

VDH Drinking Water Funding Program Guidance Package #4

PROCUREMENT

I. General

The Recipient's procurement system must be structured to promote free and open competition to the maximum extent possible. It is the Recipient's responsibility to ensure that it receives the required product at the best price and to avoid all unnecessary purchases and expenditures. The Recipient's procurement procedures should also promote, to the maximum extent possible, the use of minority-owned and women-owned businesses. The Recipient must take positive steps to seek out qualified minority-owned and women-owned businesses to directly solicit, or otherwise bring them into the bidding process.

All procurement made during the course of planning, design, and construction of the project must be purchased, acquired or contracted for in accordance with Chapter 43, Title 2.2-4300, Code of Virginia, and known as the Virginia Public Procurement Act (Act) and Code of Federal Regulations Title 40 Part 31.36.

This program requires all participants to follow the provisions of the Virginia Public Procurement Act as revised by the 2018 General Assembly Session **with no exceptions recognized for localities under 3,500 in population.**

Reference is made in this guidance to the VDH Contract Inserts and the Attachments therein (Guidance Packages #13 and #15). Note that there are two distinct sets of Contract Inserts:

- 1) Contract Inserts for Projects Subject to American Iron and Steel (AIS) Requirements
- 2) Contract Inserts for Projects Subject to Build America, Buy America (BABA) Act Requirements

The FCAP Project Manager can verify which set of Contract Inserts is to be used.

II. Definitions

Recipient – Eligible water system receiving financial assistance.

Prime Contractor – A business concern that enters into written agreements directly with Recipient. **The term prime contractor** includes agreements to provide services (such as engineering and legal), supplies, equipment and construction.

Subcontractor – A business concern that enters into written agreement directly with the Prime Contractor. Subcontractor includes agreements to provide services (such as engineering and legal), supplies, equipment and construction.

Minority-Owned Business Enterprise (MBE) - A business concern with at least 51 percent owned by one or more minorities or in the case of a corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by

one or more minorities and whose management and daily business operations are controlled by one or more of such individuals.

Woman-Owned Business Enterprise (WBE) - A business concern which is at least 51 percent owned by one or more women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more women, and whose management and daily business operations are controlled by one or more of such individuals.

III. MBE/WBE

A. Six (6) Good Faith Efforts

The Code of Federal Regulations Title 40 Part 31.36(e), “Procurement,” requires the Recipient and Prime Contractor to take all necessary affirmative steps to assure that minority-owned and women-owned businesses are afforded contracting opportunities. **This requirement applies to all contracts, subcontracts and procurements for services (including engineering and legal), supplies, equipment, and construction.** The goal is to make MBE/WBE firms aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. To achieve this goal, the affirmative steps, otherwise known as “six good faith efforts,” that must be followed are:

1. Include qualified small and minority businesses and women’s business enterprises on solicitation lists;
2. Ensure that small and minority and women’s businesses are solicited whenever they are potential sources of products or services to be bid;
3. Divide total requirements, when economically feasible, into small tasks or quantities to permit maximum participation by small and minority and women’s businesses (i.e., provide alternative bidding scenarios);
4. Establish delivery schedules to encourage participation by small and minority and women businesses (i.e., timing and flexibility);
5. Use the services and assistance of the Small Business Administration, and the Minority Business Development Agency, U.S. Department of Commerce; and
6. Require the Prime Contractor to take affirmative steps as outlined in items one through five above to subcontract with small and minority and women’s businesses, if they award subcontracts.

