CHAPTER 6
ACQUISITION

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CHAPTER 6
ACQUISITION

6.0 Introduction and Purpose

TxCDBG funded projects are subject to both the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 et seq. ("URA"), and the federal regulations found in 49 C.F.R. Part 24 (See also Section 104(d) of the Housing and Community Development Act of 1974 and its implementing rules at 24 CFR Part 42 regarding relocation assistance policies for HUD funded programs). [Deleted Text] The URA provides for uniform and equitable treatment of persons displaced from their homes, businesses or farms as a result of rehabilitation, demolition or private acquisition carried out under federally assisted programs. The URA also establishes equitable land acquisition policies.

Relocation requirements of the URA are discussed in the relocation guidelines available on the HUD website.

The purpose of the URA is:

1. To ensure that owners of real property acquired for federal and federally assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in federal and federally-assisted land acquisition programs.
2. To ensure that persons displaced as a direct result of federal or federally assisted projects are treated fairly, consistently and equitably and do not suffer disproportionate injuries as a result of projects that benefit the public as a whole.
3. To ensure that acquiring/condemning authorities implement these regulations in an efficient and cost effective manner.

General Requirements

HUD's Handbook 1378 provides thorough guidance on real property acquisition under URA. If there are questions whether any of the following apply to a specific situation, please consult your contract specialist.

Acquisition rules apply whenever an acquiring entity:

- undertakes the purchase of property directly;
- provides a nonprofit or for-profit entity with funds to purchase the property;
- hires an agent or consultant to act on its behalf in acquisition;
- undertakes acquisition on or after a TxCDBG application submission date unless the acquiring entity demonstrates that the acquisition was unrelated to the proposed activity;
- undertakes an acquisition before the application submission date and the acquisition were intended to support a subsequent TxCDBG activity.

Each property owner must be properly informed of their rights, as required by law, and the acquiring entity must document compliance with the laws and regulations. Each property owner is entitled to the payment of just compensation for their land, even if they are a direct beneficiary of the project.

Before requiring the property owner to surrender possession of the real property, the acquiring entity must pay the agreed purchase price to the owner.

If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant of the property, the acquiring entity must offer to acquire the uneconomic remnant along with the portion of the property needed for the project. 49 CFR §24.102(k)

6.0.1 Environmental and Acquisition

A contract to purchase or lease property for a CDBG project before the environmental review is completed is considered a commitment of funds and a choice limiting action according to 24 CFR §58.22(a) and must be avoided until after the environmental review process is completed and TDA has issued a release of funds. Note that any executed instrument, such as an easement document, which conveys an interest in property, whether purchased, leased, or donated, is also considered an activity limiting the choice of reasonable alternatives. However, there is one action that may be taken beforehand that might conclude in acquisition once the environmental review process is completed: an option contract. An option contract is a useful tool for grantees to obtain site control while allowing time to complete the environmental review.

HUD's regulations at 24 CFR §58.22(d) allow for an option agreement for any project prior to the completion of the environmental review when the following requirements are met:

(1) the option agreement is subject to a determination by the recipient on the desirability of the property for the project as a result of the completion of the environmental review in accordance with 24 CFR Part 58; and

(2) the cost of the option is a nominal portion of the purchase price.

For more information, see Ch. 3, Environmental.

6.1 Terms and Definitions

Acquiring Entity / Acquiring Agency

The term "acquiring entity" and "acquiring agency" are used interchangeably and refer to the entity (in most cases, the Grant Recipient or benefitting utility) performing the acquisition or under whose authority the acquisition is performed. Ultimately, the Grant Recipient is responsible for ensuring compliance with all URA requirements, and the term Grant Recipient is used throughout this chapter. This does not, however, prevent another entity such as a water supply corporation from acquiring real property for the grant-funded project. All URA rules are applicable regardless of the type of entity completing the acquisition activity.

Eminent Domain
Eminent domain refers to the power of the government to take private property and convert it to public use. The Fifth Amendment to the US Constitution provides that government may only exercise this power if it provides just compensation to the property owner.

