

# **CDBG-DR - Updates & Clarifications to Procurement Requirements for States at 2 CFR 200**

## **April 26, 2017**

Jessie Handforth Kome: I'm Jessie Handforth Kome. I'm the deputy director of the Office of Block Grant Assistance and we manage the CDBG program. And I'm seeing a question, actually -- can somebody type in the thing -- can you hear now? I'm seeing questions about whether they can hear anything on the phone or not. People can hear? Good. Great.

Okay. So what we're doing today is more of a clarification to procurement requirements for states and less of an update. But what we wanted to talk to you about is -- this is a brief presentation so that we can help state CDBG grantees understand the choices that they have to make regarding procurement and know where additional resources are.

It's come to our attention because of a couple of fairly contentious audits that we were working through that there might be some lack of clarity out there and we wanted to help with that. This is not in-depth training on CDBG procurement. We do have Paul Webster of our financial management division and James Hoemann of our state CDBG division to help us later with our questions and answers if there's anything that comes up that's not directly on the topic. They're much more experts on that in general.

So what we're going to cover is learning from the audits why we do this and then just a brief overview of the recent policy clarification. And I have a fair amount of text on the screen because I wanted to list from -- we have both audit responses material and we have some legal opinions that I think really clarify a couple of points. So in general, we learn from audits. It's something that the Office of Inspector General recommends to us when patterns emerge in audits or when contentious issues get wrestled with. We realize that there may be some clarification. Even if we don't need to change a requirement, we do need to explain exactly what it means. And so that's basically what we're doing today.

And the background on this particular issue is that CDBG disaster recovery grants are made based on special supplemental appropriations that occasionally have some additional material in them and overlay some CDBG program. And one of the recent overlays was that the secretary of HUD was going to have to certify that the grantee had in place proficient financial controls, including procurement processes.

And so HUD published a Federal Register notice for the first one and there have been subsequent notices for other appropriations. We described the requirement and what documents a grantee needs. This is the MIP. So they probably can make a certification of proficiency. Then we designed a checklist and we have updated it so we can review a proficiency and then HUD makes a certification and followed by making the grant.

So that's sort of how it works. It's a little different from regulation state CDBG because we don't certify your financial proficiency. But because of this overlay, it raised some issues around

procurement that do have some applicability, potentially, to state CDBG. So we wanted to come out and explain both for DR and potentially for state CDBG.

So we got into a disagreement with the Office of Inspector General, which happens occasionally. There's a process where we elevate it and basically discuss it, argue it out; the general counsel gets involved. And that's happened with a couple of audits. And so I'm going to talk narrowly about the issues raised by those audits. There may be other issues related to these procurement matters that come up and we'll keep you updated as it goes.

So just sort of walking through the pieces of the procurement requirements I specifically want to talk about, state CDBG regulations apply to CDBG-DR grantees unless waived and the procurement section of the CDBG-DR notices and the regs expressly let state grantees use their own procurement requirements if they choose. A state shall establish, must establish, fiscal and administrative requirements for procurement -- well, in general, but also for procurement specifically, as a separate flexible requirement that you can -- states can use requirements -- procurement requirements applicable to their own funds, adopt new requirements specific to the grant in question, or apply the federal financial requirements.

One of the discussed points on audit situations. If the state applies the federal financial requirements, the regs state that the state is permitted, but not required, to adopt each subparagraph of the federal procurement regulations. And that was a key point in determining the overlay on the review standards for proficiency. If a state adopted all the subparagraphs, it was clear that the state had to have policies and procedures to meet all the subparagraphs just the way an entitlement would and follow them. But if the state did not adopt all of the subparagraphs and only adopted the top line thing that was going to follow, at that point, it was 85-36A, then it would actually be following its own requirements for non-federal funds.

So HUD's review, it's our checklist, brought the questions up because we said we're looking for whether the state standards were equivalent, and at one point, we used the word aligned, with the regulations. And one way of looking at this was "equivalent" meant that there was a state standard that matched every subparagraph in the federal standard, another way of looking at equivalency alignment. If you're going to have the same or similar effect as -- and results in procurement based on fair and open competition, and that's where the legal opinions came down.

They said that "equivalent" in this case, was always intended to mean -- it meant -- having the same or similar effect as the federal regulations, which means that they need to result whatever the state standards were. Policies and procedures had to result in procurements based on fair and open competition. So things that were designed to cut off competition would not be equivalent, but if you were trying to achieve fair and open competition, not having a separate matching policy for every subparagraph was okay.

And this is a case-by-case thing. It's sort of an emerging policy area. We do have some cases. And if you're a DR grant, disaster recovery staff or disaster recovery division, your assigned grant manager can help you out with this. But one of the things we wanted to bring to your attention is that we do have some tools that can be very valuable. They're tools that actually HUD uses to monitor states or to review for financial proficiency. And we're finding that

grantees who use these guides to check their own compliance, and these guys have been updated for 2 CFR 200 now, so they can help you in the state CDBG program and not just in DR to review your standards.

