**Section 661.302 Construction Contracts of Grantee**

a) This Section shall apply to construction contracts (subagreements) awarded by the grantee.

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 under Section 661.301(i).

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 (based upon the Agency's professional judgment as defined in Section 661.102(b)) for the grantee to use some other acceptable type of contract (such as, but not limited to, per diem contracts as discussed under Section 661.303(b)(5)). The cost-plus-a-percentage-of-cost type of contract shall not be used.

d) For each construction contract to be awarded by the grantee, the grantee shall require a:

1) Bid bond for 5% of the bid price;

2) Performance bond for 100% of the contract price; and

3) Payment bond for 100% of the contract price.

e) The grantee must obtain written Agency approval prior to formal advertising. The Agency shall provide approval if the grantee has complied with this Part and the conditions of the grant. Each contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with Section 661.301(1). 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 statewide, inviting bids on the project work, and stating the method by which bidding documents may be obtained and examined. When the estimated prospective cost of construction is ten million dollars or more, the notice must be published in trade journals of nationwide distribution. The applicant must in addition solicit bids directly from bidders, if it maintains a bidders list.

2) Adequate time for preparing bids

Not less than 30 days must be allowed between the date when public notice pursuant to subsection (e)(1) 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 the notice is first published.

3) Adequate bidding documents

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. The bidding documents shall include:

A) A complete statement of the work to be performed, including necessary drawings and specifications, and a 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) A copy of all the general conditions, special conditions, assurances, agreements and terms of the grant;

E) Responsibility requirements or criteria that will be employed in evaluating bidders; provided, that an experience requirement may not be utilized unless justified under Section 661.301(h)(4);

F) The following statement:

"Any contract awarded under this Invitation for Bids is expected to be funded in part by a grant from the State of Illinois. 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.";

G) A copy of subsection (e)(3)(H) shall be in the proposal form to be used by bidders and shall constitute a representation and certification to be considered part of the bid. The grantee shall not award any contract to a bidder who has deleted or modified the language contained in subsection (e)(3)(H), as set forth in the proposal form;

H) By submission of the bid, each bidder certifies, and in the case of a joint bid each party thereto certifies as to his or her 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 the prices with any other bidder or with any competitor;

ii) Unless otherwise required by law, the prices that have been quoted in the bid have not knowingly been disclosed by the 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; and

I) Each person signing the bid shall certify that:

i) He or she is the person in the bidder's organization responsible within that organization for the decision as to the prices being bid and that he or she has not participated, and will not participate, in any action contrary to subsection (e)(3)(H); or

ii) He or she 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 or she has been authorized to act as agent for the persons responsible for the decision in certifying that they have not participated, and will not participate, in any action contrary to subsection (e)(3)(H), and as their agent shall so certify; and shall also certify that he or she has not participated, and will not participate, in any action contrary to subsection (e)(3)(H).

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. The period for submission of bids shall be extended when necessary to assure fair and open competition.

6) Bid modifications

A firm that 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. The Agency's approval shall be based upon a review of the bidding documents, and the grantee's recommendation, for compliance with the grant conditions and this Part.

C) If award is intended to be made to a firm that 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 that are designed or operate to give local or in-state bidders preference over other bidders shall not be employed in evaluating bids.

f) 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 by the consulting engineer, if authorized by the grantee.

A) During negotiations the grantee shall:

i) Provide the contractor with a detailed description of the scope and extent of work to be performed;

ii) Require the contractor to demonstrate that he or she will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time; and

iii) Require a fair and reasonable price for the work.

B) For each change order the grantee shall maintain a written summary of all negotiations and an independent cost estimate prepared by the grantee's consulting engineer.

2) Changes in contract price or time

The contract price or time may be changed only by a change order. Negotiations shall be conducted in accordance with this subsection (f). The value of any work covered by a change order, or the value of claim for increases or decreases in the contract price, shall be determined by whichever method set forth in this subsection (f)(2) is the most advantageous to the grantee:

A) Unit prices

i) Original bid items: Unit prices set forth in the original bid are acceptable for pricing change orders. However, when changes in quantities exceed 15% of the original bid quantity, 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, the contractor shall submit to the grantee cost and pricing data to enable the grantee to determine if the costs are fair and reasonable. The 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 set forth by the summary format may be required to enable the grantee to determine if the costs are fair and reasonable.