Important Note: The State of Texas' eminent domain authority is delegated by statute to state agencies, political subdivisions (cities, counties and special districts) and some private entities. Governmental entities have eminent domain authority over properties that are located both inside and outside their taxing jurisdiction. All municipalities in Texas (home rule, general law and special law) are provided the authority of eminent domain under Section 251.001 of the Local Government Code; authority for counties to exercise eminent domain is found in Section 261.001 of the Local Government Code. Section 49.222 of the Texas Water Code confers water districts and water supply corporations with eminent domain authority to acquire land, easements, or other property necessary for water, sanitary sewer, storm drainage, or control purposes. (Note that water supply corporations are considered private entities.) However, Section 2206.001 of the Government Code limits the eminent domain authority of governmental and private entities for acquisition that confers a private benefit on a private party or for economic development purposes (unless the economic development is a secondary purpose resulting from a municipal community development or municipal urban renewal activities to eliminate slum or blight as provided by applicable provisions of the Local Government Code).

Condemnation
Condemnation refers to the legal process used for taking property under the authority of eminent domain. The use of the term should not be confused with its use in declaring a property to be uninhabitable or unsafe.

Real Property
All public improvements or activities related to an eligible TxCDBG project must be constructed on real property that is publicly owned, owned by the subrecipient to the grant, or recorded as a right-of way or easement. Real property in the context of acquisition refers to permanent interest in real property as well as certain less-than-full-fee interests in real property. Acquisition rules apply to TxCDBG projects whenever:

1. Fee simple title to the property is acquired;
2. Permanent and temporary easements necessary for the project are acquired;
3. Properties subject to a life estate or a life use are acquired; and
4. Property that is leased for a term of 15 years or more is acquired. Note that a lease term for less than 15 years does not satisfy HUD's standard for real property acquisition and would, therefore, not meet the TxCDBG program 'interest in property' requirement.

Improvements constructed on property that is not publicly owned or recorded as a right-of-way or easements are not eligible TxCDBG projects. Federal acquisition procedures do not apply to temporary easements needed solely to perform work intended exclusively for the benefit of the property owner.

In general, permits and licenses, such as railroad permits, do not constitute real property acquisitions and, therefore, are not subject to the URA requirements. In distinguishing whether a permit/license is actually an easement, the Grant Recipient should carefully

consider such factors as the cost of the permit or license; its term; whether the license/permit is revocable at will; and/or whether there is a transfer of interest in the property. If there is a question of whether the permit or license should be considered an easement, Grant Recipients should seek legal counsel.

6.2 Methods of Acquisition

An acquiring entity may acquire real property after determining whether the acquisition is voluntary or involuntary (see below description of determining whether an acquisition is voluntary or involuntary) through one of the following methods:

1. donation
2. just compensation purchase
3. negotiated purchase
4. condemnation

Donation: A transaction may be considered a donation if the owner agrees to give, rather than sell, property to the acquiring entity. Donations may be made in either voluntary or involuntary acquisitions.

Just Compensation Purchase: The acquisition price is determined through a valuation process, such as an appraisal or valuation through property tax records or appraisal district records.

Negotiated Purchase: Negotiated purchase is the acquisition of property at a price different from the value that was determined through just compensation. In cases of purchase through negotiation, the reasons for the purchase must be explained in a document called an administrative settlement. (See Sample Administrative Settlement Guideform A610.)

Condemnation: An acquiring entity should use condemnation only as a last resort, and must request and obtain approval from TDA in advance before commencing condemnation procedures. Acquiring entities must comply with Chapter 2206 of the Texas Government Code and all other applicable law. **Given the short term of the TxCDBG contract periods, TDA does not typically approve the use of condemnation in the acquisition of property**. In addition, the use of CDBG funds to support the use of eminent domain on an economic development project that primarily benefits a private entity is prohibited. See Section 407 of the Consolidated Appropriations Act, 2014, as well as similar provisions in previous appropriations.

