

Chapter 5: Contracting

Introduction

Once goods and services have been properly procured, it is time to develop the legal instruments necessary to establish contractual obligations and rights. This chapter provides general guidance concerning the compliance aspects of contract administration as well as sample contract language.

Section 5-A. General Contract Requirements

As with all contractual obligations, the subrecipient is advised to seek the advice of legal counsel regarding rights, duties, obligations and liabilities arising from legal arrangements. DLG is also available to provide general, non-legal advice concerning contracting requirements. If subrecipients contract with grant administrators for administrative support they must remember that they cannot delegate or contract to another party any inherently governmental responsibility.

Tip: Grantees are not required to obtain advance approval of contracts from DLG. However, subrecipients must send the Notice of Contract Award included in Chapter 4. In addition, DLG will review contracts during scheduled monitoring and compliance assistance visits to ensure compliance with CDBG-DR and other federal and state requirements.

Attachment 4-10:
Notice of Contract Award

General Contract Contents

Contracts involving the use of CDBG-DR funds must include the following provisions to ensure compliance:

- ✓ **General Administrative Provisions** including effective date of the contract, names and addresses of the parties to the contract, reference to the authority of the local unit of government to enter into the contract, conditions and terms for violation or breach of the contract, and procedures for contract amendment.
- ✓ **Period of Performance** including a start and end date to the contract.
- ✓ **A Scope of Services** including a detailed description of the work to be performed and/or products to be delivered, the schedule for performance, performance requirements, and specification of materials.
- ✓ **Method of Compensation** including fee or payment schedules, retainage, rates and maximum amounts payable. All contracts using CDBG-DR funds must have a not-to-exceed clause.
- ✓ **Terms and Conditions** - Consistency of the contract with the requirements of the grant agreement between DLG and the subrecipient. This is particularly true of those terms and conditions that involve the scope of project, implementation schedules, and method and amount of payments. In other words, the relevant terms and conditions of the grant agreement between DLG and the grantee should be reflected in subsequent contracts between the subrecipient and the entities they hire to provide services for the project. Liquidated damages must be included on all but general management contracts.

✓ **Special Conditions/Specific Provisions** - Inclusion of specific contract provisions may be required by state and federal law. These provisions are dependent on a combination of:

- Whether the contract is for construction or non-construction services (e.g., professional services such as administration, surveying, legal, etc.),
- The dollar value of the contract, and
- Statutory mandates.

Section 5-B. Contract Provisions

Tip: DLG has provided documents for construction and non-construction documents along with the Contract Documents Guide. These documents have been provided to help grantees to adopt documents that will provide the required elements as described in this chapter. DLG encourages grantees to utilize the samples and guide to maintain compliance with the Contracting requirements.

Non-Construction Contracts

The Contract for Professional Services (Attachments 5-1 and 5-2) should be used when contracting for non-construction (professional) services paid for with CDBG-DR funds. Both attachments make up one contract. The subrecipient should carefully review the citations included in Part II to determine specifically which provisions are appropriate for its non-construction contracts.

Attachment 5-1:
Contract for Professional
Services—Part I

Attachment 5-2:
Contract for Professional
Services—Part II (required non-
construction language)

Construction Contracts

A construction contract must include all items included in the bid package as well as the standard contract terms and conditions, contractor certifications, and bond and insurance forms. Because this is a legal document, the subrecipient is required to consult legal counsel and obtain a signed letter certifying that the counsel has reviewed and approved the documents.

Note: Neither the cost-plus-a-percentage nor percentage-of-construction cost methods of contracting are allowed.

The subrecipient should be concerned with both the body of the contract as well as the compliance requirements that are frequently included as exhibits to the base contract. The following must be included in the contract text:

- ✓ Parties to the agreement;
- ✓ Project location;
- ✓ Scope of services;
- ✓ Financial commitments;
- ✓ Starting and ending dates;
- ✓ Performance schedule and milestones;
- ✓ Contract representatives (grantee, contractor, subcontractor(s));

- ✓ Conflict of interest;
- ✓ Reporting requirements;
- ✓ Suspension clause;
- ✓ Incorporation of attached requirements;
- ✓ Payment schedule and contract cost;
- ✓ Signatures; and
- ✓ CDBG-DR General Conditions and any other General Conditions pertinent to the contract.

