CHAPTER 5
PROCUREMENT PROCEDURES

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CHAPTER 5
PROCUREMENT PROCEDURES

5.0 Introduction

Procurement is the process through which an entity obtains goods and services from vendors. Both the federal government and the state of Texas have established a set of procurement rules that apply to TxCDBG-funded projects. 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 that federal, state, and local law conflict, the most stringent regulation applies.

5.1 Procurement Procedures

5.1.1 Features of Good Procurement Systems

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

- Identify and specify standards for the goods or services the Grant Applicant desires. 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 (SBE), minority-owned (MBE), and women-owned businesses (WBE), and Section 3 businesses using suggestions found in *Chapter 10 Civil Rights*;
- Have adequate quality assurance and oversight systems in place to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders;
- Review all procurements to avoid unnecessary and duplicative purchases and to ensure costs are reasonable; and
- 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.

Procurement for eligible costs must **not** include the following:

- Cost-plus-a-percentage-of-cost or percentage of construction cost methods of contracting. Contracts using this method will be disallowed entirely, ineligible for any cost reimbursement or match credit;
- Line items that do not describe actual work to be completed. Any line item for profit, overhead, contingency, or other related terms that do not describe actual work to be performed will not be reimbursed;
- Retainer fees or retainer contracts are not allowable forms of procurement;
- Conflicts of interest: TDA cannot grant an exception to or waiver of conflict-of-interest regulations related to procurement, regardless of mitigating circumstances, see *Chapter 1 Administration and Reporting;* or

- Any situation considered to be restrictive of competition such as specifying a brand name product.[1]

Grant Recipients must provide adequate documentation to demonstrate that the selection process was carried out in an open, fair, uniform, and thorough manner and 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 Applicant should clearly identify during the procurement process any items included in the bid / purchase that are not associated with funded project activities included in the TxCDBG contract.

TDA recommends that the Grant Recipient's attorney review bid packets and contracts before execution in order to ensure that all federal and state TxCDBG requirements, local laws and requirements specific to that municipality or county are incorporated. An Attorney's Review Certification form for construction contracts is included with the sample bid packet documents in Appendix F.

A Grant Recipient may delegate procurement responsibilities be implemented by a subrecipient or partner organization; however, procurement actions related to the grant must comply with this chapter unless otherwise exempted, regardless of the party carrying out the purchase.

The TDA-GO Materials and Services Report (MSR) is used to report procurement of any goods or services throughout the grant project. The Grant Recipient will update the MSR several times throughout the project. The MSR is referenced at the appropriate steps in each of the sections below, and detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

5.1.2 Methods of Procurement[2]

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

- **Competitive Proposals for Administration/Professional Services** – For purchases where conditions for sealed bids are not appropriate, this is the preferred method for the procurement of non-construction services. This chapter provides several options available under this category.
- **Micro-purchases** – For the purchase of supplies or services that are in the aggregate less than or equal to $2,000, Grant Recipients may use simplified acquisition procedures instead of small purchase procedures as described below. Grant Recipients must, to the extent practicable, distribute these purchases equitably among qualified suppliers.
- **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 qualified sources.
- **Sealed Bids (Formal Advertising)** – For purchases greater than $50,000 the preferred method for a construction contract is a publicly solicited bid with a firm, fixed price—either lump sum or unit price—and awarded to the responsible bidder whose bid, conforming to all

[1] 2 CFR §200.319(b)(1-7)
[2] 2 CFR §200.320

the material terms and conditions of the invitation for bids, is the lowest in price. State law allows governmental entities to procure some goods and services through an interlocal agreement with an authorized purchasing cooperative. The cooperative must comply with state and federal competitive bidding requirements.

- **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. All special circumstances must be TDA approved.

The Grant Applicant must obtain **written** approval from TDA prior to using any method of procurement not described in this chapter (e.g., use of the competitive sealed proposal method for procurement of construction services or equipment).

5.2 Selecting a Provider – Non-Construction Services

5.2.1 Applicability of Competitive Proposals (Administration and Professional Services Contracts)

The Competitive Proposal procurement method applies to all administration services 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.

Important Competitive Procurement Requirements

- All administration and professional services related to TxCDBG projects must be procured competitively, regardless of the source of funds that will pay for the service contracts.
  - Administration and professional services paid in whole or in part with TxCDBG funds must use the step-by-step procurement procedures described below.
  - Administration services and professional services paid solely with local or matching funds must use the TxCDBG process or a competitive procurement process found in local policies.
- If procurement procedures are not performed correctly, fees for administration and/or professional 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 must keep the list current and include enough qualified sources as to ensure open competition.[3]
- TxCDBG funds and matching funds may not be used to reimburse for services provided prior to the date of the TxCDBG Grant Agreement except for eligible pre-award costs and/or activities approved by TDA through the pre-agreement process, see *Chapter 1 Administration and Reporting* regarding the timeframe in which costs are eligible under the pre-agreement plan.

[3] 2 CFR §200.319(d)

- Grant Recipients that designate a Council of Governments (COGs) as the subrecipient to carry out an eligible activity, such as administration services, must award a subrecipient interlocal agreement 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 the applicant, the contract shall be terminated by the applicant.
- The cost of preparing a TxCDBG application is an ineligible cost and is not reimbursable.

Price as a Selection Factor
Texas statutes make a distinction between **professional services** and other non-construction services. The professional services generally used for TxCDBG 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.

