CHAPTER 5
PROCUREMENT PROCEDURES

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CHAPTER 5
PROCUREMENT PROCEDURES

5.1 Introduction

This chapter summarizes the laws, rules, and regulations that apply to procurement of contracted services, goods and materials that are purchased, and equipment that is leased for use on TxCDBG projects.

Procurement is the process through which an entity obtains goods and services from vendors. The federal government has established a set of procurement rules that apply to CDBG-funded projects. In addition, the State of Texas has enacted a set of regulations that also apply to CDBG contracts. The procurement procedures set forth in this chapter comply with both sets of regulations. In addition to applicable federal and state regulations, many local governments have laws and regulations regarding procurement. Grant Recipients must comply with all local laws governing procurement policies. In the event of conflict between federal, state and local law, the most stringent regulation applies.

A good procurement system should facilitate the Grant Recipient's ability to:

- Identify and specify standards for the goods or services the Grant Recipient wants to obtain - invitations for bids or requests for proposals must be clearly written and must describe the technical requirements of the equipment or services.
- Obtain an independent cost estimate for the goods or services.
- Seek competitive offers to obtain the best possible quality at the best possible price.
- Promote the maximum use of small, minority-owned and female-owned businesses and Section 3 businesses using other suggestions found in **Chapter 10: Civil Rights Requirements** of this manual
- Have a quality assurance system that helps ensure the goods and/or services are received in accordance with the standards set forth in the contract.
- Review all procurements to avoid unnecessary and duplicative purchases and to ensure costs are "reasonable".
- Use a written agreement that clearly states the responsibilities of each party; the method of contracting (fixed price, cost plus fixed fee, purchase orders, etc.) should be appropriate.
- **"Cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting will not be allowed under the CDBG program**. Bids must describe actual work to be completed; TDA will not reimburse these costs if such factors are not delineated. Any line item for profit, overhead, contingency, or other related terms that do not describe actual work to be performed will not be reimbursed.

Grant Recipients must provide adequate documentation to show that the selection process was carried out in an open, fair, uniform and thorough manner and to ensure that federal and state procurement requirements were met. Failure to maintain proper documentation may result in disallowed costs. These records must include, but are not limited to, the following information:

- Rationale for the method of procurement;
- Solicitation/response;
- Evaluation and selection criteria;
- Contractor selection or rejection; and

- The basis for the cost or price. The Grant Recipient should clearly identify during the procurement process any items included in the bid / purchase that are not included in the TxCDBG contract.

Regardless of the type of procurement used, the Grant Recipient must execute a contract to document the work to be completed, the agreed price, and contractor or provider's required compliance with all applicable state and federal requirements that Grant Recipient must follow.

TDA recommends that the Grant Recipient's attorney review bid packets and contracts before execution in order to ensure that all federal and state CDBG requirements, local laws and requirements specific to that municipality or county are incorporated. Certification for construction contracts is included in the sample construction contract as **Appendix F.**

5.1.1 Methods of Procurement

The Grant Recipient must use one of the following methods of procurement:

1. Selection of Administration Services through the TDA Pre-Qualification process ($50,000.00 or less) – This is a 2 Phase procurement process to preapprove a pool of Grant Administrators. Local governments solicit proposals from this pool for preparation of an application to the TxCDBG program, and subsequent administration services if a grant is awarded. Communities that do not use this method will need documented justification.
1. **Competitive Proposals (Administration/Professional Services)(Traditional)** – For purchases where conditions for sealed bid are not appropriate. Preferred method for the procurement of administration and professional services. Grant applicant must use this procurement method if Administration is expected to exceed $50,000.00.
2. **Micro-purchases less than or equal to $2,000** – The purchase of supplies or services that are in the aggregate less than or equal to $2,000. For such purchases, Grant Recipients may use simplified acquisition procedures instead of Small Purchase procedures as described below. Grant recipient must, to the extent practicable, distribute these purchases equitably among qualified suppliers.
3. **Small Purchase** – The acquisition of supplies or services greater than $2,000 and less than or equal to $50,000. Small purchase procedures are relatively simple and informal procurement methods for securing services, supplies or other property. Price or rate quotations must be requested from at least three (3) qualified sources.
4. **Sealed Bids (Formal Advertising)** – For purchases greater than $50,000. Preferred method for construction contracts. Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.
5. **Noncompetitive Proposals** – Procurement through solicitation of a proposal from only one source and may be used only under special circumstances which are applicable for all purchase levels.

Source: 2 CFR 200.320.

The Grant Recipient must obtain approval from TDA prior to using any method of procurement not described in this chapter.

5.1.2 Conflict of Interest

Grant Recipients of a TxCDBG contract must avoid, neutralize or mitigate actual or potential conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair the performance of the TxCDBG contract or impact the integrity of the procurement process.

Every Grant Recipient must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts (See Sample Code of Conduct in Appendix C). The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Grant Recipient. The Grant Recipient may choose to broaden local conflict of interest policies to additional family members and relatives.

For the procurement of goods and services, no employee, officer, or agent of the Grant Recipient or subrecipient may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. (24 CFR 570.489(g), Uniform Grant Management Standards (UGMS) of the Texas Comptroller of Public Accounts, 2 CFR 200.318(c)(1)).

Example: Bay County, Texas and the Village of Seaside Creek sought a contractor to compete for some drainage improvement by sealed competitive bids. The project was funded with CDBG funds. Eric Smith and Associates is the engineering firm which will oversee the project. Jones Constructors, Inc. was the low bidder and has been selected for the award. The principals of both the engineering firm and the construction company are brothers-in-law. Under the procurement regulations, such procurement would be a conflict of interest because they are immediate family members. It would be a conflict of interest of Eric Smith and Associates to oversee a construction contract funded with CDBG money, since Eric Smith's brother-in-law is a principal of Jones Constructors, Inc.

For all other cases other than the procurement of goods and services, non-procurement conflict of interest provisions are applicable to any person or entity including any benefitting business, utility provider, or other third party entity that is receiving assistance, directly or indirectly, under a TxCDBG contract or award, or that is required to complete some or all work under the TxCDBG contract in order to meet a National Program Objective, that might potentially receive benefits from TxCDBG awards.

In such instances (non-procurement), the general rule is that no person/entity described above whom:

- exercise or have exercised any functions or responsibilities with respect to CDBG activities;
- are in a position to participate in a decision making process; or
- are in a position to gain inside information with regard to such activities may:

obtain a *financial interest or benefit* from a CDBG-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to a CDBG-assisted activity, or with respect to the proceeds of the CDBG-assisted activity, either for themselves or those with who they have family or business ties, during their tenure or for one year thereafter.

Example: Central City, Texas applied for TxCDBG funds for a first-time sewer project in the West Addition neighborhood. One of the residents included in the project is the mother-in-law of City Council member Bob Thompson. Councilman Thompson does not have a financial interest in the project; however there is a conflict of interest due to the CDBG-funded benefit to be provided to his family member. The City must disclose this conflict and request an exception to the prohibition on such conflicts from TDA before proceeding with the project.

TDA will evaluate persons in similar roles for benefitting organizations, such as utilities providing service through the project or businesses creating jobs as a result of the project, in determining a conflict of interest. The person may not have an interest in any contract or agreement related to the CDBG proceeds/program for themselves or their family/business ties during their tenure or one year after conclusion of their tenure.

In addition, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. (See also 2 CFR 200.319). For example, an administrative consulting firm that participates in developing or distributing the request for proposals (RFP) may not then submit a proposal in response to that RFP.

Some determinations of conflicts of interest:

- The same individual or firm is hired to provide both administration and engineering services on a TxCDBG funded project;
- The same individual or firm has an interest in both a benefitting business identified in the contract Performance Statement of the TxCDBG contract (Exhibit A) and any consultant or construction contracts required to complete the project;
- Elected officials voting on awarding of funds to organizations where a family member is on the staff or where the elected official is on the subrecipient's board;
- Local officials entering into contracts with companies they are affiliated with through employment of, or ownership by, themselves or their relatives;
- Grantee officials or staff who have relatives who may benefit from a subrecipient's programmatic activities;
- Failure to notify TDA / U.S. Department of Housing and Urban Development (HUD) about conflicts of interest, or late and or incomplete requests for exceptions; and
- A Council of Government (COG) which is providing administrative support to the regional review committee and is also an application preparer/administrator.

