

Office of Real Estate Services - Project Development Guide

Chapter 4

FHWA Right-of-Way Contracting Requirements

49 CFR 18.36(a)

49 CFR 18.37(a)

23 CFR 710.201(g)

23 CFR Part 200

23 CFR 1.33

REFERENCES

The regulations contained in 49 CFR 18.36(a) and 18.37(a) are primary, and govern how state Departments of Transportation (DOTs) and local public agencies (LPAs) are to procure right-of-way (ROW) contractual services.

Regulations contained in 23 CFR Part 200 cover Title VI, Civil Rights requirements. Conflict of interest is covered in 23 CFR 1.33.

Each state DOT has its own contracting requirements which it must follow. LPAs should obtain and use the state DOT procurement procedures, requirements, and guidelines appropriate for their work. State DOTs and LPAs need to maintain records sufficient to detail the significant history of a procurement.

The Federal Highway Administration (FHWA) allows state DOTs to use the same procurement procedures on federally funded ROW service contracts that they use on non-federally funded projects. Contracting requirements for LPAs, as sub-grantees, must follow the state DOT procedures, unless the state has approved the sub-grantee to use its own procedures.

STATE DOT

The procurement procedures followed by a state DOT when executing ROW service contracts on Federal-aid projects are the same policies and procedures used for procurement with non-Federal funds. However, the state DOT must ensure that every purchase order and contract includes clauses required by Federal statutes and implementing regulations, as well as state requirements. State contracting officials will be able to assist in delineating the appropriate clauses that each contract must contain.

LPA

49 CFR 18.37(a) requires the state to administer sub-grants to local governments in accordance with the state's own procedures. Therefore, local government sub-grantees, i.e., LPAs are to

follow the procurement procedures specified by the state, unless the state approves the sub-grantee's use of its own procurement procedures.

CONTRACTING FOR SERVICES GUIDELINES

4.1. Selecting the Contracting Method

There are many types of contracts that are acceptable and currently used for ROW services contracts:

a. Competitive Proposals

Under this technique more than one source submits an offer and either a fixed-price or cost reimbursement contract is usually awarded. If this method is used, the following usually apply:

1. Requests for proposals are publicized and identify all significant evaluation factors and their relative importance.
2. Proposals are evaluated.
3. Awards are made to the responsible firm whose proposal will be most advantageous to the program, with price and other factors considered.

- Selecting the contracting method
- Pre-qualifying contractors
- Soliciting and selecting proposals
- Writing the contract
- Administering contracts
- Avoiding problems

CONTRACTING FOR SERVICES

b. Noncompetitive Proposals

This technique allows solicitation of a proposal from only one source. This sometimes occurs when, after solicitation of proposals from a number of sources, competition is determined inadequate. Procurement may be subject to cost analysis by the agency or pre-award review. States in which contractors are paid by billable hours use pre-award audits where overhead rates are agreed upon prior to the notice to proceed with work. Care is used when reviewing contractor billings to assure that charges accurately reflect contractor progress toward project completion.

This method is usually used when the award of a contract is not feasible under small purchase procedures, sealed bids, or competitive proposals and one of the following applies:

1. The item is available only from a single source.
2. Public need will not permit the delay resulting from competitive solicitation.

3. After solicitation of a number of sources competition is inadequate.

c. Small Purchase Procedures

These are relatively simple procurement methods for securing services, supplies, or other property that often do not cost more than a specific dollar threshold. Often when small purchase procedures are used, price or rate quotations are usually obtained from an adequate number of qualified sources.

d. Sealed Bids

Under this technique bids are publicly solicited and a fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid conforms to the material terms and conditions of the invitation for bids and is lowest in price.

e. Qualifications-based Procedures

Using this method, the best qualified contractor is selected and the price is negotiated.

4.2. Pre-qualifying the Contractor

Do a thorough pre-qualification screening. Check with previous customers as to quality and timeliness of the work product. It is important to know whether the contractor has had previous highway ROW experience or experience with federally funded projects administered under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act). Check backgrounds and references.