6.3 Step by Step Procedures

6.3.1 Determining Voluntary or Involuntary

Acquisition will be either voluntary or involuntary. The terms relate to whether or not the acquiring entity possesses the authority of eminent domain (condemnation), and if the transaction occurs as a result of the use or threat of use of that authority. URA provides different protections to property owners depending on whether acquisition is voluntary or involuntary. (See 49 CFR 24, Subpart B Real Property Acquisition)

VOLUNTARY

Acquiring Entities with Eminent Domain Authority

Voluntary acquisitions are negotiated between the property owner and the acquiring entity without the threat of eminent domain or condemnation. For acquiring entities with the authority of eminent domain, acquisitions must meet the following conditions to be considered voluntary: (See 49 CFR 24.101(b)(1)(i)-(iv)).

1. No specific site is needed and any one of several properties could be acquired for project purposes.
2. The property is not part of an intended, planned or designated project area where other properties will be acquired within specific time limits.
3. The acquiring entity must inform the owner in writing that the property will not be acquired through condemnation if negotiations do not reach an amicable agreement.
4. The acquiring entity must inform the owner in writing of the property's market value.

Acquiring Entities without Eminent Domain Authority

Public Land Acquisition - Acquiring entities do not have eminent domain authority to obtain publicly-owned land. Therefore, acquisitions of property owned by federal, state, local governments, or political subdivisions (such as school districts or river authorities) are considered voluntary acquisitions. The acquiring entity must still provide notification to the governmental entity regarding interest in the property, the lack of eminent domain to acquire the property, and the estimated market value of the property to be acquired before negotiating the sale, lease, or donation of the public land.

Economic Development - economic development projects benefiting a private entity acquisition may only be conducted through voluntary procedures using non-federal funds.

In no case is it permissible for an entity to subsequently undertake the acquisition under threat or use its eminent domain authority if initial negotiations for a voluntary acquisition fail. If the agency cannot ensure the applicable requirements of 49 CF R 24.101(b)(1)(i)-(iv) are satisfied, then such acquisitions must be pursued as an involuntary acquisition under the full requirements of 49 C.F.R. Part 24 Subpart B.

INVOLUNTARY

If the acquisition does not comply with the requirements above (see 49 CFR 24.101(b)(1)(i) – (iv)), the acquisition is considered involuntary. Involuntary acquisition procedures must be followed for any acquisition of real property for programs and projects where there is Federal financial assistance in any part of project costs.

6.3.2 Step by Step - Voluntary Acquisitions

Step 1 – Determine property to be acquired
Prior to beginning an acquisition process, the Grant Recipient must have a clear understanding of the grant-funded project and the property that must be acquired for the project to be successful.

Step 2 – Submit Form A600 Initial Acquisition Report to TDA for review and acceptance.

Step 3 – Determine Market Value of the Property
The Grant Recipient may use a market estimate such as a tax valuation to determine value. An appraisal is not required for voluntary acquisitions.

Step 4 – Notify Owner of Property Rights
Voluntary acquisitions can occur only when an acquiring entity lacks the authority to condemn (eminent domain) or when it revokes its intent to use eminent domain by giving specific written notice to the property owner.

The Grant Recipient must notify the owner in writing, prior to making a purchase offer, of the following (49 CFR § 24.101(b)(1)(i)-(iv)):

- the property's market value and
- the Grant Recipient or acquiring entity will not acquire the property if an amicable settlement cannot be reached. See sample ***HUD Guide forms Appendices 31 and 32,*** **Forms A603** and **A604** respectively, for appropriate language based on the Grant Recipient's eminent domain powers.

Optional - In addition, the owner can also be invited to donate the property. The acquiring entity may include a form for the owner to complete allowing him/her to accept or decline the request to donate the land.