Additional clauses required by the federal government (e.g., labor standards, Section 3, etc.) must also be incorporated in the contract. They require specific language, which must be inserted verbatim into the contract. The **CDBG-DR Contract Documents Guide**, which is available on DLG’s website, provides the relevant clauses and information on the dollar value of the contracts to which they apply. These paragraphs generally advise contractors that they must comply with specific federal laws pertaining to the environment, fair housing, labor, and other laws attached to the CDBG-DR legislation.

KCDBG Contract Documents Guide:
https://kydlgweb.ky.gov/Documents/CDBG_handbook/KY%20CDBG%20Contract%20Documents%20Guide%20Final%202017.pdf, listed under Chapter 5: Contracting

Tip: **Subrecipients must have a full, bound copy of each executed contract in its files for review by DLG. All conditions must be contained within the contract document.**

Subcontracting

An important labor standards component is proper subcontracting. Prime contractors are required to hire only eligible subcontractors (i.e., that are not on the Excluded Parties List; refer to Chapter 4). Prime contractors must also execute a subcontract document with each subcontractor containing all CDBG-DR provisions such as labor standards and other required provisions, such as equal opportunity and general conditions. This subcontract agreement is required for all subcontractors wishing to participate in a CDBG-DR project.

A sample subcontract agreement with the required language is provided in Attachment 5-3. A copy of the executed subcontract agreement should be obtained and filed prior to or upon receipt of the first subcontractor payroll for that respective subcontractor.

Attachment 5-3:
Subcontract Form

Note: **The executed subcontract document must be on file before subcontractor pay requests can be processed. Work closely with the prime contractor to track the subcontractors and ensure that copies of the fully executed subcontracts, containing all required CDBG-DR provisions are obtained and filed in project files.**

Section 5-C. Bonding Requirements

Bonds are negotiable instruments required by federal and state law from construction contractors as a form of insurance. The bonds are available to contractors from surety companies, which

KRS 45A.430 and 2 CFR 200.325

are then turned over to the subrecipient to protect against situations that may arise. Some of these situations include:

- ✓ Work not completed as specified and/or the contractor refuses to finish the work without a change order or price escalation;
- ✓ Laborers or subcontractors are not being paid for work and are suing the subrecipient to recover their loss; or
- ✓ Payment of liquidated damages is required, arising from labor standards violations.

State law requires that, for project contracts over \$100,000, contractors must secure a performance bond for 100 percent of the contract price as it may be increased and a payment bond for 100 percent of the original contract price. Federal bonding requirements are also triggered when contracts exceed \$100,000 in value, per 2 CFR 200.325.

The circumstances that dictate the specific assurances, certifications, or other provisions in any given contract can be complex. Subrecipients should consider contacting DLG or legal counsel for guidance in this area.

Section 5-D. Local Subrecipient Agreements

It is not uncommon for subrecipients to carry out project activities through a local subrecipient. A local subrecipient is defined as a public or private nonprofit agency, authority, or organization, or other eligible entity, that is provided CDBG funds to carry out eligible activities on behalf of the state subrecipient.

The most likely scenario under which a subrecipient would opt to utilize a local subrecipient is when the subrecipient needs to engage the additional capacity a local subrecipient could provide to implement specific eligible activities that are then carried out or are the primary responsibility of some agency outside of the subrecipient. This can be an effective method to expand local capacity if the subrecipient can identify a local subrecipient with appropriate skills, staffing, and technical knowledge. A local subrecipient will work under the oversight of the subrecipient and the subrecipient will remain responsible for ensuring compliance with all CDBG-DR requirements.

It is crucial to stress the importance of the subrecipient- local-subrecipient relationship. The subrecipient is not absolved of its responsibilities by utilizing a local subrecipient to carry out project activities; in fact, many of these responsibilities cannot be undertaken by anyone other than the state's subrecipient, such as environmental determinations and requesting funds from DLG. Further, all CDBG-DR requirements are applicable to subrecipients in terms of how they carry out project activities (procurement, financial management, labor compliance, acquisition, etc.).

When is an Entity not Considered a Subrecipient?