B. “Good Faith” Effort Compliance Documentation

The Recipient and Prime Contractors must provide documentation to support a “good faith” effort in the solicitation of MBE and WBE firms only. **A Prime Contractor is a business concern that enters into written agreement directly with the Recipient and includes agreements to provide services (engineering and legal), supplies, equipment, and construction.** The submission of documentation to support a “good faith” effort in the solicitation of Small Business Enterprise is not required. However, the Recipient and

Prime Contractors must maintain this documentation in their files for possible future reference. Documentation may include the following:

1. Copies of announcements/postings in newspapers or other media for specific contracting/subcontracting opportunities. Include language in announcements/postings that MBE/WBE firms are encouraged to bid.
2. Copies of announcements/postings of contracting/subcontracting opportunities in trade publications or minority media that target MBE and/or WBE firms.
3. Documentation of sources used to identify potential MBE/WBE firms.
4. Documentation of contacts with MBE/WBE firms, including the name, address, telephone number, dates of phone calls, letters, emails, and the contact results.
5. Copies of direct solicitation letters/emails sent to all MBE/WBE firms.
6. Copies of the MBE/WBE certification documentation for ALL proposed prime and subcontractor MBE/WBE firms.
7. Documentation showing Prime Contractor has made the six good faith efforts to seek qualified MBE/WBE subcontracts - to the extent they use subcontractors.

Contract Inserts Attachment 1 - MBE/WBE Compliance Checklist has been developed to assist in documenting compliance with MBE/WBE requirements and must be submitted to VDH.

C. Additional Guidance on Conducting Outreach

1. Possible sources for identifying MBE/WBE firms:

- (a). Virginia's Department of Small Business and Supplier Diversity's website.
<http://sbsd.virginia.gov/>

- At Department of Small Business and Supplier Diversity's website click on "SWaM Vendors Search" tab.

EXAMPLES:

- A search for vendors with commodity code 92500 – Engineering Services and 92533 – Engineer Services, Professional yields a list of registered firms.
- A search for vendors with commodity code 91874 – Legal Consulting and 96149 – Legal Services, Attorney yields a list of registered firms.
- A search for vendors with commodity code 91356 – Construction, Utility/Underground Projects and 91360 Construction, Water System, Main and Service Line yields of list of registered firms.
- Select the link to National Institute of Governmental Purchasing (NIGP) to get the listing of commodity codes
- <http://sbsd.virginia.gov/> At Department of Small Business and Supplier Diversity's website click on "DBE Directory" for alphabetically list of construction related registered firms. This listing will contain VDOT work codes and descriptions.

- (b). Virginia’s Department of Transportation’s website.
<http://www.vdot.virginia.gov/>
 - http://www.virginiadot.org/business/small_business_enterprise_program.asp At the Virginia Department of Transportation’s website click on “Contractor Firms (PDF)” under VSBEP Directory.
- (c). Federal Government’s federal contracts database known as the System for Award Management (SAM) www.sam.gov, which replaced the Central Contractor Registry (CCR, www.ccr.gov). SAM is the primary vendor database for the federal government. Both current and potential government vendors must register in SAM in order to be awarded federal government contracts.

These various searches yield a list of potentially qualified MBE/WBE businesses. From these lists, identify those businesses in your area/region to directly solicit. Solicit businesses that you would reasonably expect to respond and submit a quote.

To ensure the Recipient is given credit for good-faith outreach efforts, the Recipient documents the searches executed and the results of the searches, describes criteria used to determine who on the list(s) to directly solicit (probably area code or distance) and describes any other resources used to seek qualified MBE/WBE firms to solicit.

The Recipient must give a copy of this outreach guidance (PG #4) to Prime Contractors because they are likewise required to make good faith outreach efforts when searching for MBE/WBE subcontractors. Prime Contractors are also required to document their outreach efforts just as project owners are.

2. Possible minority publications to consider when advertising (when it is believed that advertisement may increase MBE/WBE participation):