You can use the financial proficiency checklist and take a look at that and look at what documents the Federal Register notices say to submit and get an idea of what it takes to be sure you have financial proficiency at the level that we're looking at as a grant over here. And also, the HUD CPD monitoring handbook has been reissued and updated and has all the Part 200 citations alongside the Part 85 citations. And so you can look at Exhibit 4-7 from the monitoring handbook, and I have the link here and we'll be posting this. And you can take a look and see whether you are equivalent. You know, whether you've met the requirements.

So that's really all I wanted to share with you today directly. It was just to call attention to this area where we're having this discussion around equivalency and alignment and make sure you know this is going on and give you some tools to be able to look at your own records and your own record systems and your policies and procedures and make sure that you are in compliance. So with that, we can move to questions that you may have about this topic or procurement. And we'll try to answer the questions. Chantel, do you want to come on and tell us how we're going to do this?

Chantel Key: Sure. Thanks. Well, so for any content related questions, we ask that you send them through the Q&A box and if you're not seeing your Q&A box on the right-hand side of the screen, on the right corner, you should see an icon that says Q&A. click on that box and the Q&A box will automatically appear in your tool bar. So again, that's all content related questions through the Q&A box and send them to all panelists. Jessie.

Jessie Handforth Kome: Okay. So I only see one question and Tyler Bridges, I believe is on in the background, is going to try to sort this out.

There's a question regarding subgrantee and what applies to subgrantees. I believe it's a Part 200 question. So if they get CDBG-DR funds funneled through the state, the notice, I believe, speaks to -- "If you're treating them as subrecipients, what you're going to have to do under Part 200, if you're doing standard method distribution, how would it work in state CDBG?" James is here with me. He's going to -- James Hoemann is going to come take a swing at this. What applies to state grant recipients?

James Hoemann: Well, the state's responsible for designing the procurement policies and procedures for its subgrantees. Now, I will tell you if you go to 2 CFR Part 200 and you start looking at pieces to adopt out of there, if you look at 317, the first part of that talks about the state itself and what applies. And the second part of that mentions that all of that will be applied to your subgrantees.

So you have to be careful when you look at 2 CFR Part 200 in that section that you don't inadvertently apply a policy to yourself or to your subgrantee that you don't want to. So again, your requirement is to have not only your own procurement policies and procedures, but the ones that you expect your subgrantees to follow as well.

Jessie Handforth Kome: Okay. And I see a couple entitlements. Charlotte asking the equivalency thing and alignment thing doesn't apply to you? No. But if you want to use the monitoring handbook, Exhibit -- I want to say it's chapter three, but I could be confused, there's an exhibit for entitlement financial management that includes all the dual citations, SB Part 85 and the 200, so that you can check yourself and make sure you switched over all your documents. The subrecipient management one also has a review for subrecipient agreement so you can check that you've updated all your agreements properly.

There's another state question here for you, James. "If a state previously adopted Part 85 in entirety, but not would like to consider adopting parts or none of 2 CFR 200, how do they document their adoption?"

James Hoemann: Well, you have to have your own policies and procedures. So even if you were to actually adopt all of the 2CFR aspects of it, you would have to have in your policy to that is what you were doing. So in order to kind of document that, it's the same thing, where you just have your policies and procedures for your program and you just state in there what you are or not adopting out of 2 CFR Part 200.

But again, I would be careful of looking at 317 and a couple of the other ones. You want to really take a look at what's in there and see if it's going to apply or not going to apply to you or your subgrantees. So if you have questions about what you want to adopt out of there, I would send them in through your field office.

Jessie Handforth Kome: Okay. Let's see. This is starting to go fairly fast. "Does CDBG require non-profit organizations to request three bids prior to the procurement process?" Paul, are you there?

Paul Webster: Yes. I'm here.

Jessie Handforth Kome: Paul Webster, what do we require for non-profit organizations? I'm assuming that they got a grant from a state. So that would be CDBG-DR?

Paul Webster: Mm-hmm.

Jessie Handforth Kome: To request three bids prior to the procurement process. I think that one needs some unpacking.

Paul Webster: If you're following the Part 200 or the Part 85 requirements, there's no requirement for three bids. I believe in Part 200, it talks about sealed bid methods. You'd use that one when it's appropriate and you expect to receive two or more bids, but you're not required -- there's no three-bid minimum.

Jessie Handforth Kome: Okay. Those of you that are asking about the timing, when you received your DR funds from HUD before the uniform guidance or after, the notices, I believe, state what applies to your grant. There's too many different appropriations out there and I am not

exactly sure what the cutover timing is for the DR grants. I'm sorry about that. We'll refer that one to our DR staff. Tyler can make sure that someone gets that answer out.

Tyler Bridges: Yeah. It was in the CPD notice that applies that all three appropriations -- or the state entitlement and disaster.

Jessie Handforth Kome: Okay. The most recent -- yeah. Okay. So there was a notice out about when the cut-over happens.

Tyler Bridges: Yeah. I'm pretty sure that if you received your grant award after January 1st of -- I think it was '16 -- then 2 CFR 200 applies. But I'll go back to make sure I get the CP notice.

