

# Contracting

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## Contents

<b>Introduction .....</b>	<b>1</b>
<b>General Contract Requirements .....</b>	<b>2</b>
SAM.gov .....	2
Website .....	2
Prohibition of Cost Plus Percentage of Cost .....	2
<b>General Contract Contents.....</b>	<b>3</b>
<b>Contract Provisions.....</b>	<b>3</b>
Appendix II to 2 CFR 200 .....	3
Contract Provision Guidance .....	3
Change Orders.....	5
Subcontracting .....	5
<b>Bonding Requirements.....</b>	<b>6</b>
<b>Public Agency Agreements.....</b>	<b>6</b>
<b>Intergovernmental and Cooperative Agreements.....</b>	<b>6</b>
<b>Reporting Requirements .....</b>	<b>7</b>



## Introduction

Once goods and services have been properly procured, it is time to develop the legal instruments necessary to establish contractual obligations and rights. This chapter provides general guidance concerning the compliance aspects of contract administration.

## General Contract Requirements

As with all contractual obligations, the subrecipient is advised to seek the advice of legal counsel regarding rights, duties, obligations and liabilities arising from legal arrangements. DCA is also available to provide general, non-legal advice concerning CDBG-DR related contracting requirements. If subrecipients contract with grant administrators for administrative support, they must remember that they cannot delegate any inherently governmental responsibility to another party.

**Note:** Prior to executing any contract, subrecipients must share pending contracts with DCA for review. DCA will review the contracts and provide feedback to subrecipients within 14 days of receipt. Following contract execution, subrecipients must send to DCA the Notice of Contract Award included in the Procurement Chapter. DCA will also review contracts during scheduled monitoring and technical assistance visits to ensure compliance with CDBG-DR and other federal and state requirements.

### SAM.gov

As stated in the Procurement Chapter, prior to award, the eligibility of the selected firm to be awarded a CDBG-DR funded contract must be verified using <https://SAM.gov>. The subrecipient must verify the vendor is not on any state or County debarment lists, as well. Subrecipients should save a copy of the SAM verification document maintain this with the project records.

### Website

Both DCA and the subrecipient must post all contracts paid with CDBG-DR funds on their respective websites. This includes a summary that describes and updates the status of the services or goods being procured (like the phase of procurement and proposal requirements). Contracts and procurement actions that are below the micro-purchase threshold do not need to be posted online. 87 FR 6384 (February 3, 2022)

### Prohibition of Cost Plus Percentage of Cost

Neither the “cost plus a percentage cost” nor “percentage of construction costs” methods of contracting are allowed [[2 CFR 200.324\(c\)](#)].



## General Contract Contents

Contracts involving the use of CDBG-DR funds must include the following provisions to ensure compliance:

- **General Administrative Provisions** - Including effective date of the contract, names and addresses of the parties to the contract, reference to the authority of the local unit of government to enter into the contract, conditions and terms for violation or breach of the contract, and procedures for contract amendment.
- **Period of Performance** - Including a start and end date to the contract.
- **A Scope of Services** - Including a detailed description of the work to be performed and/or products to be delivered, the schedule for performance, performance requirements, and specification of materials.
- **Method of Compensation** - Including fee or payment schedules, retainage, rates and maximum amounts payable. All contracts using CDBG-DR funds must have a not-to-exceed clause.
- **Terms and Conditions** - Consistency of the contract with the requirements of the grant agreement between DCA and the subrecipient. The relevant terms and conditions of the grant agreement between DCA and the subrecipient should be reflected in subsequent contracts between the subrecipient and their contractors. A liquidated damages provision must be included in all contracts except general management contracts.
- **Special Conditions/Specific Provisions** - Inclusion of specific contract provisions may be required by state and federal law. These provisions are dependent on a combination of:
  - Whether the contract is for construction or non-construction services (e.g., professional services such as administration, surveying, legal, etc.),
  - The dollar value of the contract, and
  - Statutory mandates.

## Contract Provisions

### Contract Provision Guidance

All contracts funded in whole or in part with CDBG-DR funds must contain the contract provisions detailed in [Appendix II to Part 200](#), as applicable.

More detailed guidance on required contract provisions can be found in [HUD's guide Buying Right: CDBG-DR and Procurement: A Guide to Recovery](#).

A contract must include all items from the bid/solicitation package as well as the standard contract terms and conditions, contractor certifications, and bond and insurance forms, as

applicable. The subrecipient is encouraged to consult legal counsel and obtain a signed letter certifying that the counsel has reviewed and approved the documents.