Exception to Conflicts of Interest: TDA may grant an exception, upon written request from the Grant Recipient, to the non-procurement conflict of interest provisions on a case-by-case basis if TDA determines that such exception will serve to further the purpose of the TxCDBG project and the effective and efficient administration of the project. The written request must address all elements identified in 24 CFR 570.489(h)(4).

Regulations: The regulations related to conflict of interest and nepotism may be found at the Texas Government Code Chapter 573, Texas Local Government Code Chapter 171, 24 CFR 570.489(g) and (h), UGMS, and guidance under 2 CFR 200.

5.2 Competitive Proposals (Administration and Professional Services Contracts)

The Competitive Proposal procurement method applies to all administration and professional services contracts paid in whole or in part with TxCDBG funds.

Competitive Proposal procurement is used when conditions are not appropriate for the use of sealed bids and is the preferred method of selection of professional services, such as grant administration, engineering, architectural, or surveying services. Unlike sealed bidding, the competitive proposal method permits consideration of technical factors other than price and negotiation of contract price or estimated cost, and other contract terms and conditions. All contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.

5.2.0 Procurement - Administration Services and the Professional Services of Engineering/Architectural/Surveying

The steps for procuring administration services (including other professional services), and engineering, architectural, and land surveying services are similar with one major exception. For the procurement of engineering, architectural, and land surveying services, price may NOT be used as a selection factor and the Grant Recipient must choose the most highly qualified provider of these services on the basis of demonstrated competence and qualifications. Once the most qualified respondent is chosen, then a fair and reasonable price may be negotiated. (See also 2 CFR 200.320(d)(5) and Texas Government Code, §2254.004.)

In contrast, for administration services and other professional services such as accounting (CPA), grant writing, and real estate appraising (state certified or state licensed), price may be a selection factor and should be taken into consideration.

The professional services generally used for CDBG projects means services within the scope of the practice, as defined by state law, of:

- Accounting;
- Architecture;
- Landscape Architecture;
- Land surveying;
- Professional engineering;
- Real estate appraising; or
- Provided in connection with the professional employment or practice of a person who is licensed or registered as:
    - A certified public accountant;
    - An architect;
    - A landscape architect;
    - A land surveyor;
    - A professional engineer; or
    - A state certified or state licensed real estate appraiser.

All administration and professional services related to TxCDBG projects <u>must be procured competitively</u>, regardless of the source of funds that will pay for the service contracts.

Grant Recipients must adhere to the State of Texas' Professional Services Procurement Act (Texas Government Code, Chapter 2254).

Other important competitive proposal requirements:

- Professional services and administration services paid in whole or in part with TxCDBG funds must use the Step-by-Step procurement procedures described below.
- Professional services and administration services paid solely with local or matching funds must use the TxCDBG process or a competitive procurement process found in local policies.
- Such procurement procedures must be performed prior to the performance of any work by the service contractor. If such procurement procedures are not performed correctly, fees for professional services/administration services will not be eligible for reimbursement with grant funds or count towards community match funds.

- If pre-qualified lists of persons, firms (other than those provided by TDA) or products are used for acquiring goods and services, the Grant Recipient needs to keep the list current and include enough qualified sources as to ensure open competition. (2 CFR 200.319(d))
- TxCDBG funds and matching funds may not be used to pay/reimburse for services provided prior to the date of the TxCDBG grant contract with the exception of eligible pre-award costs/activities approved by TDA through the pre-agreement process. See Chapter 1, Section 1.1.1 Pre-Agreement, regarding the timeframe in which costs are eligible under the pre-agreement stratagem.
- ***To prevent a potential conflict of interest, Grant Recipients must procure service providers - such as administration and engineering or any service provider that may be used to assist the Grant Recipient in its preparation of its TxCDBG application for CDBG funding - before the provider conducts any work to prepare the TxCDBG application for TxCDBG grant funding.***
- If an administration or professional services contractor is preselected and a contract is entered into prior to grant award, the contract should include a statement which states that in the event TxCDBG funds are not awarded to [City/County], the contract shall be terminated by [City/County].
- The cost of preparing a TxCDBG application is an ineligible cost under the CDBG program and therefore is not reimbursable.

The procurement requirements described in this Chapter will not apply to:

- Professional services and administration services performed by an employee of the Grant Recipient; and
- A subrecipient agreement (interlocal agreement) with an agency of the state, such as an agreement with a Council of Governments, whereby a Grant Recipient designates the subrecipient to carry out an eligible activity (such as administration services) for the Grant Recipient. (Chapter 791.001 Texas Government Code)

Engineering Services
The Texas Engineering Practice Act requires most public works projects to be designed, supervised, inspected, and accepted by a registered professional engineer. If the project is exempt from this requirement under Texas Occupations Code §1001.053, the Grant Recipient must document the exception through a letter certified by the chief local official.

Testing Services

- The Grant Recipient shall determine whether the testing is a component of construction or a professional service, and then should be consistent with that decision in procurement and requests for reimbursement. (For the drilling of 'test wells', see also Ch. 7 to determine whether Davis-Bacon labor requirements are applicable in such cases.)
- Testing Services which require professional services must comply with the State of Texas' Professional Services Procurement Act (Texas Government Code, Chapter 2254).

5.2.1 Choosing a TDA Pre-Qualified Grant Administrator

Applicants for TxCDBG grants are responsible for identifying the person or firm that will provide administrative services for the project, if funded. In an effort to simplify the procurement process for communities, TDA solicits "Applications to Prequalify Grant Administrators" from vendors interested in grant writing and administering TxCDBG projects - see TDA website for the current solicitation schedule. TDA reviews the proposals based on satisfaction of the minimum qualifications and develops a pre-qualified list of vendors, which is posted on the TDA website.

Although this process is primarily intended for procurement of administrative services needed to implement a project if funded, the community may choose to include grant writing services in the solicitation as well.

Procurement of a Grant Administrator – Phase 1 (completed)

Step i – "Application to Prequalify Grant Administrators":

TDA prepares an "Application to Prequalify Grant Administrators," in order to collect qualifications. The opportunity is advertised across the state and open to any qualified respondents.

Step ii – Application submittal from Grant Administrators:

Grant Administrators submit their qualifications directly to TDA using the application form (2 parts).

Step iii – Approved Vendor List of Prequalified Grant Administrators:

TDA reviews the submittals for responsiveness and prepares an Approved Vendor List of prequalified Grant Administrators. Preapproval of a Grant Administrator indicates that the application is complete and timely, and does not include an evaluation of the quality of services offered by the administrator.

Procurement of a Grant Administrator – Phase 2
(all 6 Steps to be completed by the Applicant community)

Applicants for TxCDBG grant funding may only use administrative service providers that are:

- Employees of the Applicant community (self-administering community),
- Councils of Government acting as subrecipients to the applicant community, or
- Vendors included on the Approved Vendor List **and** have been selected using the following procedures:

Step 1 – Identify Evaluation Team and Review Approved Vendor Applications

The applicant community must identify an Evaluation Team (at least 3 persons) to complete Phase 2. The committee must include at least one local official, such as a member of the elected governing body. The Evaluation Team members shall have no potential conflicts of interest with any of the individuals, firms, or agencies under review (e.g., family relationships, close friendships, business dealings).

The Evaluation Team should review the qualifications provided to TDA for each approved vendor.

Part 1 responses for each "Application to Prequalify Grant Administrators" identified on the Approved Vendor List can be found at:

https://texasagriculture.gov/GrantsServices/RuralEconomicDevelopment/RuralCommunityDevelopmentBlockGrant(CDBG)/PrequalifiedProfessionalServices.aspx

Communities may request a copy of **Part 2** responses for any Approved Vendor by sending an email listing the requested vendors to CDBGapps@TexasAgriculture.gov. **Part 2** includes responses to the following:

1. Describe the character, integrity and reputation of the respondent and key personnel, including whether the respondent is in good standing with TDA, and former and current clients.

2. Has the respondent ever had a contract terminated or denied renewal for noncompliance with policies or regulations of any state or federally funded program within the past five years?
3. Has the respondent or any of its principals ever been debarred, suspended or otherwise excluded from or ineligible for participation in federally-assisted programs?

