

ORDINANCE 2022-07

**AN ORDINANCE ADOPTING PURCHASING AND PROCUREMENT
REQUIREMENTS FOR FEDERAL PROJECTS**

WHEREAS, the Town of Morgantown (“Town”) is or may be a recipient or subrecipient of Federal Awards, as that term is defined in 2 CFR §200.1 and,

WHEREAS, 2 CFR §200.318 *et seq.* require certain procedures be implemented, as internal controls, related to purchasing using Federal funds and awards.

NOW, THEREFORE BE IT ORDAINED, by the Town Council (“Council”) of the Town of Morgantown, Indiana that:

PURCHASING PROCEDURES AND REQUIREMENTS WHEN UTILIZING FEDERAL FUNDS.

Any and all Purchasing Agents, the Council and all other Boards of the Town shall comply with the following procedures and requirements when using Federal funds or awards to procure goods and/or services, whether received directly or as a sub-recipient:

- A. No employee, officer, or agent of the Town may participate in the selection, award, or administration of a contract supported by a Federal Award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. Violation of this requirement shall result in disciplinary action against the employee in violation. This policy shall not apply in situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. Prior to any participation in the selection, award of administration of a contract, the employee shall disclose any financial interest to the Council for a determination if such interest is substantial.
- B. All purchasing shall avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.
- C. To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the Town shall consider state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.
- D. The Town shall consider using Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

- E. The Town shall consider using value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.
- F. The Town shall award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
- G. The Town shall maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.
- H. The Town may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to the Town is the sum of:
 - i. The actual cost of materials; and
 - ii. Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract with the Town must set a ceiling price that the contractor exceeds at its own risk. Further, the Town shall assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

- I. The town shall be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.
- J. All procurement transactions for the acquisition of property or services required under a Federal award shall be conducted in a manner providing full and open competition consistent with the standards of this section and 2 CFR §200.320.
- K. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:
 - i. Placing unreasonable requirements on firms in order for them to qualify to do business;
 - ii. Requiring unnecessary experience and excessive bonding;
 - iii. Noncompetitive pricing practices between firms or between affiliated companies;
 - iv. Noncompetitive contracts to consultants that are on retainer contracts;
 - iv. Organizational conflicts of interest;
 - v. Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
 - vi. Any arbitrary action in the procurement process.

- L. The Town shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- M. All solicitations for bids or quotes by the Town shall incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used to define the performance or other salient requirements of procurement.
- N. The specific features of the named brand which must be met by offers must be clearly stated; and identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals
- O. The Town shall ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. The Town shall not preclude potential bidders from qualifying during the solicitation period.
- P. Methods of procurement to be followed. The Town may use the following methods of procurement used for the acquisition of property or services required under a Federal Award or sub-award.
- i. Informal procurement methods. When the value of the procurement for property or services under a Federal award does not exceed the simplified acquisition threshold (SAT), as defined in 2 CFR § 200 (**which as of the date of adoption of this Ordinance is \$250,000**), formal procurement methods are not required. The Town may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:
- a. Micro-purchases.
- Distribution. The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (**which as of the date of adoption of this Ordinance is, generally, \$10,000**). To the maximum extent practicable, the Town should distribute micro-purchases equitably among qualified suppliers.
- Micro-purchases may be awarded without soliciting competitive price or rate quotations

if the Town considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly.

b. Small purchases.

Regarding the acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold, if small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the Council.

- ii. Formal procurement methods. When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used in accordance with 2 CFR § 200.319 or this Section. The following formal methods of procurement are used for procurement of property or services above the SAT:

Sealed bids. A procurement method in which bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction bids. For sealed bidding to be feasible, the following conditions should be present:

- a. A complete, adequate, and realistic specification or purchase description is available;
- b. Two or more responsible bidders are willing and able to compete effectively for the business; and
- c. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

If sealed bids are used, the following requirements apply:

- a. Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;
- b. The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
- c. All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;
- d. A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such

discounts are usually taken advantage of; and

- e. Any or all bids may be rejected if there is a sound documented reason.

Proposals. A procurement method in which either a fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

- a. Requests for proposals must be publicized and identify all evaluation factors and their relative importance.
 - b. Proposals must be solicited from an adequate number of qualified offerors.
 - c. Any response to publicized requests for proposals must be considered to the maximum extent practical;
 - d. The Town shall conduct technical evaluations of the proposals received and making selections by a committee of three persons;
 - e. Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the Town, with price and other factors considered; and
 - f. The Town may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort.
- iii. Noncompetitive procurement. There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:
- a. The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold;
 - b. The item is available only from a single source;
 - c. The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;
 - d. The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the Town; or
 - e. After solicitation of a number of sources, competition is determined inadequate.

- Q. The Town shall take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

Affirmative steps shall include:

- i. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- ii. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- iii. Dividing total requirements, when economically feasible, into smaller tasks or quantities to

- permit maximum participation by small and minority businesses, and women's business enterprises;
- iv. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- v. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- vi. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in this section.

R. As appropriate and to the extent consistent with law, the Town, to the greatest extent practicable under a Federal award, shall provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

For purposes of this section:

- i. "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- ii. "Manufactured products" means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

S. The Town shall comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

T. The Town shall perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

U. The Town shall negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

V. Costs or prices based on estimated costs for contracts under the Federal award are allowable only

to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the Town under Federal regulations.

- W. The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.
- X. For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the Town provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:
- i. A bid guarantee from each bidder equivalent to five percent of the bid price. The bid guarantee must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
 - ii. A performance bond on the part of the contractor for 100 percent of the contract price. A performance bond is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.
 - iii. A payment bond on the part of the contractor for 100 percent of the contract price. A payment bond is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.
- Y. The Purchasing Agent or other Employee in Responsible Charge shall maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders."

Effective Date. This ordinance shall be in full force and effect after passage by the Town Council.

PASSED AND ADOPTED by the Town Council of the Town of Morgantown, Indiana this 11th day of August, 2022.



Penny Anderson, Town Council President

Attest:



Sharon McIntosh, Clerk Treasurer