



Jim Haining <jhaining@gmail.com>

Comments pertaining to the attached HUD E-Newsletter: "Competitive Proposal Procurement" for Construction Projects"

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Housing Agency Procurement Assistance

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Dear Procurement Professional:

I realize that this is quite a long Notice. However, it is my opinion that this Notice addresses an important issue and I hope that you take the time to read through my following thoughts and recommendations. It is my goal to help housing agencies comply with Federal requirements and industry best practices and, as a result, stay out of trouble with HUD, the OIG, and the public at large (newspapers?). The 10 minutes or so that it takes to read this Notice may save you a lot of grief later if you are ever audited as to this specific issue.

Several folks have recently sent to me the attached HUD E-Newsletter (dated October 2011) and asked for my opinion (these folks are aware that I "teach and preach," especially during my seminars, that RFPs are not typically appropriate for construction projects). I have previously seen this specific E-Newsletter and my following thoughts reflect the opinions that I have shared on this subject since I first saw this E-Newsletter in October, 2011.

First, I will establish the "facts of the case" as listed within the regulations, especially as listed within HUD Procurement Handbook 7460.8 REV 2:

(1) Within Section 6.2 of the Procurement Handbook HUD states, "Sealed bidding [IFBs] is the preferred method for procuring construction . . .", then further in the same Section HUD states, ". . . PHAs may use competitive proposals [RFPs] for construction contracts."

(2) Within Section 7.2.B of the Procurement Handbook HUD describes in detail the various forms that are required to be a part of competitive proposals (RFPs) that a housing agency issues. HUD also states therein the following: "(Note: the forms listed below assume that competitive proposals [RFPs] are used for procuring non-construction services. Only under limited circumstances would construction services be procured by competitive proposals [RFPs].)"

(3) It appears that the language within Section 7.2.B is in substantial conflict with the language within Section 6.2. So, which do you comply with? To answer, HUD gives us additional guidance within the Procurement Handbook as to this dilemma. HUD states within Section 1.5 of the Handbook that whenever two regulations conflict, "In general, the PHA must comply with whichever is more stringent." HUD restates this requirement within Section 13.1 of the same Handbook: "In general, where these rules conflict, the more stringent law or rule applies." NOTE: I acknowledge that both of these references within the Handbook address the issue of federal vs. state laws and rules, but I have observed HUD and OIG audits where this same requirement is applied to the issue of two HUD regulations that potentially conflict.

My Conclusion as to the affect of the Regulations: Pertaining to the potential of utilizing RFPs for construction competitions, the stricter of the HUD regulations states that such will be done "only under limited circumstances." It is my opinion that those "limited circumstances" are references to Design-

build projects, GCCM (General Contractor Construction Manager) projects, or perhaps even CMAR (Construction Manager At Risk) projects. My reasoning is that these types of projects are very heavy on professional services as well as construction services, and it is typically not even possible to do a sealed bid (IFB) for these projects because the actual design product has not yet even been completed (hence, there is typically not yet any clear detailed specifications developed that would allow a sealed bid price to be submitted by the bidders).

Second, I will share my opinions as to the potential problems with utilizing an RFP for a construction project:

We typically utilize RFPs for services, especially professional services, because when considering our award we feel that the total of the non-price factors (e.g. demonstrated qualifications and capability; resources; experience and past performance; etc.) have greater importance for us than the price factor (this is called making an award decision based on "Best Value"). A typical value for proposed costs in an RFP for professional services is 30% of the total non-preference points; a typical value for proposed costs in an RFP for non-professional services is 50% of the non-preference points. Sealed Bidding is the preferred method for construction because it typically results in a better proposed price than when we do an RFP (when a proposer realizes that proposed costs are only 30% of the decision, the proposed costs can tend to rise a bit because it has only a 30% affect on the award decision).

