



PHA PROCUREMENT HANDBOOK

7460.8 REV 3

A Guide to Assist Public Housing Agencies on Procurement Practices

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

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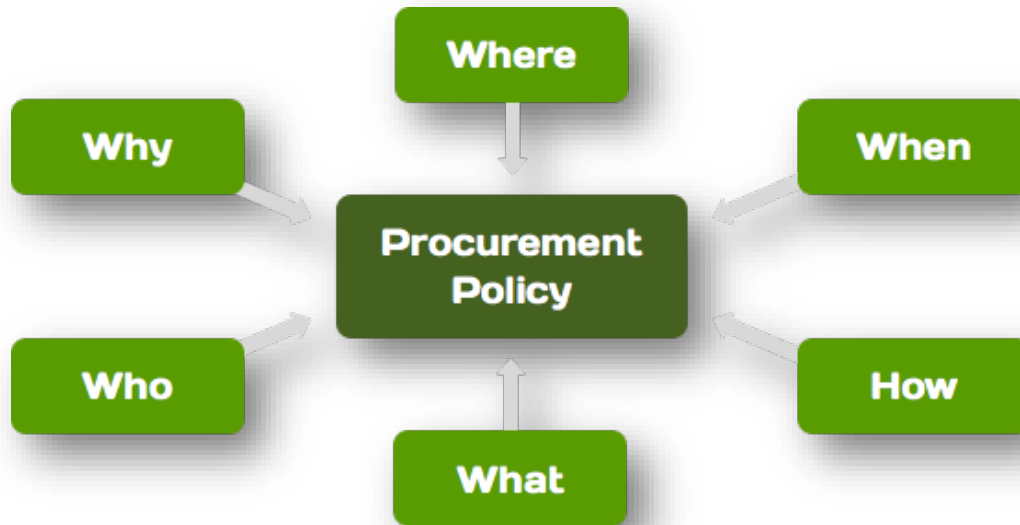
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CHAPTER 1 – BACKGROUND

1.1 PURPOSE OF THIS HANDBOOK



This Handbook describes both required and recommended procurement practices for Public Housing Agencies' (PHAs or agencies) operation, modernization, and development of public housing and operation of Housing Choice Vouchers (HCV) and Project-Based Vouchers (PBV). It incorporates Federal laws, regulations, and other instructions that have changed since the previous iteration of the Handbook, most significantly the primary governing regulation from 24 CFR 85.36 to [2 CFR 200.317-327](#). This Handbook replaces the former Public Housing Procurement Handbook 7460.8 (2007). Significant changes include:

- A. Incorporate changes made in response to the most recent version of 2 CFR Part 200, especially 200.317-327 (previous version was based on 24 CFR Part 85).
- B. Covers PHAs as "Recipients" because they receive a Federal award directly from a Federal agency to carry out an activity under a Federal program (previous version of part 200 used the term "non-Federal entity"). Incorporates, updates, and adds procurement terms.
- C. Applies Procurement Handbook (2 CFR Part 200) to Section 8 HCV Program Administrative Fees. These funds had been exempted from procurement requirements because Section 8 was exempt from the requirements in 24 CFR Part 85 prior to December 26, 2014. The Procurement Handbook does not apply to Housing Assistance Payments (HAP) contracts of the Section 8 HCV and PBV programs in accordance with 2 CFR 200.101(d). The procedures for a PHA entering into a Housing Assistance Payments (HAP) contract with an owner under the HCV program are governed by 24 CFR part 982. The procedures for a PHA selecting an owner's proposal or project under the PBV program are governed by 24 CFR 983.51.
- D. Discusses HUD forms and documents and provides links but no longer includes the forms in the Appendix.
- E. Updates audit and recordkeeping guidance.

- F. Updates conflict of interest requirements based on Part 200 and the public housing ACC. Also covers additional Section 8 HCV and PBV conflicts of interest based on the HAP contracts and regulations.
- G. Includes significant revision to informal procurement and payment methods including micro-purchases, petty cash purchases and purchasing cards and updates the simplified acquisition threshold.
- H. Incorporates Capital Fund regulatory exceptions to bid guarantees.
- I. Explains the difference between in-house counsel as an employee and other legal counsel as contract legal counsel and discusses the differences between employment and independent contracts.
- J. Describes specifications and statements of work incorporating 2 CFR 200.319.
- K. Reviews significant contract administration guidance and oversight discussion based on 2 CFR part 200 covering both construction and non-construction contracts.
- L. Guidance provided on contract modifications, especially incorporating contract cost principles at 2 CFR Part 200, Subpart E and various HUD forms, such as the HUD-5370s.
- M. Provides contract claims examples, default clauses, and discusses process.
- N. Discusses contract terminations either for default or convenience and in accordance with the HUD-5370s.
- O. Includes new section on procurement during disasters.
- P. Explains considerations for Joint Ventures, Subsidiaries, and Affiliates.
- Q. Includes a new section on energy-related procurements.

1.2 APPLICABILITY

This Handbook's contents apply to all PHA procurement actions using Federal financial assistance as defined in 2 CFR 200.1, regardless of agency size. Examples of Federal financial assistance are Operating Funds and Capital Funds. The Handbook's instructions also apply to income that the Central Office Cost Center (COCC) generates through fees of various types, as well as the Section 8 HCV Program's Administrative Fees. Section 8 HCV Program Administrative Fees had been exempt from procurement requirements because Section 8 was exempt from the requirements in 24 CFR Part 85 prior to December 26, 2014, but after this date was revised to reference part 200 requirements, and these funds are within the definition "Federal financial assistance." This Handbook does not apply to HAP contracts of the Section 8 HCV and PBV Programs in accordance with 2 CFR 200.101(d). The procedures for a PHA entering into a HAP contract with an owner under the HCV program are governed by 24 CFR part 982. The procedures for a PHA selecting an owner's proposal or project under the PBV program are governed by 24 CFR 983.51. This Handbook also does not apply to Tribal Designated Housing Entities or Indian Housing Authorities.

This Handbook is intended to be the primary reference document for all PHA procurement matters. However, this document is not exhaustive and should not be interpreted as encompassing all possible scenarios or considerations. If a situation arises that this Handbook does not address, the PHA should contact the local HUD field office or the procurement email mentioned in Section 1.8. This Handbook contains both mandatory and permissive instructions. To distinguish between the two, readers should interpret the following terms in the following ways:

- “*Shall*” and “*must*” mean that an action or item is mandatory (i.e., required by statute or regulation). This Handbook provides regulatory and statutory citations when applicable.
- “*Should*” and “*may*” mean that the action or item provides guidance and/or a best practice but is not mandatory.

1.3 SOURCES OF REQUIREMENTS

PHAs are “Recipients” as defined at 2 CFR 200.1 because they are entities that receive a Federal award directly from a Federal agency to carry out an activity under a Federal program. The term recipient does not include subrecipients or individuals that are participants or beneficiaries of the award. A PHA also meets the definition of a “Non-Federal entity” because it is a state or local governments that carries out a Federal award as a recipient. 2 CFR 200.1 further defines “local government” as including PHAs under the United States Housing Act of 1937. As such, PHAs are recipients and non-Federal entities, and governed by Part 200 of Title 2 of the Code of Federal Regulations (2 CFR Part 200), Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally Recognized Indian Tribal Governments. Sections 200.317 through 200.327 are the controlling regulations governing procurement. The standards provided in this Handbook are basic principles rooted in these regulations that each PHA must adhere to when contracting for goods or services using Federal financial assistance.

