

TDA Pre-Application Procurement Q&A

General Policy:

1. The language in 2 CFR 200 appears to be unchanged from previous circular language as it relates to procurement. It has simply moved locations. Has TDA received information from HUD that indicates that the interpretation of the language will be changing in the near future?

The language which states “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” was not included in the former administrative requirements for grants and cooperative agreements to state and local governments (24 CFR Part 85). TDA has been advised that other federal agencies treat grant applications as “statements of work” and consider grant writers and others that assist in the preparation of the grantee’s application to be “employees, officers, and/or agents of the grantee” for purposes of determining whether a conflict of interest exists. Although TDA has not received specific instruction from HUD on this matter, we recommend that communities complete procurement actions based on that interpretation in order to avoid a situation where individuals or firms that prepared or assisted in the preparation of an application are not eligible to be selected for grant implementation contracts consequently resulting in disallowed costs.

2. New procurement guidelines for engineering services appear to state that, if an engineer prepares Table 2 of a TxCDBG application, then that engineer cannot submit an RFQ for the same project. Is the preparation of Table 2 for the TxCDBG application included in the prohibition that "contractors that develop or draft specifications, requirements, statements of work" may not submit an RFQ for that project.

At this time, an engineer may prepare Table 2 of a TxCDBG application and then even respond to the RFQ associated with that application. However, if the engineer does so, he/she is taking the risk that such costs will be disallowed by HUD at a future time and date. As discussed previously, some federal agencies have made a determination that if a firm assists a grantee with its application for grant funding, then that firm may not participate in, or benefit from, the procurement contract made as a result of the associated grant award. The reasoning behind such interpretation is that the application preparer is privy to information on budgets, project complexities, and alternatives that may not be available to other respondents, and it gives the appearance that the vendor will receive preference regardless of whether this is true or not.

At this time, HUD has not issued written guidance adopting such an interpretation. However, if HUD makes such a determination, it will be in effect immediately. Thus, in an overabundance of caution, TDA recommends that engineers are procured before Table 2 is prepared for an application for TxCDBG funding.

For the remainder of this Q&A, it will be presumed that communities have elected to follow the recommendation of procuring both administration and engineering services before applying for federal grant funding.

3. TCF/Downtown Revitalization does not finance engineering costs; applicants pay for A/E services with the 10% mandatory match. In such instances, if an engineer prepares Table 2, would this be a conflict of interest?

Because match funds must meet the same standards as grant funds with limited exceptions, engineers that are submitting proposals for TCF/Downtown Revitalization would be under the same federal rules. In Chapter 5 of the TxCDBG Implementation Manual, it states, "All professional services and administration services related to TxCDBG projects must be procured competitively, regardless of the source of funds that will pay for the professional services contracts."

Even if the funds used are not intended to be credited towards the Grant Recipient's match commitment, competitive procurement requirements would still apply. Therefore, federal conflict of interest policies would also apply.

4. Retainer agreements. 2 CFR 200.319(a)(4) *Competition* lists the following as a situation considered to be restrictive of competition "(4) Noncompetitive contracts to consultants that are on retainer contracts."

Many engineers are on retainer contracts with cities and counties, and these agreements do not specifically exclude CDBG assistance. Would an engineer or engineering firm under a retainer contract with an applicant be considered to be in a conflict of interest if that engineer submits an RFQ for a project assisted by CDBG funds?

An engineer that is under a retainer contract may compete for a TxCDBG just as long as there has been competitive procurement for such project. Under 2 CFR 200.319(a)(4), it would be considered a conflict of interest if the engineer that was on retainer was non-competitively procured (sole source), meaning that the retained engineer was the only engineer being considered for the TxCDBG project.

What the Grant Recipient may not do is simply assign engineering tasks for the CDBG project to an engineering firm with whom they have a retainer agreement. If the Grant Recipient did this, it would be considered a non-competitive contract because the Grant Recipient did not competitively procure the engineer (i.e. select the best qualified from a pool of interested firms) for this federal project.

5. Are communities required to procure for application preparation services, either as a separate contract or included with implementation services?

No. There is no current requirement that a community procures for application services. Again, the purpose of recommending procurement of application services and implementation services is to prevent any potential noncompliance issues with 2 CFR 200.319(a) requirements.

TDA compliance is concerned with the service contracts for grant implementation (grant administration services or design and construction engineering services) and whether an individual or firm selected had an unfair advantage over competitors by virtue of previously preparing or assisting with the preparation of the application for the grant. TDA will not review a contract or a procurement process related **only** to application preparation services unless such procurement also includes grant implementation services. Please contact your local legal counsel to ensure that all contracts comply with state and local requirements regardless of whether they will be reviewed by TDA.

