which prohibits the awarding of contracts, paid for in whole or in part with state funds, to a person against whom a finding for recovery has been issued by the auditor of state on or after January 1, 2001, if the finding for recovery is unresolved. Refer to the auditor of state's website for information about these requirements and the database of unresolved findings:

<http://www.auditor.state.oh.us/WhatsNew/FFR/>.

(8) Monitoring

County family services agencies and workforce development agencies will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(K) Contract provisions

The county family services agency's and workforce development agency's contracts must contain the provisions in this subsection. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the office of federal procurement policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

(2) Termination for cause and for convenience by the county family services agency and workforce development agency including the manner by which it will be effected and the basis for settlement. (All contracts in excess of ten thousand dollars.)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in department of labor regulations (41 C.F.R. chapter 60). (All construction contracts awarded in excess of ten thousand dollars by grantees and their contractors or sub-grantees)

(4) Compliance with the Copeland "Anti-Kickback" act (18 U.S.C. 874) as supplemented in department of labor regulations (29 C.F.R Part 3).

(5) Compliance with the Davis-Bacon act (40 U.S.C. 276a to 276a-7) as supplemented by department of labor regulations (29 C.F.R. Part 5).

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards act (40 U.S.C. 327-330) as supplemented by department of labor regulations (29 C.F.R. Part 5).

(7) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(8) Notice of awarding agency requirements and regulations pertaining to reporting.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the ODJFS, the county family services agency and workforce development agency, the federal grantor agency, the comptroller general of the United States, or any of their duly authorized representatives to any books, documents, papers, and record of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857 (h). section 508 of the Clean Water act (33 U.S.C. 1368), Executive Order 11738, and environmental protection agency

regulations (40 C.F.R. part 15).

(12) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

(13) Retention of procurement records for a seven year period.

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Certification

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