Other Federal regulations that affect specific aspects of a PHA's procurement process include:

- 24 CFR Part 75 – Economic Opportunities for Low- and Very Low-Income Persons, which implements Section 3 of the Housing and Urban Development Act of 1968
- 24 CFR 905, Subpart C and F – Capital Fund General Program Requirements and Development Requirements
- 24 CFR Part 905 – Public Housing Capital Fund Modernization (see 905.308 on wage provisions and 905.316 on contracting requirements)
- 24 CFR Part 943 – PHA Consortia and Joint Ventures
- 24 CFR Part 963 – Public Housing – Contracting with Resident Owned Businesses
- 24 CFR Part 964 – Tenant Participation and Tenant Opportunities in Public Housing
- 24 CFR Part 965 – PHA-Owned or Leased Projects – General Provisions (see Subpart A on preemption of state prevailing wage requirements and Subpart B on Required Insurance Coverage)
- 24 CFR Part 982 – Section 8 Tenant-Based Assistance: HCV Program
- 24 CFR Part 983 – PBV Program
- 24 CFR Part 990 – The Public Housing Operating Fund Program

Finally, each PHA operates under a different set of State and/or local laws. In some cases, PHAs may operate within Indian territory and be subject to Tribal law. In some cases, the Federal standards may be more stringent than the State, local, or Tribal law/regulation. In general, the PHA must comply with whichever is most stringent unless Federal law has preempted the State, local, or Tribal requirement. It would be impossible for the Department to provide guidance on every State/Tribal/local requirement affecting procurement. A more complete discussion of the relationships between Federal, State, Tribal, and local laws is found in Chapter 14.

1.4 CONSISTENCY WITH GOOD BUSINESS PRACTICES

The fundamental goal of a PHA's procurement system should be to satisfy the terms of cost, quality, and timeliness of the delivered product or service while complying with all applicable laws, regulations, and the PHA's own policies. Further, those involved in procurement should exercise initiative and sound business judgment in providing the best value product or service to meet the PHA's needs. Consistent with that goal, Contracting Officers may assume that, if a specific strategy, practice, policy or procedure is in the PHA's best interests and is not addressed in this Handbook nor prohibited by law, executive order, regulation, or other directive (including the PHA's own policy), it may be a permissible exercise of authority by the PHA. Contracting Officers should seek advice whenever they have doubts about an intended strategy, practice, policy, or procedure.

1.5 PUBLIC ACCESS TO PROCUREMENT INFORMATION

Certain information about PHA procurements is normally considered public (e.g., the name of the winning contractor and the total contract price), and PHAs should release such information to the public in accordance with their procurement policies and applicable State laws and regulations. Other information related to procurement is often protected from disclosure (i.e., proprietary business information, such as technical methods or processes, detailed pricing information, personal information, or the PHA's pre-decided information, such as internal proposal evaluations). PHAs must not publicize protected information. Contracting personnel should consult the PHA's legal counsel whenever they have any questions regarding the release of information.

In addition to laws requiring the publication of procurement opportunities, many States have enacted Freedom of Information or similar laws to further the goal of open government by providing public access to procurement information. These laws are not uniform, as each State has a different set of rules defining what type of information is public as well as how and when it may be released. The State law on public records may or may not apply to the PHA's procurement actions. Each PHA must incorporate applicable State laws into its procurement policy and ensure that procurement actions are conducted in accordance with such laws.

1.6 AVAILABILITY OF HUD FORMS AND DOCUMENTS

All required forms listed in this document, as well as relevant HUD notices, handbooks, and regulations, can be found online through one or more of the following:

- Information related to public housing and voucher programs is available at HUD's Office of Public and Indian Housing webpage: www.hud.gov/program_offices/public_indian_housing
- HUD forms may be found through HUDClips: <https://www.hud.gov/hudclips>

PHAs must not modify any mandatory forms or clauses discussed in this Handbook without written HUD approval from the Assistant Secretary for Public and Indian Housing. For public housing, HUD field offices may approve changes to forms when such changes are necessary to conform to State and local laws, subject to HUD field office counsel's concurrence. For Vouchers, required program contracts and other

forms must be word-for-word in the form required by HUD headquarters. Any additions to or modifications of required program contracts or other forms must be approved by HUD headquarters.

1.7 PAPERWORK REDUCTION INFORMATION

The information collection requirements contained in this Handbook has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. §§ 3501–3520) and OMB's implementing regulations in 5 CFR Part 1320, Controlling Paperwork Burdens on the Public. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. Any new information collection and reporting requirements not covered under previous approvals will require a new package to be prepared and submitted to OMB for review.

1.8 PROCUREMENT EMAIL

HUD has created an email mailbox for Office of Public and Indian Housing (PIH) staff, PHAs, contractors, and the public to ask questions or voice concerns about HUD's procurement policies. Questions and concerns can be directed to PHAProcurement@hud.gov. A HUD employee will address any questions or concerns in a timely manner.

1.9 GLOSSARY OF PROCUREMENT TERMS

This list defines key procurement and contracting terms used throughout this Handbook. Additional definitions for other terms are available at 2 CFR § 200.1.

- **Acceptance** – The PHA's authorized representative's acknowledgment that the supplies or services delivered to or received by the PHA conform to contract requirements.
- **Affiliate** – An entity other than an instrumentality, formed by a PHA and in which a PHA has a financial or ownership interest or participates in its governance. The PHA has some measure of control over the assets, operations, or management of the affiliate, but such control does not rise to the level of control to qualify as an instrumentality. See 24 CFR 905.604(b)(4).
- **Amendment** – Written revision or clarification made to a solicitation.
- **Anti-Competitive Practices** – Actions by potential contractors that improperly reduce or eliminate competition or restrain trade. This includes agreements or understandings among competitors to restrain trade (e.g., submitting collusive bids or proposals, rotating low bids, follow-the-leader pricing, or sharing of the business). Contractors may also wrongfully discourage competition through illicit business actions that have the effect of restraining trade, such as controlling the resale price of products or an improper collective refusal to bid. See 2 CFR 200.319(c) for additional information.
- **Architect/Engineer (A/E)** – Person (or company) usually responsible for developing a building's plans and specifications or development and, in some cases, supervising its construction.
- **Architect/Engineer Services** – Professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person who

is licensed, registered, or certified to provide such services; Professional services of an architectural or engineering nature that are associated with research, planning, development, design, construction, alteration, or repair of real property; and such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals they employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services. see 2 CFR 200.320 (b)(2)(iv)