Step 5 – Complete Environmental Review
In accordance with U.S. Department of Housing and Urban Development (HUD) regulations at 24 CFR §58.22, a Grant Recipient may not execute an agreement for the sale, lease, or donation of real property before an environmental review has been completed and release of funds authorized by TDA. (See Chapter 3 of this manual.) If a significant environmental impact will occur, look at alternative sites.

Step 6 - Determine Price or Donation
The owner may choose to donate the property. However, after an acquiring entity has established an amount it believes to be the market value of the property and has notified the owner of this amount in writing, an acquiring entity may negotiate freely with the owner in order to reach an agreement. Since these transactions are voluntary, accomplished by a willing buyer and a willing seller, negotiations may result in agreement for the amount of the original estimate, an amount exceeding it, or for a lesser amount. Although not required by the regulations for voluntary acquisition, it would be entirely appropriate for an acquiring entity to apply the administrative settlement concept and procedures in 49 CFR 24.102(i) to document the rationale for determining the negotiated price.

Step 7 – Execute Agreement
The Grant Recipient and the property owner must execute a sale or donation agreement and the deed must be recorded as required by State regulations.

Step 8 – Report Acquisition Parcel Information
The Grant Recipient must prepare and submit to TDA an *Acquisition Report* **(Form A601)** for each parcel.

6.3.3 Step by Step Procedures - Involuntary Acquisitions

Step 1 – Determine property to be acquired
Prior to beginning an acquisition process, the Grant Recipient must have a clear understanding of the grant-funded project and the property that must be acquired for the project to be successful.

Step 2 – Submit Form A600 Initial Acquisition Report to TDA for review and approval.
Involuntary acquisition requires TDA authorization prior to pursuing the property; the *Initial Acquisition Report* **(Form A600)** includes a request for this approval. TDA's response must be maintained in the local files. The Grant Recipient may also submit **Form A600** to request TDA approval to waive appraisal requirements on properties with an estimated value of $10,000 or less as permitted under 49 CFR 24.102(c)(2).

Step 3 – Notify Owner of Property Rights
As soon as feasible, the acquiring entity must notify the owner in writing of its interest in acquiring the property and the basic protections provided to the owner under URA and HUD regulations.

The Grant Recipient must provide the owner with the following, prior to making a purchase offer:

- Notice to Owner For Involuntary Acquisition (See sample ***HUD Guide form Appendix 30***, **Form A602** for appropriate language)
- "When a Public Agency Acquires Your Property" - This HUD booklet describes important features of the *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, as amended.
- "The Texas Landowner's Bill Of Rights" – This required informational booklet explains the rights and protections available to landowners. (See § 402.031, Texas Govt. Code and Property Code §21.0112)

Optional - In addition, the owner can also be invited to donate the property. The acquiring entity may include the following documents:

- Form for the owner to complete allowing him/her to accept or decline the request to donate the land.
- Form on which the owner may waive his/her right to an appraisal of the land.

Step 4 – Determine Just Compensation for the Property
An appraisal is required for property acquired under involuntary procedures unless the following (see 49 CFR 24.102(c)(2)):

- If the property valuation is simple and the anticipated value of the proposed acquisition is $10,000 or less, no formal appraisal is required. The acquiring entity must prepare a waiver valuation and have a reasonable basis for the waiver valuation.
- If the owner is donating the property and releases the acquiring/condemning authority from its obligation to appraise the property, no formal appraisal is required, 49 CFR § 24.102(c)(2).
- If the value of the property exceeds $10,000, but is less than $25,000, TDA will consider written requests for waiver of appraisal, which must be submitted with the *Initial Acquisition Report* (**Form A600**).

The process of estimating value when an appraisal is determined to be unnecessary is considered a "waiver valuation." Appraisal standards are addressed in 49 CFR *24.103*.

The property owner, or the owner's designated representative, must be invited to accompany the appraiser and be given the opportunity to present facts and information which may affect the valuation. See 49 CFR §24.102(c)(1). The Grant Recipient should consult with their legal counsel for guidance with respect to the requirements and procedures of the URA in determining just compensation.

