

## **ENGINEERING POLICY 08-01**

**SUBJECT:** Contract Bid Document Requirements.

**PURPOSE:** Provide additional guidance in the bidding construction contracts under AIP.

**POLICY:** All bids for construction should be opened publicly per 49 CFR 18.36.

### Negotiating with Bidders after bid opening:

Single Bid: Order 5100.38C allows the sponsor to negotiate for a lower price with a single bidder, provided that it is permitted by State and Local law. If the single bid is determined to be unreasonable when compared to the Engineer's estimate, the sponsor should attempt to negotiate price with the bidder. If the sponsor does not have sufficient funds to award, they may negotiate scope and price to get the single bid within the available funds. We recommend that the sponsor have their attorney provide a letter to us that specifically address the state and local procurements laws that permit the negotiation. The sponsor is required to provide a summary of negotiation to FAA with a detailed list of what changes are proposed in the negotiated contract. Sponsors may not substitute or reduce specification requirements without specific FAA approval.

Multiple bids: The order does not allow negotiating with multiple bidders or negotiating with the low bidder only when there are multiple bidders for lower prices. Negotiation on competitive procurement is prohibited since it would not provide for open competition per 49 CFR 18.36.

### Bid Alternatives:

The bid documents should contain the factors that are used to determine the low bid. The document should be clear as to how the low bid will be determined.

Generally we would suggest that sponsor's have a base bid and a number of add alternates, with the phrase that the low bidder will be selected based on the combination of base bid plus additive alternates (or in some cases, deductive alternates) that most closely matches the available funding for the project: Sample wording:

### Preparation of Bids – Construction

“A. Bids must be: (1) submitted on the bid proposal forms, or copies of forms, furnished by the Owner or the Owner's agent, and (2) signed in ink. the person signing a bid must initial each change appearing on any bid form. If the bid is made by a corporation, it shall be signed by the corporation's authorized designee. The address of the bidder shall be typed or printed on the bid form in the space provided.

- B. The bid form may require bidders to submit bid prices for one or more items on various bases, including: (1) lump sum base bid; (2) lump sum bid alternate prices; (3) unit prices; or (4) any combination of items (1) through (3) above.
- C. If the solicitation includes alternate bid items, failure to bid on the alternates may disqualify the bid. If bidding on all items is not required, bidders should insert the words “no bid” in the space provided for any item on which no price is submitted

Additive or Deductive Bid Items

The low bidder, for purposes of award, shall be the responsive bidder offering the low aggregate amount for the base bid item, plus additive or deductive bid alternates selected by the Owner, and within funds available for the project. (Note: the additive and deductive bids must be clear in the order that they are calculated. For example, if there are three bid add alternates plus the base bid, the proposal must make it clear the order that the alternates will be considered, **in order to meet funds available**. So, the first check is the base bid, then base bid PLUS alternate 1, then the base bid PLUS alternate 1 + 2, the Base Bid PLUS alternate 1 + 2 + 3. You are not allowed to figure out all the different alternatives in order to eliminate a bidder.

The bidder agrees to hold all bid alternate prices for sixty (60) days from date of bid opening.”

REFERENCES: Order 5100.38C, paragraphs 900, 913, and 1052.  
49 CFR 18.36.

APPROVAL:

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Airports Division, Northwest Mountain Region

DATE: 6/3/2008

References:

**Excerpts Order 5100.38C:**

900. GENERAL.

a. Procurement Regulations. Title 49 CFR, Part 18.36 (referred hereinafter as Part 18.36) provides the policy, procedures, and regulations to be used for procurements made under Federal grant programs. Typical procurements under the airport aid program involve construction projects, equipment purchases, and professional services such as engineering/architectural, planning, legal, land appraisal, and audit services.

b. State and Local Procurement Standards. Federal law provides that the granting agency (FAA) has a minimal role in the procurement used by airport sponsors. For example, if the sponsor is a state, states are authorized under Part 18.36 to use the same procurement policies and laws that they use for procurements not funded in whole or in part by Federal sources. Other non-state Sponsors will use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in Part 18.36.

c. Contractual Responsibility. The standards in this section do not relieve the sponsor of the contractual responsibilities arising under its contracts. The sponsor is the responsible authority, without recourse to the FAA regarding the settlement and satisfaction of all contractual and administrative issues arising from procurements entered into, in support of an AIP grant. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature.