- **Bid** – The price at which a bidder proposes to perform the work a PHA needs done. Bidders submit bids to PHAs in the sealed bidding method of procurement. See 2 CFR 200.319(b)(1).
- **Bidder** – The person or entity submitting a bid to the PHA.
- **Bidder’s List** – General list of persons or firms who may be interested in contracting opportunities with the PHA, and in submitting bids in response to an Invitation for Bid.
- **Business Concern** – A business entity formed in accordance with State law, and which is licensed under State, county, or municipal law to engage in the type of business activity for which for which it was formed.
- **Change Order** – A document that modifies a contract in accordance with the contract's changes clause. See Section 11.4.
- **Changed Conditions** – Construction site or repair conditions that differ significantly from those indicated in the contract or from those ordinarily encountered in the performance of the specific type of work under the contract.
- **Competitive Proposals** – Also called contracting by negotiation, a method of procurement using the solicitation, evaluation, and negotiation of proposals (see Chapter 7). PHAs may use this method when the value of the procurement for property or services under a Federal financial assistance award exceeds the PHA's simplified acquisition threshold and when conditions are not appropriate for sealed bidding. See 2 CFR 200.320(b)(2). Note: Under the Qualifications-Based Procurement method only, a Request for Qualifications (RFQ) is used to solicit proposals in place of an RFP. See 2 CFR 200.320(b)(2)(iv).
- **Competitive Range** – Proposals submitted in response to an RFP that, after the PHA's selection panel's technical evaluation and consideration of the proposed costs/prices, have a reasonable chance of being awarded the contract (see Chapter 7, paragraph 7.2.N).
- **Consortia** – These are a special kind of PHA consortium where two or more agencies have joined together to perform planning, reporting and other administrative functions, including, importantly, the joint preparation of a PHA Plan. Consortia are addressed separately in Chapter 15 paragraph 15.8. See 24 CFR Part 943.
- **Contract** – A legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award.
- **Contracting Officer** – The Executive Director or PHA employee authorized by the PHA Board and/or designated and authorized by the Executive Director to enter into and/or administer contracts and make related determinations and findings.
- **Contract Administration** – All the actions taken regarding a contract after its award. Administration includes monitoring the contractor's performance to ensure compliance with the contract requirements, terms, and conditions. See Chapter 11.
- **Contract Modification** – Any written alteration to a contract executed by a Contracting Officer (see Chapter 11, paragraph 11.4.A).

- **Contractor** – An offeror (see definition below) who is awarded a contract.
- **Contract Pricing Arrangements** – The arrangement, as reflected in the contract, for how the contractor will be paid for services. While there are two basic contract pricing arrangements—firm fixed-price and cost-reimbursement—there are multiple variations on these models. See Chapter 10.1 for more detail.
- **Cost-Reimbursement Contract** – The contractor is reimbursed for its allowable costs of performance up to a total estimated amount specified in the contract. See Chapter 10.1. The contract may provide for the payment of a fee (i.e., additional profit) on top of costs.
- **Cure Notice** – A document from the Contracting Officer notifying the contractor that the contract may be terminated for default unless performance is corrected within a specified number of days.
- **Excusable Delay** – A failure to perform within the contract period that is beyond the control and without fault or negligence of the contractor, as determined by the Contracting Officer.
- **Financial Obligation** – Orders placed for property and services, contracts and subawards made, and similar transactions that require payment by a recipient under a Federal award that will result in expenditures by a recipient under a Federal award. See 2 CFR 200.1.
- **Firm Fixed-Price Contract** – A contract under which the contractor is paid a preestablished amount for all work regardless of the contractor’s actual costs. See Chapter 10, Section 10.1.C.
- **Goods** – All supplies, equipment, material, or other things (including specially manufactured items) which are movable at the time of identification in the contract for sale, other than the money in which the contract price is to be paid.
- **Independent Cost Estimate (ICE)** – An estimate the PHA prepares prior to obtaining offers. The degree of analysis will depend on the size and complexity of the purchase.
- **Inspection** – The examination and/or testing of supplies and services to determine conformance with the contract.
- **Instrumentality** – As it relates to the public housing program, an entity whose assets, operations, and management are legally and effectively controlled by the PHA, and through which PHA functions or policies are implemented, and which utilizes public housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. An instrumentality assumes the role of the PHA, and is the PHA under all requirements applicable to public housing including, but not limited to, the 1937 Act (see Acronyms below); HUD regulations; the Consolidated Annual Contributions Contract (ACC), including amendments; HUD notices; and all applicable Federal statutes, executive orders, and regulatory requirements, as these requirements may be amended from time to time (the “Public Housing Requirements”), for purposes of implementing public housing development activities and programs and must abide by the Public Housing Requirements. Instrumentalities must be authorized to act for and to assume such responsibilities. For purposes of development, ownership of public housing units by an instrumentality would be considered mixed-finance development. See 24 CFR 905.108 and 905.604(b)(3).
- **Intergovernmental or Interagency Agreement** – An agreement between a PHA and a Federal, State, or local government agency (including other PHAs) for the provision of goods or services. In recent years, the terms "Intergovernmental" and "Interagency" have been interchangeable and are treated the same in this Handbook.
- **Internal Controls** – Processes that PHAs design and implement to provide reasonable assurance regarding the achievement of objectives in the following categories: (a) Effectiveness and efficiency of operations; (b) Reliability of reporting for internal and external use; and (c) Compliance with applicable laws and regulations. 2 CFR 200.1.

- **Invitation for Bids (IFB)** – Solicitation type used for sealed bidding. The IFB invites bids from potential contractors and must include any specifications and pertinent attachments as well as define the items or services the PHA is seeking so the bidder can properly respond.
- **Joint Venture Partner** – A participant, other than a PHA, in a joint venture, partnership, or other business arrangement or contract for services with a PHA. 24 CFR 943, Subpart C.
- **Level-of-Effort Contract** – A type of contract (usually falling under the “cost reimbursement” contract umbrella) that specifies the number and type of person–hours that the contractor will use to perform under the contract.
- **Major Change** – Modification of an existing contract that goes beyond the general scope of the contract or a change to a substantive element of the existing contract that is so extensive that a new procurement should be initiated.
- **Micro-purchase** – Individual procurement transaction for supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchases comprise a subset of a Recipient’s Simplified Acquisition Threshold purchases using informal procurement methods as set forth in 2 CFR 200.320(a)(i).
- **Micro-purchase threshold** – The dollar amount at or below which a Recipient may purchase property or services using micro-purchase procedures. Generally, except as provided in 2 CFR 200.320, the micro-purchase threshold for procurement activities administered under Federal awards is not to exceed the amount set by the FAR at 48 CFR Part 2, subpart 2.1, unless a higher threshold is requested by the Recipient and approved by the cognizant agency for indirect costs.
- **Negotiation** – Discussions: (1) with offerors in the competitive range regarding technical and/or price proposals when awarding a contract using the competitive proposals method of procurement; (2) with contractors when issuing modifications to existing contracts; or (3) other required discussion with offerors for the other methods of procurement.
- **Noncompetitive Proposals** – Part of noncompetitive procurement. PHAs may solicit noncompetitive proposals when: (1) the aggregate dollar amount to acquire property or services does not exceed the micro-purchase threshold; (2) the item is only available from one source, (3) a public exigency or emergency will not permit the delay that results from publicizing a competitive solicitation, (4) HUD expressly authorizes a noncompetitive procurement in response to the PHA’s written request, or (5) after soliciting a number of sources, competition is determined inadequate. See 2 CFR 200.320(c).
- **Offer** – A response to a solicitation (IFB or RFP) that, if accepted, binds the offeror to perform the resulting contract. This Handbook uses different words as synonyms for “offer” depending on the situation. Responses to invitations for bids (sealed bidding) are called “bids” or “sealed bids” and responses to requests for proposals (negotiation) are called “proposals.” “Small purchases” or “Simplified Acquisition Threshold purchases become binding contracts once the vendor accepts the order (e.g., by signature or substantial performance of the order). Offers submitted under the Qualifications-Based Selection (QBS) method are called “qualifications.” See Chapter 7, paragraph 7.3.A.
- **Offeror** – The general term for the entity that responds to a solicitation. For the purposes of this Handbook, offeror is used interchangeably with bidder, proposer, or respondent.
- **Procurement** – Acquiring supplies and services (including construction) with the PHA’s Federal financial assistance through contract (e.g., via purchase, lease). Procurement begins when the PHA establishes its needs and describes the requirements to satisfy these needs. From there, the PHA solicits and selects sources, awards contracts, finances contracts, and ensures contract performance through contract administration.