For the procurement of architectural, engineering, or 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.[4]

In contrast, for administration services and other non-construction services not listed above, including grant writing and planning, price may be a selection factor and must be taken into consideration during the procurement process.

Non-Construction Services Exempt from Competitive Procurement
The procurement requirements described in this chapter will not apply to

- Administration and professional services performed by an employee of the Grant Recipient; and
- A sub-applicant interlocal agreement with an agency of the state, such as an agreement with a COG, whereby a Grant Recipient designates the subrecipient to carry out an eligible activity, such as administration services, for the Grant Recipient.[5] Even though the procurement requirements described in this chapter do not apply with an agency of the state, all conflict-of-interest situations apply as described in *Chapter 1.2.2 Conflict of Interest.*

[4] 2 CFR §200.320(b)(2)(iv) and Texas Government Code, §2254.004
[5] Texas Government Code, Chapter 791

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, the Grant Recipient must document the exception through a letter certified by the chief local official.[6]

Testing Services

- The Grant Recipient shall determine whether the testing is a component of construction or a non-construction/professional service, and then must be consistent with that decision in procurement and requests for reimbursement.
  EXAMPLE: Drilling a test well can be considered either a component of construction or a professional service; however, if the test well is procured as an engineering contract (or subcontract), all payment requests must be charged to the engineering line item. To determine if the Davis-Bacon Act applies to a test well, please refer to the U.S. Department of Labor (DOL) Field Operations handbook, 15d05, for additional guidance.
- Testing services, which require professional services, must comply with the State of Texas' Professional Services Procurement Act.[7]
- Other services necessary to complete the TxCDBG funded project may be requested for approval by completing the Special Requests section of the TDA-GO *Grant Overview* page.

Administrator Training Certification
Administrators must be certified annually by TDA to be eligible to be paid from TxCDBG grant funds or match funds. This certification is separate from participation in the pre-qualified procurement process. See TDA's website for current certification procedures, which may include attending training, completion of a certification exam, or both.

Each person within a firm who will be primarily responsible for administration or serve as the administrative point of contact for a TxCDBG Grant Agreement must be certified. Grant Recipients need to be aware that administration costs will be delayed or disallowed if the selected administrator has not received such annual certification.[8]

Non-Construction Services to Prepare Grant Applications
If a provider intends to provide administration, planning, engineering, or similar services for a TxCDBG Grant Agreement, if funded, the provider must not have any involvement in preparation of the application for grant funds until after formal award of a services contract for project implementation services. If a Grant Administrator has been involved with discussions or decisions regarding a grant application prior to the procurement process for administration services, that firm may not be selected as the Grant Administrator.

- If the community chooses to execute the contract(s) for administration, planning, engineering, or other non-construction services prior to submittal of the application, include language stating that payment for project implementation services are contingent on receipt of grant funds.
  EXAMPLE: Payment of the fees associated with Part III – Payment Schedule of this Agreement shall be contingent upon TxCDBG 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.

[6] Texas Occupations Code, §1001.053
[7] Texas Government Code, Chapter 2254
[8] 4 TAC §30.80

- The community 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.
- A non-construction services contract must include only one TxCDBG-funded project unless explicitly approved by TDA in writing. TxCDBG grants are intended to fund stand-alone projects as described in the respective Performance Statement. Separate services contracts are appropriate to ensure all requirements for each grant are satisfied and to ensure that costs are charged to the appropriate grant.

5.2.2 Step-by-Step Selection – Pre-Qualified Provider Method

The Pre-Qualified Provider Method has been discontinued effective September 1, 2023. TDA will no longer solicit or post administrator and planner qualifications as part of a formal procurement process. TDA will make available the contact information of individuals and firms that have requested to be included as interested service providers.

5.2.3 Step-by-Step Selection Procedures for Competitive Proposal (Traditional)

For non-construction services that do not meet the parameters of the pre-qualified provider method (administration/planning services expected to exceed $50,000 and professional services), the Grant Recipient must use the full traditional competitive proposal method.

Step 1. Establish Selection Committee
The selection 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 or a city/county employee with authority to act on behalf of the local elected official in this capacity—such as the mayor, county judge, or a member of the elected governing body. 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 *Chapter 1.2.2 Conflict of Interest.*

BEST PRACTICE: The selection committee should consist of three or more persons.

Update the MSR with selection committee members. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

Step 2. Determine the Scope of Services
The scope of work for a non-construction services contract describes all desired tasks that a Grant Recipient expects a provider to perform under a contract. The scope of work should itemize the 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.

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 Appendices 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 contracts and should be closely involved in the establishment of the written selection criteria. Sample rating sheets for administration and similar services 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 Package
The Grant Recipient must develop an Request for Proposal (RFP) (administration / planning/ similar services) or Request for Qualifications (RFQ) (architectural / engineering / surveying services) package to issue to potential respondents. RFP/RFQs must identify all evaluation criteria factors and their relative importance.

Each RFP/RFQ should include only one TxCDBG-funded project. If the Grant Recipient would like to issue a single RFP that includes several stand-alone TxCDBG project(s) or pending applications, the packet must clearly identify each separate grant project or application cycle and the services requested. The RFP/RFQ must request separate pricing information for each grant project, if applicable, and must state whether contracts may be awarded to multiple respondents based on the single RFP/RFQ.

