



**Guidance on
Procuring Architects and Engineers
When Receiving Financial Assistance from the
Clean Water State Revolving Fund**

Overview

On June 10, 2014, President Obama signed into law the Water Resources Reform and Development Act of 2014 (WRRDA). Among its provisions are amendments to Titles I, II, V, and VI of the Federal Water Pollution Control Act (FWPCA). On January 6, 2015, the Environmental Protection Agency (EPA) issued an interpretive guidance for those provisions affecting the Clean Water State Revolving Fund (CWSRF) program.

This guidance pertains to the procurement of architectural and engineering services when such services are financed with CWSRF equivalency funds.

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Federal Water Pollution Control Act (FWPCA)

As amended, the FWPCA now includes section 602(b)(14), which states:

a contract to be carried out using funds directly made available by a capitalization grant under this title for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services shall be negotiated in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40, United States Code, or an equivalent State qualifications-based requirement (as determined by the Governor of the State)

Guidance

Below is a link to a full copy of EPA's interpretive guidance on the WRRDA changes.
http://www.twdb.texas.gov/financial/programs/cwsrf/doc/sfy16/epa_wrrda_guidance.pdf

This requirement applies to architectural and engineering (A/E)¹ contracts for **equivalency projects only** that will be funded under the State Fiscal Year 2016 Intended Use Plan (IUP), or a subsequent IUP, if the A/E services will be financed with CWSRF funds. New A/E solicitations, significant contractual amendments,² and contract renewals initiated on or after October 1, 2014, must comply with the elements of the procurement processes for A/E services as identified in 40 U.S.C. 1101 *et seq.*, if these services will be financed through the CWSRF program.

- ❖ The Texas Water Development Board will ensure that these provisions are followed by requiring the submission of the attached certification form (Exhibit A), when applicable. This certification form is to be submitted;
 - (a) before the CWSRF **Equivalency** financing transaction is closed, and/or
 - (b) prior to the release of funds for any A/E contract solicited and procured subsequent to the closing.

¹Applies to contracts for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or A/E services as defined in 40 U.S.C. 1102(2)(A-C).

² TWDB will determine what constitutes a significant amendment using best professional judgment to analyze increases to both scope and cost of work.

The requirements of 40 U.S.C. 1101 *et seq.* are:

- public announcement of the solicitation (e.g., a Request for Qualifications)
- evaluation and ranking of the submitted qualifications statements based on established, publicly available criteria (e.g., identified in the solicitation)
 - Evaluation criteria should be based on demonstrated competence and qualification for the type of professional services required (e.g., past performance, specialized experience, and technical competence in the type of work required).
- discussion with at least three firms to consider anticipated concepts and compare alternative methods for furnishing services
- selection of at least three firms considered to be the most highly qualified to provide the services required
- contract negotiation with the most highly qualified firm to determine compensation that is fair and reasonable based on a clear understanding of the project scope, complexity, professional nature, and the estimated value of the services to be rendered
 - In the event that a contract cannot be negotiated with the most highly qualified firm, negotiation continues in order of qualification.

Questions and Answers Provided by EPA

Q1: Can cost/price be a selection factor for procurement of A/E services covered by section 602(b)(14)?

A1: No. Cost/price cannot be a selection factor under qualifications based selection procedures. Selection must be based on demonstrated competence and qualification only. As such, cost/price cannot be used as a criterion to evaluate, rank, or select the most highly qualified firm. However, 40 USC 1104 allows a financial assistance recipient to terminate contract negotiations with the most highly qualified firm if an agreement cannot be reached regarding fair and reasonable compensation. In that case, the financial assistance recipient must formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached.

Q2: What happens if an applicant/financial assistance recipient follows qualifications based selection procedures, but does not generate interest from at least three firms?

A2: A procurement of A/E services shall be considered in compliance with section 602(b)(14) even when the Request for Qualification does not generate three responses as long as the applicant/financial assistance recipient made a good faith effort to publicly advertise and directly solicit participation. On a case by case basis and using best professional judgement, the TWDB shall determine whether a good faith effort was made.

Q3: Do A/E services contracts procured via design-build procedures satisfy the section 602(b)(14) requirement?

A3: No. The 602(b)(14) requirement pertains to the design portion of a design-bid-build process and is not compatible with a design-build process. Because it would be impossible to fully satisfy the 40 USC 1101 *et. seq.* requirements through a design-build procurement, A/E services procured via the design-build methodology cannot comply with section 602(b)(14) and should not be used as equivalency projects.

Architectural and Engineering Services Procurement Certification

This executed certification covering procurement of project architectural and engineering services is required of all recipients of Clean Water State Revolving Fund Equivalency financial assistance when the financing of such services is requested. The requirement for this certification applies to new solicitations, significant contractual amendments, and contract renewals initiated on or after the effective date of October 1, 2014, that will be funded from the State Fiscal Year 2016 or later Intended Use Plans.

Name of Entity: _____

TWDB Project Number: _____

Project Name: _____

Section 602 (b)(14) of the Water Resources Reform and Development Act (WRRDA), 2014 states that:

a contract to be carried out using funds directly made available by a capitalization grant under this title for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services shall be negotiated in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40, United States Code.

The undersigned hereby certifies that all architectural and engineering services procured for the project referenced above, meet the requirements of the Federal Water Pollution Control Act as interpreted by the Environmental Protection Agency's "Interpretive Guidance for Certain Amendments in the Water Resources Reform and Development Act to Titles I, II, V, and VI of the Federal Water Pollution Control Act."

http://www.twdb.texas.gov/financial/programs/cwsrf/doc/sfy16/epa_wrrda_guidance.pdf

- Please check this box if three or more responses were received from the subject solicitation.
 Please check this box if fewer than three responses were received from the subject solicitation.

Signature of Authorized Official

Date

Printed Name of Authorized Official

Phone No.

Title of Authorized Official