- **Proposal** – The offer a potential contractor submits in the competitive or noncompetitive proposal methods of procurement.
- **Public Housing Annual Contributions Contract (ACC)** – The grant agreement between HUD and the PHA setting forth terms and conditions for the operation, modernization, and development of public housing under the 1937 Act. The document for this is Form HUD-53012 (2023 version) or 53012 Parts A and B (1995 version) depending on when the PHA last entered into their ACC. Some PHAs may still be operating under a 1969 version of ACC (which limits contract term to two years, plus one-year extension if approved). The 1995 and 2023 versions of ACC s do not contain any specific language governing PHA procurement activity but incorporate by reference regulations promulgated at Title 2 and Title 24 of the Code of Federal Regulations, as well as all applicable laws and executive orders and regulations.
- **Qualification Based Selection (QBS)** – A form of procurement for architect-engineering (A/E) services by competitive proposals in which price is not requested in the Request for Qualifications (RFQ) or used as an evaluation factor. Instead, only technical qualifications are reviewed and negotiations are conducted with the best-qualified firm. PHAs may only procure A/E services (and development partners, as provided in 24 CFR 905.604(h)(1)) with this method.
- **Quotation** – The price or cost a vendor submits when the PHA is using the Simplified Acquisition Threshold procedures procurement method.
- **Request for Proposals (RFP)** – A method for soliciting proposals under both the competitive and non-competitive methods of procurement. PHAs use the evaluation criteria and factors for award stated in the RFP to evaluate proposals and select contractors. Price is only one criterion; PHAs also consider whether the proposal responds to the statement of work’s requirements and whether it would result in the greatest benefit to the PHA.
- **Responsible Bidder** – A bidder who: (1) can comply with the PHA’s required or proposed delivery or performance schedule; (2) has a satisfactory performance record; (3) has a satisfactory record of integrity and business ethics; (4) has the necessary organization, experience, accounting and operational controls, and technical skills to carry out the project, or the ability to obtain them; (5) has the necessary production, construction, and technical equipment and facilities to carry out the project, or the ability to obtain them; and (6) is otherwise qualified and eligible to receive an award under all applicable laws and regulations (e.g., the bidder is not suspended, debarred, or under a HUD-imposed Limited Denial of Participation).
- **Responsive Bid** – A bid that conforms exactly to the requirements in the Invitation for Bids (IFB).
- **Sanctions** – Measures that HUD may invoke to exclude or disqualify contractors, PHA staff, or agents acting on behalf of a PHA who violate the ethical standards of the PHA’s policies from participation in HUD programs. In the case of violations, HUD may exercise any available remedy under the ACC, Federal regulations and statutes, and grant agreements, including the U.S. Housing Act of 1937, as amended, 2 CFR Part 180, 200, and 2424, and 24 CFR Part 907.
- **Scope** – The overall boundaries and extent of a project. This may include criteria and preliminary design, budget parameters, and schedule or delivery requirements. The scope is a component of the Statement of Work (SOW).
- **Sealed Bidding** – A method of formal procurement. This method requires complete, adequate, and realistic specifications or purchase descriptions, two or more responsible bidders willing and able to compete for the PHA’s business, and that the type of procurement lends itself to a firm fixed price contract, meaning that the PHA can select a successful bidder principally based on price. If sealed bidding is used, PHAs must publicly advertise the bids, solicit bids from an adequate number of qualified sources, and provide these sources with sufficient time to respond prior to the date set for opening the bids. PHAs must also perform a public bid opening at the time and place

named in the invitation for bids. PHAs will award the contract in writing based on the lowest price a responsive and responsible contractor submitted. Sealed bidding is the preferred method for procuring construction services. See 2 CFR 200.320(b)(1) for complete information.

- **Section 8 ACC** – The written contract between HUD and the PHA, under which HUD agrees to make payments to the PHA, over a specified term, for housing assistance payments to owners and for the PHA administrative fee. The ACC specifies the maximum payment over the ACC term. The PHA agrees to administer the program in accordance with HUD regulations and requirements. 24 CFR 982.151(a). The document for this is form HUD-52520.
- **Show Cause Letter** – A document the Contracting Officer sends to a defaulting contractor notifying them that the contract may be terminated for default unless the contractor can adequately justify the PHA not terminating the contract within a specified time period (e.g., 10 days).
- **Simplified Acquisition Threshold** – The dollar amount below which a non-Federal entity may purchase property or services using informal procurement methods. The simplified acquisition threshold is currently \$350,000, but this threshold is periodically adjusted for inflation. 2 CFR 200.1; 48 CFR Part 2 Subpart 2.1. The Simplified Acquisition Threshold shall never exceed the amount specified in 2 CFR 200.320(a)(2)(i), (ii).
- **Single Source** – Any contract a PHA enters into without a competitive procurement process because only one known source exists or only a single supplier can fulfill the PHA's requirements. See 2 CFR 200.320(c)(2).
- **Solicitation** – The PHA's request for offers from potential offerors. A solicitation package generally contains the proposed contract, including contract terms and conditions, instructions to potential offerors regarding submitting an offer, and any other information needed to prepare an offer.
- **Solicitation Provisions** – The instructions provided to bidders/offerors in solicitations. The provisions must include how bidders/offerors prepare an offer, bonding requirements, date, and time for submission of offers. Provisions required by HUD, as applicable, are on forms HUD-5369, Instructions for Bidders, HUD-5369-A and B, Representations, Certifications and Other Statements and HUD-5369-B, Instructions to Offerors -Nonconstruction.
- **Specifications** – A specification is a detailed description of materials, supplies, equipment, pre-cuts, or construction work that tells vendors what the PHA wants to procure. Statement of Work (SOWs) are a subset of specification generally used as a component of the contract.
- **Statement of Work (SOW)** – A written description of work to be performed that establishes a PHA's standards for the goods or services under the contract.
- **Supplemental Agreement** – A type of contract modification to which both parties agree.
- **Termination for Cause** – Termination of a contract on a unilateral basis when the contractor fails to perform, fails to make progress (thereby endangering performance), or defaults as specified in the contract.
- **Termination for Convenience** – A PHA's unilateral termination of a contract when the PHA no longer needs the product or service or when it is in the PHA's best interest.
- **Time Delay** – An interruption during which contractors do not deliver supplies or do not complete services or work in accordance with the performance schedule in the contract.
- **Vendor** – The term often used for an offeror or contractor when talking about small purchasing.