Jessie Handforth Kome: Perfect. Okay. Here's an interesting one. "How could or would the use of GSA pre-competed contracts for business services meet the equivalency procurement test?"

Any of these contracts and pricing can be accessed by state and local jurisdictions. This is a completely separate topic, but one that we've actually been discussing here because it's actually getting to be more common in disaster recovery because GSA has been expanding its portfolio. James, do you know the answer if they're a regular CDBG answer?

James Hoemann: Regular CDBG, we would look to what was in Part 85 where it talked about using agreements like that for economies of scale, for procurement practices. In that case, if you actually belong to that group or subscribe to that group, you can use those agreements as long as you put in the CDBG requirements in your packet that you put out the bid. And some of those would go out on Demand Star or some of the other subscription services.

Jessie Handforth Kome: Yeah. So you don't want to leave the CDBG requirements behind. We're not quite uniform with everybody else. Paul, do you have anything to add on that one?

Paul Webster: No.

Jessie Handforth Kome: All right. "We were told at recent HUD seminar, that if they adopted a part of 2 CFR 200, that the other sections of 2 CFR would apply for states?"

Paul Webster: If you go into 570.489, which is the admin requirements for the state, we have in there what actually applies to our regulations in 2 CFR Part 200. Anything beyond that would be of your own choosing.

But again, I would be cautious in terms of adopting things out of 2 CFR Part 200 to make sure you read an entire section before you do that because there are caveats throughout there that if you take one piece of it, then the whole actually applies. So just make sure you read through the entire section first. Just like with the procurement, if you take a piece like 319, you're actually adopting 317 as well, which means you're taking all of the procurement section out of there.

Jessie Handforth Kome: Yeah. So read carefully and read the intersection between the two regulations, the ones for the CDBG program and 2 CFR 200.

Okay. Do we have any other questions? The thing has stopped scrolling on me so I can actually read. Does anybody else have any additional questions on this?

Let's see. We don't usually release copies of our legal opinions, but I can check. They're very case-specific and that's why we were trying to extract just the lessons for this. It isn't very common if don't have a nationwide kind of legal opinion to release it. But we will put the slides up for this presentation as soon as they're 508-compliant.

"So we have does 2 CFR 200 apply to RFPs that are for application and grant management or engineering services for state subrecipients?" That is an interesting intersection question. Almost has to be a CDBG-DR question and I believe there's a case moving in that space. I don't have the answer to that question. Tyler, that one we're going to have to -- I believe that [inaudible] is working on this one.

Tyler Bridges: Okay.

Jessie Handforth Kome: The general applicability is as we have described, the trick with DR -- disaster recovery -- is that grant management and engineering services may be covered by the grantee [inaudible] the requirements that they can't outsource grant management. They have to stay in control of their own programs and have the oversight responsibility. They can't source it out.

So that question intersects with that policy, Paul, that's being made about exactly how far can you go.

Paul Webster: Yeah. The only other piece we have on that is in -- for the state CDBGs in 570-489G, which is the procurement requirements. At the tail end of that regulation, it says that he subrecipient, which would be who your subgrantee actually uses if they use a subrecipient, and contractor determinations are to be made in accordance with 2 CFR 200.330, which is the only piece that we applied that may come into play on that.

Jessie Handforth Kome: Okay. And then one of my all-time favorite questions that I know Paul has answers for, "What if a homeowner is getting quotes from contractors for repair work that will be paid with CDBG-DR funds? Is the homeowner required to follow CDBG-DR procurement requirements and should CDBG compliance provisions be included with the resulting contracts?"

I am assuming with this question that the homeowner has the contractual relationship with the contractor. Paul?

Paul Webster: Well, the requirements only apply to non-federal entities and a homeowner who is receiving a grant or a loan from a grantee to carry out -- for rehabilitation wouldn't be included in the definition of a non-federal entity.

In other words, it's not a subrecipient. So they're really not subject to the Part 200 or Part 85 requirements.

Jessie Handforth Kome: That was a good one. That's a question I get asked and answered fairly often in different angles. Thank you. Does anybody else have any other questions? All right. Going once. Going twice.

Let's see. I'm seeing somebody asking, "Will we do a webinar for entitlements on procurements?" Not planning one right now, but we can. We can add that to the queue.

We have one in combining -- ah. This is the question I thought it was, about combining application and grant management or engineering services in a single RFP or RFQ as applicable. That one, I'm going to have to set aside. I'm aware that question is moving, but I'm not prepared to handle it right now, yet. [inaudible] is definitely working about it.

So, "A business receiving DR funds; do they have to follow procurement process?" I'm assuming again the business is the beneficiary. Paul, I assume that's the same answer as with a homeowner; right?

Paul Webster: Yeah. If they're not considered to be a subrecipient, then they're not subject to the requirement.

Jessie Handforth Kome: Now, there we go. Okay. Chantel, do we have any wrap-up business here?

Chantel Key: No. That's all on my end.

Jessie Handforth Kome: Okay. Thank you very much for participating today and we look forward to getting this posted. If you have any questions, talk to your HUD representative or enter a question in the HUD Exchange. Thank you all.

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