12.0 Introduction

This chapter is intended to provide guidance to Department employees in the administration and review of Federally Aided, locally administered contract bid documents prepared by sponsors.

Contracts that are off the National Highway System (NHS):

The sponsor should provide a written certification to the RLPL that all the requirements and appropriate appendices (see External Manual Section 12.1) have been included in the contract bid documents.

Contracts that are on the State Highway System or NHS:

In addition to the sponsor’s certification, the draft bid proposals should be reviewed by the appropriate Regional staff, using the guidance provided in this Chapter, to insure the proposal contains all necessary Federal requirements AND does not contain local requirements or restrictions which would violate federal rules. Any identified deficiencies should be noted for the sponsor’s correction. If the proposal meets requirements listed above, then approval should be given by Regional Director or his designee to the sponsor for contract advertisement.

For All Contracts:

The RLPL must review and approve the Sponsor’s Management plan prior to Contract Award. The review should verify the topics listed in External Manual Section 12.2 have been included and described in appropriate detail. This is in order to have timely selection of consultants if necessary and/or to arrange for the necessary resources.

12.1 Distinctions Between 100% Locally Funded Contracts and Federally Aided Local Contracts

- The primary distinctions between 100% locally funded contracts and Federally Aided local contracts are as follows:

  - Certain Federal rules and regulations apply to ALL Federal Aid Contracts. These include:
    - Certification for Federal Aid Contracts (See External Manual Appendix 12.1.1)
    - Non-collusive bidding certification (See External Manual Appendix 12.1.2)
    - Disclosure of Lobbying Activities (See External Manual Appendix 12.1.1)
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- Debarment certification (See External Manual Appendix 12.1.2)  
Equal Employment Opportunity requirements (See External Manual Appendix 12.1.4)  
FHWA-1273 Required Contract Provisions (See External Manual Appendix 12.1.5)  
Davis-Bacon Prevailing Wage Rates (for bid situations) (See External Manual Section 12.2)  
Provisions Relating to Convict Labor (See External Manual Appendix 12.2.1)  
Disadvantaged Business Enterprise Utilization (See External Manual Appendix 12.2.3)  
Buy America Provisions (See External Manual Appendix 12.2.2)  
Changed Conditions/Dispute Resolution language. (See External Manual Appendix 12.2.4)  

> When local rules and regulations conflict with Federal rules and regulations, Federal rules must be used.

12.2 Detailed Requirements

- **Contracts with Multiple Funding Sources.** Some locally administered contracts use multiple funding sources, which often cause problems in trying to determine which rules govern. TEA-21 rules require that if there is a TEA-21 Federal share in a contract, even if that share is minimal compared to other funding sources, that TEA-21 Federal rules govern that contract with the exception of multiple Federal funding shares. When there are multiple Federal funding shares, the federal agency share with the highest dollar value rules apply.

- **Competitive bidding.** Contracts are to be done by competitive bidding, with a public bid opening and an award to the lowest responsible bidder. FHWA has directed that *negotiation with the low, or any other bidder on a given contract prior to award is prohibited.*

- **Force account** construction (work done directly by the sponsor with its own forces rather than contracted out by bid) is allowable in those occasional instances where a public interest finding can be made which clearly demonstrates that it is more cost effective and expedient to perform the work with local forces rather than by competitive bidding. The sponsor must certify in writing that the sponsor’s work force can complete the contract at less cost and in less time than by letting a contract, or that sufficient competition does not exist to justify bidding. Sponsor’s certification should be consistent with the requirements in 23CFR § 635.201-205. The certification (if applicable) should be included in PS&E package that is submitted for RLPL for review and approval as required for contracts that are **on the State**
Highway System or NHS. (See External Manual Section 12.2.)

- **Residency Requirements and/or Geographical Restrictions.** The concept on federal aid contracts is free and open competition, meaning almost anyone can participate. Therefore, anything which tends to hinder or reduce competition is not allowable. Some sponsors have residency requirements or other restrictions (you must live in the County to bid), and these are not allowed on federal aid contracts.

- **Contracts requiring specialized expertise or experience.** Occasionally, a contract will require specific expertise or specialized experience, such as historic preservation contracts or computerized, integrated traffic signal systems. It is permissible to include expertise or experience requirements for specialized work in a local contract bid proposal as a condition of award. The special requirements should be clear, reasonable and consistent with standard industry practices. Requirements of special expertise cannot be written to preclude any bidder from submitting a bid and can only be used to determine the lowest responsible bidder. For instance, on historic preservation, several years of experience in the historic preservation field, or at least three completed historical preservation contracts similar in size and scope would be a reasonable requirement if the contract required that level of expertise. The same would apply to other specialty type work. (See External Manual Sections 12.2 and 12.4).

- **Alternate bidding** can be used to stay within budget limits. The methodology is described in External Manual Section 12.3.

- **Wicks Law.** Whenever a contract involves construction or reconstruction of a building, sponsors must be aware of the provisions of the so-called Wicks Law (Section 101, NYS Municipal Law), which requires separate specifications and separate bids for the general construction, plumbing, heating/ventilating, and electrical components if the total contract estimate is $50,000 or higher. Buildings owned by not-for-profit organizations may be exempt from this law. (See External Manual Section 12.2).

- **Warranties.** 23 CFR 635.413 prohibits warranties of overall workmanship or maintenance warranties or bonds. These are considered a maintenance function, and the contract is out of control of the contractor once completed. The Department does not have any special FHWA approved warranty provisions for special construction features, so if a locality insists on a warranty of a special construction feature, they will need pre-approval from FHWA. On non-traditional enhancement contracts, such as building restorations, we do have the latitude to use “standard industry practice.” Therefore, if standard industry practice is to warranty a roof for ten years, we could accept this without going to FHWA for approval. Standard
industry warranties on installed equipment and materials are allowable, as these are also standard industry practice. Sponsor’s request and justification for warranty provisions for special construction features for contracts that are on the State Highway System or NHS should be forwarded to FHWA for their approval. Contracts that are off the NHS should be forwarded to Department’s Office of Engineering for their approval.

- **Disadvantaged Business Enterprise Utilization.** Many municipalities have their own local certification programs, which utilize DBE or M/WBE. On federally aided contracts, ONLY Disadvantaged Business Enterprise utilization language can be used, even if the contract has no goals. Contractors/Vendors are still expected, but not required, to make voluntary efforts and outreach to DBE firms. Sponsors should not place local program Minority and Women’s Business Enterprise requirements in these contracts. (See External Manual Chapter 13 for details).

- **Changed Conditions/Dispute Resolution Language.** Federal regulations require that a rational process be constructed to deal with changed conditions and disputes. The language contained in the External Manual Appendix (Volume 2) for Chapter 12 has been approved by FHWA, and is a combination of three different areas from the Department specifications. If a sponsor does not want to use the approved language, their only option is to submit their process (meaning their entire contract procurement process, including design standards, accounting and reimbursement procedures, selection procedures for consultants, procurement procedures, right of way acquisition procedures, etc.) to FHWA for review and approval. Sponsors must ensure that the pre-approved language fits in with their general terms and conditions, equivalent to our Section 100 specifications. If the sponsor chooses to use their own provisions, this request along with local provisions should be forwarded to FHWA for their approval.

### 12.2 Contact Information

- Questions about this chapter can be referred to the Contract Management Bureau, currently Bill Ringwood (518) 457-3583.