TDA will **not** accept RFP/RFQs that include future application cycles beyond the program year for which an application is currently or next expected to be available.

BEST PRACTICE: Treat each grant as a separate procurement, requiring separate RFPs/RFQs scoring, and award, even if the advertisements are combined.

Step 4.1. Request for Proposal of Administration, Planning, and Similar 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; and
   - Either the sample administration services or professional services rating sheet for administration services or similar rating sheet with weighted criteria.

The RFP should also 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;

- 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; and
- Proposed costs must be considered in the RFP process.

BEST PRACTICE: 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.

   This contract should contain four parts:
   - Part I - Agreement
   - Part II - Scope of Work
   - Part III - Payment Schedule
   - Part IV - Terms and Conditions

Step 4.2. RFQ for Professional Services, Including Architectural/ Engineering/Surveyor Services

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

2. **Request for Qualifications (RFQ):** The RFQ for professional 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, such as the *Budget Details* section 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 — a list of past/current clients

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.

   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 preapplication procurement of vendors, there is no prohibition on combining the required advertisements for several RFP/RFQ processes into one publication; however, the Grant Recipient must:
- Advertise in a locally distributed newspaper and
- Advertise the solicitation for at least ten 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.

In addition, the Grant Recipient must facilitate contracting opportunities for Section 3 businesses, as well as minority-owned businesses and women-owned businesses by reporting the RFP/RFQ opportunity to at least one organization providing access to and assistance with bid opportunities, particularly those that recognize small and disadvantaged businesses that are likely to include Section 3 Businesses. Retain screenshots or other confirmation to document compliance with this requirement. Examples of acceptable organizations include:
- Public/non-profit organizations;
- Private plan rooms; or
- Local Workforce Solutions Offices (WIOA One Stop Shop), if applicable, see https://www.twc.texas.gov/directory-workforce-solutions-offices-services.

Update the MSR with information from the advertisements. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

Step 6. Send RFP/RFQ to at Least Five 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 TxCDBG 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 SBEs, MBEs, and WBEs, as well as Section 3 business concerns. See *Chapter 10 Civil Rights*. Although Grant Applicants 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 Grant Agreement. TDA recommends sending the solicitation to a minimum of two service providers that meet the definition for SBE, MBE, WBE, or Section 3 businesses.

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 individuals/ firms.
  - If email/fax, print verifiable evidence that email/fax was delivered.
  - If USPS mail, send return receipt.

The proposal deadline must allow at least ten 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 professional services, price/cost may **not** be considered until after the successful respondent 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 has the most qualifications in the proposal evaluation. The recommendation must meet the reasonable, responsible, and responsive tests according to federal procurement procedures:

- **Reasonable** – Refers to the most suitable, fit, and appropriate respondent to accomplish the project.
- **Responsible** – Refers to the respondent that can 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.

Step 8.1. Selecting the Respondent – For Administration and Other Professional Services Contracts Other than Architectural/ Engineering/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.

Step 8.2. Selecting the Respondent – For Architectural/ Engineering/Surveying Services

Negotiation of price for architectural/engineering/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 the most qualified bidder has been chosen.

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

Once the most highly qualified respondent is identified, request a price proposal. As necessary, negotiate a fair and reasonable price with that provider. Grant Recipient 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.

After completing the steps listed in this section, the Grant Recipient must complete the steps listed in *Section 5.5 Steps for Award and Contracting*.

5.2.4 Selection of Subrecipient Services Provider

Grant Recipients may also select a non-profit or intergovernmental service provider for administration or other non-construction services through a subrecipient agreement.[9] Texas Councils of Government are eligible to serve in this capacity through an intergovernmental local agreement.

Intergovernmental agreements are not competitive procurements and are not subject to the competitive requirements of this section. However, intergovernmental agreements are subject to *Section 5.5 Awards and Contracting*, and all agreements must meet HUD requirements for subrecipient agreements.[10]

In addition, to ensure an open selection process, intergovernmental agreements for administration services must be selected by the local governing body prior to the subrecipient performing any work relative to the TxCDBG funded project, including work to prepare the application. Subrecipient agreements selected after beginning work on the project will be disallowed and not eligible for grant reimbursement or match credit.

5.3 Construction Services and Materials Contracts

5.3.1 Applicability

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 funds or match injection.

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

[9] Texas Government Code, Chapter 791
[10] 24 CFR §570.503.

5.3.2 Sealed Bid Procurement – Traditional Method

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 and 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.

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.

- The use of additive alternatives is strongly recommended to give Grant Recipients maximum flexibility to award a contract that fits within the available budget and provides the maximum benefit to the community.
- If a construction contract includes both a TxCDBG project and a separate project not included in the Performance Statement of the Grant Agreement 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.

Update the MSR regarding the bid package. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

Step 2. Comply with Davis-Bacon Act Requirements
For bids that include construction work, the Grant Recipient must obtain prevailing wage rates for the local area as required by the Davis-Bacon Act and Related Acts (DBRA) and incorporate those wage rates into the procurement for construction, see *Chapter 7 Davis-Bacon Labor Standards* for specific information on the Davis-Bacon Act.