6. Does a conflict of interest still exist if the service providers do not charge for assistance with application preparation?

Yes. Even if there is no charge for the application preparation by the service provider, the preparer is still privy to information on budgets, project complexities, and alternatives that may not be available to other respondents. Therefore – *if preparing an application is considered drafting or developing a statement of work under 2 CFR 200.319(a)* – the professional service provider would be prohibited from submitting a proposal to implement that same grant if awarded.

7. Is procurement at this time limited to only the current application cycle or can procurement include a service period beyond the current application cycle?

TDA does not consider it appropriate to procure services beyond the current two year application cycle.

8. If a community has already begun preparing an application and has not yet procured service providers for administration and engineering services for grant implementation, what is the agency's guidance?

TDA recommends completing the procurement process for grant services as soon as practicable if an individual or firm that assists a community with preparing its grant application intends to respond to the solicitation for grant implementation services.

At this time, procurement of grant services after the application is not a violation. TDA has not traditionally considered the application to be a “statement of work” that creates a conflict of interest, and any procurement actions completed now will be reviewed for compliance based on this interpretation. TDA anticipates clarifying guidance on the 2 CFR 200 language, at which time all procurement actions will be required to follow the new guidance immediately.

Cost Eligibility:

9. In cases where a community is procuring for application development (pre-application) and grant implementation (post-award), can a contract be signed prior to the date of the application?

Yes. There are two basic options:

- 1) Execute a contract prior to preparing the application for grant funds, including a contingency clause statement such as the one below. CDBG funds cannot be used to pay for services dated prior to the grant funding date. In this case, no costs associated with grant implementation should be incurred prior to the grant contract start date or pre-agreement date.
 - a. As contract terms become known upon grant award, the contract between community and service provider may need to be amended.
 - b. The contract needs to contain an option clause that states in the event TxCDBG funds are not awarded to community, the contract shall be terminated by community. For example: "Payment of 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."
- 2) Complete the formal selection and award process for both pre-application and post-award services prior to preparing the application for grant funds, but delay executing a service contract for grant implementation until funding is known to be available, provided the community has legal authority to delay executing a contract after contract selection award. Please discuss this option with your local legal counsel so that you understand the full legal ramifications of this choice.

Note that the environmental exemption for administrative and engineering services must be certified PRIOR to the contract execution.

10. If a community procures a service provider to prepare the application, will the costs be eligible for CDBG reimbursement or matching funds?

No. Costs related to preparation of an application are ineligible for CDBG grant reimbursement or matching funds. If the community requests pre-agreement cost approval, the procured service providers may begin work and incur costs for implementation of the project once the application submittal phase is completed.

11. If a community procures prior to the application for only services related to grant implementation, will costs for the advertisements be eligible for CDBG reimbursement or matching funds?

No. Costs incurred prior to the grant contract start date or pre-agreement date are not eligible for grant or match funding.

Combining Advertisements, RFP/RFQ, and contracts

12. Does the procurement need to be project specific or is program specific okay?

The advertisement and RFP/RFQ should be as specific as possible. If the project scope is unknown, at the very minimum solicitations for services should provide a description, whenever practical, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards, and identify the funding cycle (fund category and program year) for which the procurement of grant implementation services was intended. The procurement records must point to a specific award or project. For this reason, the more detail about the project that can be included in the solicitation, the better. Eventually, compliance monitors will need to line up the procurement records with the project that was funded.

As a best practice, TDA recommends including at least broad project parameters or potential project types in the RFP/RFQ, based on the ongoing or informal program planning and development of community development objectives conducted by the community.

13. Can the newspaper advertisements and other solicitations for an RFP/RFQ cover several TxCDBG programs – for example Texas Capital Fund (TCF), Disaster Relief Program (DRP), Community Enhancement Fund (CEF), and Community Development (CD)?

Yes. There is no prohibition on combining the required advertisements for several RFP/RFQ processes.

14. Can the RFP/RFQ packet include several TxCDBG programs – for example TCF, DRP, CEF, and CD?

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.

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 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.

15. If a Community has currently been awarded CDBG grant funding but is still interested in applying for additional funding from other CDBG funds, can the Community include all programs (current award(s) and future) in its RFP/RFQ?

Again, the best practice is to treat each grant (whether awarded or not) as a separate procurement, requiring separate RFP/RFQ's, scoring, and award, even if the advertisements are combined.

