

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 grantee 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.

Tip: Grantees are not required to obtain advance approval of contracts from DLG. However, DLG will review contracts during scheduled monitoring and compliance assistance visits to ensure compliance with CDBG and other Federal and state requirements.

General Contract Contents

Contracts involving the use of KCDBG 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.
- ✓ **A Scope of Services** including a detailed description of the work to be performed and/or products to be delivered, the schedule for performance, and specification of materials.
- ✓ **Method of Compensation** including fee or payment schedules, retainage, rates and maximum amounts payable. All contracts using KCDBG 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 grantee. 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 grantee and the entities they hire to provide services for the project.
- ✓ **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.

24 CFR Part 85.36(l)

Section 5-B. Contract Provisions

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 KCDBG funds. The grantee 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 grantee 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 grantee 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
- ✓ General Conditions

Additional clauses required by the Federal government (e.g., labor standards requirements) must also be incorporated in the contract. They require specific language, which must be inserted verbatim into the contract. The KCDBG 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 KCDBG legislation.

Tip: Grantees 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 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 KCDBG project.

An example of a 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 are obtained and filed in project files.

Section 5-C. Bonding Requirements

Bonds are negotiable instruments required from construction contractors as a form of insurance. The bonds are available to contractors from surety companies, which are then turned over to the grantee to protect against situations that may arise. Some of these situations include:

KRS 45A.435

- ✓ 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 grantee to recover their loss; or
- ✓ Payment of liquidated damages is required, arising from labor standards violations.

24 CFR 85.36(h) or 84.48(c)

State law requires that, for project contracts over \$25,000, 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 triggered when contracts exceed \$100,000 in value, per 24 CFR 85.36(h) or 84.48(c).

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

Section 5-D. Subrecipient Agreements

It is not uncommon for grantees to carry out project activities through a subrecipient. A 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 grantee.

The most likely scenario under which a grantee would opt to utilize a subrecipient is when the grantee wishes to “support” certain eligible activities that are either being carried out or are the primary responsibility of some agency outside of the grantee. In effect, the grantee’s goals coincide with the subrecipient’s, and it makes more sense to utilize the capacities of an existing organization rather than create the apparatus necessary to carry out project activities and/or duplicate services.

It is crucial to stress the importance of the grantee-subrecipient relationship. The grantee is not absolved of its responsibilities by utilizing a subrecipient to carry out project activities; in fact, many of these responsibilities cannot be undertaken by anyone other than the grantee, such as environmental determinations and requesting funds from DLG. Further, all KCDBG 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:

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- ✓ A contractor procured according to the requirements described in Chapter 4;
- ✓ 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 project.

There may be additional nonprofit organizations that are not considered subrecipients. These are certain types of nonprofits authorized under section 5305.(a)(15) of the CDBG statute that carry out community economic development, neighborhood revitalization or energy conservation projects. A grantee should contact DLG if they are uncertain regarding the status of a particular organization.

Written Agreements with Subrecipients

In order to protect the grantee, and to ensure the 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 KCDBG funding is provided and establish a legal basis for action if those terms and conditions are not met. A sample agreement that can be used as the basis for a subrecipient agreement is provided as Attachment 5-4.

This agreement must contain the following minimum provisions (like the contract provisions discussed in Section 5-B above, these require specific language, and simple reference is not sufficient):

Attachment 5-4:
Legally Binding Agreement

- ✓ **Scope of Work** – In sufficient detail to provide a sound basis for evaluating performance, a schedule and a budget.
- ✓ **Records and Reporting** – Specifying the records that must be maintained and reports which must be submitted in order for the grantee to meet its own record keeping and reporting responsibilities.
- ✓ **Program Income** (if applicable) – 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.
- ✓ **Administrative Requirements** – Specifically requiring compliance with all applicable uniform administrative mandates.
- ✓ **Program Requirements** – Specifying compliance with KCDBG requirements and other state and Federal overlay requirements (labor, affirmative action, etc.), except that the subrecipient may not assume the grantee’s environmental responsibilities.
- ✓ **Conditions for Religious Organizations** – Where applicable, the conditions prescribed by HUD for the use of KCDBG funds by religious organizations.
- ✓ **Suspension and Termination** – Specifying the conditions for convenience and cause. 24 CFR 85.44
- ✓ **Reversion of Assets** – Stipulating that, on the expiration of the agreement, the subrecipient must transfer to the grantee any KCDBG funds on hand and any accounts receivable attributable to KCDBG funds. This must also include provisions designed to ensure that any real property acquired or improved in whole or in part with KCDBG funds in excess of \$25,000 is either:
 - Used to meet one of the three national objectives for at least five (5) years after the expiration of the agreement, or longer if stipulated by the grantee; or
 - Disposed of in a manner that results in the grantee being reimbursed in the amount of the current fair market value of the property, less any portion of the value attributable to non-KCDBG expenditures. (Reimbursement is not required after five years from close-out.)
- ✓ **Cessation of the Subrecipient** – Providing remedies and procedures in the event of the subrecipient ceases to exist.
- ✓ **Standard Provisions** – Required of all contracts (such as equal opportunity, Section 3, Section 504, labor, etc.). See Section B of this chapter. Section 5-B: Specific Contract Provisions

Section 5-E. Public Agency Contracts

Grantees are permitted under Title I to designate public agencies to assist in carrying out eligible activities on behalf of the grantee. Such designation is a non-procurement action by which the grantee 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 KCDBG 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-F. Intergovernmental and Cooperative Agreements

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

- ✓ An intergovernmental agreement typically involves two or more units of local governments who enter into an agreement to apply jointly for KCDBG 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-G. Reporting Requirements

HUD Form 2516 Contract and Subcontract Activity Report (Attachment 5-5) must be completed by the grantee 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 also available for downloading from DLG's website.

Attachment 5-5: Contract and Subcontract Activity Report
<http://www.dlg.ky.gov/downloads>

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