NOTE: Preapproval of a Grant Administrator indicates that the application is complete and timely, and does not include an evaluation of the quality of services offered by the administrator.

Step 2 – Select Firms to consider further

Based on the available qualifications, the Evaluation Team **must select at least three individuals/firms** from the Approved Vendor List to consider further. The committee may choose to consider as many approved vendors as it wishes.

The TDA website identifies each approved vendor that has self-identified as a minority-owned business (MBE), woman-owned business (WBE), Small business enterprise (SBE), or Section 3 business (S3). One or more of the approved vendors selected for further consideration **must** qualify under at least one of these categories.

Step 3 – Complete **Phase 2 Solicitation – Request for Project-Specific Proposal**

Enter information in each field of the *Phase Two Solicitation for Administrative Services – Request – Request for Project-Specific Proposal* (**Form A506)** to request a project-specific proposal, including services to be provided and costs.

- Description of Anticipated Project(s) – Provide any information available to describe the potential grant project. This description should help vendors understand the community's priorities, but is not binding for the final grant application. Examples include:
  - Water and/or sewer improvements;
  - Infrastructure improvements;
  - Sidewalk and lighting improvements;
  - Housing rehabilitation project in multiple colonia areas; and
  - Unknown pending public hearing.

- Anticipated Scope of Work – check all that apply. For additional information, please see: http://texasagriculture.gov/Portals/0/Publications/RED/CDBG/RFQ%20prequalify%20admin%20Final%203.30.17.pdf

- Evaluation Criteria – Develop written weighted criteria that will be used to evaluate proposals. **Form A506** lists several criteria that may be used, or the community may list additional elements to be considered. Cost must be included in the evaluation and selection criteria. The relative importance of each criteria must be identified:
  - If using scores, list the maximum number of points for each criterion.
  - The Evaluation Team may also use categories such as Very Important, Somewhat Important, or Minor Importance to describe the weight of each criterion.

Send **Form A506** to each vendor identified in **Step 2**. Email contact information is provided on the "Application to Prequalify Grant Administrators" form for each vendor. Allow the vendors a reasonable period of time to prepare a proposal. TDA considers five to ten days to be reasonable for most projects, but the community must determine what is reasonable for the anticipated project. Print a copy of each **Form A506** sent to the vendors for your files.

Step 4 – Receive and review the proposals

Vendors interested in competing for an administrative services contract will respond to the Phase 2 Solicitation. Vendors may use the optional form provided by TDA *Phase Two Solicitation for Administrative Services – Response from Service Provider* (**Form A507**) or may provide information in their own format. In either case, the proposal must outline the services being offered and the proposed cost of those services.
The proposal must also identify any conflict of interest, real or apparent, with the vendor and the project. Such a conflict would arise when:

(i) The employee, officer or agent,
(ii) Any member of his immediate family,
(iii) his or her partner, or
(iv) An organization which employs, or is about to employ, any of the above,

has a financial or other interest in the firm selected for award.

The Evaluation Team must review all proposals, evaluate the proposals using the specific criteria established in **Step 3**, and determine most responsive and responsible respondent whose proposal is most advantageous to the program, with price and other factors considered. The Evaluation Team makes a recommendation to the Applicant's governing body (City Council / Commissioners Court).

Step 5 – Select a Grant Administrator using local procedures to award the contract

The Applicant's governing body must award the contract(s) for administrative services to the selected vendor.

NOTE: The local governing body has the final authority to award contracts and is encouraged to follow the committee's recommendation, but may select another respondent if the minutes of the local governing body meeting include justification for the selection.

- Appendix D of the TxCDBG Implementation Manual includes a sample contract that may be used for administrative services.
- If the applicant chooses to execute the contract(s) immediately, include language stating that payment for project implementation services are contingent on receipt of grant funds, such as:
  "Payment of the fees associated with Part III – Payment Schedule of this Agreement shall be contingent upon CDBG funding. In the event that grant funds are not awarded to the City / County by TDA through the TxCDBG program, this agreement shall be terminated by the City / County."
- The applicant may also choose not to execute the contract(s) for project implementation services prior to funding, however, the award of the contract must be reflected in the minutes of the governing body.

Step 6 –Work with the Grant Administrator to prepare the Application.

Only after formal award of the administrative services contract may the Grant Administrator be involved in preparing the grant application.

If a Grant Administrator has been involved with discussions or decisions regarding a grant application prior to the procurement process for administrative services, that firm may NOT be selected as the Grant Administrator.

NOTE: Keep all documentation of the procurement process to demonstrate compliance if a grant application is funded.

5.2.2 Step by Step Selection Procedures for Competitive Proposal (Traditional)

For engineering and other Professional Services providers, as well as Administration Services expected to exceed $50,000, the Grant Recipient must use the full (Traditional) Competitive Proposal method.

STEP 1 Establish local Selection Review Committee

The Selection Review Committee establishes the criteria or evaluation factors to be used for selection and rating of competing respondents. The committee must include at least one local elected official (such as the mayor or county judge), a member of the elected governing body, or a city/county employee with authority to act on behalf of the local elected official in this capacity. The committee may consist of the entire local governing body, a subset of the governing body, other officers or employees of the locality, or employees or officers of third-party public utilities served through the project.

The selection committee members shall have no potential conflicts of interest with any of the individuals, firms, or agencies under review (e.g., family relationships, close friendships, business dealings), and shall adhere to the conflict of interest policy stated herein (See Section 5.1.2 above and Appendix I).

STEP 2 Determine the Scope of Services

The scope of work for a professional services or administration services contract describes all desired tasks that a Grant Recipient expects a professional services or administration services provider to perform under a contract. The scope of work should itemize tasks needed, with timeframes and achievable goals as appropriate and is the basis for the Request for Proposals (RFP)/Request for Qualifications (RFQ) and services contract.

A contractor that intends to respond to the Request for Proposals may provide information on TxCDBG procurement procedures, but may NOT participate in the development or drafting of specifications, requirements, statements of work, or invitations for bids or requests for proposals, including, but not limited to, the development of the scoring criteria, the final selection of firms to be contacted, or the scoring of proposals.

STEP 3 Establish Written Selection Criteria

The committee's written selection criteria should include, at a minimum, a clear and accurate description of the technical requirements of the services to be procured. Such descriptions shall not contain features that unduly restrict competition. TDA strongly recommends that the Grant Recipient use a scoring method for reviewing administration and professional services proposals. (See **Appendix D and E.**)

The specific criteria to be used by the Grant Recipient should fit the needs of the desired services and the specifics of the proposed project. The importance of each of these factors should be determined before the review process begins by assigning weighted values to each factor. The local governing body has final authority to approve all professional services and administration services contracts and should be closely involved in the establishment of the written selection criteria. Sample rating sheets for Administration and other Professional Services (other than Engineers/Architects/Surveyors) are found in Appendix D; a sample rating sheet for Engineers/Architects/Surveyors is found in Appendix E.

STEP 4 Develop the Request for Proposals/Qualifications (RFP/RFQ) Package

The Grant Recipient must develop a RFP (Administration and other Professional Services)/RFQ (Engineering/Architectural/Surveying Services) package to issue to potential respondents. RFP/RFQ's must identify all evaluation criteria factors and their relative importance.

When Grant Recipient seeks multiple grants from the State before the Grant Recipient applies for TxCDBG funding (pre-application procurement) - Even though combining several programs into one RFP is allowed, the best practice is to treat each grant as a separate procurement, requiring separate RFP/RFQ's scoring, and award, even if the advertisements are combined.

Multiple TxCDBG fund categories may be included in one RFP. If several fund categories are included in a single RFP/RFQ packet, the RFP/RFQ packet should clearly indicate what project or application cycle is included. However, different fund categories or projects may require different qualifications (i.e., the need to evaluate the engineering firms differently due to the type of project) and therefore may require separate RFP/RFQ packets. If several fund categories are included in a single RFP/RFQ packet, the Community should document how the same scope of services applies to each category, and for administration services the costs associated with each fund category in the proposal must be identified. Note that the funding cycle should be no longer than the current application cycle.