Often acquiring agencies (because of political considerations) will want specific firms to do the work. Important things to remember are:

- a. Is the contractor qualified for the job?
- b. Governing procurement procedures must be followed.

4.3. Soliciting and Selecting Proposals

Once contractors have been pre-qualified, a request for proposal may be prepared and a proposal requested. When all proposals for a particular job are received, an evaluation process is undertaken. The evaluation process involves analysis of price, staff, as well as the general capability to do the job.

4.4. Writing the Contract

In general, contracts contain the following items. Item 4n. below, regarding non-discrimination clauses, is a requirement of the governing regulations. Contracts must contain the provisions required in 49 CFR 18.36(i).

- a. Date of the agreement.

- b. Complete name and address of each party to the agreement whether it is an individual, partnership, firm or corporation. If a corporation is one of the parties, identify the state in which it is incorporated.
- c. Description of the work, showing the nature and scope of services to be performed.
- d. Specifications as to work performance, the content and format of needed reports, timeliness, accuracy and acceptability of work.
- e. Provision for court testimony when necessary.
- f. Provision for revision or correction of work required as the result of contractor failure to comply with contract specifications.
- g. The basis of progress payments for services as completed.
- h. Provision for the renegotiation of the contract for mutual acceptance of major changes in the scope, character, or estimated total cost of the work to be performed, if such change becomes necessary.
- i. Provision to terminate the contract by the agency in the event the contractor is not complying with the terms of the agreement, the progress or quality of the work is unsatisfactory, or for other stated reasons. A provision covering the ownership of work completed, or partially completed, and the basis of payment in the event of termination of the agreement by the acquiring agency, should be included.
- j. Provision for resolving contract disputes.
- k. Prohibition against subletting or transfer of any of the work, except as is otherwise provided for in the agreement, or approved by the agency.
- l. Provision for compliance with applicable laws, regulations and Agency procedures.
- m. Indemnification of the Agency.
- n. Inclusion of all required non-discrimination provisions.
- o. Properly executed signatures and dates.

A sample of current contracts, requests for proposals, and general guidance is available on the FHWA Office of Real Estate Services Website:
www.fhwa.dot.gov/realestate/programa.htm

4.5. Administering the Contract

What happens after the contract has been signed and before you make the final payment is called contract administration. Following are the typical steps in this process:

- a. A start up conference and a subsequent field review can be an invaluable first step in getting acquainted with each other and starting the project in a positive manner. Often these early meetings can be used to set a positive atmosphere which is beneficial through the life of the project. These early meetings also set the stage for avoiding misunderstandings and crystallizing the expectations of both parties regarding the scope of the project.
- b. Monitoring progress and overseeing the contractor's performance is probably the most difficult of the step of the process. One of things that can be done to accomplish this is to establish checkpoints for the work to be done under the contract. An example would be to review very carefully the initial batch of work products in various functional areas that are completed. Let the contractor know at the very start what you expect in the way of quality and if there are any problems with the work product.
- c. Contract supplements, adjustments and payments are processed.
- d. Project close out is typically accompanied by a quality assurance check of the records to identify general contract compliance and resolution of issues.

4.6. Avoiding Problems

- a. A contractor will need an appropriate amount of time to complete the ROW work. If this time is compressed for reasons within or outside of the control of the contractor, problems will result.
- b. A problem can arise as the result of holding parcels too long and not advancing them to the condemnation stage. Improper staging of acquisition priorities can create scheduling conflicts.
- c. Sometimes communication breaks down between agency staff and the contractor. Everyone needs to understand the contractor's role and how this will enhance the agency's accomplishment of project and organizational goals.
- d. As a rule of thumb, improved properties requiring whole takes and relocation should be appraised first and offers made. Small residential strip takes with no improvements or signs generally cause the least trouble.