1.10 ACRONYMS, INITIALISMS, AND ABBREVIATIONS

1937 Act – United States Housing Act of 1937

A/E – Architect/Engineer

ABA – American Bar Association

ACC – Annual Contributions Contract

BAT – Bureau of Apprenticeship and Training

CEA – Comprehensive Energy Analysis

CFR – Code of Federal Regulations

CSS – Community and Supportive Services

DOE – U.S. Department of Energy

DOL – U.S. Department of Labor

EPC – Energy Performance Contracting

ESCO – Energy Service Company

FAR – Federal Acquisition Regulation

GAO – U.S. Government Accountability Office

GSA – General Services Administration

HCV–Housing Choice Voucher

HOPE VI – Homeownership and Opportunity for People Everywhere

HUD – U.S. Department of Housing and Urban Development

ICE – Independent Cost Estimate

IFB – Invitation for Bids

IPP – Individual Procurement Plan

LDP – Limited Denial of Participation

LGB– Local Governing Body

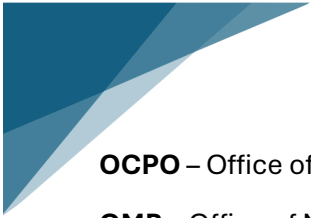
LSP – Legal Service Personnel

MBDC – Minority Business Development Center

MOC – Minority Owned Corporation

NAICS – North American Industry Classification System

NOFO– Notice of Funding Opportunity



OCPO – Office of the Chief Procurement Officer
OMB – Office of Management and Budget
PBV – Project-Based Voucher
PDF – Portable Document Format
PHA – Public Housing Agency
PHAS – Public Housing Assessment System
PIH – HUD Office of Public and Indian Housing
Pub.L. – Public Law
QBS – Qualifications-Based Selection
QHWRA – Quality Housing and Work Responsibility Act
RFP – Request for Proposals
RFQ – Request for Qualifications
RMC – Resident Management Corporation
SBDC – Small Business Development Center
SOW – Statement/Scope of Work
T-List – U.S. Treasury Circular 570
U.S.C. – United States Code
WBC – Women's Business Centers
WBE – Women's Business Enterprise

CHAPTER 2 – PROCUREMENT AUTHORITY & ADMINISTRATION OF THE PROCUREMENT FUNCTION



2.1 GENERAL

This chapter discusses the authority for procurement activity and delegation of the administration of the procurement function.

2.2 THE PROCUREMENT POLICY

PHAs are required to establish and follow a written procurement policy that is consistent with 2 CFR 200.317 through 200.327. A sample procurement policy may be found at Appendix 1. The policy need not contain detailed working-level procedures but should require establishment of such procedures to carry out the policy. Some PHAs prefer to combine the policy and procedures into a single publication for the convenience of staff.

While it is not required that the procurement policy be submitted to HUD for approval, PHAs that wish to be exempt from prior HUD approval of certain individual procurement actions can have their procurement policy reviewed/approved by HUD, as discussed in Chapter 12. PHAs can also self-certify that their procurement system meets all HUD requirements, which would also exempt them from certain HUD review requirements. See Chapter 12. See also 2 CFR 200.325.

2.3 DELEGATION OF AUTHORITY

- A. The PHA Board approves the procurement policy and usually delegates and authorizes responsibility for procurement functions to the Executive Director, with authority to redelegate all or

a portion of that responsibility to positions or individuals based on the organization and staffing of the PHA. The Executive Director is responsible for ensuring procurement actions comply with the PHA's adopted procurement policy as well as with applicable federal, state, local, and territorial requirements.

- B. A person with authority for procurement activities is referred to as the Contracting Officer when he/she performs that function, regardless of any other job or position title he/she may have.
- C. PHAs shall establish policies for the delegations of procurement authority (e.g., to the Executive Director). These policies shall be included in the PHA's written procurement policy. Delegations of procurement authority shall clearly state the limits of the authority delegated in terms of dollar value of individual obligations the person may make and any other limits (e.g., types of contracts the individual may award such as Simplified Acquisition Threshold purchases). Delegations shall also state whether the recipient may further re-delegate any of the authority and, if so, how much.

2.4 RESPONSIBILITY OF THE CONTRACTING OFFICER

Regardless of the authority delegated, it is the responsibility of the Contracting Officer to:

- A. Use sound judgment in accomplishing the procurement activities of the PHA;
- B. Ensure that bidders and contractors receive fair, impartial, and equitable treatment;
- C. Ensure that contract actions comply with all applicable Federal, State and local laws and rules and with the PHA's approved procurement policy; and
- D. Seek the best value and greatest overall benefit for the PHA in response to the needs desired.

2.5 CONTRACTING OFFICER SIGNATURE/OBLIGATION OF FUNDS

Each contract or purchase action (e.g., new contract, modification, interagency agreement, or purchase order) that obligates the PHA to pay a contractor or vendor must be signed or otherwise authorized by an individual to whom the PHA has expressly delegated the authority to make such an obligation.

The signature of the Contracting Officer on PHA contracts is a legal commitment and requires continuing performance by the PHA under the terms and conditions of the contract. Performance includes such duties as monitoring contractor performance and acceptance or rejection of contractors' requests for changes in performance, specifications, or price.

Caution: If an individual is not an authorized Contracting Officer, that individual must not bind the PHA by making an implied contract such as by making a promise or stating an intent to purchase, either orally or in writing. Under the laws of agency and apparent authority, the PHA may be liable for, or bound by, the acts of a PHA employee, if such person (who is not a Contracting Officer) appears to an offeror to have been given authority by the PHA. Therefore, all actions that could be misinterpreted as committing the PHA to

purchase shall be clarified with a statement such as, "this request for price quotation is not an offer to buy and should not be assumed as such."

2.6 STAFFING & TRAINING

PHAs ensure that their procurement employees have training and experience commensurate with the requirements of their duties. PHAs should develop training and experience standards for their procurement positions and periodically review their procurement operations to ensure that procurement personnel meet those standards. PHAs should consider any changes in the procurement environment (e.g., new laws, regulations, market conditions, or buying needs and practices of the PHA) when assessing the qualifications of personnel and the need for additional training.



CHAPTER 3 – GENERAL REQUIREMENTS

3.1 PROCUREMENT PLANNING (2 CFR 200.318(d)-(g))

- A. **General.** Planning is essential to managing the procurement function properly; however, the type and extent of planning will depend on, among other factors, the method and size of the procurement, with larger and more complex procurements requiring more planning. See, e.g., 2 CFR 200.318(d).
- 1) Careful advanced planning provides the PHA with adequate time to accomplish its procurement actions. Advanced planning helps to: Maximize competition and competitive pricing among contracts and decrease the PHA's procurement costs; reduce PHA administrative costs; ensure that supplies and services are obtained without any need for re-procurement, e.g., resolving bid protests; and minimize errors that occur when there is inadequate lead-time.
 - 2) PHAs should periodically review their record of prior purchases, as well as future needs, to find patterns of procurement actions that could be performed more efficiently or economically.