Update the MSR regarding the DBRA statistics. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

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 fifteen (15) days prior to the bid opening date (applies to both municipalities and counties);
- Ensure that the two published notices are at least seven days apart;
- Describe work or item to be purchased or cite where specifications can be obtained;
- Include time and place for receiving and opening;
- 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 a specified timeframe (e.g., 30 or 60 days); and
- Identify TxCDBG grant agreement number.
- If there is no newspaper of general circulation in the city or the county, the notice must be posted at the city hall or in a prominent place in the courthouse for fifteen (15) days before the date of the bid opening. The postings must be documented by affidavit and photo evidence in accordance with public notice policy in *Chapter 1 Administration and Reporting.* If postings are

used, the Grant Recipient is encouraged to use web resources, such as the Dodge Report and Civcast, to further publicize bidding opportunities to qualified contractors.

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: 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. If the revised bid opening date is more than fifteen (15) days after the originally published date, all required publications must be repeated.

Costs associated with advertising may be eligible TxCDBG costs. However, these costs can only be reimbursed (or claimed as matching funds) from the administration activity, regardless of purpose.

EXAMPLE: The cost of construction advertisements may be eligible as an administration expense only.

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.

Update the MSR with proof of advertising. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

Step 4. Promote Participation of Minority-Owned Businesses and Section 3 Business Concerns
In addition to the required advertisements, the Grant Recipient must facilitate contracting opportunities for Section 3 businesses, as well as minority-owned businesses and women-owned businesses by reporting the contracting opportunity to the following resources no later than the date of the first advertisement:

- At least one organization providing access to and assistance with bid opportunities, particularly those that recognize small and disadvantaged businesses that are likely to include Section 3 Businesses. Retain screenshots or other confirmation to document compliance with this requirement. Examples of acceptable organizations include:
  - Public/non-profit organizations;
  - Private plan rooms; or
  - Local Workforce Solutions Offices (WIOA One Stop Shop), if applicable, see https://www.twc.texas.gov/directory-workforce-solutions-offices-services.
- TDA-GO Materials and Services Record Pre-Selection Clearance data including bid opening date – this data is made available to the public during the bid period.

The Grant Recipient should actively take steps to encourage proposals from SBEs, MBEs, and WBEs, as well as Section 3 business concerns, see *Chapter 10* Civil Rights.

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.

- **Electronic Bids –** The Texas Local Government Code permits counties and municipalities to accept bids through electronic transmission if the local governing body has adopted written rules and procedures to ensure the identification, security, and confidentiality of electronic bids.[11]

The procedures must ensure that the electronic bids remain effectively unopened until the proper time to unseal bids. The Grant Recipient must maintain in its project procurement records copies of the written rules/procedures, local governing body minutes verifying adoption of the rules/procedures, documentation of any application software used to accept and administer the electronic bids—and any other documentation deemed necessary to verify compliance with statutory or programmatic requirements.

Step 6. Evaluate and Select the Low Bidder

The Grant Recipient or its designee, usually the project 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.[12]

- Municipalities are required by state law to award the contract to the lowest responsible bidder.
- A bid subject to either Texas Local Government Code §252.043(g) or §271.026 that has been opened, may NOT be changed for the purpose of correcting an error in the bid price.[13]
- A bidder may withdraw a bid due to a material mistake in the bid.[14]
- A governmental entity is entitled to reject any and all bids.[15]
- **Best value** criteria may only be considered if identified in the bid packet. The municipality may reject any and all bids.[16]
- 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.[17]

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.
- Accept the low bid and provide additional local funds.
- Accept the low bid and execute the construction contract for the full amount; identify for the future any work that may be eliminated from the executed contract through change order, if the contractor agrees to the reduction.

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**.

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[11] Texas Local Government Code, §§252.0415 & 262.0235

[12] Grant Recipients are responsible for ensuring that all applicable Federal and State procurement procedures, standards, and requirements are met. TDA recommends that the Grant Recipient's attorney review bid packets and contracts before execution in order to ensure that all federal and state TxCDBG requirements, local laws and requirements specific to that municipality or county are incorporated.

[13] *See* Texas Local Government Code, §§ 252.043(g) & 271.026(a).

[14] Texas Local Government Code, §§252.043(g) & 271.026(b).

[15] Texas Local Government Code, §§252.043(f) & 271.027(a).

[16] Texas Local Government Code, §252.043(f)

[17] Texas Local Government Code, §262.027(a)

The Grant Recipient must retain **all** supporting documentation for every action taken in the procurement process, including established procurement policies, publications, all bid documentation submitted, calculations and recommendations regarding technical and/or material deficiencies, and award documentation. In limited circumstances, TDA may also request an opinion from the local legal counsel to document how the procurement complies with all Texas Local Government Code provisions and other applicable, laws, rules, and regulations.

After completing the steps listed in this section, the Grant Recipient must complete the steps listed in *Section 5.5 Steps for Award and Contracting*.

5.3.3 Sealed Bid Procurement – Third Party Cooperative Purchase

A Grant Recipient may choose to purchase certain goods and services through an interlocal agreement with an authorized purchasing cooperative, such as the Texas Association of School Boards, Buy Board, or the Houston-Galveston Area Council (HGAC-Buy). All state and federal competitive 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 copies of the cooperative's competitive procurement procedures. At a minimum, such records should include:

- Interlocal agreement between the cooperative and local government,
- Invitation for bids advertisements,
- Documentation of affirmative steps to include small, minority- and women-owned business enterprises in accordance with 2 CFR §200.321,
- Bid tabulation of bids received and opened, and
- Updating the MSR with third-party cooperative purchases.