D) For costs under cost reimbursement change orders, the contractor shall have an accounting system that accounts for the costs in accordance with GAAP. This system shall provide for the identification, accumulation, and segregation of allowable and unallowable change orders. The contractor shall propose and account for allowable change order costs in a manner consistent with these accounting procedures.

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

4) Agency review

For any change order, the grantee shall submit the following to the Agency for review to determine compliance with this Part:

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 change order with a justification describing the need and reasonableness of the change order.

5) 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.

6) Allowability

Allowability of costs for change orders shall be determined in accordance with Section 661.701.

g) Progress payments to contractors

1) Policy

Except as may be otherwise required by 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 [810 ILCS 5], 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 75% of the cumulative incurred costs allocable to contract performance with respect to the undelivered equipment or items. Submission of a request for any 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 75% 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% of the contract or item price quoted by the fabricator.

4) A subcontractor or supplier that 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 shall be determined nonresponsible.

5) Contract provisions

Appropriate provisions regarding progress payments must be included in each contract and subcontract.

6) The foregoing progress payments policy shall be implemented in invitations for bids under construction grants.

h) Retention from progress payments

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

A) The withheld amounts shall be not more than 10% of the payment claimed until the work is 50% complete.

B) When work is 50% complete, the withheld amount shall be reduced to 50% of the dollar value of all work satisfactorily completed to date if the contractor is making satisfactory progress and there is no specific cause for greater withholding (as determined by the grantee).

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

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

2) The foregoing retention policy shall be implemented with respect to all construction projects for which plans and specifications are approved. 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.

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

i) Required construction contract provisions

Each construction contract shall include the "General Conditions of Construction Contract Document" as set forth in Appendix A. In addition, each construction contract 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 generally accepted accounting principles and with American Institute of Certified Public Accountants' Professional Standards (666 Fifth Avenue, New York City, New York 10019; June 1, 1987). (This incorporation contains no later amendments or editions.). 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 subsection (f) 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, competitively awarded, fixed price contract, the contractor agrees to include the language set forth in subsection (i)(1) in all contract amendments or negotiated change orders in excess of $10,000, which affect the contract price. In the case of all other prime contracts, the contractor agrees to include language set forth in Section 661.303(i)(1) in all his or her contracts and all tier subcontracts or change orders directly related to project performance that are in excess of $10,000.

C) Audits conducted pursuant to this provision shall be in accordance with generally accepted auditing standards.

D) The contractor agrees to the disclosure of all information and reports resulting from access to records pursuant to subsection (i)(1)(A). When 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 subsection (i)(1)(A) shall be maintained and made available pursuant to Section 661.501 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 that 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 that dispute, appeal, litigation, claim, or exception.

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 affecting the price of a formally advertised, competitively awarded, fixed price contract; or

iii) any subcontract or purchase order under a prime contract other than a formally advertised, competitively awarded, fixed price contract.

B) This clause is not applicable for contracts or subcontracts to the extent that they are awarded on the basis of effective price competition.

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 costs or pricing data or data not current as certified in his or her certification of current cost or pricing data, then that price or cost or profit shall be reduced accordingly and the contract shall be modified in writing to reflect the reduction.

D) Failure to agree on a reduction shall be subject to 35 Ill. Adm. Code 661.Appendix A, Article 30.

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 the commission, percentage, brokerage, or contingent fee.

4) Gratuities

A) The owner shall, 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 shall be reviewed in proceedings pursuant to 35 Ill. Adm. Code 661.Appendix A, Article 30.

B) In the event this contract is terminated as provided in subsection (i)(4)(A) the owner shall be entitled to pursue the same remedies against the contractor as it could pursue in the event of a breach of the contract by the contractor.

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.

j) Subcontracts under construction contracts

The award or execution of all subcontracts by a prime contractor and the procurement and negotiation procedures used by the prime contractor in awarding or executing subcontracts shall comply with all provisions of federal, State and local law, including but not limited to all provisions set forth in this Part relating to:

1) Fraud and other corrupt practices; and

2) Access to facilities and records, and audit of records.

(Source: Amended at 41 Ill. Reg. 13243, effective October 20, 2017)