**Section 360.302 Construction Contracts of Grantee**

a) This condition shall apply to construction contracts (subagreements) awarded by recipients of Step 3 or Step 2 and 3 projects only, except that it shall not apply to personal and professional service contracts, for which see General Condition Section 360.303, (Contracts for Personal and Professional Services − Consulting Engineering Agreements) below.

b) The project work shall be performed under one or more contracts awarded by the grantee to private firms, except for force account work authorized by the Agency.

c) Each contract shall be either a fixed-price (lump sum) contract or fixed-rate (unit price) contract, or a combination of the two, unless the Agency gives advance written approval for the grantee to use some other acceptable type of contract. The cost-plus-a percentage of cost type of contract shall not be used.

d) Each contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with General Condition Section 360.301(m), (Negotiation of Subagreements) above. Formal advertising shall be in accordance with the following:

1) Adequate public notice

The applicant will cause adequate notice to be given of the solicitation by publication in newspapers or journals of general circulation, beyond the applicant's locality (statewide, generally) inviting bids on the project work, and stating the method by which bidding documents may be obtained and examined. Where the estimated prospective cost of Step 3 construction is ten million dollars or more, such notice must generally by published in trade journals of nationwide distribution. The applicant should in addition solicit bids directly from bidders, if it maintains a bidders list.

2) Adequate time for preparing bids

Adequate time, generally not less than 30 days, must be allowed between the date when public notice pursuant to paragraph (1) of this section is first published and the date by which bids must be submitted. Bidding documents (including specifications and drawings) shall be available to prospective bidders from the date when such notice is first published.

3) Adequate bidding documents

A reasonable number of bidding documents (invitations for bid) shall be prepared by the grantee and shall be furnished upon request on a first-come, first-served basis. A complete set of bidding documents shall be maintained by the grantee and shall be available for inspection and copying by any party. Such bidding documents shall include:

A) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule. (Drawings and specifications may be made available for inspection instead of being furnished.);

B) The terms and conditions of the contract to be awarded;

C) A clear explanation of the method of bidding and the method of evaluation of bid prices, and the basis and method for award of the contract;

D) Responsibility requirements or criteria which will be employed in evaluating bidders; Provided, That an experience requirement or performance bond may not be utilized unless adequately justified under the particular circumstances by the applicant;

E) The following statement:

Any contract awarded under this Invitation for Bids is expected to be funded in part by a grant from the Illinois Anti-Pollution Bond Fund. Neither the State of Illinois nor any of its departments, agencies or employees is or will be a party to this Invitation for Bids or any resulting contract;

F) A copy of this General Solution Section 360.302 (d)(3)(F) in the proposal form to be used by bidders, which shall, unless deleted by a bidder, constitute a representation and certification to be considered as a part of his bid. This General Condition Section 360.302 (d)(3)(F) shall also constitute a statement that a bid will not be considered for award where Section 360.302 (d)(3)(G)(i), (d)(3)(G)(iii), below has been omitted or modified. Where Section 360.302(d)(3)(G)(ii) has been deleted or modified, the bid will not be considered for award unless the bidder furnishes with the bid a signed statement which sets forth in detail the circumstances of the disclosure and the Director of the Agency, or his designee, determines that such disclosure was not made for the purpose of restricting competition:

G) By submission of the bid, each bidder certifies, and in the case of a joint bid each party thereto certifies as to his own organization, that in connection with the bid:

i) The prices in the bid have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;

ii) Unless otherwise required by law, the prices which have been quoted in the bid have not knowingly been disclosed by bidder, prior to opening, directly or indirectly to any other bidder or to any competitor; and

iii) No attempt has been made or will be made by the bidder to induce any other person or firm to submit or not to submit a bid for the purpose of restricting competition.

H) Each person signing the bid shall certify that:

i) He is the person in the bidder's organization responsible within that organization for the decision as to the prices being bid and that he has not participated, and will not participate, in any action contrary to Section 360.302 (d)(3)(G)(i-iii) above; or

ii) He is not the person in the bidder's organization responsible within that organization for the decision as to the prices being bid but that he has been authorized to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to Section 360.302 (d)(3)(G)(i-iii) above, and as their agent shall so certify; and shall also certify that he has not participated, and will not participate, in any action contrary to Section 360.302 (d)(3)(G)(i-iii) above; and

I) A copy of all the general conditions, special conditions, assurances, agreements and terms of the grant offer.

