



Rebuild Florida General Infrastructure Program

Memorandum to the File

SUBJECT

City of Lakeland, Lake Bonnet Project

TO

Caroline Pryor
Florida Department of Economic Opportunity
Mitigation Program Manager

DATE

January 25, 2022

FROM

CRI Team

COPIES TO

Paul Wotherspoon

Introduction and Background

This memorandum serves as communication to the City of Lakeland, as a subrecipient of the Florida Department of Economic Opportunity (DEO) Rebuild Florida CDBG-Mitigation grant program, regarding the Lake Bonnet project awarded \$42.9 million as a Round 1 General Infrastructure Program project. The Lake Bonnet project (project) may take 8 years or more to implement, per project documentation provided by the City.

Upon review of project documentation and HUD policy, Florida DEO proposes to proceed with the aforementioned project in a phased approach. The phased approach will allow the City to complete necessary investigations to confirm project scope, schedule, budget, and eligibility questions, as well as allow DEO to confirm compliance with CDBG-MIT program requirements periodically throughout the project.

The phased approach will begin with a feasibility study, not to exceed a 30-percent design milestone, funded as part of the initial \$42.9 million award. Background on the feasibility study recommendation is provided in Attachment A. This memorandum presents questions and issues that will need to be addressed as part of the feasibility study.

Compliance Issues

The following activities are not eligible for reimbursement under the CDBG-MIT Program:

- Lake Bonnet Canal Excavation, Widening, Deepening - \$2,215,080. Section V.C.2 under the Federal Register Notice (84 FR 45838), *Requirements for Flood Control Structures*, states that “Grantees that use CDBG-MIT funds to assist flood control structures (i.e. dams and levees) are prohibited from using CDBG-MIT funds to enlarge a dam or levee beyond the original footprint of the structure that existed prior to the disaster event.”
- Post-Dredging Wetlands Operations and Maintenance. As stated on page 77 of the Action Plan, “Long-term maintenance and operating costs are ineligible under CDBG-MIT funding except as identified under 84 FRN 45838 Section V.A.9.” Long-term maintenance and operations may only be paid for with CDBG-MIT dollars through program income earned, which is not applicable to this project.

Floodplain Management and Environmental Review

The feasibility study should address the following floodplain management and environmental review requirements:

- A floodway encroachment analysis is required to evaluate the hydraulic impact of the proposed pump station in the regulatory floodway, per 44 CFR § 60.3(d)(3).

- If the floodway encroachment analysis indicates an increase in base flood elevation, the city must apply for a Conditional Letter of Map Revision (CLOMR) and receive FEMA approval prior to construction (44 CFR § 60.3(d)(4)). Budget and schedule implications of this should be reviewed.
- Define the National Environmental Policy Act (NEPA) review requirements for the project, including level of review required.
- Define necessary state, federal, and local permitting requirements. Early coordination with permitting agencies to confirm the need and schedule for permits and obtain project feedback is highly recommended.

Stakeholder Coordination

It is recommended that the feasibility study accomplish and/or define the following stakeholder engagement efforts:

- Specify property required to obtain easements for project implementation.
- Coordinate with property owners and establish detailed budgets for easement acquisition, including appraisals.
- Scope community engagement specifics during design and construction, including number of public meetings held.

Technical Delivery, Schedule, and Budget

The project's scope, schedule and budget should be adjusted and refined in response to the results of the feasibility study, and to confirm that the project can be implemented in compliance with CDBG-MIT requirements and deadlines. This includes the following:

- Re-evaluate the technical approach to the work: easement acquisition, followed by complete design and encroachment study, followed by construction.
- Refine the schedule to follow the technical approach.
- Refine project budget based on eligible activities and new schedule.
- Provide a plan to fund long-term operation and maintenance of the project, since this will not be funded with CDBG-MIT dollars.