Alexandria, Virginia	Metro Herald	(703) 548-8891
Alexandria, Virginia	Omaid Weekly	(703) 922-6321
Annandale, Virginia	Latino Impacto	(703) 847-0810
Arlington, Virginia	El Tiempo Latino	(703) 527-7860
Centreville, Virginia	Asian Fortune	(703) 968-0202
Falls Church, Virginia	Pho Nho Vietnamese	(703) 533-0264
Fredericksburg, Virginia	LaConexion	(540) 368-5055
Hampton Roads, Virginia	Hampton Roads Voice	(757) 244-5654
Harrisonburg, Virginia	Shenandoah Valley Hit	(540) 432-0416
Harrisonburg, Virginia	Nuevas Raices	(540) 271-0799
Norfolk, Virginia	Norfolk New Journal and Guide	(757) 543-6531
Richmond, Virginia	Richmond Free Press	(804) 644-0496
Richmond, Virginia	Richmond Voice	(804) 644-5617
Roanoke, Virginia	Roanoke Tribune	(540) 343-0336

D. MBE/WBE “Fair Share” Goals

It is a federal requirement that MBE and WBE firms be provided the opportunity to participate in contract awards for projects. EPA requires that VDH establish MBE and WBE fair share percentage goals for four procurement categories to include: supplies, equipment, services, and construction. A fair share does not constitute an absolute goal, but a commitment on the part of the Recipient and Prime Contractor to attempt to use MBE/WBE firms by carrying out the six good faith effort steps. Recipients and Prime Contractors are not required to award contracts to MBE/WBE firms. However, Recipients and Prime Contractors must document good faith efforts to afford MBE/WBE firms the opportunity for a contract award.

The Recipient is required to monitor and maintain records regarding the Recipient’s and Prime Contractor's efforts to meet and fulfill our good faith effort/fair share goals. The Recipient must discuss at pre-bid conference and incorporate into the bid package contract specifications the: Contract Inserts **Attachment 2** - Instruction to Bidders/Offerors: MBE/WBE Requirements of 40 CFR 33.240; Contract Inserts **Attachment 3** - Bidder Compliance Statement/Certification Regarding Equal Employment Opportunity, and Contract Inserts **Attachment 4** - Subpart Inserts containing 12 mandatory subparts (Subpart A-L). The VDH will provide the Recipient with its fair share goals to be included in Subpart C of the Contract Inserts prior to solicitation of bids.

Upon receipt of bids, the Recipient shall ascertain submittal of apparent low bidder's documentation to support his or her efforts in the solicitation and recruitment of MBE/WBE contractors, subcontractors, and/or equipment suppliers, etc. The Recipient must evaluate the low bidder's good faith efforts regarding MBE/WBE solicitation prior to contract award.

All MBE/WBE solicitation and recruitment documentation must be submitted for VDH approval along with the bid documents. The MBE/WBE compliance checklist will be part of, and will aid in submittals.

Immediately following contract award, the Recipient shall complete and submit to VDH Contract Inserts **Attachment 5** - MBE/WBE Utilization Reporting Form identifying the selection, if any, of minority and female-owned businesses to be utilized during construction of the facility.

The Recipient is also required to submit the MBE/WBE Utilization Reporting Form on a **quarterly** basis during the construction period. In addition, the **Prime Contractor** must submit its MBE/WBE Utilization Reporting Form firms to the Recipient on a quarterly basis during the construction period utilizing Contract Inserts Attachment 5. The Recipient must compile these MBE/WBE Utilization Reports and submit them by the 15th of the month following the end of each fiscal quarter to VDH at the following address:

**Virginia Department of Health
Office of Drinking Water, 6th Floor
109 Governor Street
Richmond, Virginia 23219**

E. Bidders List

In accordance with the Code of Federal Regulation Title 40, Section 33.501(b) and (c) a recipient of an identified loan through the DWSRF is required to create and maintain a bidders list if the recipient of the loan is subject to, or chooses to follow, competitive bidding requirements. The list must include all firms that bid or quote on prime contracts or bid or quote subcontracts on EPA assisted projects, including both MBE/WBEs and non-MBE/WBEs. For entities receiving identified loans, the bidders list must only be kept until the project period for the identified loan has ended. The following information must be obtained from all prime and subcontractors:

- (1) Entity's name with point of contact
- (2) Entity's mailing address, telephone number, and e-mail address
- (3) The procurement on which the entity bid or quoted, and when
- (4) Entity's status as an MBE/WBE or non-MBE/WBE.