913. ALTERNATE BIDS. To allow more flexibility in the procurement process, the sponsor may request alternate bids in a procurement action. For example, a sponsor may be taking bids on a bituminous aircraft-parking apron. An alternate might be the construction of the same apron with concrete. The amount of Federal participation will depend on the manner in which the alternate bids are addressed in the IFB.

a. If the sponsor specifies in the IFB that it reserves the right to award to the low bidder in either alternate category and establishes a reasonable objective standard that will be applied in making the award, then the contract may be awarded to the low bidder in either alternate with full Federal participation. (As an example, the IFB might state that: "The sponsor reserves the right to award to the low bidder in either Alternate "A" or Alternate "B," provided that the amount of the low bid in the alternate selected does not exceed the amount of the low bid in the other alternate by more than 10%.")

b. If, in the IFB, the sponsor has not reserved the right to accept the low bid in either alternate or has not established an objective standard to be applied in making the award, the sponsor may award to the low bidder in the higher alternate bid if local policy allows; but the Federal participation will be based on the lowest responsive alternate bid.

c. If a sponsor plans to use alternate bids, the FAA Airports Office should call to the sponsor's attention the differences in "a" and "b", above, so that the sponsor is aware prior to the issuance of the IFB of the Federal participation.

**1052. DETERMINATION OF REASONABLENESS OF COSTS.** To be allowable, a cost must be reasonable. Where a project cost appears excessive, close attention should be paid to the plans and specifications to determine whether the excessive cost is due to over design. Projects

for which there are no FAA specifications may require redesign so that the project benefits will justify the costs. FAA field personnel should determine during the review of the application that the amount of funds requested by the sponsor is reasonable. Issuance of a grant offer effectively constitutes a determination that the costs on which the grant offer is based are reasonable. The determination should be made in accordance with one of the following guidelines:

**a. Application amounts based upon estimated costs:**

(1) Requested amounts should be compared to the costs of similar type work included in other recently awarded grants, taking into account such factors as inflation and geographical differences;

(2) Estimated cost of land acquisition should be based on appraisals of the parcels to be acquired as well as appropriate relocation assistance and administrative costs.

**b. Application amounts based upon competitive bids:**

(1) The sponsor is required to submit an itemized abstract of bids and a copy of the engineer's estimate, both to be included in the project file. The low bid should be compared to the engineer's estimate, as well as costs for similar type work in other projects. If there are several bids, it may not be necessary to compare the low bids to costs in other projects since experience has shown that the greater the number of bidders, the lower the price;

**(2) If only one bid is received, the FAA should encourage the sponsor to negotiate with the sole bidder to obtain lower prices if such negotiation is permitted by state or local law;**

(3) If there are less than five bidders and the low bid exceeds the engineer's estimate by 10%, the grant should not be issued unless the FAA satisfies itself that the costs are reasonable.

**Excerpts from 49 CFR 18.36**

(b) Procurement standards. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees 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.

(c) Competition. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of Sec. 18.36. Some of the situations considered to be restrictive of competition include but are not limited to:

**[[Page 138]]**

- (i) Placing unreasonable requirements on firms in order for them to qualify to do business,
- (ii) Requiring unnecessary experience and excessive bonding,
- (iii) Noncompetitive pricing practices between firms or between affiliated companies,
- (iv) Noncompetitive awards to consultants that are on retainer contracts,
- (v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the 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.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service 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 standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

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

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) Methods of procurement to be followed--(1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by sealed bids (formal advertising). Bids are publicly solicited 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. The sealed bid method is the preferred method for procuring construction, if the conditions in Sec. 18.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(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 and 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.

(ii) If sealed bids are used, the following requirements apply:

**[[Page 139]]**

(A) The invitation for bids 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 invitation for bids, 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 cost, 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

(E) Any or all bids may be rejected if there is a sound documented reason.