Procurement

Procuring support for the feasibility study must comply with 2 CFR 200 requirements and [HUD's Buying Right CDBG-DR and Procurement](#) guidance. In addition, the feasibility study should consider appropriate methods of project delivery and procurement, including the following:

- Re-evaluating the use of Design-Build project delivery method. Design-Build is not advisable due to the complexity of meeting federal procurement requirements.
- Navigating conflict of interest with existing design firms. "All procurement transactions for the acquisition of property or services required under a federal award must be conducted in a manner providing full and open competition consistent with this section and § 200.320," (2 CFR § 200.319).

National Objective

Florida DEO recommends that the feasibility study confirms that any changes proposed to the initial project will still meet a National Objective and that the low-to-moderate income analysis for the project is revised, if necessary.

Summary

The recommended scope for the feasibility study was established based on available project documentation, expert judgement, and policy analysis conducted by Florida DEO. The City may propose revisions and/or additional work for the feasibility study, to be reviewed and approved by Florida DEO.

Attachment A: Feasibility Study Eligibility and Applicable Waivers. Memorandum to Caroline Pryor and Paul Wotherspoon, dated January 20, 2022

Purpose of Feasibility Study and Applicable Waiver Memo

This memorandum serves as a follow-up to previous memos submitted to the Florida Department of Economic Opportunity (DEO) team regarding the City of Lakeland Lake Bonnet Project awarded under the first round of the General Infrastructure Program (GIP) for CDBG-MIT.

Previous memos found that acquisition and design for the proposed project will not meet a national objective until the end use (i.e. construction) is complete. Given the schedule concerns for the Lake Bonnet project, the CRI Team explored two potential paths forward:

- Allow the subrecipient to conduct a feasibility study to coordinate with landowners, solidify project costs, and confirm the project schedule based on CDBG-MIT eligible activities, and coordinate with permitting agencies to confirm that the project can be completed prior to the program funding deadline.
- Apply for a waiver. HUD can waive certain requirements per the CDBG-MIT FRN and the Housing and Community Development Act. To request a waiver, DEO “must demonstrate to the satisfaction of the Department that there is good cause for the waiver or alternative requirement”.

Policy analysis and expert judgement finds that the two paths are not mutually exclusive. By taking the approach to complete a feasibility study first, DEO will have the data needed to support requesting a waiver (if needed).

Recommended Approach

At this time, it appears that the only waiver option available and applicable to the Lake Bonnet project is to request a program extension beyond the twelve years allocated in the FRN. The CRI Team recommends that DEO take the following approach to move forward with the project:

- Allow Lakeland to use a portion of the GIP award as a “planning only” grant to complete a feasibility study for the Lake Bonnet project. This approach will allow forward movement on the project that will not be required to meet a national objective, if the feasibility study is for a LMI benefit.
- Complete a project feasibility study as referenced above. This feasibility study cannot exceed 30-percent design milestones.
- Depending on the feasibility study findings, DEO can request a waiver from HUD to support extending the program timeline at the appropriate time. Additionally, the feasibility study may identify other aspects of project implementation that requires a waiver.

Applicable HUD policy and guidance that informs this recommendation is provided below.

Planning: Feasibility Study

HUD allows planning and feasibility studies when evaluating if a project should receive funding. However, only plans up to 30-percent complete can fall into the category of feasibility planning. Once a design exceeds 30-percent design, HUD considers the solution a specific project which must be completed and meet a national objective to be eligible for funding.

The guidance below is from HUD’s [*Guide to Eligible Activities and National Objectives for States*](#), Chapter 2, pg. 2-43.

2.13.2 Eligible Planning Activities

CDBG funds may be used for:

- ✓ Studies,
- ✓ Analysis,
- ✓ Data gathering,
- ✓ Preparation of plans, and
- ✓ Identification of actions that will implement plans.

The types of plans which may be paid for with CDBG funds include, but are not limited to:

- ✓ Comprehensive plans;
- ✓ Individual project plans:
- ✓ Community development plans;
- ✓ Capital improvement programs;
- ✓ Small area and neighborhood plans;
- ✓ Local analyses of impediments to fair housing choice;
- ✓ Environmental and historic preservation studies; and
- ✓ Functional plans (such as plans for housing, land use, energy conservation, or economic development).

