

X. Procurement, Construction Bid Advertisement and Award

- A. Construction Contracts.** For TTP funded projects, a Tribe may construct the project using a construction contractor, or may construct the project by “force account,” also known as “in-house,” using its own forces and equipment (see 25 CFR Appendix A to Subpart B, (b)(24)). The “force account” process is described in greater detail in [Chapter XI - Construction and Construction Engineering](#).

The objectives of a Tribe’s construction contract advertisement and bidding process are: to provide competition among bidders; to award the contract to the bidder who best meets cost and other criteria contained in the Tribe’s Contracting Procedures; and, to provide assurance that the completed project will meet all of the standards specified in the contract.

A contract to perform construction work is between a contractor and the Tribe, not the FHWA or other agency. The Tribe pays the contractor or consultant directly for successful completion of contracted services.

B. Statutory/Regulatory Requirements.

- Under 25 U.S.C. § 5307(b), Indian organizations and Indian-owned economic enterprises are entitled to a preference, to the greatest extent feasible, in the award of contracts, subcontracts, and sub-grants for all work performed under the TTP Program.
- The project package must be complete and approved by the appropriate public authority, and a copy provided to FHWA, before construction is started on the project (25 CFR §§ 170.460 and 170.461).
- The Tribe must certify in writing to the FHWA Administrator, prior to soliciting bids for a project, that the Tribe gave the public authority an opportunity to review and comment on the PS&E, the Tribe addressed any issues, and the Tribe received no written comments from the public authority that prevent the Tribe from proceeding with the project (TTPA - Article III). **NOTE:** This is required on those facilities owned or maintained by a public authority other than the Tribe or the BIA.
- The Tribe agrees to initiate and complete TTP construction projects in accordance with the approved PS&E (TTPA - Article III).
- Procurement requirements in 25 CFR § 170.606 and 2 CFR §§ 200.318 – 200.326.
- TTP construction projects: Competitive bidding is required by Chapter 2 of title 23 USC, Section 202(a)(10), and 2 CFR § 200.319.

C. Guidelines / Procedures.

- 1. Procurement.** Each Tribe must have in their files “written” Contracting Procedures that describe how the Tribe makes (a) small purchases; (b) sealed bids; (c) competitive proposals; and (d) non-competitive proposals (see 2 CFR .318(a)), so that the Tribe can perform the contracted programs and projects in accordance with the requirements of 25 CFR Part 170. A Tribe may adopt applicable FHWA procedures, or develop Tribal procedures which meet or exceed federal standards. These procedures are used for equipment purchasing (cost or price analysis), construction (advertising for bids, award, and contraction), architectural/engineering services, etc. These procedures will be reviewed by the FHWA Financial Manager to ensure they meet federal policies and regulations.

2. TTP Transportation Facility Construction Projects.

- a. Competitive bidding.** Transportation facility construction contracts funded by the TTP require direct recipients or sub-recipients to use bidding methods that ensure effective competition. See 2 CFR § 200.319.

23 USC § 202 Tribal Transportation Program, paragraph (a)(10) COMPETITIVE BIDDING states the following:

“(A) CONSTRUCTION.— (i) IN GENERAL.—Subject to clause (ii) and subparagraph (B), construction of each project shall be performed by contract awarded by competitive bidding. (ii) EXCEPTION.—Clause (i) shall not apply if the Secretary (of Transportation) or the Secretary of the Interior affirmatively finds that, under the circumstances relating to the project, a different method is in the public interest.

(B) APPLICABILITY.—Notwithstanding subparagraph (A), section 23 of the Act of June 25, 1910 (25 U.S.C. § 47) and section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 5307(b)) shall apply to all funds administered by the Secretary of the Interior that are appropriated for the construction and improvement of tribal transportation facilities.”

Example bidding methods may be found in 23 CFR § 635 subpart A.

A cost analysis will be necessary when adequate price completion is lacking in contract modifications or change orders unless price reasonableness can be established on the basis of a catalog or market price (2 CFR § 200.323(a)).

- b. Other requirements.** 25 CFR § 170.606 lists other legislation and procurement requirements that apply to TTP procurement practices. Federal Acquisition Regulation (FAR) clauses are not required in contracts for TTP projects, unless the contract is being advertised and awarded by a Federal agency, or the activities are to be performed by the Secretary of the Interior.
- c. Pre-Advertisement Checklist.** The Tribe shall submit documentation to the TC showing that all necessary items have been accomplished before advertisement of the project construction contract (see 25 CFR § 170.461). An optional form to use is in Appendix C, [Exhibit 10.2 – TTP Pre-Advertisement Checklist](#).

- 3. Goods and Services Contracts.** Contracts for goods and services (engineering and design) must comply with, and be in accordance with, procurement requirements in 2 CFR §§ 200.318 – 200.326). A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts (see 2 CFR § 200.323(a)).

D. Roles and Responsibilities for Procurement, Construction Bid Advertisement and Award. The following table summarizes the roles and responsibilities of the Tribe, the TC, and others as applicable.

| Roles and Responsibilities for Procurement, Construction Bid Advertisement and Award | | |
|---|------------------------------|--------------------------|
| Program Activity / Process | Authority / Reference | Responsible Party |
| Certification of public authority: Before soliciting bids for the project, the Tribe must certify in writing to the FHWA Administrator that it gave the public authority an opportunity to review and comment on the PS&E, addressed all comments, and received no written comments from the public authority that prevent the Tribe from proceeding with the project. (NOTE: This is required on those facilities owned or maintained by a public authority other than the Tribe or the BIA). | TTPA–Article III | Tribe |
| Completion of Construction Project: Agreed to complete TTP construction project. | TTPA–Article III | Tribe |
| Tribe has Documented Contracting Procedures: (for advertising, bidding, awarding and contracting). | 2 CFR § 318(a) | Tribe |

E. Resources

- Contract Administration Core Curricular Participants’ Manual and Reference Guide 2014, located at <http://www.fhwa.dot.gov/programadmin/contracts/coretoc.cfm>
 This document provides guidance to State DOTs on advertising for bids, bid analysis, and awarding of contracts.
- 2 CFR § 200 at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf>
- 23 CFR § 635 Subpart A at http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title23/23cfr635_main_02.tpl