The subrecipient should be concerned with both the body of the contract as well as the compliance requirements that are frequently included as exhibits to the base contract. The following must be included in the contract text:

- Parties to the agreement;
- Project location;
- Scope of services;
- Financial commitments;
- Starting and ending dates;
- Performance schedule and milestones;
- Contract representatives (grantee, contractor, subcontractor(s));
- Conflict of interest;
- Reporting requirements;
- Suspension clause;
- Incorporation of attached requirements;
- Payment terms and contract cost;
- Signatures; and
- As mentioned above, additional clauses required by the federal government per [Appendix II to Part 200](#) (e.g., labor standards, Section 3, etc.) must also be incorporated in the contract. These contract clauses include but are not limited to the two noted below which have been highlighted as high priority compliance requirements; however, subrecipients must review the full list of required contract clauses in Appendix II and incorporate appropriate contract language:
  - **Section 3** – All projects that need to be Section 3 compliant must include the required Section 3 language referenced in New Jersey’s Section 3 Plan located in Appendix C: *Section 3 Contract Clause for Covered Contracts*, in all Request for Proposals (“RFPs”) or other types of solicitation (including procurement documents and bid offerings) and in any contracts. This language provides an overview of Section 3, requirements for bidders, and the required HUD Section 3 clause ([24 CFR 75.27](#)).
  - **CWHSSA and Copeland Act** – Contractors must comply with the Contract Work Hours and Safety Standards Act (CWHSSA) and the Copeland Anti-Kickback Act (Copeland Act). CWHSSA requires that, for any project in which the prime contract exceeds \$100,000, workers must be paid one-and-a-half times their normal hourly rate for any hours worked in excess of 40 hours weekly, based on a work week of 7 consecutive days.



The Copeland Act prohibits any person from inducing a worker on a federally funded project to give up any part of the compensation to which the worker is entitled. No payroll deductions are permitted that are not specifically listed in the Copeland Act unless the contractor has obtained written permission from the employee as specified in [29 CFR 3.5](#) for otherwise permissible payroll deductions.

- Contractors must comply with specific federal laws pertaining to the environment, fair housing, labor, and other laws attached to the CDBG-DR legislation and referenced within the Federal Register.

Subrecipients must have a full, bound copy of each executed contract in its files for review by DCA. All conditions must be contained within the contract document.

### Change Orders

Change orders to contracts executed by subrecipients of this program may be required to address unforeseen and/or unanticipated circumstances. Any changes that revise line items in the schedule of values or increase project costs due to unanticipated scope requirements must be submitted through a written change order with supporting documentation. The supporting documentation may include, but is not limited to:

- Contractor's estimate and schedule
- Written justification for the change order
- Evidence of cost reasonableness

DCA and its Construction Management Firm will review the change order and determine whether a grant amendment or environmental re-evaluation is necessary. Any amount in excess of the grant award will be considered an overage and will be the responsibility of the applicant. Based on the circumstances and the availability of program funds, DCA may allow for an increase to the grant award in order to complete projects.

### Subcontracting

An important labor standards component is proper subcontracts. Prime contractors are required to hire only eligible subcontractors (i.e., those not on the Excluded Parties List found by checking SAM.gov). Prime contractors must also execute a subcontract document with each subcontractor, containing all CDBG-DR provisions including labor standards and other required provisions, such as equal opportunity and general conditions. This subcontract agreement is required for all subcontractors participating in a CDBG-DR project.

**The executed subcontract document must be on file with the subrecipient before any subcontractor pay requests can be processed. Work closely with the prime contractor to track the subcontractors and ensure that copies of the fully executed subcontracts containing all required CDBG-DR provisions, are obtained and filed in project files.**

## Bonding Requirements

Bonding requirements are detailed under [2 CFR 200.326](#) and state that for construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the minimum requirements must be as follows:

- a) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.
- c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

## Public Agency Agreements

Subrecipients are permitted under Title I to designate public agencies to assist in carrying out eligible activities on behalf of the subrecipient. Such designation is a non-procurement action by which the subrecipients may obtain services through non-competitive negotiations with another public agency (e.g., water/sewer or industrial authority that is a separate legal and financial entity from the grantee). (Note that this does not apply to administration by Area Development Districts.) See the Procurement Chapter for applicable procurement requirements.

Once the negotiations are complete, a contractual agreement must be executed. This agreement designates the scope of services, roles and responsibilities of each party, the time of performance and cost for such services. The contract must also contain the specific contract provisions that apply found in [Appendix II to Part 200](#) – Contract Provisions for Non-Federal Entity Contract Under Federal Award. A summary of the direct and indirect charges to be reimbursed under the contract, and the basis on which these charges are calculated, should be provided to the grantee with each payment request. Time sheets documenting staff time spent on the project should also be maintained.

## Intergovernmental and Cooperative Agreements

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

- An intergovernmental agreement typically involves two or more units of local governments who enter into an agreement to apply jointly for CDBG-DR funding.

- A cooperative agreement is often used when a local governmental entity applies for a grant to construct public facilities or improvements and decides to have another government entity own, operate, and/or maintain the improvements once they are completed.
- At a minimum, intergovernmental agreements and cooperative agreements should:
  - State that the parties have agreed to cooperate in undertaking the project;
  - Delineate the responsibilities and authorities of each party with respect to the administration of the grant and continuing ownership, operation and maintenance of facilities if applicable; and
  - Authorize one of the parties to be the recipient of the funds and have primary administrative responsibility.

## Reporting Requirements

To meet federal requirements for timely reporting of contracts funded through the CDBG-DR grant, subrecipients must report contract information to DCA. DCA will provide additional information about the process for reporting this information.

Additionally, subrecipients must complete the [HUD Form 2516 Contract and Subcontract Activity Report](#) and submit to DCA on a quarterly basis. DCA is then required to submit the report to HUD. Subrecipients should only report on contracts executed during the quarterly report period, including both professional and construction contracts. Once all contracts have been reported, the subrecipient should continue to submit the report and write “No additional contracts to be awarded” on the activity report.