Items purchased repetitively might be obtained more economically through various master contracts. However, consideration should be given to storage, security, and handling requirements when planning these types of purchasing actions. For example, it may not be economical or prudent to buy truckloads of salt in summer months for deep discounts if there is no appropriate storage space or if the cost of handling would exceed the savings in price.

- 3) PHAs may enter into interagency or intergovernmental agreements with State or local government agencies (including other PHAs) to obtain needed supplies or services if such agreements will foster economy and efficiency. See 2 CFR 200.318(e). The use of interagency or intergovernmental agreements can significantly reduce the amount of time required to contract for supplies or services, while allowing PHAs to take advantage of prices obtained through volume purchasing by State or local agencies. See Chapter 15 and 2 CFR 200.318(e).

- B. **Individual Procurement Plans (IPPs).** For larger, more complex procurements, such as major computer purchases or construction projects, PHAs shall establish IPPs. IPPs shall establish deadlines or milestones for the completion of the steps necessary to ensure timely delivery or performance and may also include staffing assignments. The scope of the IPP should be determined by the Contracting Officer.
- C. **Equipment Lease or Purchase.** Based on a case-by-case evaluation of costs and other factors, PHAs should consider the leasing of equipment. Those factors would include: length of period the equipment is to be used and the extent of use within that period; financial and operating advantages of alternative types and makes of equipment; cumulative rental payments for the estimated period of use; net purchase price; transportation and installation; maintenance and other service costs; potential obsolescence of the equipment because of imminent technological improvements; availability of the purchase items; trade-in or salvage value; imputed interest; and availability of servicing capability (for example, whether the equipment can be serviced by PHA staff).

3.2 INDEPENDENT COST ESTIMATE (ICE) (2 CFR 200.324(a))

- A. The ICE is the PHA's estimate of the costs of the goods or services to be acquired under a contract or a modification. It serves as the PHA's benchmark for evaluating the reasonableness of the contractor's proposed costs or prices. PHAs must make independent estimates before receiving bids or proposals.
- B. The ICE also helps the Contracting Officer determine the contracting method to be used. For example, if the costs can be estimated with a high degree of confidence in their accuracy, sealed bidding may be possible.
- C. While the Contracting Officer is responsible for the preparation of the ICE, other PHA personnel (e.g., the end user, or budget and finance) are usually involved and may do most of the preparation. The PHA may develop the ICE using its own employees, outside parties (e.g., consultants), or a combination of the two. If any outside party (whether compensated or not) assists in developing the

ICE, the PHA must take appropriate steps to ensure that organizational conflicts of interest are avoided and that the outside party does not obtain any competitive advantage from its advance knowledge of the PHA's cost estimate (see also Chapter 4, Ethics in Public Contracting and 2 CFR 200.318(c)(1)).

- D. The Contracting Officer shall prepare, or have prepared, an ICE commensurate with the purchase requirement. The level of detail will depend upon the dollar value of the proposed contract and the nature of the goods or services to be acquired. The ICE must be prepared prior to the solicitation of offers. The requirements for ICEs are:
- 1) *For micro-purchases*, the Contracting Officer generally does not need to prepare an ICE. Price reasonableness normally will be based on a comparison with historical prices paid for the item, commercial catalog prices, or other offers.
 - 2) *For Simplified Acquisition Threshold purchases*, an ICE is not required. However, an ICE may still be recommended to assist the Contracting Officer in determining the proper type of procurement to use in accordance with the PHA's Simplified Acquisition Threshold. Such a situation may arise when the price is less certain and further research is required, as in construction and other services. In general, while it is not required for Simplified Acquisition Threshold purchases, an ICE is recommended as a good business practice to assist the Contracting Officer in evaluating the lowest quote for price reasonableness and for any further negotiation of price.
 - 3) *For purchases above the PHA's Simplified Acquisition Threshold*, PHAs must prepare an ICE. The level of detail within the ICE will vary but should be commensurate with the size (i.e., dollar value), complexity, and commercial nature of the requirement. ICEs are normally broken out into major categories of cost (e.g., labor, materials, and other direct costs such as travel, overhead, and profit). Commercially available products and services may require less detail as the marketplace tends to provide current reliable pricing information for commercially available products; a PHA may also not need to break out components. Non-commercial type requirements, and work designed specifically for the PHA, will require much more extensive estimation and a detailed ICE. In addition, see 200.324(b) and (c).
- E. The ICE serves as the primary in-house gauge of cost and price reasonableness, but it should not be relied upon to the exclusion of other sources of pricing information. Market conditions may fluctuate between the time the ICE is prepared and the receipt of offers. For example, materials or labor costs may have increased or decreased. If a significant period of time has elapsed, or the PHA knows that certain market conditions have changed, the Contracting Officer should request that an updated ICE be prepared to use in evaluating offers.

3.3 DOCUMENTATION

- A. **General (2 CFR 200.318(i)).** The PHA must maintain records sufficient to detail the significant history of each procurement action. Such documentation is particularly important in the event a protest is lodged against the PHA. It will also facilitate future purchases of similar supplies or services since it will not be necessary to recreate solicitation documents. Supporting

documentation shall be in writing and placed in the procurement file. These records shall include, but shall not necessarily be limited to, the following:

- 1) Rationale for the method of procurement selected. For example, the contract file would not need to state why the Contracting Officer chose Simplified Acquisition Threshold purchase procedures to order a desk but would want to note why non-competitive proposals were used for a roofing contract;
- 2) The solicitation documents;
- 3) Selection of contract pricing arrangement, but only if not apparent. For example, the contract file would not need to document why a firm fixed price was used to obtain building materials;
- 4) Information regarding contractor selection or rejection, including, where applicable, the negotiation memo, the source selection panel, evaluation report, cost and price analysis, email correspondence (including offers, selections, pertinent pre- and post-award discussions and negotiations);
- 5) Basis for the contract price (as prescribed in this Handbook); and
- 6) Any contract administration issues/actions taken during procurement.

The level of documentation should be commensurate with the value of the procurement. A sample contract file checklist is included in Appendix 2.

- B. Record Retention (2 CFR 200.334).** PHAs shall retain all significant and material documentation and records concerning all procurements they conduct. These records must be retained for a period of three years after final payment and all matters pertaining to the contract are closed. If any claims or litigation are involved, the records shall be retained until all issues are satisfactorily resolved.
- C. Audits.** HUD, the HUD Inspector General, and the Comptroller General of the United States have the right of access to any documents, papers, or other records of the PHA which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the PHA's personnel for the purpose of interview and discussion related to such documents (2 CFR 200.337(a)). HUD will periodically perform audits and management review of the PHA procurement function to determine whether the PHA's procurement actions meet the requirements set forth in 2 CFR 200.317 through 200.327 and this Handbook. 2 CFR 200.334 requires all non-Federal entities who receive Federal funds to retain records for three years from the date of submission of their final financial report. The records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken if any litigation, claim, or audit is started before the expiration of the three-year period. Records to be retained include but are limited to financial records, supporting documentation, and statistical records.
- D. Examination and Retention of Contractor's Records (2 CFR 200.337).** The PHA, HUD, the Comptroller General of the United States, or any of their duly authorized representatives must have access to and the right to examine any of the contractor's directly pertinent books, documents, papers, or other records involving transactions related to the contractor's contract with the PHA

until three years after final payment for making audit, examination, excerpts, and transcriptions. To ensure this requirement is enforceable, PHAs must include this provision in their contracts.