Step 4.1 RFP of Administration and other Professional Services Contracts other than Engineering/Architectural/Surveying Services

The RFP package for Administration/Professional Services must contain three parts. (Samples of each required documents are found in Appendix D.)

1. Cover Letter: The purpose of this letter is to solicit proposals from interested parties. This can be tailored to the Grant Recipient's specific project.

2. Request for Proposals (RFP): The RFP provides detailed instructions to respondents and the criteria to be used in evaluating proposals.

The RFP should include the following components:

- The request for proposal, including specifications and attachments, must clearly describe the scope of services required and identify the factors that will be used to evaluate proposals.
- Either the Sample Administration/Professional Services Rating Sheet for Administration Services or similar rating sheet with weighted criteria.

And should request the following:

- A statement of qualifications;
- Proposed cost of services/fee structure;
- Related experience with federal programs;
- Capacity to perform the specific proposed task;
- Experience in developing and/or implementing civil rights/equal opportunity/Fair Housing activities; and
- References – a list of past/current clients so that the proposals can be ranked based on past performance. The selection committee should contact these references and evaluate the respondent's experience, work performance, and capacity to perform.
- Proposed costs must be considered in the RFP process.

It is possible to solicit and procure for application preparation services and administration services in one step. The RFP must clearly indicate that bids are being solicited for both application preparation and administration services, and must clearly separate the scope and cost of the services associated with preparing an application and the scope and cost associated with administration of the grant. Costs associated with application preparation services are NOT eligible costs under the TxCDBG program.

3. Sample Contract: A sample professional services/administration services contract containing the terms and conditions of the contract between the Grant Recipient and the service provider should be provided as part of the RFP package. Separate contracts should be submitted for each fund sought by the Grant Recipient. The service contract must be associated with only one TxCDBG grant and the funding cycle should be no longer than the current application cycle.

This contract should contain four parts:

- Part I - Agreement
- Part II - Scope of Work
- Part III - Payment Schedule
- Part IV - Terms and Conditions

Note: Certification Requirement for professional administrators – Per 4 TAC 30.80, effective date January 1, 2015, professional administrators need to be certified annually by TDA in order to be eligible to be paid from TxCDBG grant funds or match. Any person who intends to actually perform grant administration on behalf of a locality must be certified. Therefore, each person within a firm, who will administer a TxCDBG grant, must be certified by attending a TxCDBG Project Implementation Manual Workshop (or by completing the TxCDBG Project Implementation Manual Workshop webinar online and passing the CDBG review examination). Grant Recipients need to be aware that professional administration costs will be disallowed if the professional administrator has not received such annual certification.

Step 4.2 RFQ for Engineering/Architectural/Surveyor Services

1. Cover Letter: The purpose of this letter is to solicit proposals from interested parties. This can be tailored to the Grant Recipient's specific project.

2. Request for Qualifications (RFQ): The RFQ for Engineering/Architectural/Surveyor Services provides detailed instructions to respondents and the criteria to be used in evaluating proposals.

The RFQ should include the following components:

- The request for qualifications, including specifications and attachments, must clearly describe the scope of services required and identify the factors that will be used to evaluate proposals.
- It is possible to solicit and procure for preliminary engineering services and design engineering services in one step. A preliminary engineering report (i.e. Table 2 of the TxCDBG application which consists of a budget justification identifying project activities/materials with cost estimates) must be prepared by a registered professional. The RFQ must clearly indicate that bids are being solicited for both preliminary engineering and design engineering services, and must clearly separate the scope of the services associated with preparing the preliminary engineering report for the TxCDBG application and the scope associated with designing the plans and specifications for the project.
- The RFQ should request that the proposal include/address the following factors:
  - Statement of qualifications;
  - Work experience;
  - Capacity to perform the specific proposed task;
  - Technical expertise;
  - Ability to meet schedules;
  - Proximity to the area of the proposed work;
  - Familiarity with the area of the proposed work;
  - References – list of past/current clients; etc.

3. Sample Contract: A sample engineering/architecture/surveying services contract containing the terms and conditions of the contract between the Grant Recipient and the service provider should be provided as part of the RFQ package. Separate contracts should be submitted for each fund sought by the Grant Recipient. The service contract must be associated with only one TxCDBG grant and the funding cycle should be no longer than the current application cycle.

This contract should contain four parts:

- Part I - Agreement
- Part II - Scope of Work
- Part III - Payment Schedule
- Part IV - Terms and Conditions

STEP 5 Advertise the RFP/RFQ

In order to create competition for the work, the Grant Recipient must advertise the RFP/RFQ**.** A sample advertisement is provided that can be altered for the appropriate service. (See samples in **Appendices D and E.**) For pre-application procurement of vendors, there is no prohibition on combining the required advertisements for several RFP/RFQ processes into one publication. The Grant Recipient must:

- Advertise in a locally distributed newspaper.
    - To increase and promote participation of small, minority- and women- owned businesses as required below under Step 6, Grant Recipients should email a copy of the solicitation advertisement to TDA at MWBE@texasagriculture.gov.
- The solicitation must be advertised for at least ten (10) days before the proposal submission deadline.

Retain a tear sheet/full-page advertisement/photo copy with publisher's identification and date/publisher's affidavit for proof of advertising for monitoring purposes.

STEP 6 Send RFP/RFQ to at least Five (5) Individuals/Firms

Prepare a list of potential firms/individuals. TDA's list of certified administrators or firms is available on the TDA website, and the Texas Comptroller of Public Accounts' Historically Underutilized Business (HUB) Directory is available on its website. In accordance with Section 3 of the Housing and Urban Development Act of 1968, successful applicants using CDBG funding for housing or other public construction are required, to the greatest extent feasible, to provide training and employment opportunities to lower-income residents and contract opportunities to businesses in the project area.

Grant Recipients should actively take steps to encourage proposals from small (SBE's), minority (MBE's), and woman-owned businesses (WBEs), as well as Section 3 business concerns. Although Grant Recipients are not directly responsible for meeting a specific minority business participation goal, TDA reports to HUD on the levels of MBE and WBE hiring under all TxCDBG contracts.

Send the RFP/RFQ package to a minimum of five individuals/firms by email, fax, and/or return receipt mail.

- Document reasons for selecting such individuals/firms for local files.
- Document evidence of contacting five (5) individuals/ firms.
    - If email/fax, print verifiable evidence that email/fax sent.
    - If mail, send return receipt.

The proposal deadline must allow at least 10 days after the RFP/RFQ was sent to these individuals/firms.

STEP 7 Evaluate and Rate the Proposals

After the proposal submission deadline, the selection committee must rate the proposals received by the deadline, using only the specific selection criteria identified in its RFP/RFQ. This selection process must be thorough, uniform, and well documented through the rating sheets developed in Step 3.

For engineering, architectural, and surveying services, price/cost may not be considered until after the bidder has been chosen.

STEP 8 Select Respondent

The selection committee recommends that the contract be awarded to the respondent with the highest total score (if this method is used) or that has the most qualifications in the proposal evaluation. The recommendation must meet the reasonable, responsive, and responsible tests according to federal procurement procedures:

- Reasonable - Refers to the most suitable, fit and appropriate respondent to accomplish the job in question.
- Responsible - Refers to the respondent that is able to fully perform the requirements of the contract and has the integrity and reliability that will assure good faith performance.
- Responsive - Refers to the respondent that has submitted a bid/proposal that fully conforms to the information requested in the RFP.

The local governing body has the final authority to award contracts and is encouraged to follow the committee's recommendation, but may select another respondent if the minutes of the local governing body meeting include justification for the selection.

The Grant Recipient must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

8.1 Selecting the Respondent - For Administration and other Professional Services Contracts other than Engineering/Architectural/Surveyors Services

Determine the most responsive and responsible respondent whose proposal is most advantageous to the program, with price and other factors considered.

The Grant Recipient may conduct negotiations with those offerors who are deemed responsive and responsible and fall within a competitive price range, based on the Grant Recipient's evaluation of bidders' pricing and technical proposals. After negotiations, these bidders may be given the opportunity to submit a best and final offer.

8.2 Selecting the Respondent - For Engineering/Architectural/Surveying services

Price/cost may **not** be considered until after the Respondent bidder has been chosen.

Determine the most qualified provider of services on the basis of demonstrated competence and qualifications.