5.3.4 Small Purchase Procurement

The small purchase procurement method uses relatively simple and informal procurement methods to secure equipment, non-professional/non-administration 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 the following:

- **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, and by the project description of the relevant Environmental Review;
- **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; and
- **Component purchases** – Purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

The Texas Local Government Code specifically prohibits 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.[18] Separate small purchases

[18] Texas Local Government Code §§262.023(c) and 252.021

for materials/equipment and installation are not considered appropriate if the initial estimate for both material/equipment and associated installation exceeds $50,000.

EXAMPLE:

- A water line job is one project; all purchases of pipe, fire hydrants, valves, and fittings are reviewed collectively to determine compliance with the $50,000 threshold.
- A water storage tank is considered one project; subject to the $50,000 threshold; site preparation, foundation, piping, valves, welding, etc. are not separate projects.

Prior to beginning small purchase procedures, the Grant Recipient should get an estimate of the cost of construction or, for materials contracts, the cost of both equipment/materials and installation, 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.

Step 1. Prepare Scope of Request

The Grant Recipient must prepare a brief description of the scope of work being requested, detailing the specific goods or services to be provided by the contractor. This package should provide sufficient technical information for potential respondents to submit a competitive quote.

Update the MSR with the Scope of Request. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

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 procurement for construction, see *Chapter 7 Davis-Bacon Labor Standards*.

Update the MSR with DBRA statistics. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

Step 3. Contact Three Vendors for Quotes or Estimates

The Grant Recipient must contact a minimum of three firms or individuals 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) must be recorded with written quotes or written record of telephone quotes, including the date, price, specifications and other relevant terms, and the name and phone number of both the person providing the quote and the person requesting the quote. These quotes will be uploaded in TDA-GO. Retain all written communications from all three firms.

Update the MSR with vendors' names. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

Step 4. Promote the Participation of SBEs, MBEs, WBEs, and Section 3 Businesses

Grant Recipients should actively take steps to encourage proposals from SBEs, MBEs, and WBEs, as well as Section 3 business concerns.

The Grant Recipient must facilitate contracting opportunities for Section 3 businesses, as well as minority-owned businesses and women-owned businesses by reporting the contracting opportunity to the following resources no later than the date of the first request for quotes:

- At least one organization providing access to and assistance with bid opportunities, particularly those that recognize small and disadvantaged businesses that are likely to include Section 3 Businesses. Retain screenshots or other confirmation to document compliance with this requirement. Examples of acceptable organizations include:

    - Public/non-profit organizations;
    - Private plan rooms; or
    - Local Workforce Solutions Offices (WIOA One Stop Shop), if applicable, see https://www.twc.texas.gov/directory-workforce-solutions-offices-services.
- TDA-GO Materials and Services Record Pre-Selection Clearance data including bid opening date – this data is made available to the public during the bid period.

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 Grant Agreements. For this reason, retain all efforts demonstrating encouragement of SBE, MBE, WBE, and Section 3 businesses. TDA recommends requesting a quote from at least one firm or individual that meets the definition for SBE, MBE, WBE, or Section 3 businesses.

Step 5. Evaluate Responses and Select the Lowest Quote
The Grant Recipient must determine the lowest responsible, responsive vendor, based on the responses to the request for quotes. The Grant Recipient must not select a respondent that did not submit the lowest quote that met all established criteria.

After completing the steps listed in this section, the Grant Recipient must complete the steps listed in *Section 5.5 Steps for Award and Contracting*.

5.3.5 Micro-Purchases

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

Step 1. Identify Supplies or Services Needed
The Grant Recipient should identify all supplies or materials that were not procured as part of the larger project. Local records must indicate the justification for not including these supplies or services with competitive procurement actions. All micro-purchases for the TxCDBG project must not exceed $2,000 cumulatively.

Step 2. Identify a Vendor or Supplier to Meet the Need
The micro-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 orders does not exempt the Grant Recipient from the requirements of *Section 5.5 Awards and Contracting*. The Grant Recipient is required to distribute micro-purchases equitably among qualified suppliers. TDA recommends including at least one firm or individual that meets the definition for SBE, MBE, WBE, or Section 3 businesses in the micro-purchase process.

EXAMPLE: Purchase of signage 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 several sign stores. Grant Recipients may require that the purchase of signage rotate among qualified suppliers if they offer the same rates.

No MSR entry is required for Micro-purchases; record the amount and purpose of each micro-purchase on the TDA-GO *Grant Overview* page.

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 whenever possible; micro-purchases are generally made for unanticipated costs.

- After completing the steps listed in this section, the Grant Recipient must complete the steps listed in *Section 5.5 Steps for Award and Contracting*.
  NOTE: If local policy does not require action by the governing body to award a contract for a micro-purchase, *Section 5.5.2* will not apply.

5.4 Non-Competitive Proposal Procurement

Non-competitive procurement 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 procurement is most often used for emergency situations and disaster projects.

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 to the assigned TDA Grant Specialist, by the Grant Recipient.

TDA will consider the use of non-competitive proposal procurement under the following situations:[19]

- **Sole 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 State Urgent Need (SUN) Fund;

The condition of bids being over budget alone does not create a qualifying condition of inadequate competition or justification for non-competitive procurement. Grant Recipients must demonstrate multiple attempts to competitively procure the goods or services, including changes to specifications, project scope, timeline, or other constraints to address any barriers to participation, before TDA will consider approving non-competitive procurement under this provision.