4) Sealed Bids

The grantee shall provide for bidding by sealed bid and for the safeguarding of bids received until public opening.

5) Amendments to bidding documents

If the grantee desires to amend any part of the bidding documents (including drawings and specifications) during the period when bids are being prepared, the amendments shall be communicated in writing to all firms who have obtained bidding documents in time to be considered prior to the bid opening time; when appropriate, the period for submission of bids shall be extended.

6) Bid modifications

A firm which has submitted a bid shall be allowed to modify or withdraw its bid prior to the time of bid opening.

7) Public opening of bids

The grantee shall provide for a public opening of bids at the place, date and time announced in the bidding documents.

8) Award to the low responsive, responsible bidder.

A) After bids are opened, they shall be evaluated by the grantee in accordance with the methods and criteria set forth in the bidding documents.

B) The grantee may reserve the right to reject all bids. Unless all bids are rejected, award shall be made to the low, responsive, responsible bidder after the bid evaluation has been submitted to the Agency and written notice of Agency approval has been received by the grantee.

C) If award is intended to be made to a firm which did not submit the lowest bid, a written statement shall be prepared prior to any award and retained by the grantee explaining why each lower bidder was deemed not responsive or not responsible.

D) Local laws, ordinances, regulations or procedures which are designed or operate to give local or in-state bidders preference over other bidders shall not be employed in evaluating bids.

e) Negotiations of contract amendments (change orders)

1) Grantee responsibility

The grantee is responsible for negotiation of construction contract change orders. This function may be performed by the grantee directly or, if authorized, by his consulting engineer. During negotiations the contractor shall:

A) Make clear that the contractor has a clear understanding of the scope and extent of work and other essential requirements;

B) Assure that the contractor demonstrates that he will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time; and

C) Assure a fair and reasonable price for the required work.

2) Changes in unit price or time

The contract price or time may be changed only by a change order. When negotiations are required, they shall be conducted in accordance with paragraph Section 360.302(e) of this General Condition, as appropriate. The value of any work covered by a change order or of any claim for increases or decrease in the contract price shall be determined by the method set forth in Section 360.302(e)(2)(A-C) below which is most advantageous to the grantee.

A) Unit prices

i) Original bid items: Unit prices previously approved are acceptable for pricing changes of original bid items. However, when changes in quantities exceed 15 percent of the original bid quantity and the total dollar change of that bid item is significant, the unit price shall be reviewed by the grantee to determine if a new unit price should be negotiated.

ii) New items: Unit prices of new items shall be negotiated.

B) A lump sum to be negotiated.

C) Cost reimbursement

The actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work plus an amount to be agreed upon to cover the cost of general overhead and profit to be negotiated.

3) For each change order not in excess of $100,000 the contractor shall submit sufficient cost and pricing data to the grantee to enable the grantee to determine the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

4) For each change order in excess of $100,000, the contractor shall submit to the grantee for review sufficient cost and pricing data to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed. Such data shall include:

A) As a minimum, proposed change order costs shall be presented in summary format as prescribed by the Agency and shall be supported by a certification executed by the contractor that proposed costs reflect complete, current and accurate cost and pricing data applicable to the data of the change order.

B) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price change orders and a specific total dollar amount of profit will be set forth separately in the cost summary for cost reimbursement change orders.

C) More detailed cost data than that required by the summary format may be required by the grantee format may be required by the grantee to substantiate the reasonableness of proposed change order costs.

D) Allowability of costs for change orders shall be determined in accordance with General Condition Section 360.801, (Determination of Allowable Costs) below.

E) For costs under cost reimbursement change orders, the contractor shall have an accounting system which accounts for such costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation, and segregation of allowable and unallowable change orders. Allowable change order costs shall be determined in accordance with General Condition Section 360.801, (Determination of Allowable Costs), below. The contractor shall propose and account for such costs in a manner consistent with his normal accounting procedures.

F) Change orders awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds where subsequent audit substantiates that such certification was not based on complete, current and accurate cost and pricing data and on costs allowable under these General Conditions at the time of the change order execution.

5) Agency review

Prior to the execution of any change order in excess of $100,000, the grantee shall submit to the Agency for its review:

A) The cost and pricing data submitted by the contractor;

B) A certification of review and acceptance of the contractor's cost or price; and

C) A copy of the proposed change order.

6) Profit

For the purpose of negotiated change orders to construction contracts under Agency grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. The estimate of profit is to be reviewed by the grantee as are all other elements of price.