IV. Methods of Procurement

Competitive sealed bidding or competitive negotiation may be used for the purchase or lease of equipment, supplies, materials, services, and construction, under public contract. Professional services may be procured by competitive negotiation. Competitive negotiation may be used for procurement of other than professional services when it has been determined, and documented in writing, that competitive sealed bidding is not practical or advantageous to the public. The procedures for these and other eligible procurement methods are discussed below.

Competitive Sealed Bids

Procurement under this method includes the following procedures or steps. A formal public announcement is made that sealed bids will be received for the specified work, or a solicitation for bids is placed in newspapers and publications with wide distribution. The announcement should be published at least 30 days prior to the bid opening so that the project receives maximum exposure to potential contractors. Potential qualified MBE/WBE firms must be identified and directly solicited.

All bids must be opened at the same time and all non-responsive bids should be rejected immediately. A responsive bidder is one whose bid has followed all requirements of the bidding

document specifications and is one who can provide documentation to support good faith efforts to solicit MBE/WBE participation. Bids are then evaluated in accordance with criteria established by the Recipient in the bid document to determine the lowest, responsive, responsible bidder. A responsible bidder is one who has the financial and technical resources to perform the scope-of-work. Further, a responsible bidder has a satisfactory performance record, is willing to comply with federal labor requirements and standards and has an adequate accounting system to document compliance.

Once the bids and bidders have been evaluated and the lowest, responsive, responsible contractor has been determined, the contract can be awarded. Award of the contract will also follow the method described in the contract documents. Award of the contract cannot be made to a contractor who has been debarred and/or suspended from bidding on any federal or state funded project. The contractor is required to take the first five (5) good faith effort steps outlined above.

Competitive Negotiation

Procedures for this type of procurement require posting of a public notice and an advertisement in a newspaper or online news publication of general circulation. The notice and advertisement must identify the needed services and request that proposals be submitted. It should be published so that it receives wide circulation and appears at least 30 days prior to the deadline for receiving proposals. The notice will include the scope of services; the method by which documents associated with the services can be obtained or examined; the criteria to be used to evaluate each proposal; and the deadline and place for submitting the proposals. Contact VDH for approval to publish the advertisement for less than 30 days prior to the deadline for receiving proposals. Potential qualified MBE/WBE firms must be identified and directly solicited.

Once the proposals are received, they are to be evaluated uniformly in accordance with criteria established in the notice to determine the qualified offerors and acceptable proposals. The Recipient then determines the list of the best qualified firms, and negotiation with these firms begin. Negotiations are to be conducted in a manner that does not identify or disclose any information regarding competing firms. Once a proposal is determined to be the most advantageous to the Recipient, considering price and evaluation criteria, the contract can be awarded.

Noncompetitive Negotiation

Award of a contract or sub-agreement under noncompetitive negotiation methods may occur only when an item is available from a single source, a public emergency exists requiring immediate action, or after solicitation from a number of sources, competition is determined to be inadequate. A written determination by the public body shall document the availability of only the sole source or emergency situation. Authorization from VDH must be obtained for procurement through noncompetitive negotiation.

Small Purchases

Section 2.2-4303(G) of the Act allows for the establishment of purchase procedures, if adopted in

writing, not requiring competitive sealed bids for competitive negotiation for single or term contracts for **goods and services**, other than professional services if the aggregate or the sum of all phases is not expected to exceed \$200,000; however, such small purchases procedures must provide for competition whenever practicable. For local public bodies, such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$80,000.

Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

Documentation of the procedures followed in small purchases procurement must be kept by the Recipient. Contract Inserts **Attachment 6** - Small Purchase Procurement Requirements has been developed to assist with documentation and to be submitted to VDH.

Cost and Price Consideration

In competitive negotiation, cost is one of the evaluation factors used in the selection process. Detailed cost data should be obtained from the firms involved in the negotiation process. Pricing should be evaluated based on the complexity of the work and the prices charged in the surrounding geographical area.