<u>Qualifications of Appraiser and Review Appraiser</u>
The appraisal procedures require that a qualified appraiser and a qualified review appraiser be retained (See 49 CFR 24.103 -.104) in compliance with TxCDBG professional services procurement procedures and applicable state procurement law. A contract (fee) appraiser hired to perform an appraisal or a review appraisal must be a state licensed or certified real estate appraiser.

Appraiser – The appraiser must provide an independently and impartially prepared opinion of the value of an adequately defined property as of a specific date, supported by the presentation and analysis of relevant market information.

- Review Appraiser – Per 49 CFR 24.104, the review appraiser must examine the analysis of market information in appraisals to assure that they meet the definition of appraisal found in 49 CFR 24.2(a)(3), appraisal requirements found in 49 CFR 24.103, and all other applicable requirements. The review appraiser may be a member of the staff of the acquiring entity but must have adequate experience, education, training, and certification/licensing. If the review appraiser is unable to recommend or approve an appraisal as an adequate basis for the establishment of just compensation, the review appraiser may, as part of the review, present market information to support a recommended value.

Step 5 - Notification—Establishment and offer of just compensation
Before the initiation of negotiations, the Grant Recipient must establish an amount believed to be just compensation to offer the property owner. The Grant Recipient must provide the just compensation value of the property to the owner in writing prior to making a purchase offer. The amount shall not be less than the approved appraisal of the fair market value of the

property, taking into account the value of allowable damages or benefits to any remaining property. The just compensation determination statement and notification to the owner must be signed by an acquiring entity official and must include:

(1) A statement of the amount offered as just compensation. In the case of a partial acquisition, the compensation for the real property to be acquired and the compensation for damages, if any, to the remaining real property shall be separately stated.

(2) A description and location identification of the real property and the interest in the real property to be acquired.

(3) An identification of the buildings, structures, and other improvements (including removable building equipment and trade fixtures) which are included as part of the offer of just compensation.

(See 49 CFR 24.102)

Step 6 – Complete Environmental Review

In accordance with U.S. Department of Housing and Urban Development (HUD) regulations at 24 CFR §58.22, a Grant Recipient may not execute an agreement for the sale, lease, or donation of real property before an environmental review has been completed and release of funds authorized by TDA. (See Chapter 3)

Step 7 – Determine Price

The owner may choose to donate the property or may accept the just compensation amount, in which case the parties may proceed with the execution of appropriate donation or sales documents in Step 8.

The owner may also decline the offer of just compensation and negotiate a different price. The owner must be given reasonable opportunity to present material and information which the owner believes is relevant to determining the value of the property, and to suggest modifications in the proposed terms and conditions of the purchase.

The purchase price may differ or exceed the amount offered as just compensation when reasonable efforts to negotiate an agreement have failed and an acquiring entity official approves such settlement as reasonable, prudent, and in the public interest. Once a final price is determined to be acceptable by both parties, an Administrative Settlement with written justification shall be prepared, which states pertinent information, including trial risk and other factors that support such a settlement (see 49 C.F.R. § 24.102(i)). (See also Sample Administrative Settlement Guide form **Form A610**). Relocation payments are not acquisition costs and cannot be used to support an administrative settlement. When a Negotiated Purchase is completed, the Administrative Settlement document must be submitted to TDA with the *Acquisition Report* (**Form A601**) upon completion of acquisition.

If negotiations are unsuccessful and the use of eminent domain has been approved by TDA, the acquiring agency must complete all required procedures. Please refer to your local attorney for specific guidance.

Step 8 – Execute Agreement

The Grant Recipient and the property owner must execute a sales or donation agreement. The deed must be recorded as required by State regulations.

Step 9 – Report Acquisition Parcel Information
The Grant Recipient must prepare and submit to TDA an *Acquisition Report* (**Form A601**) for each parcel (include any administrative settlements as necessary).