7) Related work

Related work shall not be split into two amendments or change orders merely to keep it under $100,000 and thereby avoid the requirements of this General Condition. For change orders which include both additive and deductive items:

A) If any single item (additive or deductive) exceeds $100,000, the requirements of Section 360.302(e)(4) hereof shall be applicable.

B) If no single additive or deductive item has a value of $100,000, but the total price of the change order is over $100,000, the requirements of Section 360.302(e)(4) hereof shall be applicable.

C) If the total of additive items of work in the change order exceeds $100,000, or the total of deductive items of work in the change order exceeds $100,000, and the net price of the change order is less than $100,000, the requirements of Section 360.302(e)(4) hereof shall apply.

f) Progress payments to contractors

1) Policy

Except as may be otherwise required by applicable state law, prompt progress payments shall be made by grantees to prime contractors and by prime contractors to subcontractors and suppliers for eligible construction, material, and equipment costs, including those of undelivered specifically manufactured equipment, incurred under a contract under an Agency construction grant.

2) Protection of progress payments made for specifically manufactured equipment

The grantee shall assure protection of the State's interest in progress payments made for specifically manufactured equipment. This protection must be in a manner or form acceptable to the grantee and shall take the form of recordation under the Uniform Commercial Code adequate to protect the interest of the grantee and the State.

3) Limitations on progress payments

In no case may progress payments for undelivered equipment or items be made in any amount greater than seventy-five percent of the cumulative incurred costs allocable to contract performance with respect to the undelivered equipment or items. Submission of a request for any such progress payments shall be accompanied by a certification furnished by the fabricator of the equipment or item that the amount of progress payment claimed constitutes not more than seventy-five percent of cumulative incurred costs allocable to contract performance, and in addition, in the case of the first progress payment request, a certification that the amount claimed does not exceed 15 percent of the contract or item price quoted by the fabricator.

4) A subcontractor or supplier which is determined by the Agency to have frustrated the intent of the provisions regarding progress payments for major equipment or specifically manufactured equipment through failure to deliver the equipment may be determined nonresponsible and ineligible for further work under Agency grants.

5) Contract provisions

Where applicable, appropriate provisions regarding progress payments must be included in each contract and subcontract.

6) The foregoing progress payments policy should be implemented in invitations for bids under Step 3 grants.

g) Retention from progress payments

1) The grantee may retain a portion of the amount otherwise due the contractor. Except as provided in subsection (D) below, the amount retained by the grantee shall be limited to the following:

A) Withholding of not more than 10 percent of the payment claimed until the work is 50 percent complete.

B) When work is 50 percent complete, reduction of the withholding to 5 percent of the dollar value of all work satisfactorily completed to date; Provided that the contractor is making satisfactory progress and there is no specific cause for greater withholding.

C) When the work is substantially complete (operational or beneficial occupancy), the withheld amount shall be further reduced below 5 percent to only the amount necessary to assure completion.

D) The grantee may reinstate up to 10 percent withholding if the grantee determines, at its discretion, that the contractor is not making satisfactory progress or there is other specific cause for such withholding.

2) The foregoing retention policy shall be implemented with respect to all Step 3 projects for which plans and specifications are approved after July 1, 1976. Appropriate provision to assure compliance with this policy shall be included in the bid documents for such projects initially or by addendum prior to the bid submission date, and as a special condition in the grant agreement or in a grant amendment. For all previous active projects, the foregoing policy may be implemented by the grantee through contract amendment upon written request to the grantee by the contractor upon consideration upon consideration which the grantee deems adequate.

3) A grantee who delays disbursement of grant funds may be required to credit to the State all interest earned on those funds.

h) Required construction contract provisions

Each construction contract shall include the "General Conditions" of the "Contract Documents for Construction of Federally Assisted Water and Sewer Projects," a copy of which is included as Appendix A to these General Conditions. In addition, each construction contract entered into after July 1, 1976, shall include the following provisions:

1) Audit; access to records:

A) The contractor shall maintain books, records, documents and other evidence directly pertinent to performance on grant work under this agreement in accordance with accepted business practices, appropriate accounting procedures and practices, and the requirements which would be applicable to a federal grant under the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1251, et seq., PL 92-500). The Contractor shall also maintain the financial information and data used by the Contractor in the preparation or support of any cost submissions required under General Condition Section 360.302(e), (Negotiation of Contract Amendments, Change Orders) and a copy of the cost summary submitted to the owner. The Auditor General, the owner, the Agency, or any of their duly authorized representatives shall have access to such books, records, documents, and other evidence for the purpose of inspection, audit, and copying. The contractor will provide proper facilities for such access and inspection.

