



NSP Policy Alert!

Guidance on Developers, Subrecipients, and Contractors – Updated November 16, 2011

Note: *The NSP Program Administration Implications by Entity Type Table was revised November 16, 2011 to clarify guidance on housing counseling activities administered by developers. The original guidance was issued August 27, 2010.*

Neighborhood Stabilization Program (NSP) grantees may work with developers, subrecipients, contractors, or any combination of these entities to implement their programs. However, different sets of HUD and OMB rules apply to these entities in certain situations. Accordingly, an NSP grantee must carefully consider the implications of any decision to implement NSP-funded activities through one type of entity versus another. HUD has developed the following guidance to clarify the definitions of each of these entity types, as well as the requirements for NSP grantees which establish relationships with such entities. This guidance consolidates information that has been addressed in previous NSP policy alerts, and offers new guidance regarding developer fees based on more recent questions received from NSP grantees and affiliates.

Definitions

Subrecipient: A nonprofit or public agency that assists a grantee or another subrecipient to administer all or a portion of the NSP program. As provided in the NSP Bridge Notice, published on June 19, 2009, "Subrecipient shall have the same meaning as at the first sentence of 24 CFR 570.500(c). This includes any nonprofit organization (including a unit of general local government) awarded funds by a state. The term also includes any land bank receiving NSP funds from a grantee or another subrecipient." Section 570.500(c) reads as follows: "*Subrecipient* means a public or private nonprofit agency, authority, or organization, or a for-profit entity authorized under 570.201(o), receiving CDBG funds from the recipient or another subrecipient to undertake activities eligible for such assistance under subpart C of this part."

Developer: A for-profit or private nonprofit individual or entity that the grantee provides NSP assistance to for the purpose of (1) acquiring homes and residential properties to rehabilitate for use or resale for residential purposes and (2) constructing new housing in connection with the redevelopment of demolished or vacant properties. Developers are program beneficiaries and thus distinct from subrecipients, grantee employees, and contractors. Developers may receive NSP funds from either the grantee or a subrecipient. Developer led rehabilitation is undertaken pursuant to 24 CFR 570.202(b)(1). New housing construction is undertaken pursuant to 24 CFR 570.204, or the NSP notice published on October 6, 2008, as amended.

NSP grantees should note that they may but are not required to treat all third-party development entities as subrecipients. HUD regulations treat developers as private entities entitled to benefit under 570.202(b)(1). This is important in situations where a private for-profit or non-profit organization receiving

NSP funds is neither a contractor nor a subrecipient. In such instances, the developer is not an intermediary acting for the grantee, but is receiving assistance itself as a beneficiary under the program.

Examples include a for-profit or nonprofit entity receiving a housing rehabilitation grant or loan to improve property it owns. Public nonprofits such as Housing Authorities or Redevelopment Authorities do not qualify as developers because 570.202(b)(1) requires them to be private entities.

Both grantees and subrecipients can engage developers. However, to be treated as a developer, the entity must demonstrate ownership or control of the property to be rehabilitated or redeveloped. That is, a grantee or a subrecipient cannot designate an entity as a developer if it is simply providing construction services on a property owned by the grantee or subrecipient; such an entity would be classified as a contractor.

Contractor: An entity that supply goods and services at an agreed-upon rate or price. When a grantee or subrecipient hires a contractor, the contractor must be procured pursuant to Part 84.

Additional Considerations Regarding Developer Fees

Questions pertaining to developer fees are among those most frequently asked by Neighborhood Stabilization Program (NSP) grantees and affiliates. This section is intended to provide grantees with a few additional points to keep in mind as they contemplate entering into agreements with private developers.