16. Can the RFP/RFQ and service provider contracts include both application preparation services and grant implementation services?

Yes. The costs associated with application services must be clearly identified separately from grant implementation costs. Costs for preparation of applications are not eligible costs, and therefore not reimbursable, under the CDBG program. If application services are addressed in the contract but there are no associated costs, include those services in the fee schedule as \$0.

Separate contracts for application services and implementation services may also be made.

17. Can grant implementation services for multiple grant projects be included in one contract?

No. Service contracts must only include one TxCDBG grant.

18. Does TDA have a sample notice/advertisement that combines Administration and Engineering into a single publication? If so, when will this be available?

Yes. Sample publication notices have been included in the latest edition of the TxCDBG Implementation Manual, Appendix D and E, in addition to the standard language that has been available for many years. Communities should add the relevant RFP/RFQ description(s) to the sample as appropriate.

Pricing

19. If competing for a grant implementation contract in anticipation of an award for a project that has not yet been fully defined, how can a firm propose a price for their contract? And how can the community rate a firm based on price, when the negotiated cost for the services cannot be accurately estimated?

Historical information regarding an applicant's projects and general TxCDBG thresholds provide some guidance in proposing a price. The maximum grant amount for each application round can be found on the TDA website, and grant-funded administration costs may not exceed 16% of the construction costs under that grant.

Some service providers propose the same flat rate for all contracts, regardless of the specific project. Other firms may choose to propose costs specific to certain activities that may be included or removed from the final contract once the project is determined – for example, acquisition of easements or housing rehabilitation intake services could be added to the contract later based on prices in the original proposal.

As contract terms become known upon grant award, this contract may need to be amended. For example, service dates and deadlines may be adjusted and the specific description and compliance requirements associated with the project as funded may be added or modified from the original contract.

20. Procurement for engineering without knowing what engineering services will be required, because there will not be a known project yet until the application phase, will prove to be a bit difficult for both parties to negotiate a "fair & reasonable" contract price.

Similar to administrative services above, the historical information regarding an applicant's projects and general TxCDBG thresholds provide some guidance. The maximum grant amount for each application round can be found on the TDA website, and grant-funded engineering costs may not exceed 25% of the construction costs under that grant.

The budget justification portion (Table 2) of the application must be completed and signed by a registered engineer or architect. Before soliciting for these preliminary engineering services, a community should complete the planning process and identify the general and/or specific project activities under which services may be required.

TDA has been assured that communities engage in ongoing but informal planning and are aware of needs that may be potential grant projects in advance of the actual application process. To the extent that these needs are communicated in the RFQ process, the engineering firms will be better able to negotiate a fair and reasonable price. For example, if a community knows that aged water lines are a priority but the exact locations are not yet determined, this information may be included in the RFQ. Firms may also propose costs specific to certain activities that may be included or removed from the final contract once the project is determined.

Finally, the community may award the contract for engineering services (based on the firm's qualifications), contingent upon a final negotiation of price. The community and service providers would then proceed with the application preparation, and once the project details are known, the final price may be established, based generally on the original proposal, and the contract executed.

Regarding COGS/Interlocal Agreements

21. What is the applicability of TDA's recommendation regarding pre-application procurement to interlocal agreements?

The Interlocal Cooperation Act (Chapter 791 of the Texas Government Code) authorizes governmental entities to enter into agreements to provide services, which does not require competitive procurement.

The recommendation to procure grant administration services prior to preparing an application applies to the competitive procurement process. The inter-local agreements traditionally used by members of Councils of Government fall under the category of subrecipient agreements (ex. the COG is a subrecipient of the City designated by the agreement to provide administrative services). As such, the requirements that apply to competitive procurement of services are not applicable.

As a subrecipient, the COG should enter into a written agreement that meets all of the requirements of 24 CFR 570.503. TDA recommends that communities complete the selection of administrative service providers (through either procurement or subrecipient inter-local agreement) prior to preparing the application if the administrative service provider or subrecipient will also provide assistance with preparing the application. The community is responsible for monitoring the subrecipient for compliance should the grant be awarded.

A COG may also participate in the RFP process, subject to the same competitive procurement and conflict of interest provisions as other administrative services firms.

Additional References:

Q&A TxCDBG Recommendation of Procuring Administration Engineering Services Prior to Preparing a TxCDBG Application - Slides to Presentation:

<https://www.texasagriculture.gov/Portals/0/Publications/RED/CDBG/Procurement%20Prior%20to%20App%20Final.pdf>