**Section 365.620 Construction Contracts**

The following procedures shall apply to construction contracts (subagreements) awarded by loan recipients for the construction phase only. They shall not apply to personal and professional service contracts.

a) Each construction contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with Section 365.610(i).

b) The bid advertisement shall notify the bidders that the procurement will be subject to the following requirements:

1) this Part;

2) the Davis-Bacon Act (40 U.S.C. 3141 through 3148) and regulations adopted under that Act by the U.S. Department of Labor;

3) the Employment of Illinois Workers on Public Works Act [30 ILCS 570];

4) the use of American iron and steel as required by Sec. 608 of the federal Clean Water Act (33 U.S.C. 1388);

5) the Participation by Disadvantaged Business Enterprises in United States Environmental Protection Agency Programs (40 CFR 33);

6) the Build America Buy America Act (BABA Act) at Public Law 117-58, Sections 70901-52, as applicable; and

7) any applicable federal or State Executive Orders.

c) A complete set of bidding documents shall be maintained by the loan recipient and shall be available for inspection and copying. Bidding documents shall include:

1) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule;

2) The terms and conditions of the contract to be awarded;

3) A clear explanation of the method of bidding, the method of evaluation of bid prices, and the basis and method for award of the contract;

4) The statement that any contract awarded in response to the bid is expected to be funded in part by a loan from the WPCLP, and that neither the State of Illinois nor any of its departments, agencies or employees is or will be a party to this bidding or any resulting contract;

5) Responsibility requirements or criteria that will be used in evaluating bidders, provided that an experience requirement or performance bond may not be used unless adequately justified by the loan recipient;

6) A proposal form, to be used by all bidders, that includes the following language:

A) By submission of the bid, each bidder certifies, and in the case of a joint bid, each party to the joint bid certifies, as to the party's own organization, that in connection with the bid:

i) the prices in the bid have been arrived at independently, without consultation, communication, or agreement with any other bidder or with any competitor, for the purpose of restricting competition, as to any matter relating to the prices;

ii) unless otherwise required by law, the prices quoted in the bid have not knowingly been directly or indirectly disclosed to any other bidder or to any competitor prior to opening; and

iii) no attempt has been made or will be made by the bidder to induce any other person or firm to submit or withhold a bid for the purpose of restricting competition. Also, each bidder shall submit a certification regarding compliance with Article 33E-11 of the Illinois Criminal Code of 2012 [720 ILCS 5/33E-11];

B) Each person signing the bid shall certify that:

i) the signer is the person in the bidder's organization responsible for the decision as to the prices being bid and that the signer has not participated, and will not participate, in any action contrary to subsection (c)(6)(A); or

ii) the signer is not the person in the bidder's organization responsible for the decision as to the prices being bid, but that the signer has been authorized to act as agent certifying that the persons determining the prices have not participated, and will not participate, in any action contrary to subsection (c)(6)(A), and as the bidder's agent shall so certify. The signer shall also certify that the signer has not participated, and will not participate, in any action contrary to subsection (c)(6)(A).

d) If the loan applicant wishes to amend any part of the bidding documents (including drawings and specifications) during the period when bids are being prepared, the loan applicant shall send written addenda to all firms who have obtained bidding documents in time to be considered prior to the bid opening. When appropriate, the time period for submission of bids shall be extended. All addenda to the bidding documents shall be submitted to the Agency for approval.

e) Awarding the Contract

1) After bids are opened, they shall be evaluated by the loan applicant inaccordance with the methods and criteria set out in the bidding documents.

2) The loan applicant shall submit a bid evaluation to the Agency that contains the following:

A) a copy of the newspaper ad and the certificate of publication or equivalent;

B) the bid tabulations;

C) any addenda issued by the loan applicant, if applicable;

D) an analysis of the bids and recommendations for the award of the bids;

E) a copy of the loan applicant's notice of intent to award;

F) selected bidder's proposal and bid bond or cashier's check for not less than 5% of the bid amount;

G) a summary of the evidence that the selected bidder has met the disadvantaged business enterprise requirements pursuant to 40 CFR 33;

H) a copy of the selected bidder's certification regarding the use of American iron and steel products;

I) a copy of the selected bidder's certification regarding the compliance with the BABA Act, as applicable.

3) The loan applicant may reserve the right to reject all bids if it has documented sound business reasons. Unless all bids are rejected, award shall be made to the low, responsive, responsible bidder after the Agency issues the loan agreement or provides other written permission; and

4) If the award is intended to be made to a firm that did not submit the lowest bid, prior to any award the loan applicant shall submit to the Agency a written statement explaining why each lower bidder was deemed not responsive or not responsible.

f) Each construction contract shall include the following provisions:

1) Audit; Access to Records

A) The contractor shall maintain books, records, documents, and other evidence directly pertinent to performance on loan work in accordance with generally accepted accounting principles. The contractor shall also maintain the financial information and data used by the contractor in the preparation or support of any cost submissions required under Section 365.420(b)(2) and a copy of the cost summary submitted to the owner. The Illinois Auditor General, the owner, the Agency, or any of their authorized representatives shall have access to the books, records, papers, documents, and other evidence for purposes of inspection, audit, examination, excerpts, transcriptions, and copying. The contractor shall provide facilities for access and inspection.

