

KAY IVEY
GOVERNOR



KENNETH W. BOSWELL
DIRECTOR

STATE OF ALABAMA

June 7, 2017

MEMORANDUM

TO: All Interested Parties

FROM: Kenneth Boswell
Director

SUBJECT: Procurement of Professional Services

It is not uncommon for cities and counties in Alabama to secure services of a consultant and licensed engineer/architect, often at no cost, to assist in the preparation of grant applications for federal funds for programs such as CDBG and ARC. The purpose of this memo is to address the question of should the consultants and engineers/architects who provide the preliminary services for the preparation of grant applications be excluded from competing for such procurements under 2 CFR 200.319 Competition, which in part states "...contractors that develop or draft specifications, requirements, statement of work, or invitation for bids or requests for proposals must be excluded from competing for such procurements."

According to the ADECA CED Division's Engineer and the ADECA CED Division's Procurement Specialist, the preliminary cost estimates provided by an engineer, as well as the verbalization and/or placing in writing of information by a consultant for a unit of local government concerning an activity (such as construction of a sewer line) for grant application purposes does not – and should not – meet the level of actual services that will need to be performed by a consultant or engineer/architect for such a construction project once the unit of local government is awarded the grant.

An engineering/architectural contract will typically require surveying sites, testing soil, preparing engineering designs, determining size and quantities of materials and

labor, preparing detailed plans and specifications, acquiring permits, acquiring easements and rights-of-way, compiling bid proposals, advertising bids, conducting pre-bid meetings, opening and reviewing bids and qualifying the lowest bidder, assisting the local government with awarding bids, conducting pre-construction meetings, providing on-site inspections, maintaining on-site inventories of materials, reviewing and recommending invoices submitted for payments, securing warranties, conducting final inspections, preparing as-built plans, and advertising notices for closeouts.

Similarly, a contract for consulting services will typically require conducting environment assessments including securing concurrences from the U.S. Army Corps of Engineers/U.S. Fish and Wildlife Service/Alabama Historical Commission/Native American Tribes/etc., preparing assessments of fair housing, compiling fair housing and equal opportunity data and certifications, creating and maintaining files and records, reviewing bid documents for necessary clauses, participating in pre-construction meetings, reviewing payrolls and conducting HUD-11 employee interviews for labor compliance, preparing invoices for payment, reviewing project progress, reporting 2516 and Section 3 activities, assisting grant recipients with monitoring and audits and resolving concerns and findings, conducting public hearings, and preparing documents to close grants.

Based on the above information, it is the opinion of ADECA that actions such as an engineer/architect providing preliminary cost estimates or a consultant writing a grant application for a local government are diminutive in relation to full services required to implement a project and do not rise to a level at which the consultant and engineer/architect would be excluded from competing for bid proposals to perform such professional work once the grant is awarded. Further, it is the opinion of ADECA that such a judgement made to the contrary on grant activities that are already underway has the potential to cause severe and irreparable financial harm to the units of local government, consultants, and project engineers/architects, particularly because the current practice for the open and competitive bid process has been followed for decades without any questions arising from federal monitors, auditors, examiners, or other interested parties.

However, ADECA believes that from this date forward, it is prudent to encourage cities and counties interested in applying for federal funds (from HUD, ARC, etc.) to adopt an alternate approach to conducting their grant application processes in order to

eliminate the appearance of any impropriety regarding compliance issues that could arise involving the application of 2 CFR 200.319. Under such approach, the cities and counties would establish a list of one or more pre-approved consultants and licensed engineers/architects following an open and competitive "Request for Qualification" process per the federal regulations and local procurement policies. Such list would not be based on a specific grant activity, and therefore, eliminate any potential concerns regarding competitive advantages for certain specific consultants and engineers/architects. It would not be unreasonable for such a list to be made effective for a three-year period, although the local government could establish such list on a more frequent basis. Another approach would be for a local government applying for a federal grant to procure services for an entire grant process which would include providing grant writing services all the way to full grant management services by a consultant and providing preliminary cost estimates all the way to full engineering/architectural services by an engineer/architect for a specific grant project. Under this scenario, the local government should not sign contracts and obligate funds for such services prior to the grant being awarded and the funds being released by the awarding entity, if funds for such services are provided by the federal grant.

Please note that the guidance provided by ADECA in this memo is intended to provide some clarity to potential issues that could result from a strict interpretation or a misinterpretation of 2 CFR 200.319 for those grant projects that are currently underway and to suggest alternate approaches that can be implemented to eliminate concerns regarding future projects. The guidance and opinions provided by ADECA in this memo have not been reviewed or approved by HUD or any other federal agency. The City/County should feel free to seek an independent opinion from its own legal counsel to ensure compliance with 2 CFR 200.319.

If you have any questions, please call Shabbir Olia, CED Division Chief, at (334)242-5468, or Wendy Hester, Chief Audit Executive, at (334)353-3431.

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