The two types of costing/pricing which are typically preferred for service type contracts are *Fixed Price* or *Lump Sum*, and *Cost Plus Fixed Fee*. The fixed price arrangements are used when the scope-of-work can be clearly defined, and a fixed price or lump sum cost can be negotiated. Under this type of sub-agreement, the final cost cannot be changed unless a formal change in the scope of the work is negotiated.

The cost plus fixed fee pricing arrangement is used when it is difficult to define accurately the complete scope-of-work. Under this type of sub-agreement, a cost ceiling or upper limit is established along with a fixed fee or profit for the work. If costs increase for additional work within the original scope-of-work, the contractor does not receive any increase in the fixed fee.

The acceptable methods of obtaining the cost for construction services are "Unit Price" bids and "Lump Sum" bids. In lump sum bidding, the entire scope-of-work is grouped together as a single item and the contractor provides a price which will accomplish the entire scope. In unit price bidding, each individual task or item is broken out by linear feet, cubic yards, etc., and a cost is given per unit specified, along with the total cost of all units required for the task identified.

V. Reporting Requirements

A. Prior to the award of construction contracts, the Recipient will be able to determine if an increase or decrease is needed for the funding commitments to reflect the actual project costs. The Recipient shall provide for VDH's approval copies of the following information and documents:

- The updated or "as-bid" costs for all tasks/elements involved with the project. This budgeting summary should include, and break out individually, the

construction cost, equipment cost, fees for inspection and engineering services, etc., which will require outlay during the construction of the project.

- Evidence of bid advertisement/announcement/postings [See Contract Inserts Attachment 7 for General Language]
- The Bid Form(s) or Bid Proposal(s).
- The Bid Tabulation(s).
- Anticipated construction start date.
- Identification and direct solicitation of MBE/WBE firms
- Contract Inserts Attachment #1 – MBE/WBE Compliance Checklist
- All bonds (*bid, payment, and performance*).

B. For procurement of professional services other than construction contracts, (*i.e., architectural/engineering/legal/bond counsel*) the Recipient will submit for VDH's approval the following information (unless procured using small purchase procedures under \$80,000 (see Contract Inserts Attachment 6)):

- Copy of RFP to include scope of services, evaluation criteria, and contact info
- Proof of date RFP or RFQ was issued (copy of advertisement/announcement/posting [see Contract Inserts Attachment 7 for General language])
- Identification and direct solicitation of MBE/WBE firms
- Contract Inserts Attachment #1 – MBE/WBE Compliance Checklist
- Copy of executed contract
- Ranking of respondents
- Statement detailing with whom negotiations were conducted

C. All documentation and support information concerning the procurement of service and goods shall be retained in the Recipient's project files and will be available for inspection by VDH or their authorized agent.

VI. Nondiscrimination Provisions

The Recipient shall maintain records of all executed nondiscrimination (EEO compliance) certifications filed.

VII. Supplemental Procurement Guidance

Copies of the Professional Services Procurement Review Checklist and the Construction Contract Bid Review Checklist are provided for your reference. These forms outline the criteria used for review and approval of procurement efforts.

**VDH Financial and Construction Assistance Programs
PROFESSIONAL SERVICES PROCUREMENT REVIEW CHECKLIST**

**This form must be completed in full and submitted with the required documentation to Mr. Howard Eckstein, Project Officer, at 109 Governor Street, 6th Floor, Richmond, Virginia 23219, to satisfy Professional Services Procurement Procedures.*

Project No. : _____ Date: _____

Project Name: _____

Submitted by: _____

I: Firm Information

Firm name: _____

Address: _____

Phone number: _____

Service Provided: _____

Date RFP Issued: _____

Contract Date: _____

Date for Receipt of Proposals: _____

Contract Amount: \$ _____

(At least 30 calendar days from date RFP issued)

Verified federal debarment status (Y/N). Attach print screen: _____. Verified state debarment status (Y/N).