B) For a formally advertised, competitively awarded, fixed price contract, the contractor shall include access to records as required by subsection (a)(1)(A) for all negotiated change orders and contract amendments in excess of $25,000 that affect the contract price. In the case of all other prime contracts, the contractor shall agree to include access to records required by subsection (a)(1)(A) in all contracts and all tier subcontracts or change orders in excess of $25,000 that are directly related to project performance.

C) Audits shall be in accordance with auditing standards generally accepted in the United States.

D) The contractor shall agree to the disclosure of all information and reports resulting from access to records required by subsection (a)(1)(A). When the audit concerns the contractor, the auditing agency shall afford the contractor an opportunity for an audit exit conference and an opportunity to comment on the pertinent portions of the draft audit report. The final audit report shall include the written comments, if any, of the audited parties.

E) The records required by subsection (a)(1)(A) shall be maintained and made available during performance of the work under the loan agreement and for 3 years after the date of final loan audit. In addition, records that relate to any dispute or litigation or the settlement of claims arising out of any performance, costs, or items to which an audit exception has been taken shall be maintained and made available for 3 years after resolution of the dispute, appeal, litigation, claim, or exception.

F) The right of access will generally be exercised with respect to financial records under:

i) negotiated prime contracts;

ii) negotiated change orders or contract amendments in excess of $25,000 affecting the price of any formally advertised, competitively awarded, fixed price contract; and

iii) subcontracts or purchase orders under any contract other than a formally advertised, competitively awarded, fixed price contract.

G) The right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective price competition. In any event, the right of access shall be exercised under any type of contract or subcontract:

i) with respect to records pertaining directly to contract performance, excluding any financial records of the contractor; and

ii) if there is any indication that fraud, gross abuse, or corrupt practices may be involved in the award or performance of the contract or subcontract.

2) Covenant Against Contingent Fees

The contractor shall warrant that no person or selling agency has been employed or retained to solicit or secure the contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee. For breach or violation of this warranty, the owner shall have the right to annul the contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of the commission, percentage, brokerage, or contingent fee.

3) Wage Provisions

The contractor shall pay prevailing wages in accordance with the Davis-Bacon Act (40 U.S.C. 3141 through 3148), as defined by the U.S. Department of Labor.

4) Disadvantaged Business Enterprise Requirements

The contractor shall provide evidence that the contractor has taken affirmative steps in accordance with 40 CFR 33 to assure that disadvantaged business enterprises are used when possible as sources of supplies, equipment, construction, and services, consistent with the provisions of the Agency's Operating Agreement with USEPA.

5) Debarment and Suspension Provisions

The contract shall require the successful bidders to submit a Certification Regarding Debarment, Suspension, and Other Responsibility Matters (EPA Form 5700-49) showing compliance with federal Executive Order 12549.

6) Nonsegregated Facilities Provisions

The contractor shall be required to submit a certification of nonsegregated facilities on forms provided by the agency.

7) American Iron and Steel

The contractor shall be required to use American iron and steel, if required by USEPA for that fiscal year.

8) Build America Buy America

If applicable, the contractor shall be required to comply with the requirements of the BABA Act.

9) A clause that provides:

"No contractor or subcontractor shall discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor or subcontractor shall carry out applicable requirements of 40 CFR 33 in the award and administration of contracts awarded under the WPCLP. Failure by the contractor or subcontractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies."

g) Subcontracts Under Construction Contracts

The award or execution of all subcontracts by a prime contractor and the procurement and negotiation procedures used by the prime contractor shall comply with:

1) all applicable provisions of federal, State, and local law;

2) all provisions of this Part regarding fraud and other unlawful or corrupt practices;

3) all provisions of this Part with respect to access to facilities, records and audit of records; and

4) all provisions of subsection (f)(5) that require a Certification Regarding Debarment, Suspension, and Other Responsibility Matters (EPA Form 5700-49) showing compliance with any controlling federal Executive Orders.

h) Contractor Bankruptcy

In the event of a contractor bankruptcy, the loan recipient shall notify the Agency and shall keep the Agency advised of any negotiations with the bonding company, including any proposed settlement. The Agency may participate in those negotiations and will advise the loan recipient of the impact of any proposed settlement to the loan agreement. The loan recipient shall be responsible for assuring that every appropriate procedure and incidental legal requirement is observed in advertising for bids and re-awarding a construction contract.

i) Every contract entered into by the loan recipient for construction work, and every subagreement, shall provide Agency representatives with access to the work. The contractor or subcontractor shall provide facilities for the access and inspection.

(Source: Amended at 48 Ill. Reg. 3751, effective February 27, 2024)