- Grantees and subrecipients may not earn a developer's fee. An entity may charge developer's fees only under 24 CFR 570.202(b)(1), which allows a grantee to provide CDBG funds (or NSP funds) to assist in the acquisition and rehabilitation/ reconstruction of property by private individuals or entities. The right to charge a developer's fee is available only to an entity that receives assistance from the grantee or the subrecipient and assumes some of the risk of the project, which the developer does by investing some of his/her own money in the project. Grantees and subrecipients are compensated for the actual costs of carrying out eligible activities, which reduces or eliminates any development risk if actual costs exceed estimates. Therefore, accounting principles and cost circulars do not allow grantees or subrecipients to collect a developer's fee. (Note that this is a CDBG policy that has existed for decades.)
- Public entities having an identity of interest with the grantee may only carry out NSP development activities for an NSP grantee under a subrecipient agreement, not under a developer agreement
- When negotiating a developer fee, it is crucial for grantees to clearly specify what project costs can and cannot be paid with NSP fees. For example, if a developer's budget called for directly paying a project manager and also a developer fee that would be double-dipping and would not be allowed. Direct costs or indirect costs of a developer related to project management should be paid only through the fee. Grantees may also require a developer to pay some of the holding costs and receive reimbursement through the fee. Though not required by NSP, such a provision is used to encourage developers to complete projects in a timely manner. If a developer agreement does not include specific property addresses, then the contract should include a detailed list of criteria describing eligibility for acquisition and include a list of NSP-related obligations that carry forward with the property. It is also advisable for grantees to retain the right to individually sign off on each acquisition by a developer.

NSP Program Administration Implications by Entity Type

	Grantee	Developer		Subrecipient	Contractor
Federal Procurement Process?	Yes	No		Yes	N/A (procured)
Revenue/Program Income CFR 570.504	Must treat excess revenues as Program Income, to be used for other NSP-eligible activities	Not required to return excess revenues. However, HUD strongly encourages grantees to implement mechanisms which prevent undue enrichment.		Must treat excess revenues as Program Income and return to grantee, or if the grantee wishes, subrecipients may keep program income to implement other NSP-eligible activities.	N/A (Contractors not subject to Program Income requirements)
Activity Delivery and General Administration 24 CFR 570.205 and 570.206	10% cap on admin and Program Income; no cap on activity delivery costs.	May receive a developer fee which includes a reasonable profit margin. May charge contractor fee or brokerage fee if performing these separate services.		May receive activity delivery costs and admin funds for all direct costs. Any indirect costs may only be charged to NSP with an approved indirect cost allocation plan.	All costs built into bid. Bids should incorporate costs and expected rate of return.
OMB Cost Principles	Part 85, A-87	Doesn't have to follow OMB circulars		<i>Nonprofits:</i> Part 84, A-122 <i>Public Entities:</i> Part 85, A-87	N/A
Obligations: Acquisition 24 CFR 570.201(a)	Funds are obligated when there is a purchase agreement in place for a given property.	N/A		Funds are obligated when there is a purchase agreement in place.	N/A
Obligations: Rehabilitation 24 CFR 570.202	Funds are obligated when there is a written agreement with a contractor in place.	Funds are obligated when a developer's agreement is executed and a developer provides the grantee a detailed cost estimate for the rehab work.		Funds obligated with a written agreement with a contractor.	Funds are obligated when rehab contract is signed.
Obligations: Homeownership Assistance 570.201(n)	Execution of an instrument that awards homeownership assistance to an individual who will purchase a property pursuant to NSP eligible use (B) or (E).	May not directly provide homeownership assistance.		Execution of an instrument that awards homeownership assistance to an individual who will purchase a property pursuant to NSP eligible use (B) or (E).	N/A
Obligations: Demolition 24 CFR 570.201(d)	Funds are obligated when there is a contract for demolition activities.	N/A		Funds are obligated when there is a contract for demolition activities.	N/A
Obligations: Redevelopment; Public Facilities / Improvements 24 CFR 570.204, 24 CFR 570.201(c)	Funds are obligated when there is a written agreement with a contractor in place.	When developers engage in new residential construction, the requirements for acquisition and rehabilitation apply. Developers may not construct public facilities.		Funds are obligated when there is a written agreement with a contractor in place.	May build a public facility for a grantee or subrecipient.
Housing Counseling 24 CFR 570.201(e)	Total dollar amount of an agreement is obligated when the agreement is executed with a provider of counseling services.	Must ensure that buyers have received 8 hours of housing counseling, but may not provide counseling through developer agreement. Developers with HUD-approved counseling programs may offer counseling services under a separate contract. REVISED NOV 16, 2011		May perform housing counseling directly or through contractor. Total dollar amount of an agreement is obligated when agreement is executed with a counseling services provider.	May perform housing counseling for either grantee or subrecipient.
Registration for First Look Program Allowed?	May register for First Look	<i>Nonprofits:</i> May register for First Look	<i>For-profit:</i> Ineligible for First Look	May register for First Look	Must coordinate with grantee/subrecipient to access First Look.