II: Required Documentation

If procured via competitive negotiations (all items are required)

Advertisement	
Certification of Publication/Advertisement with MBE/WBE language	<input type="checkbox"/>
RFP to include scope of services desired, evaluation criteria, and contact information	<input type="checkbox"/>
MBE/WBE Requirements	
Documentation of MBE/WBE contractor search (DMBE website printout)	<input type="checkbox"/>
Copies of direct solicitations to MBE/WBE firms (certified letters/receipts, e-mails, fax receipts)	<input type="checkbox"/>
Evaluation of Respondents	
Scoring sheets with evaluation criteria	<input type="checkbox"/>
Ranking of qualified respondents	<input type="checkbox"/>
Statement detailing with whom negotiations were conducted (at least two respondents) (this may be in the form of Board meeting minutes)	<input type="checkbox"/>
Contract (to be submitted after VDH has approved procurement procedure)	
Executed contract with top ranked respondent for fixed price amount (For term contracts please provide general terms and task order; the fixed price amount for the task order cannot exceed \$100,000)	<input type="checkbox"/>

If procured via a small purchase procedure for purchases under \$80,000 (all items are required)

Procurement Requirements for Small Purchases Form	<input type="checkbox"/>
MBE/WBE Requirements	
Documentation of MBE/WBE contractor search (website printout)	<input type="checkbox"/>
Copies of direct solicitations to MBE/WBE firms (certified letters/receipts, e-mails, fax receipts)	<input type="checkbox"/>
Contract (to be submitted after VDH has approved procurement procedure)	
Executed contract with top ranked respondent for fixed price amount	<input type="checkbox"/>

**VDH Financial and Construction Assistance Programs
CONSTRUCTION CONTRACT BID REVIEW CHECKLIST**

**Please complete this form in full and submit with the required documentation to Mr. Howard Eckstein, Project Officer, at 109 Governor Street, 6th Floor, Richmond, Virginia 23219, to satisfy Construction Contract Procurement Procedures.*

Project No.: _____ Date: _____

Project Name: _____

Submitted by: _____

I: Lowest Responsive and Responsible Bidder Information

Firm name: _____

Address: _____

Phone number: _____

Proposed Contract Amount: \$ _____

Service Provided: _____

II: Advertisement for Bids Information

Date AFB issued: _____

Date of bid opening: _____

(At least 30 calendar days from date IFB issued)

Contract Date: _____

III: Required Documentation

If procured via competitive sealed bidding (all items are required)

Advertisement	
Certification of Publication/Advertisement with required language	<input type="checkbox"/>
MBE/WBE Requirements	
Documentation of MBE/WBE contractor search (website printout)	<input type="checkbox"/>
Copies of direct solicitations to MBE/WBE firms (certified letters/receipts, e-mails, fax receipts)	<input type="checkbox"/>
Documentation to support Prime Contractors six good faith efforts to solicit MBE/WBE firms (must include copies of direct solicitations)	
Documentation regarding contractor selection	
Statement detailing bid opening and anticipated construction start date	<input type="checkbox"/>
Certified Bid Tabulation (signed by Consulting Engineer)	<input type="checkbox"/>
Bid Proposal/Forms and Bid Bond of the apparent low bidder	<input type="checkbox"/>
Updated Total Project Budget (to include all funding sources)	<input type="checkbox"/>

If procured via small purchase procedure for purchases under \$200,000 (all items are required)

Procurement Requirements for Small Purchases Form	
MBE/WBE Requirements	
Documentation of MBE/WBE contractor search (website printout)	<input type="checkbox"/>
Copies of direct solicitations to MBE/WBE firms (certified letters/receipts, e-mails, fax receipts,)	<input type="checkbox"/>
Documentation to support Prime Contractors six good faith efforts to solicit MBE/WBE firms (must include copies of direct solicitations)	<input type="checkbox"/>
Proposal of the apparent low bidder	<input type="checkbox"/>
Updated Total Project Budget (to include all funding sources)	<input type="checkbox"/>