Negotiation of price for engineering/architectural**/**surveyor services must take place after selection is completed; proposed cost may not be a selection criteria or consideration. Proposed costs should not be disclosed by Grant Recipient to such bidders until most qualified bidder has been chosen.

Once the most highly qualified respondent is identified, request a price proposal. As necessary, negotiate a fair and reasonable price with that provider. Grant Recipients can use negotiation as an opportunity for better pricing or added value.

If negotiations with the most highly qualified respondent are unsuccessful, formally end negotiations with that provider. Select the next most highly qualified provider and attempt to negotiate a fair and reasonable price. Repeat this process to select and negotiate with providers until a fair and reasonable priced contract can be awarded.

STEP 9 Clear the Respondent for Federal Requirements

The Grant Recipient must check the service provider's status in the System for Award Management (SAM) to verify the provider is eligible to participate in the contract if awarded (not suspended or debarred) (www.SAM.gov). Service providers include Councils of Government also known as COGs; COGs must also receive clearance through the SAM website. Eligibility of all businesses, and eligibility of all principals of the business must be verified through the SAM website prior to any formal action authorizing the award of a contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.).

In some cases (e.g., planning services for planning only grant contracts) the environmental review for the activity must also be cleared prior to executing the services contract. Professional services contracts in support of construction activities generally do not require separate environmental clearance. See Chapter 3 for additional information.

STEP 10 Approve the Selected Respondent and Award Contract
Prepare contract for execution by all parties. (See Sample Contract in Appendix D & E)

Present selection to the local governing body.

Local governing body approves selection of firm/individual.

- The local governing body has the final authority to award contracts but may select another Respondent if the minutes of the local governing body meeting include justification for the selection.

Local governing body approves and executes contract.

- The award and the execution of the contract may/may not occur at the same meeting.

NOTE: TxCDBG funds and matching funds may not be used to pay/reimburse for services dated prior to the date of the TxCDBG grant contract with the exception of eligible pre-award costs/activities approved by TDA through the pre-agreement stratagem. See Chapter 1, Section 1.1.1 Pre-Agreement, regarding the timeframe in which costs are eligible under the pre-agreement stratagem. If a professional services contractor is preselected and a contract is entered into prior to grant award, the contract should include a statement which states that in the event TxCDBG funds are not awarded to [City/County], the contract shall be terminated by [City/County].

STEP 11 Submit Financial Interest Report (A503) within 30 days

Submit the Financial Interest Report (Form A503) to TDA within 30 days of executing the services contract or within 30 days of grant award, whichever occurs last. This requirement applies to all subcontractors as well. [Note: As of September 1, 2017, the updated Financial Interest Report (FIR) (A503) now includes information previously required in the Labor Standards Report (LSR) (Form A706), and the Labor Standards Report (LSR) is no longer a requirement.]

5.2.3 Contract Provisions

A copy of the service provider contract or agreement must be submitted to TDA, which must include the following at a minimum:

- Names of Both Parties - Grant Recipient and firm.
- Effective Dates - Starting and ending dates.
- Scope of Services - Either directly written into the contract or provided as an attachment that is incorporated into the contract.
- Compensation - Including the maximum amount of the contract as either a firm, fixed-price contract, or a not to exceed cost-reimbursable type contract.
- Local Program Liaison - Identification of a local public official as the consultant's primary contact.
- Amendments - Procedures for amending the scope of work and/or compensation section.
- Termination - Explaining circumstances under which the Grant Recipient or other party can cancel the contract (e.g., unsatisfactory performance).
- Resolution of Program Non-compliance – Procedures for determining the party responsible for any disallowed costs as a result of non-compliance with federal, state, or program requirements.
- Access to records – Provides TDA or other government entity with access to any documents of the Grant Recipient pertinent to the TxCDBG award.
- Retention of records for three years - retain all required records for three years after the City/County makes its final payment and all pending matters are closed.
  Note: The Grant Recipient must retain files beyond this period as described in the Program Overview chapter, P.2.3 Recordkeeping/Administration section.
- Equal Opportunity Clause (for contracts over $10,000)
- Section 3 Clause (for contracts over $100,000) - Economic Opportunities for Section 3 Residents and Section 3 Business Concerns.
- On-site inspections - ensure that the complete work conforms with the approved plans and specifications (Engineering contract only).

If the administrator or other professional service provider is procured before the award of grant funding, then it may be necessary to amend the contract at a later time to provide such contract terms as these details become known.

See **Appendix D and E** for Sample Bid and Contract Documents for Administration/Professional Services Contracts.

Any changes to the Administration/Professional Services contract price must be documented in the local files through a contract addendum.

5.3 Micro-Purchases

For purchases of supplies or services that in the aggregate are less than or equal to $2,000, the Grant Recipient may use processes that expedite the transaction and minimize the associated administrative burden.

The purchase orders may be awarded without soliciting any competitive quotations if the Grant Recipient considers the costs to be reasonable and local laws and policies do not prohibit this method of procurement; however, the use of purchase order does not exempt the Grant Recipient from verifying that the contractor is not debarred under the System for Award Management (www.SAM.gov). The Grant Recipient is required to distribute micro-purchases equitably among qualified suppliers.

For example, a purchase of computer paper in the amount of $1,500 can be treated as "a micro-purchase." No competitive quotations would be necessary for the purchase and a price analysis would not be required. However, the Grant Recipient must consider whether to make the purchase from any one of a number of office supply stores. Grant recipients may require that the purchase of computer paper rotate among qualified suppliers if they offer the same rates.

TDA will monitor the use of micro-purchases to ensure that they are not being used to circumvent competitive procurement. Materials and construction should be purchased through small purchase or sealed bids procurement; micro-purchases are generally made for unanticipated costs.

5.4 Construction Services & Materials Contracts

Construction services and materials contracts paid in whole or in part with TxCDBG funds must be procured using either the **Small Purchase** procurement method or the **Sealed Bids** procurement method. Grant Recipients must comply with TxCDBG program requirements in order to be considered eligible for grant (reimbursement) or match injection.

Environmental clearance must be completed before the Grant recipient executes any construction contract or a materials contract.

5.4.1 Small Purchase Procurement

The Small Purchase procurement method uses relatively simple and informal procurement methods to secure equipment, non-professional**/**non-administrative services, supplies or other property that cost, in the aggregate, greater than $2,000 and less than or equal to $50,000 in accordance with state law.

Key concepts for Small Purchase procurement include:

- Aggregate cost – **total cost of the project/job** including TxCDBG funds and all other funding sources;
- Job – a project as defined by the engineering plans and specs;
- Separate purchases – purchases, made separately, of items that in normal purchasing practices would be purchased in one purchase;
- Sequential purchases – purchases, made over a period, of items that in normal purchasing practices would be purchased in one purchase;
- Component purchases – purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

The Local Government Code, Sec. 262.023 (c) and Sec. 252.021 specifically prohibit the use of the small purchase procurement method to make separate, sequential, or component purchases of items or services, with the intent of avoiding the competitive bidding and competitive proposal requirements. For example:

- A water line job should be one purchase, rather than separate purchases of pipe, fire hydrants, valves, and fittings.
- A water storage tank should be bid as one purchase, rather than separate purchases of site preparation, foundation, piping, valves, welding, etc.

Prior to beginning small purchase procedures, the Grant Recipient should get an estimate of the cost of the construction from the engineer. If the estimated cost is greater than $50,000, small purchase procurement would not be considered appropriate and is not an allowable cost.

5.4.2 Step by Step Small Purchase Procedures

STEP 1 Comply with Davis-Bacon Act requirements
The Grant Recipient must obtain prevailing wage rates for the local area as required by the Davis-Bacon and Related Acts, and incorporate those wage rates into the procurement for construction. See **Chapter 7: Davis-Bacon Labor Standards** for specific information on the requirements of the Davis-Bacon Act.

> Wage Rates are not required for construction contracts of $2,000 or less.

STEP 2 Contact three vendors for quotes or estimates
The Grant Recipient must contact at least three firms by phone, in person, or in writing including email, to obtain cost estimates for the goods or services. The responses (including responses that indicate no interest or quotes provided) must be recorded on the *Small Purchase Procurement Record* **(Form A504)**.