3.4 FUNDING & PAYMENT

Regardless of the system used (centralized or decentralized purchasing), the PHA must make sure that funds are available for any purchases made and that there is an orderly process to pay contractors promptly.

- Under centralized purchasing arrangements, the Contracting Officer (often a "buyer" in the Purchasing Department) typically must receive approval from the Budget or Finance Department that funds are, indeed, available before making the purchase.
- Under a decentralized system, the Housing Manager is generally the Contracting Officer, who should make sure that funds are available in the property's approved budget before making a purchase.

To maintain good relations with contractors, a PHA should ensure that the work performed is inspected in a timely manner and that contractor invoices for work accepted by the PHA are paid promptly. Unnecessary delays in either inspection or payment can discourage contractors from participating in future PHA procurements or cause them to increase their bid price to account for expected delays in payment. In addition, some States and local governments have passed "Prompt Payment" laws that establish specific time standards for payment of contractor invoices, along with interest penalties for unjustified late payments. Further, in accordance with 2 CFR Part 200 Subpart E, Section 200.441, certain penalties and interest cannot be paid with HUD program funds without written advance permission of HUD. The PHA should become familiar with any applicable State or local laws of this nature and incorporate their substance into the PHA's own operational procurement procedures.

3.5 INTERNAL CONTROLS

PHAs must establish appropriate internal controls to assure the proper expenditure of funds. In centralized purchasing arrangements, these controls often result in the separation of duties between those ordering, those receiving, and those paying for goods and services. In decentralized purchasing arrangements, the Housing Manager is often the person both ordering and receiving the goods/supplies as well as the person authorizing payment. In these latter arrangements, the PHA must establish other means of internal controls, such as site-based budgets and appropriate purchasing thresholds. Additional information regarding conflicts of interest and other ethical considerations is found in Chapter 4, Ethics in Public Contracting.

CHAPTER 4 – ETHICS IN PUBLIC CONTRACTING

4.1 GENERAL

Ethical standards apply not only to PHA employees and Contracting Officers but to others with a vested interest in PHA contracts such as members of the Board of Commissioners, other officials and agents of the authority, and contractors with whom the PHA does business. This chapter explains the specific ethical requirements for PHA contracting, 2 CFR 200.318(c)(1).



4.2 PRINCIPLES

Members of the Board of Commissioners, PHA employees, and any others serving in an official position or acting as an agent of the PHA (hereafter referred to as employees, officers, or agents) must discharge their duties impartially to ensure fair competitive access to procurement opportunities by responsible contractors. Moreover, employees, officers, and agents should conduct themselves in such a manner as to foster the public's confidence in the integrity of the PHA procurement organization and process. Any attempt to realize personal gain through PHA employment or to serve as an officer or agent of the PHA through actions inconsistent with the proper discharge of duties is a breach of public trust.

4.3 REQUIREMENT FOR A WRITTEN CODE OF STANDARDS (2 CFR 200.112 & 2 CFR 200.318(c)(1))

PHAs must maintain a written code of standards governing the performance of their Board of Commissioners and employees engaged in the award and administration of contracts. These standards shall be included in the PHA's procurement policy. Additionally, these standards must provide for disciplinary actions to be applied for violations of standards. PHAs must disclose in writing any potential conflict of interest to HUD.

4.4 CONFLICTS OF INTEREST (2 CFR 200.318(c)(1))

PHAs must observe the following conflict of interest prohibitions.

- A. **The non-Federal entity** must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration

of a contract supported by a Federal award if they have a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial, or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

B. Additional Public Housing Conflicts of Interest:

Pursuant to Section 18 of the ACC (53012, 2023 version) PHAs shall maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts for which program receipts will be or are expended. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The PHA's procedures must avoid the acquisition of unnecessary or duplicative items. The PHA must disclose in writing any potential conflict of interest to HUD. Further, the PHA, its contractors and subcontractors shall not enter into any contract, subcontract, or arrangement in connection with a project under the ACC in which any of the following classes of people has an interest, direct or indirect, during his or her tenure or for one year thereafter:

- 1) Any present or former member or officer of the governing body of the PHA, or any member of the officer's immediate family. There shall be excepted from this prohibition any present or former tenant commissioner who does not serve on the governing body of a resident corporation, and who otherwise does not occupy a policymaking position with the resident corporation, the PHA or a business entity.
- 2) Any employee of the PHA who formulates policy or who influences decisions with respect to the Project(s), or any member of the employee's immediate family, or the employee's partner.
- 3) Any public official, member of the local governing body, State or local legislator, or any member of such individuals' immediate family, who exercises functions or responsibilities with respect to the project(s) or the PHA.
- 4) Any member of these classes of persons must disclose the member's interest or prospective interest to the PHA.
- 5) The requirements of this subsection may be waived by HUD for good cause, if the prohibited contract, subcontract or arrangement is otherwise permitted under State and local law. No person for whom a waiver is requested may exercise responsibilities or functions with respect to the contract, subcontract or arrangement to which the waiver pertains.

- 6) **Pursuant to Section 19(A) of the 1995 version of ACC**, (Form HUD-53012A), neither the PHA nor any of its contractors or their subcontractors may enter into any contract, subcontract, or arrangement in connection with a project under the ACC in which any of the following classes of people have an interest, direct or indirect, during his or her tenure or for one year thereafter:
 - a. Any present or former member or officer of the governing body of the PHA, or any member of the officer's immediate family. There shall be excepted from this prohibition any present or former tenant commissioner who does not serve on the governing body of a resident corporation, and who otherwise does not occupy a policymaking position with the resident corporation, the PHA or a business entity.
 - b. Any employee of the PHA who formulates policy or who influences decisions with respect to the project(s), or any member of the employee's immediate family, or the employee's partner.
 - c. Any public official, member of the local governing body, State or local legislator, or any member of such individuals' immediate family, who exercises functions or responsibilities with respect to the project(s) of the PHA.
- 7) **Pursuant to Section 515 of the 1969 ACC**, no present or former PHA employee, officer, or agent shall engage in selling or attempting to sell supplies, services, or construction to the PHA for one year following the date such employment ceased. (See Form HUD-53011, dated 1.) The term "sell" means signing a bid or proposal, negotiating a contract, contacting any PHA employee, officer, or agent for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling contract disputes; or any other liaison activity with a view toward the ultimate consummation of a sale, although the actual contract is negotiated by another person.

C. Additional Section 8 HCV and PBV Conflicts of Interests: The regulations at 24 CFR 982.161 contain conflict of interest requirements applicable to both the HCV and PBV programs. Section 13 of the HCV HAP contract (HUD-52641 or HUD-52642) contains conflict of interest requirements for the HCV program. Section 19 of the PBV HAP Contract (HUD-52530B Part 2 or HUD-52530A Part 2) and Section 1.20 of the Agreement to enter into HAP contract (AHAP) (HUD-52531A) contain conflict of interest requirements for the PBV program. While the language related to conflicts of interest in the HAP contracts and AHAP and 24 CFR 982.161 is not identical, the two provisions contain the same fundamental standard with respect to conflicts of interest.