An organization or individual is not considered a subrecipient if the entity is:

- ✓ A contractor procured according to the requirements described in Chapter 4: Procurement; Chapter 4: Procurement
- ✓ A homeowner or landlord of an apartment building receiving a rehabilitation loan or grant;
- ✓ A nonprofit or for-profit entity receiving relocation payments and other relocation assistance;

- ✓ A for-profit business receiving a loan for a special economic development project; or
- ✓ A public agency of the grantee, designated by the grantee, to administer a CDBG-DR project.

Written Agreements with Local Subrecipients

In order to protect the subrecipient, and to ensure the local subrecipient’s compliance with all relevant requirements, the relationship between the two entities must be formally defined through a written agreement (or contract). Such an agreement’s purposes are to clearly establish the terms and conditions under which the CDBG-DR funding is provided and establish a legal basis for action if those terms and conditions are not met. Once complete, the subrecipient must submit to DLG a copy of the contract as well as attachment 5-4a which is a certification by an attorney that the agreement meets the requirements in section as well as attachment 5-c which is the standard provisions that each contract must contain.

Attachment 5-4a and 5-4c:
Legally Binding Agreement

Attachment 5-4a – Certification of a Legally binding agreement: This document is for legal council to certify that they have reviewed the contract.

Attachment 5-4c - Legally binding agreement standard provisions: This document is standard and must be included as an attachment to your agreement. However, the program income section as noted below must be filled out.

The agreements must contain the following minimum provisions:

- ✓ Scope of Work – In sufficient detail to provide a sound basis for evaluating performance, a schedule and a budget.
- ✓ Reporting – Specifying the frequency of reports which must be submitted in order for the grantee to meet its own record keeping and reporting responsibilities.
- ✓ Reference to the requirements of the CDBG-DR Grant agreement that the local subrecipient will help the subrecipient accomplish.
- ✓ All requirements listed in Attachment 5-4c – include this in its entirety as an attachment to your agreement. Be sure to fill out the program income section. Subrecipients may be allowed to retain program income for use in specified eligible activities during the life of the agreement. If the grantee allows the subrecipient to retain program income, the agreement must specify which activities may be undertaken with those funds. In all cases, program income will be used before requesting additional funding from DLG. Public Agency Contracts

Subrecipients are permitted under Title I to designate public agencies to assist in carrying out eligible activities on behalf of the subrecipient. Such designation is a non-procurement action by which the subrecipients may obtain services through non-competitive negotiations with another public agency (e.g., water/ sewer or industrial authority that is a separate legal and financial entity from the grantee). (Note that this does not apply to administration by Area Development Districts.) See Chapter 4: Procurement for applicable procurement requirements.

Chapter 4: Procurement

Once the negotiations are complete, a contractual agreement must be executed. This agreement designates the scope of services, roles and responsibilities of each party, the time of performance and

cost for such services. The contract must also contain the specific contract provisions found in the CDBG-DR Contracts Document Guide available on DLG’s website.

A summary of the direct and indirect charges to be reimbursed under the contract, and the basis on which these charges are calculated, should be provided to the grantee with each payment request. Time sheets documenting staff time spent on the project should also be maintained.

Section 5-E. Intergovernmental and Cooperative Agreements

Intergovernmental and cooperative agreements can be used by local jurisdictions to assist in the development, operation, and/or management of CDBG-DR projects.

- ✓ An intergovernmental agreement typically involves two or more units of local governments who enter into an agreement to apply jointly for CDBG-DR funding.
- ✓ A cooperative agreement is often used when a local governmental entity applies for a grant to construct public facilities or improvements and decides to have another government entity own, operate, and/or maintain the improvements once they are completed.
- ✓ At a minimum, intergovernmental agreements and cooperative agreements should:
 - State that the parties have agreed to cooperate in undertaking the project;
 - Delineate the responsibilities and authorities of each party with respect to the administration of the grant and continuing ownership, operation and maintenance of facilities if applicable; and
 - Authorize one of the parties to be the recipient of the funds and have primary administrative responsibility.

Section 5-F. Reporting Requirements

HUD Form 2516 Contract and Subcontract Activity Report (Attachment 5-5) must be completed by the subrecipient and submitted to DLG by September 15 of each year. (DLG is then required to submit these reports to HUD by October 1.) The form is available for downloading from DLG’s website at .

Attachment 5-5:
Contract and Subcontract Activity
Report

Subrecipients should only report on contracts executed during the report period, including both professional and construction contracts. Once all contracts have been reported, the subrecipient should write “No additional contracts to be awarded” on the activity report.