STEP 3 Promote participation of MBEs and Section 3 Businesses
The Grant Recipient should actively take steps to encourage proposals from small, minority, and female-owned businesses (MBEs), as well as Section 3 business concerns.

STEP 4 Clear the Contractor
The Grant Recipient must verify the contractor's eligibility through the System for Award Management (www.SAM.gov). See **Chapter 7 Davis Bacon Labor Standards** for details. Eligibility of all contractors must be verified through the SAM website prior to any formal action authorizing the award of the contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.).

STEP 5 Award the Contract
The Grant Recipient must award the contract to the lowest appropriate bidder. If the contract is awarded to a bidder that does not propose the lowest price, the Grant Recipient must document the decision in compliance with Texas Local Government Code Section 252.043 (municipalities) or Section 262.027 (counties), as applicable.

STEP 6 Execute the Contract
The Grant Recipient must submit the *Small Purchase Procurement Record* **(Form A504)** and *Financial Interest Report* **(Form A503)** to TDA within 30 days of executing the contract.

5.4.3 Sealed Bid Procurement

Procurements of equipment, non-professional services, non-administrative services, materials and construction contracts whose total cost is **more than $50,000** must formally advertise for sealed bids in a newspaper of general circulation and hold a public bid opening. Procurements by sealed bids are usually for construction and price is a major factor in awarding these contracts.

Sealed bids are publicly solicited and a firm, fixed-price contract (lump sum or unit price) is awarded to the responsible respondent whose bid, conforming with all the material terms/conditions of the invitation for bids, is lowest and best in price (See **Appendix F and Appendix G** for sample bid and contract documents for construction and material contracts, respectively).

5.4.4 Step by Step Sealed Bid Procedures

STEP 1 Prepare Bid Package
The Grant Recipient must prepare a bid package detailing the specific goods or services to be provided by the contractor. This package should provide sufficient technical information for potential

bidders to submit a competitive bid. If a construction contract includes both a TxCDBG project and a separate project (not included in the Performance Statement (Exhibit A of the contract) or claimed as match) to be paid by the Grant Recipient or another funding source, the construction contract should clearly indicate the work and the costs associated with each project.

STEP 2 Comply with Davis-Bacon Act requirements
The Grant Recipient must obtain prevailing wage rates for the local area as required by the Davis-Bacon and Related Acts and incorporate those wage rates into the construction procurement. See **Chapter 7: Davis-Bacon Labor Standards** for specific information on these requirements.

STEP 3 Advertise for Bids
The procedure for advertising for bids is as follows:

- Publish once a week for two consecutive weeks prior to bid opening;
- Ensure that the first publication date is at least fourteen (14) days prior to the bid opening date;
- Ensure that the two published notices are at least seven (7) days apart;
- Describe work or item to be purchased or state where specifications can be obtained;
- Include time and place for receiving and opening bids (count fifteen (15) calendar days, not including the print date, from the first advertisement date);
- Include name and position of local official or employee to whom bids are sent;
- Indicate whether bidder should use lump-sum or unit pricing;
- Indicate method of payment by Grant Recipient;
- Indicate type(s) of bond(s) required by the bidder;
- Indicate whether contract will be awarded within thirty (30) or sixty (60) days; and
- Identify TxCDBG contract number.

If an addendum to the bid package is necessary, it must be distributed to each potential bidder. The distribution of an addendum shall be verified either by statements of receipt or registered/certified mail receipts, which shall be included in the public works construction file. The addendum shall allow adequate time for consideration in bid preparation (usually at least one week). If adequate time is not available, the bid opening date must be extended and the Grant Recipient must republish the invitation for bids containing the place, time, and date for the new bid opening. Note that any change to the original bid opening date will require republication of the invitation for bids at least once in a locally published newspaper. The republished notice will include the place, time and date for the new bid opening and must be published at least seven days prior to the new bid opening date.

TDA notes that the Dodge Report, *Texas Contractor*, the Minority Business Development Center, and regional newspapers are resources for advertising bids. See **Chapter 10: Civil Rights Requirements** for further information on Minority Business Centers.

Retain a tear sheet/full-page advertisement/photo copy with publisher's identification and date/publisher's affidavit for proof of advertising for monitoring purposes.

STEP 4 Promote Participation of MBEs and Section 3 Business concerns.
The Grant Recipient should actively take steps to encourage proposals from small, minority, and female-owned businesses (MBEs), as well as Section 3 business concerns. Grant Recipients should email a copy of the solicitation advertisement to MWBE@texasagriculture.gov so that SBE/MBE/WBE's can also be notified by TDA of such opportunities.

STEP 5 Hold the Bid Opening

- Note the date and time of receipt of each bid on the bid envelope, which must be kept with the original bid even following the bid opening;
- Open and read aloud each bid;

- Record the base bid, along with any alternates, on a bid spreadsheet;
- Announce the apparent low bidder and all bidders with complete packets.

The Grant Recipient or its designee (usually the engineer) should carefully review the bids submitted and the low bidder's statement of qualifications and references. Awarding the contract on the same date as the bid opening does not generally allow sufficient time to research and review the documents and ensure that the low bidder has provided all the required forms, bonds, certifications, as well as qualifications and references.

- **Municipalities** are required by state law to award the contract to the lowest responsible bidder based on best value considerations to the municipality. The municipality may reject any and all bids. (Texas Local Government Code Section 252.043(f))
- **Counties** are required by state law to award the contract to the responsible bidder who submits the lowest and best bid or must reject all bids and publish a new notice. (Texas Local Government Code, Section 262.027(a))

Overbids
If the bids received exceed the designated budget, the Grant Recipient has the following options:
- Reject all bids and re-bid the project;
- Accept the deductive alternates in the bid packet (if applicable);
- Delete bid items or quantities before contract award, if all bidders agree in writing to changes;
- Accept the low bid and provide additional local funds.

If all bids received exceed the amount of the construction budget, **THE GRANT RECIPIENT MAY NOT NEGOTIATE THE CONTRACT PRICE SOLELY WITH THE LOW BIDDER**. To allow one bidder to negotiate the contract price is not fair to the other contractors who submit bids. **NEGOTIATION OF THE CONTRACT PRICE SOLELY WITH THE LOW BIDDER WILL RESULT IN THE DISALLOWANCE OF TxCDBG FUNDS FOR CONSTRUCTION COSTS**.

Recordkeeping for the Bid Opening
Minutes of the bid opening, along with a tabulation of the bids, must be placed in the contract file. After contract award, the opened bids must be kept on file and available for inspection by anyone desiring to see them. However, any trade secrets and/or confidential information in the proposals are subject to the restrictions of Section 252.049(b) of the Texas Local Government Code and Chapter 552 of the Texas Government Code.

STEP 6 Clear the Contractor
The Grant Recipient must verify the construction contractor's eligibility through the System for Award Management. See **Chapter 5 Procurement** - Introduction and **Chapter 7 Davis Bacon Labor Standards** for details. Eligibility of all contractors must be verified through the SAM website prior to any formal action authorizing the award of the contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.).

STEP 7 Award the Contract
The Grant Recipient must award the contract within the number of days indicated in the bid advertisement.

STEP 8 Execute the Contract
The Grant Recipient must submit the Bid Tabulation and the *Financial Interest Report* (FIR) **(Form A503)** to TDA within 30 days of executing the contract. [Note: As of September 1, 2017, the updated Financial Interest Report (FIR) (A503) now includes information previously required in the Labor

Standards Report (LSR) (Form A706), and the Labor Standards Report (LSR) is no longer a requirement.]

Third Party Procurement Services

A Grant Recipient may choose to purchase certain goods and services through a third party, such as the Texas Association of School Boards "Buy Board" or the Houston-Galveston Area Council "HGACBuy". All procurement requirements apply to purchases through these entities; however many steps may be conducted by the third party rather than the Grant Recipient. The Grant Recipient must retain a copy in the contract files of the cooperative agreement with the third party certifying the type of procurement process used.