CDBG funds spent for planning and capacity building costs, *when undertaken in conjunction with other CDBG assisted activities*, are considered to address the national objectives of the CDBG program as a whole; no documentation of such compliance is required. *Reference: 24 CFR 570.483(f)*

However, states may also award grants to units of general local government in which planning is the only activity, or in which planning activities are unrelated to any other activity funded as part of the grant. These are often referred to as "*planning-only grants*" or "*planning-only activities*." Planning-only grants or activities must comply with the requirements or the L/M income or slum and blight national objectives.

Planning-only grants or activities can meet the L/M Income Benefit objective if it can be shown that at least 51 percent of the persons who would benefit from implementation of the plan are L/M income persons. For either the L/M Income Benefit or the Slum/Blight national objective, such determinations are not dependent on the planned-for activity or project actually being implemented at some point. *Reference: 24 CFR 570.483(b)(5); 24 CFR 570.483(c)(3).*

Authority for CDBG-MIT Grantees to Request Additional Waivers

HUD states in the Federal register notice allocating the CDBG-MIT funds that additional waivers may be requested. See excerpt below:

Section IV. Overview of Grant Process

Grantees may request additional waivers and alternative requirements from the Department as needed to address specific needs related to their mitigation activities. Grantee requests for waivers and alternative requirements must be accompanied by relevant data to support the request and must demonstrate to the satisfaction of the Department that there is good cause for the waiver or alternative requirement.

Grantees must work with the assigned CPD representative to request any additional waivers or alternative requirements from HUD headquarters. Except where noted, the waivers and alternative requirements described below apply only to the CDBG-MIT funds. Under the requirements of the Appropriations Act, waivers and alternative requirements must be published in the Federal Register and are effective five days after publication.

Considering the time necessary for the development and publication of Federal Register notices, grantees are advised to allow sufficient time for consideration, approval and publication of requests for waivers and alternative requirements.

When addressing damage in Presidentially declared disaster areas, the Secretary of HUD has authority under the Housing and Community Development Act (HCDA) to waive or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). CDBG-MIT FRN (84 FR 45843, 8/30/19).

The Housing and Community Development Act authorizes waivers for addressing damage in area with Presidentially declared disasters. The Act states:

Sec. 5321.* Suspension of requirements for disaster areas [* Section 122 of the Act]

For funds designated under this chapter by a recipient to address the damage in an area for which the President has declared a disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5170 et seq.], the Secretary may suspend all requirements for purposes of assistance under section 5306 of this title for that area, except for those related to public notice of funding availability, nondiscrimination, fair housing, labor standards, environmental standards, and requirements that activities benefit persons of low- and moderate-income.

(Pub. L. 93-383, title I, Sec. 122, as added Pub. L. 103-233, title II, Sec. 234, Apr. 11, 1994, 108 Stat. 369.)

The regulations for implementing CDBG are found at 24 CFR Part 570. Under these regulations, CDBG activities must be eligible and meet a national objective of providing benefit to low-to-moderate income persons, addressing slum and blight, or urgent need. Per the language contained in 570.483 regarding meeting a national objective, the Secretary can waive regulatory requirements pertaining to national objectives if addressing damage in a Presidentially declared disaster area.

§ 570.5 Waivers.

HUD's authority for the waiver of regulations and for the suspension of requirements to address damage in a Presidentially declared disaster area is described in 24 CFR part 5 and in section 122 of the Act, respectively.

§ 570.483 Criteria for national objectives.

(a) *General.* The following criteria shall be used to determine whether a CDBG assisted activity complies with one or more of the national objectives as required to section 104(b)(3) of the Act. (HUD is willing to consider a waiver of these requirements in accordance with §570.480(b)).

§ 570.480 General.

(a) This subpart describes policies and procedures applicable to states that elect to receive Community Development Block Grant funds for distribution to units of general local government in the state's nonentitlement areas under the Housing and Community Development Act of 1974. Other subparts of part 570 are not applicable to the State CDBG Program, except as expressly provided otherwise.

(b) HUD's authority for the waiver of regulations and for the suspension of requirements to address damage in a Presidentially-declared disaster area is described in 24 CFR part 5 and in section 122 of the Act, respectively.