The Grant Recipient must complete the steps listed in *Section 5.5 Steps for Award and Contracting*.

5.5 Steps for Award and Contracting

Regardless of the method of procurement or selection for a contractor or service provider, the Grant Recipient must complete the following steps for each purchase.

NOTE: While the below requirements are applicable to all forms of procurement, please see the Micro-purchase specific requirements identified in *Section 5.3.5* of this Chapter.

[19] 2 CFR § 200.320(c)

5.5.1 SAM Clearance

The Grant Recipient must verify the contractor/service provider's eligibility to participate in the federally-funded project through the System for Award Management (www.SAM.gov). The Grant Recipient must verify that the contractor is neither debarred, suspended, or otherwise excluded. Record this verification with a dated screen shot for the Grant Recipient's records. Eligibility of all contractors/service providers must be verified through the SAM website prior to any formal action authorizing the award of the contract to the contractor/service provider. Examples of formal action include, but are not limited to, authorizing resolution, authorizing ordinance, council approval of award, contract execution, etc.

Update the MSR with SAM clearance information and screen shot. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

5.5.2 Award by Governing Body

The Grant Recipient's governing body must award the contract(s) to the selected contractor/service provider.

- **Competitive Proposals Only** – The local governing body has the final authority to award contracts. The local governing body 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.
- **Sealed Bids and Small Purchase Only** – The Grant Recipient must award the contract to the lowest appropriate bidder. The award amount must equal the amount of the bid, including any bid alternates awarded. 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.[20]

Update the MSR with contract award information. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

5.5.3 Prepare and Execute Contract/Agreement

Regardless of the type of procurement used, the Grant Recipient must execute a contract to document the goods and/or services to be purchased, the agreed upon price, and the contractor's or supplier's mandatory compliance with all applicable state and federal requirements. If the Grant Recipient uses a purchase order in lieu of a contract, it must similarly document goods, services, price, and all programmatically required provisions.

NOTE: The amount of the contract **must** exactly match the amount awarded by the local governing body.

In all contracts, Grant Recipients and contractors must specifically refer to the project or provide detailed information regarding the work being funded. The following appendices of the TxCDBG Implementation Manual include sample contracts that may be used for various purchases:

- **Appendix D** – Administration services
- **Appendix E** – Engineering services
- **Appendix F** – Construction services
- **Appendix G** – Materials

[20] Tex. Loc. Gov't Code, §252.043 (Municipalities), §262.027 (Counties)

In addition to other federal and state provisions required, all contracts or purchase orders must address, if applicable, the following provisions. See also Appendix B for required contract provisions.

- **Debarment and suspension** – (Executive Orders Nos. 12549 and 12689): A contract award must not be made to parties listed on the government wide exclusions list in SAM.
- **Amendments** – Procedures for amending the contract, including the scope of work and/or compensation section, and the addition of details known only once the grant project is awarded by TDA.
- **Termination** – Explaining circumstances under which the Grant Recipient or other party can cancel the contract (e.g., unsatisfactory performance).
- **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 Four Years** – Retain all required records for four years after the Grant Recipient makes its final payment and all pending matters are closed.
  NOTE: The Grant Recipient must retain files beyond this period as described in *Chapter 1 Administration and Reporting.*
- **Section 3 Provision** – For all contracts unless otherwise specified in the Grant Agreement.[21] The provision is not required for materials-only or equipment contracts and for non-construction services that require an advanced degree or professional licensing, including services identified in the Professional Services Procurement Act.
- **Equal Opportunity Clause** – For contracts over $10,000.[22]
- **Anti-lobbying certification** – All contracts ≥$100,000.

Required Contract Provisions – Non-Construction Services

In addition to the above requirements, the service provider contract or agreement must include the following at a minimum:

- **Names of Both Parties** – Grant Recipient and service provider.
- **Effective Dates** – Starting and ending dates.
  NOTE: TxCDBG funds and matching funds may only be used to pay/reimburse for services dated after both the Grant Agreement start date (or approved pre-agreement date identified in the Grant Agreement or award notice) AND the services contract start date.
- **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.
- **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.
- **On-site Inspections** – Ensure that the complete work conforms with the approved plans and specifications (engineering contract only).
- **Optional** – If a service provider 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 an applicant, the contract shall be terminated by the applicant.

Required Contract Provisions – Construction Contracts

In addition to the preceding, construction contracts must also address the following:

[21] 24 CFR §75.27
[22] 41 CFR §60-1.4(b)

- For construction contracts greater than $2,000, compliance with the Davis-Bacon Act, as supplemented by DOL regulations, is satisfied by inserting HUD 4010 in construction contract.[23][24] See **Appendix B**.
- For construction contracts greater than $2,000, compliance with the Copeland "Anti-Kickback" Act, as supplemented in DOL regulations, is satisfied by inserting HUD 4010 in construction contract.[25][26] See **Appendix B**.
- For construction contracts greater than $100,000, compliance with Contract Work Hours and Safety Standards Act, including work week requirements and safety conditions for workers—is satisfied by inserting HUD 4010 in construction contract.[27] See **Appendix B**.
- For contracts greater than $150,000, include the Clean Air Act and the Clean Water Act, as amended.[28][29]

Update the MSR with construction contract information. Detailed step-by-step instructions for completing and submitting an MSR in TDA-GO may be found on the TDA website.