6.4 Acquisition and Other Program Requirements

Procurement: Surveyors, appraisers, title companies and other professionals whose services are required for acquisition must be procured under TxCDBG rules for procurement of professional services.

Environmental Review: Environmental reviews must be completed prior to completion of acquisition activities.

Release of Funds:

- No TxCDBG construction funds will be released until the Initial Acquisition Report (**Form A600**), confirming any requirement for acquisition or the absence of acquisition, has been submitted to TDA.
- All acquisition activities must be fully documented, completed, executed and recorded, prior to the execution of any related construction contracts.
- If acquisition is required, then **Form A601** must also be completed and submitted to the contract specialist before construction funds may be released.

Contract Modifications and Amendments: Addition or deletion of acquisition activities to the TxCDBG contract must be approved by TDA.

Recordkeeping: The Grant Recipient is responsible for demonstrating compliance with URA requirements, regardless of who actually performs the duties. All records and notices and their date of delivery must be maintained locally for TDA and HUD monitoring purposes.

- **Forms A600** and **A601** as applicable, must be submitted to TDA and retained in the local file.
- All mailed communications should be “USPS Certified, Return Receipt Requested” or similar, or hand delivered with a notation on a copy by a witness to the delivery. The acquiring entity’s records must contain the complete record and demonstrate compliance.

Private to private acquisition of Real Property:

- URA - If an acquisition is a private to private acquisition of real property, the URA does not apply. The private development part of the project is considered separate; therefore, acquisition by a private entity from another private entity entirely for private use is not considered to be subject to URA. However, if CDBG funds are invested in public infrastructure to support that private enterprise, any acquisition with respect to that public infrastructure is subject to URA.
- Environmental - If the private to private transfer of property would not have occurred if not for the federal project, then the real property must pass environmental clearance before the acquisition (a choice limiting action) occurs.

6.5 Best Practices

Whether acquisition is voluntary or involuntary must be determined at the beginning of the process so the proper procedures and notifications are performed. Failure to follow the proper procedure for the type of acquisition may result in financial penalties, including possible contract termination. The careful completion and submittal of the **Form A600** form is an important early step to assure compliance.

TDA recommends the acquiring entity begin title research early in the acquisition process to correct title issues that may cause delays.

TDA also recommends acquisition matters be completed prior to construction activities being bid to avoid delays caused by last minute acquisition changes.

When a project includes multiple activities and only some of the activities require acquisition, the Grant Recipient must consult with TDA to determine which activities may occur prior to completing acquisition.
It is likely that the process of obtaining an appraisal and review appraisal will cause delays in the acquisition process. This may prevent completion of the TxCDBG Performance Statement (Exhibit A) activities within the contract period. In this circumstance, the project as contracted will need to be re-evaluated to determine its feasibility. Contact TDA for technical assistance.

The use of condemnation procedures is not compatible with TxCDBG projects. The use of condemnation procedures generally requires an extended time to accomplish and is not an eligible cause for contract extension.

See TDA website for additional Sample documents.

6.6 References and Guidance

Federal guidance for procuring appraisals may be found in HUD Handbook 1378 Real Estate Acquisition and Relocation Policy and Guidance on the HUD website, which includes guidance and sample language for required notices:

- Chapter 6 Recordkeeping and Reports to guide localities in the Acquisition process
- Appendix 19 Preparing an Appraisal Scope of Work
- Appendix 20 Agreement for Appraisal Services.
- Appendix 31 Informational Notice VOLUNTARY ACQUISITION for Agencies **WITHOUT** Eminent Domain Authority.
- Appendix 32 Informational Notice VOLUNTARY ACQUISITION for Agencies **WITH** Eminent Domain Authority, where it will **be REVOKED.**
- Appendix 30 Notice of Interest INVOLUNTARY ACQUISITION for Acquisition where Eminent Domain Authority **IS RETAINED.**

The following documents are included in this chapter and available on the TDA website:

- State of Texas Publication: “The Texas Landowners Bill of Rights”
- HUD publication: “When a Public Agency Acquires Your Property”