My thought within the immediate preceding paragraph can have a dramatic affect on competitive solicitations for construction. Applied properly, evaluation factors do, as stated within the attached HUD E-Newsletter, give a housing agency "flexibility" in completing a construction award. But with this "flexibility" comes greater risk. Over my 40 years in public housing procurement (32 years at a large housing agency, then 8 years as a consultant) I have witnessed several major problems with the utilization of RFPs for construction; to wit:

(1) It is my experience that housing agencies many times wish to utilize the RFP method for construction so that they can avoid awarding the contract for construction to a firm that has performed poorly in the past (this is not a bad thing; in fact, in my opinion it is the major purpose and advantage of utilizing an RFP). However, if the agency is going to utilize the evaluation factors to eliminate such a firm from consideration by awarding such a firm lower points, then the agency is at GREAT risk of doing so unless the agency has in its files documented proof of the poor performance. This "documented proof" includes Notices to Cure where the agency has during past unsatisfactory construction work notified the contractor of the unsatisfactory and poor performance, has identified to the contractor specifically how the contractor is failing to meet its contractual obligations, and has instructed the contractor specifically how it must improve its performance within a stated time frame. The agency must also ensure (and have documented proof) that the contractor did in fact correct the unsatisfactory conditions or that the contractor was punished appropriately (e.g. withheld payment for uncompleted work; terminated; etc.). if the agency gives such a contractor lower points for such poor performance, the agency will make specific reference to such incidents and documentation within the Written Narrative Justification that HUD requires within Section 7.2.L of the Procurement Handbook for all proposal evaluations. These "Written Narrative Justifications" will be utilized to later debrief the contractor or will be utilized during any legal proceedings that may occur. To recap, if you rate a contractor low, you better have the timely documentation to support your decision.

(2) It has also been my experience that some housing agencies utilize the RFP method for construction primarily not to eliminate certain contractors but to ensure award to a certain contractor. This is very, very risky and inappropriate! One way that I know that such might be occurring is that the housing agency puts a very low published value on the cost factor, perhaps as low as 15% or 10%, thereby lessening the chance that their preferred contractor is not eliminated due to a higher cost proposed. In my opinion, not only is this risky, but it is NOT appropriate! As public servants we have a fiduciary responsibility to administer the "peoples money" in an open, fair, reasonable and justified manner, ensuring that the "people" are receiving full value for the payments made. Placing a low factor for the evaluation of costs has the affect of driving up the costs (the firms knows that the cost value has little value, so why not just raise the cost?). This is not appropriate. Two thoughts if you utilize an RFP for construction: (a) Do not utilize the RFP method for construction to ensure that a certain firm receives the award (this has a technical term: fraud), but to ensure that a poor performing contractor is not chosen, that the agency thereby receives overall the best value. (b) Utilize a cost evaluation factor of at least 50% (perhaps even 60%), which will maintain the integrity of the process and will make it much more likely that the pricing received is competitive in nature.

My Overall Conclusion: My clients, those housing agencies that I have contracts with, will continue to utilize the IFB method for typical construction projects, and will only utilize the RFP method under the aforementioned "limited circumstances" conditions (Design-build; GCCM; CMAR). There is just too much risk in utilizing the RFP method for construction solicitations.

I hope that this helps. Please feel free to contact me by email if you have any questions or concerns pertaining to this or any other procurement- or contracts-related issues (such initial consultations are typically no-charge). I wish you the best.

Regards,

Michael S. Gifford, C.P.M., CPSD
Housing Agency Procurement Assistance

I have a consulting practice providing procurement- and contracts-related mentoring, training, and technical assistance to housing agencies. I help housing agencies conduct procurement and contracts in a HUD-compliant and "best practice" manner. [Click here](#) to see my full resume. Please do not hesitate to contact me if you have any questions or concerns pertaining to procurement and contracts (initial answering of questions is "no charge"). As I am either on-the-road or on the phone a lot, an initial contact by e-mail is best; please be sure to include your return telephone number (office/cellular) so that I can call you back.

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