5.4.5 Required Contract Provisions

In all contracts, Grant Recipients and contractors, including engineering, must specifically refer to the project or provide detailed information regarding the work being funded. In addition to other Federal and State provisions required, all contracts must address, if applicable, the following provisions (See also **Appendix B** for required contract provisions):

- Debarment and Suspension (Executive orders 12549 and 12689) – A contract award must not be made to parties listed on the government wide exclusions list in the System for Award Management (SAM).
- For contracts greater than $10,000, provisions for termination by the Grant Recipient, including the manner by which termination shall be effected and the basis for settlement.
- Access to Records (formerly 24 CFR 85.36 (i)(10))
- Retainage of Records (formerly 24 CFR 85.36(i)(11))

For contracts greater than **$50,000**, provisions for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

- For contracts procuring administration or engineering before an application for TxCDBG funding is made, option contract language should also be included.
- For those contracts associated with construction including administration and/or engineering (see also below under construction), the inclusion of the equal opportunity clause provided under 41 CFR 60-1.4(b).

In addition to the preceding, Construction Contracts must also address the following:

- For construction contracts greater than $2,000, compliance with the Davis-Bacon Act (40 U.S.C. 3141 *et seq*.) as supplemented by Department of Labor regulations (29 CFR part 5)(satisfied by inserting HUD 4010 in construction contract; See **Appendix B**).
- For construction contracts greater than $2,000, compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145) as supplemented in Department of Labor regulations (29 CFR part 3) (satisfied by inserting HUD 4010 in construction contract; See **Appendix B**).
- *For construction contracts greater than $10,000 including administration and/or engineering contracts associated with such construction, the inclusion of the Equal Opportunity clause provided under 41 CFR 60-1.4(b).
- For construction contracts greater than or equal to $100,000, compliance with the Byrd Anti-Lobbying Amendment (31 U.S. C. 1352) (satisfied by certification regarding lobbying signed by contractor bidder and by inclusion of language in construction contract)

- For construction contracts greater than $100,000, compliance with Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708), including work week requirements and safety conditions for workers (satisfied by inserting HUD 4010 in construction contract; See **Appendix B**).
- Where federal funding exceeds $200,000 and the contract or subcontract exceeds $100,000, include Section 3 clause. (24 CFR § 135.38 and 24 CFR § 135.3)
- For contracts greater than $150,000, the Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended.

5.4.6 Workers' Compensation Requirements

Texas Labor Code §406.096 requires a governmental entity that enters into a building or construction contract to obtain written certification that the contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the public project. Subcontractors must also provide the governmental entity with proof of coverage. Additionally, the governmental entity must include in bid specifications and contracts specific language and provisions found in 28 TAC §110.110(c)(7). Grant Recipients are responsible for compliance with all applicable statutory policies. The Texas Department of Insurance – Division of Workers' Compensation regulates and enforces workers' compensation requirements and may be contacted at 800-372-7713 for more information.

5.4.7 Bonding Information

Pursuant to Government Code Chapter 2253, for construction or facility improvement contracts or subcontracts, the minimum bonding requirements for the Grant Recipient which includes a bid guarantee, a performance bond, and a payment bond (if applicable) are as follows:

- A bid guarantee from each bidder equivalent to five percent of the bid price for contracts that is greater than $100,000. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified cashier's check, U.S. Savings bond or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

- A performance bond on the part of the contractor for 100 percent of the contract price for contracts that is greater than $100,000. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

  The only forms of surety acceptable as a performance bond are:
  - Cashier's Check
  - Certified Check
  - United States Treasury Bond
  - Certificate of Deposit
  - Irrevocable Letter of Credit issued by a financial institution subject to the laws of Texas
  - Surety or Blanket Bond from a company chartered or authorized to do business in Texas

- A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract. Required payment bond(s) must be filed within 30 days from the date of the Notice of Award.

- Municipalities: If the contract is in excess of $50,000, a payment bond is required. Government Code 2253.021(a)(2)(B)

- Counties: If the contract is in excess of $25,000, a payment bond is required. Government Code 2253.021 (a)(2)(A)

If the Grant Recipient has adopted an existing bonding policy and requirements that differs from that described above, the Grant Recipient may submit documentation of the existing bonding policy and requirements to TDA with a written request that TDA approve in writing the allowance of utilizing the existing bonding policy and requirements.

If TDA does not determine that its interest is adequately protected and does not provide written approval to the Grant Recipient, the Grant Recipient must adhere to the bonding policy described herein above, pursuant to 2 CFR 200.325 and Government Code Chapter 2253. All Grant Recipients must ensure that they are meeting all applicable federal, state and local procurement requirements.

5.4.8 Changes to an Executed Construction Contract

When changes to an executed construction or materials contract are necessary due to decrease or increase in the **quantity of work to be performed or of materials, equipment or supplies to be furnished,** the Grant Recipient must submit a *Construction Change Order Form* **(Form A505)** to TDA. TDA must approve all change orders to ensure costs are eligible and procured according to TxCDBG requirements. TDA will provide written notification to the Grant Recipient upon review.

To request approval of a proposed Change Order, the Grant Recipient must submit:

- A *Construction Contract Change Order* **(Form A505**), including required chief local official's signature indicating Grant Recipient concurs with the proposed changes. TDA also recommends that the Grant Recipient obtain the signature of the Project's Engineer along with any supporting documentation before submitting the Change Order to TDA for its approval. Submit Change Orders to: CDBGReporting@TexasAgriculture.gov .
- **Upon approval by TDA of the Change Order, the Grant Recipient then obtains the signature of the construction contractor.**
- If a Change Order involves a decrease or an increase of $50,000 or less, the Grant Recipient must receive appropriate approval by the governing body in addition to *Construction Change Order* **(Form A505)** (See Local Govt. C., §252.048 (city) and §262.031(county). **In such cases, signature by the mayor/county judge on the Construction Change Order A505 represents evidence that such approval from the governing body has been obtained by the City/County.**
- Grant Recipient must have sufficient grant or local funds available to meet any increased costs.
- Changes requested that are not directly related to the construction project and/or requesting additional supplies and or activities solely due to unutilized grant funds will not be approved.
- Changes must be appropriate and required for the specific CDBG construction project.
- If a change order includes new items which are not appurtenances, the Grant Recipient must demonstrate competitive pricing. Approved costs for these items will be eligible up to the amount of the lowest quote received.

Municipalities:

- Change Orders may not increase the original contract price by more than 25% (Tex. Local Gov't Code 252.048(d)).
- Decreases in the original contract price of more than 25% require written contractor consent. (Tex. Local Gov't Code 252.048(d)).

Counties:

- The original contract may not be increased by more than 25% unless required by state or federal law, rule or regulation after the contract is made. (Tex. Local Gov't Code 262.031(b).
- Grant Recipient must provide written justification, including citation to the appropriate source, for review.
- Decreases to the original contract of more than 18% must have the contractor's written consent. (Tex. Local Gov't Code 262.031(b)).

NOTE: Change orders for an increase of more than 25% will be rejected. Grant Recipient must rebid project in the event of an increase of 25% or more. The State of Texas considers a change in the construction contract price of greater than 25% to be non-competitive, as other potential bidders did not have the opportunity to bid on the true scope of the project during the procurement process.

TDA will not reimburse the Grant Recipient or credit the Grant Recipient's match commitment for work listed on a Change Order unless the Change Order has been submitted and approved. Requests for Payment for unapproved change orders will be put on hold at TDA's discretion. If the Change Order is executed without TDA approval, the Grant Recipient is obligated to pay for any changes that TDA does not approve. For these reasons, TDA recommends that the Grant Recipient submit the Change Order **prior** to fully executing the Change Order.

Grant Recipients must submit all Change Orders on a contract, whether or not the work will be paid with grant or matching funds, so that TDA's TxCDBG staff has a complete record of the construction contract. Any difference in price from all prime contractor and subcontractor's Financial Interest Reports (A503) to the *Certificate of Construction Completion* **(Form A709)** must be accounted for by a Change Order.

Project changes reflected in a Change Order may also require an amendment or modification to the TxCDBG contract Performance Statement or Budget (Exhibit A or B to the TxCDBG contract). These items should be submitted together as described in **Chapter 11, Contract Amendments**. Prior to executing any Change Order that makes substantial changes to the project and is likely to change the activities, location, or beneficiaries as described in the Performance Statement, the Grant Recipient should contact TDA. **TDA will approve a Change Order only when the revised project agrees with the contract Performance Statement.**

5.5 Non-Competitive Proposal Procurement

Non-competitive proposal procurement (often referred to as "sole source") may be used when the award of a contract is not feasible under small purchase, sealed bid or competitive proposal procedures. This may be due to single source availability or inadequate competition, determined after solicitation of a number of sources. Non-competitive proposal procurement is most often used for emergency situations and disaster projects.

