**Section 369.620 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) The contract documents to be submitted to the Agency shall require a bid bond or cashier's check for not less than 5% of the bid amount, executed contract, performance and payment bonds for the bid amount, certificate of insurance with loan recipient added as additional insured, and the notice to proceed.

b) Each contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with Section 369.610(i) (Negotiation of Subagreements) of this Subpart. Formal advertising shall be in accordance with the following:

1) Evidence of Advertising

The loan recipient shall submit to the Agency a certified copy of the bid advertisement that notifies the bidders that the procurement will be subject to regulations contained in the procedures for providing financial assistance from the WPCLP under the ARRA as set out in this Part, the Davis-Bacon Act (40 USC 276a through 276a-5) as defined by the U.S. Department of Labor, the Employment of Illinois Workers on Public Works Act [30 ILCS 570], and Executive Order 11246, as amended (Appendix A, Exhibit B). Bidders shall be notified that the procurement will be subject to the loan recipient's policy regarding the increased use of disadvantaged business enterprises, and that the bidders will be required to comply with section 1605 of the ARRA, which specifies that all iron, steel and manufactured goods used in the project are produced in the United States.

2) Adequate Bidding Documents

Bidding documents (invitations for bid) shall be made available by the loan recipient and shall be furnished upon request in a timely manner. A complete set of bidding documents shall be maintained by the loan recipient and shall be available for inspection and copying by any party. The bidding documents shall include:

A) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule (Drawings and specifications may be made available for inspection instead of being furnished.);

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

C) 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;

D) 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;

E) 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 applicant;

F) A copy of subsections (b)(2)(G) and (H) shall be included in the proposal form to be used by bidders and shall constitute a representation and certification to be considered as a part of their bid;

G) By submission of the bid, each bidder and, in the case of a joint bid, each party to the joint bid, certifies as to his or her own organization, that, in connection with the bid:

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

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 33 E-11 of the Illinois Criminal Code of 1961 [720 ILCS 5/33E-11]; and

H) Each person signing the bid shall certify that:

i) He or she is the person in the bidder's organization responsible for the decision as to the prices being bid and that he or she has not participated, and will not participate, in any action contrary to subsection (b)(2)(G); or

ii) He or she is not the person in the bidder's organization responsible for the decision as to the prices being bid, but that he or she 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 (b)(2)(G), and as their agent shall so certify. He or she shall also certify that he or she has not participated, and will not participate, in any action contrary to subsection (b)(2)(G).

3) Addenda to Bidding Documents

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 prior to the bid opening.

4) Award to the Low, Responsive, Responsible Bidder

A) After bids are opened, they shall be evaluated by the loan applicant in accordance with the methods and criteria set out in the bidding documents. Items that shall be submitted to the Agency include a bid tabulation, the loan applicant's or its agent's analysis of bids and recommendation for the award and the loan applicant's letter of intent to award or the official minutes of board approval.

B) 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 bid evaluation has been submitted to the Agency and written notice of Agency approval has been received by the loan applicant.

C) 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.

c) Negotiations of Contract Amendments (Change Orders)

1) Loan Recipient Responsibility

The loan recipient shall be responsible for negotiation of construction contract change orders. This function may be performed by the loan recipient directly or, if authorized, by its consulting engineer. During negotiations the loan recipient shall:

A) Make sure that the contractor has a clear understanding of the scope and extent of work and other essential requirements;

B) Assure that the contractor demonstrates that he or she will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time; and

C) Maintain a summary of all negotiations and the engineer's independent cost estimate.

2) Changes in Contract Price or Time

The contract price or time may be changed only by a change order. When negotiations are required, they shall be conducted in accordance with subsection (c).

3) For each change order the contractor shall submit to the loan recipient for review sufficient cost and pricing data to enable the loan recipient to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

4) Agency Review

For each change order, the loan recipient shall submit to the Agency for approval the following documentation:

A) A description of the changed work;

B) The contractor's proposal, itemizing the cost and time to complete the changed work;

C) The loan recipient's or engineer's estimate of the cost and time to complete the changes;

D) Two copies of the executed change order with justification including, but not limited to, the need for the proposed work and the technical solution; and

E) The summary of negotiations and resolution between the engineer's independent cost estimate and the contractor's proposal.

d) Required Construction Contract Provisions

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 consistent with generally accepted accounting standards in accordance with the American Institute of Certified Public Accountants Professional Standards. 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 subsection (c) (Negotiation of Contract Amendments (Change Orders)) 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, documents and other evidence for purposes of inspection, audit 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 specified in subsection (d)(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 as specified above in all his or her contracts and all tier subcontracts or change orders in excess of $25,000 that are directly related to project performance.

C) Audits shall be consistent with generally accepted auditing standards in accordance with the American Institute of Certified Public Accountants Professional Standards.

D) The contractor shall agree to the disclosure of all information and reports resulting from access to records pursuant to subsection (d)(1)(A). Where 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 (d)(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, 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 USC 276a through 276a-5) as defined by the U.S. Department of Labor.

4) Disadvantaged Business Enterprise Requirements

The contractor shall provide evidence, including, but not limited to, a copy of the advertisement(s) and the record of negotiation, that the contractor has taken affirmative steps in accordance with 40 CFR 33 to assure 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 the USEPA.

5) American Iron, Steel and Manufactured Goods Provisions

The contract shall require the successful bidder(s) to certify compliance with section 1605 of the ARRA, specifying that all iron, steel and manufactured goods used in the project are produced in the United States.

6) Debarment and Suspension Provisions

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

7) Nonsegregated Facilities Provisions

The successful bidder shall be required to submit a certification of nonsegregated facilities as prescribed in 18 USC 1001.

e) 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 the following:

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 (d)(6) that require a "Certification Regarding Debarment, Suspension and Other Responsibility Matters" (EPA Form 5700-49) showing compliance with federal Executive Order 12549 (Appendix A, Exhibit A).

f) 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.