

Environmental Protection Agency

§ 35.936-5

§ 35.936 Procurement.

(a) Sections 35.936 through 35.939 set forth policies and minimum standards for procurement of architectural or engineering services as defined in §35.937 and construction contracts as described in §35.938 by grantees under all steps of grants for construction of treatment works. Acquisition of real property shall be conducted in accordance with part 4, subpart F of this chapter. Other procurements of goods and services shall be conducted in accordance with the provisions of part 33 of this subchapter.

(b) This subpart does not apply to work beyond the scope of the project for which grant assistance is awarded (i.e., ineligible work).

§ 35.936-1 Definitions.

As used in §§ 35.936 through 35.939, the following words and terms shall have the meaning set forth below. All terms not defined herein shall have the meaning given to them in §30.135 of this subchapter, and in §35.905.

(a) *Grant agreement.* The written agreement and amendments thereto between EPA and a grantee in which the terms and conditions governing the grant are stated and agreed to by both parties under §30.345 of this subchapter.

(b) *Subagreement.* A written agreement between an EPA grantee and another party (other than another public agency) and any tier of agreement thereunder for the furnishing of services, supplies, or equipment necessary to complete the project for which a grant was awarded, including contracts and subcontracts for personal and professional services, agreements with consultants and purchase orders, but excluding employment agreements subject to State or local personnel systems. (See §§35.937-12 and 35.938-9 regarding subcontracts of any tier under prime contracts for architectural or engineering services or construction awarded by the grantee—generally applicable only to subcontracts in excess of \$10,000.)

(c) *Contractor.* A party to whom a subagreement is awarded.

(d) *Grantee.* Any municipality which has been awarded a grant for construction of a treatment works under this

subpart. In addition, where appropriate in §§ 35.936 through 35.939, grantee may also refer to an applicant for a grant.

§ 35.936-2 Grantee procurement systems; State or local law.

(a) *Grantee procurement systems.* Grantees may use their own procurement systems and procedures which meet applicable requirements of State, territorial, or local laws and ordinances to the extent that these systems and procedures do not conflict with the minimum requirements of this subchapter.

(b) *State or local law.* The Regional Administrator will generally rely on a grantee's determination regarding the application of State or local law to issues which are primarily determined by such law. The Regional Administrator may request the grantee to furnish a written legal opinion adequately addressing any such legal issues. The Regional Administrator will accept the grantee's determination unless he finds that it does not have a rational basis.

(c) *Preference.* State or local laws, ordinances, regulations or procedures which effectively give local or in-State bidders or proposers preference over other bidders or proposers shall not be employed in evaluating bids or proposals for subagreements under a grant.

§ 35.936-3 Competition.

EPA's policy is to encourage free and open competition appropriate to the type of project work to be performed.

§ 35.936-4 Profits.

Only fair and reasonable profits may be earned by contractors in subagreements under EPA grants. See §35.937-7 for discussion of profits under negotiated subagreements for architectural or engineering services, and §35.938-5(f) for discussion of profits under negotiated change orders to construction contracts. Profit included in a formally advertised, competitively bid, fixed price construction contract awarded under §35.938 is presumed reasonable.

§ 35.936-5 Grantee responsibility.

(a) The grantee is responsible for the administration and successful accomplishment of the project for which EPA

grant assistance is awarded. The grantee is responsible for the settlement and satisfaction of all contractual and administrative issues arising out of subagreements entered into under the grant (except as § 35.936-6 provides) in accordance with sound business judgment and good administrative practice. This includes issuance of invitations for bids or requests for proposals, selection of contractors, award of contracts, protests of award, claims, disputes, and other related procurement matters.

(b) With the prior written approval of the Regional Administrator, the grantee may retain an individual or firm to perform these functions. Such an agent acts for the grantee and is subject to the provisions of this subpart which apply to the grantee.

(c) In accordance with § 35.970, a grantee may request technical and legal assistance from the Regional Administrator for the administration and enforcement of any contract related to treatment works that are assisted by an EPA grant. The Regional Administrator's assistance does not release the grantee from those responsibilities identified in paragraph (a) of this section.

§ 35.936-6 EPA responsibility.

Generally, EPA will only review grantee compliance with Federal requirements applicable to a grantee's procurement. However, where specifically provided in this chapter (e.g., §§ 8.8(j) and 35.939), EPA is responsible for determining compliance with Federal requirements.

§ 35.936-7 Small and minority business.

Grantees shall make positive efforts to use small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements to be performed using Federal grant funds.

§ 35.936-8 Privity of contract.

Neither EPA nor the United States shall be a party to any subagreement (including contracts or subcontracts), nor to any solicitation or request for proposals. (See §§ 35.937-9(a), 35.938-

4(c)(5), and appendices C-1 and C-2 to this subpart for the required solicitation statement and contract provisions.) However, in accordance with § 35.970 the Regional Administrator, if a grantee requests, may provide technical and legal assistance in the administration and enforcement of any contract related to treatment works for which an EPA grant was made.

§ 35.936-9 Disputes.

Only an EPA grantee may initiate and prosecute an appeal to the Administrator under the disputes provision of a grant with respect to its subagreements (see subpart J of part 30 of this subchapter). Neither a contractor nor a subcontractor may prosecute an appeal under the disputes provisions of a grant in its own name or interest.

§ 35.936-10 Federal procurement regulations.

Regulations applicable to direct Federal procurement shall not be applicable to subagreements under grants except as stated in this subchapter.

§ 35.936-11 General requirements for subagreements.

Subagreements must:

- (a) Be necessary for and directly related to the accomplishment of the project work;
- (b) Be in the form of a bilaterally executed written agreement (except for small purchases of \$10,000 or less);
- (c) Be for monetary or in-kind consideration; and
- (d) Not be in the nature of a grant or gift.

§ 35.936-12 Documentation.

(a) Procurement records and files for purchases in excess of \$10,000 shall include the following:

- (1) Basis for contractor selection;
 - (2) Justification for lack of competition if competition appropriate to the type of project work to be performed is required but is not obtained; and
 - (3) Basis for award cost or price.
- (b) The grantee or contractors of the grantee must retain procurement documentation required by § 30.805 of this subchapter and by this subpart, including a copy of each subagreement, for the period of time specified in § 30.805.