NOTE: While federal and state requirements do not require the contract for materials or services to retain a percentage of funds based on progress milestones, disbursement of grant funding is dependent on both work performed and grant-based milestones. See Chapter 2 Financial Management.

5.5.4 Workers' Compensation Requirements

The Texas Labor Code 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.[30] 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 Texas Administrative Code (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.

5.5.5 Bonding Information

Grant Recipients must ensure that they are meeting all applicable federal, state and local bonding and procurement requirements.

For construction or facility improvement contracts or subcontracts, the minimum bonding requirements for the Grant Recipient which includes a performance bond and a payment bond, if applicable, are as follows:

- 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.[31]

[23] 40 U.S.C. 3141 *et seq*.
[24] 29 CFR Part 5
[25] 40 U.S.C. 3145
[26] 29 CFR Part 3
[27] 40 U.S.C. §§3701–3708
[28] 42 U.S.C. §§7401-7671q
[29] 33 U.S.C. §§1251-1387
[30] Texas Labor Code, §406.096
[31] Texas Government Code, Chapter 2253

- A **payment bond** is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and/or 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.[32]
  - **Municipalities**: If the contract is in excess of $50,000, a payment bond is required.[33]
  - **Counties**: If the contract exceeds $25,000, a payment bond is required.[34]
- A **bid bond** from each bidder equivalent to five percent of the bid price for contracts that are greater than $100,000. The **bid guarantee** shall consist of a firm commitment issued by a surety company authorized by the Texas Department of Insurance 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.[35]
- Bonds are not required on contracts for non-construction services, vehicles, equipment, or materials.

5.6 Changes to an Executed Contract

5.6.1 Change Orders

When changes to an executed construction, materials, or equipment purchase contract are necessary due to:

- A change in specifications;
- A decrease or increase in the quantity of work to be performed;
- A decrease or increase of materials, equipment or supplies to be furnished; or
- A change in the contract duration.

The change must be documented through a change order or addendum to the contract. In addition, the Grant Recipient must complete the MSR Change Request form in TDA-GO. **TDA must approve all change orders** to ensure costs are eligible and procured according to TxCDBG requirements.

Minimum Requirements for Contract Changes

- 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 unused grant funds will not be approved.
- Changes must be appropriate and required for the specific TxCDBG project.
- Change orders that include new items must demonstrate competitive pricing. A statement from the project engineer providing justification for the proposed pricing may be acceptable. TDA may request more supporting documentation for new items that differ significantly from the original bid, e.g., additional work added to grant contract due to available funds.
- Change orders replacing the originally described work with a different material or construction method must clearly identify the change in specifications. Best practice: eliminate the original line item and enter a new line item with the proposed changes.
- Change orders requesting revisions to a unit price determined through the competitive procurement process will not be approved. A Grant Recipient cannot negotiate a discounted cost for the same work. All costs for the revised line item will be disallowed if the unit price is changed.

[32] Ibid
[33] Texas Government Code, §§2253.021(a)(2)(B) and 252.044.
[34] Texas Government Code, §2253.021(a)(2)(A)
[35] Texas Local Government Code, §262.032

- Change orders that request “remobilization” costs must demonstrate that:
  - Remobilization costs are necessary and reasonable,
  - The need for remobilization is beyond the Grant Recipient’s control, and
  - The Grant Recipient took proactive steps to resolve any outstanding issues, additional work, or other factors in order to avoid any remobilization.
  - Awaiting TDA approval for grant agreement amendments or MSR change orders is not justification for remobilization costs unless all documentation is submitted a minimum of 30 days prior to the contractor’s demobilization.
- Change orders for an increase of more than 25% will be rejected. The Grant Recipient must complete a separate procurement if the proposed additional work project exceeds 25% of the original contract. 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.
- If a change order involves a decrease or an increase of greater than $50,000, the Grant Recipient must receive appropriate approval by the governing body.[36] In such cases, TDA will accept as confirmation that such approval has been obtained either the signature by the chief local official on the Construction Change Order or action by the Authorized Official to submit the change order request in TDA-GO.
- **TDA strongly recommends that Grant Recipients obtain TDA approval before fully executing a change order or addendum with the contractor/service provider.** Before approving a change order for a construction contract, TDA must have confirmation via the TDA-GO form that both the Grant Recipient and project engineer have determined the proposed change is appropriate.

Examples of Cost Justification for New Items

- Minor change in material size, comparable change in price
- Cost is comparable to recent bids for similar projects in this area
- Cost is reasonable, accounting for material pricing plus labor costs

Municipalities

- Change orders may not increase the original contract price by more than 25%.[37]
- Decreases in the original contract price of more than 25% require written contractor consent.[38]

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. Grant Recipient must provide written justification, including citation to the appropriate source, for review. [39]
- Decreases to the original contract of more than 18% must have the contractor’s written consent.[40]

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.

[36] Texas Local Government Code, §252.048 (municipalities), §262.031 (counties)
[37] Texas Local Government Code, §252.048(d)
[38] Ibid.
[39] Texas Local Government Code, §262.031(b)
[40] Ibid.

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 to TDA 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 contract. Any difference in price from the original contract to the Certificate of Construction Completion (COCC) must be accounted for by a change order.