TDA authorizes non-competitive proposals in accordance with federal law. However, **all Grant Recipients must receive prior approval from TDA before using non-competitive proposal procurement.** All requests for non-competitive procurement must be submitted in writing by the Grant Recipient.

TDA will consider the use of non-competitive proposal procurement under the following situations (See 2 CFR 200.320(f)):

- Single Source: this method allows procurement through solicitation of a proposal from only one source when the item or service is only available from a single source;

- Public urgency/emergency situations: State laws generally allow noncompetitive negotiations in such cases where the urgency for carrying out the project will not permit delays caused by competitive advertising/solicitation. Grant Recipients requesting such exemptions are those typically funded under the Disaster Relief/Urgent Need Fund;
- After solicitation of a number of sources, competition is determined inadequate. The condition of bids being over budget alone does not create a qualifying condition (inadequate competition) or justification for non-competitive procurement. Grant Recipients must first submit evidence of all public advertisement(s)/solicitations before TDA will consider approving noncompetitive negotiation.
- The Grant Recipient must verify the contractor's eligibility through the System for Award Management (www.SAM.gov). Eligibility of all contractors must be verified through the SAM website prior to any formal action authorizing the award of the contract to the contractor (examples of formal action include but are not limited to, authorizing resolution, authorizing ordinance, Council approval of award, contract execution, etc.) Council of Governments (COGs) must also be cleared through SAM.

5.6 Recordkeeping Procedures

5.6.0 Records and the Financial Interest Report (FIR)

The Grant Recipient must maintain records that are detailed enough to show the history of each procurement. At a minimum, records must demonstrate how the Grant Recipient:

- Executed price sampling for small purchases, or established [published] RFP solicitation;
- Selected the method of procurement and the type of contract to be used;
- Determined the bids or proposals to accept and the ones to reject; and
- Computed the basis for the contract cost or price.

The Grant Recipient must submit a ***Financial Interest Report*** **(FIR) (Form A503)** for all businesses and other entities contracted to provide products or services in whole or in part for a TxCDBG project, including those that will be wholly or partially paid with other funding sources. This report:

- Describes the work to be performed by the business or other entity;
- Verifies that all required clearances have been completed prior to executing a contract with the business or other entity;
- Discloses the financial interest of the business or other entity;
- Provides Minority Business Enterprise information for the business owner (not required for Councils of Government and other non-business entities);
- Identifies Section 3 business concerns and anticipated Section 3 employment opportunities; and
- Provides Davis-Bacon wage decision numbers and other key contract dates.

Upon funding, the Grant Recipient should submit all Financial Interest Reports (FIRs) to:

1. its TDA contract specialist; and
2. Labors@TexasAgriculture.gov with the exception of FIRs for administration, engineering, and/or other professional services.

All contracts over $2,000 must be reported on the *Financial Interest Report* **(Form A503)**. If the contract price is modified after the contract is reported, Form A503 does NOT need to be resubmitted.

Financial interests of $2,000 or less (Micro-purchases by definition) should be disclosed through invoices for grant/match funding – no separate disclosure required.

5.6.1 Micro-purchases

The Grant Recipient must maintain copies of all purchase orders and, if possible, show evidence of distributing purchases equitably among suppliers.

5.6.2 Competitive Proposal - Professional Services/Administration Services

The Grant Recipient must establish and maintain separate files for records relating to the procurement of a management consultant, engineer or other service provider to detail the procurement process undertaken. The files for professional services or administration services procurement should contain the following information:

- Proof of advertisement (tear sheet/full-page advertisement/photo copy with publisher's identification and date/publisher's affidavit)
- Proof that 5 or more Firms/Individuals were contacted for proposals
- A complete RFP packet: Cover letter, request for proposal, rating sheet (if utilized) and a sample contract
- Proof that all proposals were received by the Grant Recipient, with note or stamped date/time received
- Verification that the Firm and Principals of Firm are not on the SAM.gov debarred list (printout of SAM.gov page with date)
- Meeting Minutes documenting the award
- An Executed Contract
- If planning project, see Ch. 3 for environmental exemption documentation

5.6.3 Construction & Material Purchases

The Grant Recipient must establish and maintain separate files for records relating to the procurement of a construction contractor or materials supplier to detail the procurement process undertaken. The files for construction and material purchases procurement should contain:

- Bid Document(s) with Labor Standards Provisions included;
- Contract Document(s) with Labor Standards Provisions included;
- Actual Advertisements for Bids (either full page or with publisher's affidavits) or evidence of quotes/estimates received (for small purchase procurement);
- Bids Received (or quotes received);
- Verification that the Firm and Principals of Firm are not on the SAM.gov debarred list (printout of SAM.gov page with date)
- If contract > $100,000, signed Certificate Regarding Lobbying
- Bid Tabulation Sheet(s) (if applicable);and
- A copy of council/commissioner court action awarding the contract

5.7 Federal & State Laws Governing Procurement of Services, Supplies and Non-Real Property

The laws and regulations described in this section apply to the procurement of services, supplies or non-real property in TxCDBG-funded projects.

5.7.1 State Laws & Regulations

Note: The full text of state statutes may be found online at: http://www.legis.state.tx.us/.

Texas Local Government Code - Chapter 252 (Municipalities) and Chapter 262 (Counties)

Chapter 252 Municipal Grant Recipients Construction Bidding Procedures
Municipal Grant Recipients are generally required to conduct competitive sealed bid procurement for any and all contracts over $50,000.

Municipalities are required by state law to advertise their invitation for bids in a newspaper published in the municipality at least once a week for two consecutive weeks. The date of the first publication must be before the 14th day before the date set to publicly open the bids. If no newspaper is published in the municipality, the notice must be posted at city hall for fourteen days prior to the date of the bid opening. (Texas Local Government Code Section 252.041(a)).

Chapter 262 County Grant Recipients Construction Bidding Procedures
County Grant Recipients are generally required to conduct competitive sealed bid procurement for any and all contracts over $50,000.

Counties are required by state law to publish a notice in a newspaper of general circulation in the county at least once a week for two consecutive weeks, with the first day of publication occurring at least fourteen days before the date of the bid opening. If there is no newspaper of general circulation in the county, the notice must be posted in a prominent place in the courthouse for fourteen days prior to the date of the bid opening. (Texas Local Government Code Section 262.025(a)).

Texas Government Code -- Chapter 2253 Public Work Performance and Payment Bonds Covers bonding requirements.

Texas Government Code, Chapter 2254. This chapter is also known as the Professional Service Procurement Act. Chapter 2254 governs the local government procurement of professional services. It prohibits the procurement of architects, engineers, or surveyors based on bid price and requires government entities to first select the most highly qualified provider based on demonstrated competence and qualifications, and then attempt to negotiate with that provider a contract at a fair and reasonable price.

Texas Local Government Code, Chapter 171. This chapter requires local government officials to disclose conflicts of interest and sets forth rules that require officials to abstain where they are in a position to vote or make a decision on any matter involving a business entity or real property for which they have an interest in.

Texas Engineering Practice Act, Chapter 1001, Texas Occupations Code. This Act states that a registered professional engineer must be hired to prepare plans, specifications, and estimates for any public works activities in accordance with this Act. The engineer must directly supervise the project in order to ensure the public health, safety, and welfare; however, this Act does not apply to road maintenance or betterment work undertaken by Counties.

Procurement Standards (Uniform Grant Management Standards (UGMS) - Texas Comptroller of Public Accounts

Conflict of Interest - Nepotism and conflict of interest regulations can be found in the Texas Government Code Chapter 573, Texas Local Government Code Chapter 171, and UGMS.

5.7.2 Federal Laws & Regulations

24 CFR 570
Portions of 2 CFR 200, Uniform Administrative Requirements, Cost principles, and Audit Requirements for Federal Awards, as further specified by program regulations in 24 CFR Part 570
HUD Conflict of Interest regulations at 24 CFR 570.489(g) and (h)