B) If this contract is a formally advertised, competively awarded, fixed price contract, the contractor agrees to apply paragraphs (i) through (vi) of this subsection (A) applicable to all negotiated change orders and contract amendments in excess of $10,000 which affect the contract price. In the case of all other prime contracts, the contractor agrees to include paragraphs (i) through (vi) of this Section Section 360.302(h)(A) in all his contracts and all tier subcontracts or change orders thereto directly related to project performance which are in excess of $10,000.

C) Audits conducted pursuant to this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or auditing agencies.

D) The contractor agrees to the disclosure of all information and reports resulting from access to records pursuant to paragraphs (i) and (ii) above, to any of the agencies referred to in paragraph (i) above. Where the audit concerns the contractor, the auditing agency will afford the contractor an opportunity for an audit exit conference and an opportunity to comment on the pertinent portions of the draft audit report. The final audit report will include the written comments, if any, of the audited parties.

E) Records under paragraphs (i) and (ii) above shall be maintained and made available during performance on Agency grant work under this agreement and until three years from the date of final grant payment for the project. In addition, those records which relate to any dispute or litigation or the settlement of claims arising out of such performance, or costs or items to which an audit exception has been taken, shall be maintained and made available until three years after the date of resolution of such dispute, appeal, litigation, claim, or exception.

F) The right of access conferred by this clause will generally be exercised (with respect to financial records) under

i) negotiated prime contracts,

ii) negotiated change orders or contract amendments in excess of $10,000 affecting the price of any formally advertised, competively awarded, fixed price contract, and

iii) subcontracts or purchase orders under any contract at other than a formally advertised, competitively awarded, fixed price contract.

G) However, this right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective price competition. In any event, such right of access may be exercised under any type of contract or subcontract:

i) with respect to records pertaining directly to contract performance, excluding any financial records of the contractor, and

ii) if there is any indication that fraud, gross abuse, or corrupt practices may be involved.

2) Price reduction for defective cost or pricing data.

A) This clause is applicable only to:

i) any negotiated prime contract in excess of $10,000;

ii) negotiated contract amendments or change orders in excess of $100,000 affecting the price of a formally advertised, competitively awarded, fixed price contract; or

iii) any subcontract or purchase order in excess of $100,000 under a prime contract other than a formally advertised, competitively awarded, fixed price contract.

B) However, this clause is not applicable for contracts or subcontracts to the extent that they are awarded on the basis of effective price competition. The owner may elect not to utilize this clause where any such negotiated contract or subcontract is $100,000 or less.

C) If the Agency determines that any price (including profit) negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant sums because the contractor or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as certified in his certification of current cost or pricing data, then such price or cost or profit shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

D) Failure to agree on a reduction shall be subject to Article 30 (Arbitration) of the General Conditions of this Contract.

3) Covenant against contingent fees

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee. For breach or violation of this warranty the owner shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

4) Gratuities

A) The owner may, by written notice to the contractor, terminate the right of the contractor to proceed under this contract if it is found, after notice and hearing, by the owner that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the contractor or any agent or representative of the contractor, to any official or employee of the owner or of the State of Illinois with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of this contract: Provided, that if the existence of the facts upon which the owner makes such findings are in issue, they may be reviewed in proceedings pursuant to Article 30 (Arbitration) of the General Conditions of this contract.

B) In the event this contract is terminated as provided in Section 360.302(h)(i) hereof, the owner shall be entitled:

i) to pursue the same remedies against the contractor as it could pursue in the event of a breach of the contract by the contractor, and

ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an account (as determined by the owner) which shall be not less than three nor more than ten times the costs incurred by the contractor in providing any such gratuities to any such officer or employee.

C) The rights and remedies of the owner provided in this clause shall not be exclusive and are in addition to any rights and remedies provided by law or under this contract.

i) Subcontracts under construction contracts

The award or execution of all subcontracts by a prime contractor and the procurement and negotiation procedures used by such prime contractor in awarding or executing such subcontracts shall comply with:

A) All provisions of State and local law;

B) All provisions of these General Conditions with respect to fraud and other unlawful or corrupt practices; and

C) All provisions of these General Conditions with respect to access to facilities and records and audit of records.