

Distinctions between Subrecipient and Contractor

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Mr. Paul Cataldo
Director, Community Development
Office of Management and Budget
75 Park Place
New York, NY 10007

Dear Mr. Cataldo:

Thank you for your letter of July 23, 1993, requesting clarification of the definition of a subrecipient under the Community Development Block Grant (CDBG) program. In your letter, you pose several specific questions regarding the distinction between a subrecipient and a contractor.

The regulatory definition of a subrecipient under the CDBG program can be found at 24 CFR 570.500(c). As stated in that section of the regulations, a subrecipient is a public or private nonprofit agency, authority or organization, or an entity described in 24 CFR 570.204(c), receiving CDBG funds from the recipient to undertake activities eligible for such assistance under Subpart C of the regulations. With this definition laying the groundwork, each of the City's specific questions regarding subrecipients is addressed individually below.

1. The City asks whether a subrecipient other than a Small Business Investment Company or local development corporation must be a nonprofit entity. As noted in the regulatory definition of a subrecipient cited above, a subrecipient must be a "nonprofit agency, authority or organization" except for those entities that may qualify under 24 CFR 570.204(c). It is this latter section of the regulations that authorizes Small Business Investment Companies and local development corporations as subrecipients. Therefore, those organizations are the only for-profit entities that may be considered to be subrecipients under the CDBG program.
2. The City describes a scenario in which a contract is procured through open competitive bidding and the successful bidder is a nonprofit entity. The City then asks if there are any circumstances under which that nonprofit entity would be considered a subrecipient. If the procurement action was conducted by the City in full compliance with the requirements contained in 24 CFR 85.36, there are no circumstances under which the subject nonprofit entity would be considered a subrecipient under the CDBG program. Such an entity would be considered a contractor.
3. The City asks whether the complexity or type of activity undertaken determines whether or not an entity is a subrecipient. In general, it is not the type of activity or service being funded that dictates whether the providing entity is considered a subrecipient. The more important determining factor is the method that the City uses to select the entity to carry out the activity.

In order for an entity to be considered a contractor, the City must select that entity in accordance with the procurement requirements at 24 CFR 85.36. In accordance with 24 CFR 85.36(c), such procurement actions must be conducted in a manner that provides for free and open competition. No restrictions that would limit competition may be imposed on the procurement process. In accordance with 24 CFR 85.36(b)(9), the City is also required to maintain sufficient records to support the significant history of a procurement action, including the rationale for the selected method of procurement, the selection of the contract type, contractor selection or rejection, and the basis for the contract price.

When a subrecipient is used, however, there are no regulatory requirements governing how the City selects that entity. The City may simply designate a nonprofit organization or an entity described in 24 CFR 570.204(c) to act as a subrecipient to carry out an activity. However, the City and the subrecipient must then enter into a written agreement that meets all the requirements of 24 CFR 570.503. These requirements include compliance with the applicable uniform administrative requirements as described at 24 CFR 570.502 and the program income requirements as set forth in 24 CFR 570.504(c).

While the type of activity or service being funded is generally not what dictates whether the providing entity is considered a subrecipient, it should be noted that certain activities that are otherwise ineligible for CDBG assistance may only be carried out by eligible subrecipients under the provisions of 24 CFR 570.204, special activities by certain subrecipients. Examples of activities that would fall under this category are new housing construction and tenant-based rental assistance. CDBG funds may only be used for such otherwise ineligible activities if the funds are provided to an eligible subrecipient to carry out a neighborhood revitalization, community economic development, or energy conservation project. Thus, the City cannot procure a contractor to carry out such activities.

It should also be noted that there are situations where the entity receiving CDBG funds is neither a contractor nor a subrecipient. In the following cases, the entity is not carrying out an activity for the grantee, but rather is specifically eligible to receive the assistance under the regulations: an owner (either nonprofit or for-profit) of an apartment building receiving a rehabilitation loan or grant under 24 CFR 570.202(b)(1), a for-profit business receiving a loan or grant for an economic development project under 24 CFR 570.203(b) and a nonprofit organization or a business receiving relocation payments and relocation assistance under 570.201(i).

4. The City notes that HUD training materials state that a subrecipient is provided CDBG funds to carry out an eligible activity and a contractor is paid CDBG funds as compensation for its services. Clarification is requested as to whether this means that the timing of payments or reimbursements is a factor in defining a subrecipient. The referenced citations from HUD training materials are not meant to suggest that the timing of CDBG payments or reimbursements is a factor in differentiating between a subrecipient and a contractor. Instead, the terminology is meant to reflect the different nature of the relationships between the City and a subrecipient and between the City and a contractor. A subrecipient is said to be provided CDBG funds for its use in carrying out CDBG activities to indicate that it has been designated by the grantee to carry out an eligible CDBG activity. The subrecipient is subject to the applicable uniform administrative requirements as it carries out the agreed-upon CDBG activities under the scope of its subrecipient agreement

with the City. A contractor, on the other hand, is competitively selected to provide clearly specified goods or services. The contract price is established through the procurement process. CDBG funds are paid to the contractor as compensation for the satisfactory provision of the goods and services as specified in the contract. The uniform administrative requirements are generally inapplicable to contractors, with some exceptions such as the Federal Acquisition Regulations (FAR) cost principles and bonding and insurance requirements.

5. In those cases where it is not clear whether an entity is or is not a subrecipient, the City asks whether a grantee can choose to designate the entity either as a subrecipient or as a contractor. In such cases, if the entity is a nonprofit organization, the grantee does have the discretion to decide which type of relationship it wants to establish with the entity. However, it should be noted that this decision must be made up front. As discussed in response to question 3 above, an entity can only be considered a contractor if it is selected by the City in accordance with the procurement requirements at 24 CFR 85.36. If the City cannot demonstrate compliance with those requirements, the entity in question must be considered a subrecipient (keeping in mind the three exceptions noted under #3 above).
6. As a final question, the City asks which is the most important consideration in distinguishing contractors from subrecipients. As noted in the responses to most of the above questions, the most important consideration in distinguishing contractors from subrecipients is the method the City uses to select the entity to carry out the activity. In order for an entity to be considered a contractor, the City must select that entity in accordance with the procurement requirements at 24 CFR 85.36. A subrecipient may be selected by the City in any manner it determines to be appropriate.

I hope the above information provides the City with a better understanding of the definition of a subrecipient under the CDBG program. I am also pleased to know that you found the information presented at the HUD-sponsored subrecipient management training in December 1992 to be helpful in providing guidance regarding subrecipient agreements and monitoring. Please note that subrecipient management materials based, in part, on that training, will be provided to you in the near future. Subrecipients continue to play increasingly active roles in the CDBG programs of communities across the country. Thus, it is important for both HUD and City staff to have a clear understanding of the programmatic requirements relevant to the use of subrecipients in the CDBG program.

Thank you for your continued interest in the CDBG program.

Very sincerely yours,

Don I. Patch
Director
Office of Block Grant Assistance