Project changes reflected in a change order may also require an amendment to the TxCDBG Grant Agreement Performance Statement or Budget. These items should be submitted together as described in *Chapter 11 Grant Agreement 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 is consistent with the TxCDBG Grant Agreement Performance Statement.**

5.6.2 Performance Bond Claims and Assignment to New Contractor

State law requires performance and payment bonds for contracts at or above specific dollar thresholds. These bonds require the parties to a construction agreement to abide by provisions of the surety bond when processing a claim. When performance issues with the original contractor cannot be resolved, a bonding company will customarily appoint a different contractor to complete the work. This should only be done in accordance with the surety's terms. In addition, the original construction contract must contain a termination clause for contracts that are greater than $10,000, and should contain an assignability and novation clause. These provisions would permit a Grant Recipient to terminate a contract for cause or convenience and to re-assign completion of the project to a different contractor under the terms of the performance bond.

The Grant Recipient must rely on their legal counsel to ensure that termination and assignability are performed in accordance with conditions of the contract, and in compliance with federal, state, and local codes and regulations. The Grant Recipient must maintain detailed records of communications and formal actions taken which resulted in the termination of the original prime contractor and which prompted the claim to be filed with the performance bond surety company.

Payment requests for costs associated with performance bond claims must clearly identify the costs for work performed only:

- Where the Grant Recipient disburses funds directly to the bond company, the bond company is responsible for issuing payments to material suppliers, subcontractors, and the prime – neither TDA nor the Grant Recipient will track these disbursements, as the bond company has taken responsibility for the work and payment processes. The bond company or prime contractor must provide invoices detailing the work completed to date and associated pricing, as outlined in the contract. Any payments owed to the prime contractor are a matter between the contractor and the bond company.
- Eligible costs must not exceed the amount of the original construction contract, plus any change orders prior to the performance bond claim. **Any additional expenses required to complete the project that exceed this maximum amount will be the responsibility of the city or bond company**.
- Alternatively, the Grant Recipient and bond company may opt to fully document all disbursements of funds under the construction contract to the prime contractor and associated subcontractors or material suppliers. In this case, TDA may consider a change order for additional work required to be performed to resolve all performance issues.

- TDA may accept a COCC with written notice from the bond company that all work has been completed in lieu of the contractor's signature.

If a new contract is executed by the Grant Recipient for the replacement contractor selected by the bonding company, a new MSR must also be completed in TDA-GO. Select "Bond Claim Resolution / Assignment of Contract" as the Type of Procurement/Selection Process.

5.7 Recordkeeping Procedures

5.7.1 Local Records

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 an MSR in TDA-GO 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, however 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.

5.7.2 Micro-purchases

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

For micro-purchases, no Materials and Services Report is required. Instead, complete the *Eligible Costs not Reported on MSR* section of the TDA-GO *Grant Overview* page.

5.7.3 Competitive Proposal – Non-Construction 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 with a tear sheet/full-page advertisement/photocopy with publisher's identification and date/publisher's affidavit for proof of advertising for monitoring purposes.
- Proof that five or more firms/individuals were contacted for proposals.
- A complete RFP packet, including 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 or suspended list; a printout of SAM.gov page with date is required.
- Meeting minutes documenting the award.
- An executed contract.
- If planning project, see *Chapter 3 Environmental Review* for environmental review documentation.

5.7.4 Construction and 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 documents with labor standards provisions included;
- Copies of all bid addenda, if any;
- Contract documents 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;
- Minutes of the bid opening;
- Verification that the firm and principals of the firm are **not** on the SAM.gov debarred or suspended list; provide a printout of SAM.gov page with date;
- A signed *Certificate Regarding Lobbying* **(Form 80-0013)** if contract is greater than $100,000**;**
- Bid tabulation sheets, if applicable; and
- A copy of council/commissioner court action awarding the contract.

NOTE: 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.

5.7.5 Certificate of Construction Completion (COCC)

Upon completion of the work included in the contract, all parties must agree that the work is acceptable.

- For non-construction services and materials contracts, the Work Completed page of the MSR must be completed and submitted through TDA-GO. The printed COCC is not required.
- For construction contracts, see *Chapter 7 Davis Bacon Labor Standards* for additional information.

5.8 Federal and 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.

5.8.1 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 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.[41]

Chapter 262 County Grant Recipients Construction Bidding Procedures
County Grant Recipients are generally required to conduct competitive sealed bid procurement for 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.[42]

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 Services 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.

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 – Texas Grant Management Standards (TxGMS), Texas Comptroller of Public Accounts

[41] Texas Local Government Code, §252.041(a)
[42] Texas Local Government Code, §262.025(a)

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 TxGMS.

5.8.2 Federal Laws & Regulations

24 CFR §570
Portions of 2 CFR Part 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), (h).

Resources

Resource Number	Description	URL
	Pre-qualified Professional Administration and Planning Services	TDA Prof./Admin. Services page
Appendix B	Required Contract Provisions	TDA Forms page
Appendix C	Vehicle/Equipment General Conditions	TDA Forms page
Appendix D	Sample Administration Services RFP Packet	TDA Forms page
Appendix E	Sample Engineering Services RFQ Packet	TDA Forms page
Appendix F	Sample Construction Bid Packet	TDA Forms page
Appendix G	Sample Material Bid	TDA Forms page

*Note: these items will be updated as needed.