- 1) Pursuant to 24 CFR 982.161(a), neither the PHA nor any of its contractors or subcontractors may enter into any contract or arrangement in connection with the program in which any of the following classes of persons has any interest, direct or indirect, during tenure or for one year thereafter: (1) Any present or former member or officer of the PHA (except a participant commissioner); (2) Any employee of the PHA, or any contractor, subcontractor or agent of the PHA, who formulates policy or who influences decisions with respect to the programs; (3) Any public official, member of a governing body, or State or local legislator, who exercises functions or responsibilities with respect to the programs; or (4) Any member of the Congress of the United States.
- 2) Section 13 of the HCV HAP contract provides the following:

13. Conflict of Interest

a. "Covered individual" means a person or entity who is a member of any of the following classes:

(1) Any present or former member or officer of the PHA (except a PHA commissioner who is a participant in the program);

(2) Any employee of the PHA, or any contractor, sub-contractor or agent of the PHA, who formulates policy or who influences decisions with respect to the program;

(3) Any public official, member of a governing body, or State or local legislator, who exercises functions or responsibilities with respect to the program; or

(4) Any member of the Congress of the United States.

b. A covered individual may not have any direct or indirect interest in the HAP contract or in any benefits or payments under the contract (including the interest of an immediate family member of such covered individual) while such person is a covered individual or during one year thereafter.

c. "Immediate family member" means the spouse, parent (including a stepparent), child (including a stepchild), grandparent, grandchild, sister or brother (including a stepsister or stepbrother) of any covered individual.

d. The owner certifies and is responsible for assuring that no person or entity has or will have a prohibited interest, at execution of the HAP contract, or at any time during the HAP contract term.

e. If a prohibited interest occurs, the owner shall promptly and fully disclose such interest to the PHA and HUD.

f. The conflict-of-interest prohibition under this section may be waived by the HUD field office for good cause. g. No member of or delegate to the Congress of the United States or resident commissioner shall be admitted to any share or part of the HAP contract or to any benefits which may arise from it.

g. No member of or delegate to the Congress of the United States or resident commissioner shall be admitted to any share or part of the HAP contract or to any benefits which may arise from it.

4.5 GRATUITIES, KICKBACKS, & USE OF CONFIDENTIAL INFORMATION

PHA solicitations and contracts above the Federal simplified acquisition threshold shall include clauses advising prospective contractors of the prohibitions against gratuities and kickbacks (2 CFR 200 Appendix II(D)). These rules are designed to protect the integrity of the procurement system and to ensure that contracts are awarded fairly, based on merit, without improper influence.

- A. **Gratuities (2 CFR 200.318(c)(1)).** PHA officers, employees, officers, board members, and agents shall neither solicit, accept gratuities, favors, or anything of monetary value from contractors. PHAs may set standards where the financial interest is not substantial, or the gift is an unsolicited item of nominal value. These rules shall be incorporated in the PHA's procurement policy. These standards must also provide for disciplinary actions to be applied for violation by its employees, officers, agents, or board members.
- B. **Kickbacks and Anticompetitive Practices.** It is a breach of ethical conduct and prohibited for any payment, gratuity, or offer of employment to be made by, or on behalf of, a contractor or

subcontractor under contract to the prime contractor, higher tier subcontractor, or any person associated therewith, as an inducement for the award of a subcontractor order. The Contracting Officer shall report to the Executive Director, the HUD field office, and the appropriate State and local officials any suspected anticompetitive practices by contractors.

- C. **Use of Confidential Information.** Disclosure of confidential information to any person not authorized by the Contracting Officer to receive such information shall be a breach of ethical standards. Confidential information includes but is not necessarily limited to: the contents of a bid (prior to bid opening) or proposal (prior to contract award using competitive proposals), names of individuals or firms that submitted bids (prior to bid opening) or proposals (prior to contract award); PHA-generated information related to a procurement (including PHA cost estimates, contractor selection and evaluation plans, specifications [before solicitation is issued]); and any other information the disclosure of which would have a direct bearing upon the contract award or the competitive process. It is a breach of ethical conduct for any current or former employee, officer, or agent to knowingly use confidential information for actual or anticipated personal gain or for actual or anticipated personal gain of any other person.

4.6 PROHIBITION AGAINST CONTINGENT OR REFERRAL OR RETAINAGE FEES

It is a breach of ethical conduct for a person to be retained to solicit or secure a PHA contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for the retention of bona fide employees or a bona fide agency established for the purpose of securing business. This prohibition includes the employment of former PHA officials and employees on a contingency basis to obtain contracts with the PHA by a business seeking PHA contracts. Many States also have specific laws against contingent fees. The ACC also prohibits this type of conduct for one year after the individual leaves the employ or under a contract with the PHA.

“Contingent Fees” means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

4.7 SANCTIONS

The Executive Director and the Board of Commissioners are responsible for establishing sanctions when someone within the PHA violates the ethical standards of the procurement policy. As stated previously, many States have passed laws governing the conduct of officials involved in procurement. All such laws shall be enforced by the Executive Director and, in cases where the State or local government has no such rules, appropriate sanctions for violation of the standards of conduct in this Chapter shall be published and imposed.

Civil and administrative remedies shall be established for use whenever employees, officials, or agents breach ethical standards. References to State ethics laws, which shall be consulted by the PHA in

developing and administering sanctions for misconduct, shall be included in the PHA's administrative or human resources policy. Such as:

- Oral or written warnings or reprimands;
- Suspension with or without pay for specified period of time;
- Termination of employment; or
- Dismissal from the official or agency position.

The value of anything received by an employee or a non-employee in breach of the ethical standards should be recovered by the PHA either by confiscating the items or by charging the violator for any and all gratuities received. All procedures in this Chapter shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided before imposing any suspension or termination of employment. Remedies against contractors may include suspension and/or debarment, as provided in Chapter 11.

In the case of violations, HUD may exercise any available remedy under the 1937 Act, the ACC, the Federal regulations (e.g., 2 CFR Part 200 and 24 CFR Parts 905 and 907) and statutes, and program grant agreements.

CHAPTER 5 – INFORMAL PROCUREMENT METHODS



5.1 GENERAL (2 CFR 200.320(a))

Informal procurement methods are simplified means for PHAs to acquire supplies, materials, and services, including professional and construction services. The informal procurement methods are “micro-purchases” and “simplified acquisition procedures.” When available, PHAs may use informal procurement to expedite their transactions and minimize formal procurement’s administrative burden and cost.

5.2 INFORMAL PROCUREMENT DOLLAR LIMITS

Generally, PHAs can only use informal procurement methods when the property or service’s value does not exceed the simplified acquisition threshold. 2 CFR 200.320(a)(2)(ii). As of this Handbook’s publication, the simplified acquisition threshold is \$350,000. See 48 CFR Part 2, Subpart 2.1 (i.e., the FAR). While this ceiling applies to both informal procurement methods, micro-purchases and simplified acquisition procedures (as sub-categories of informal procurement) have their own thresholds. Additionally, in some cases, PHAs may establish different ceilings within the regulatorily-prescribed thresholds.

- A. **Micro-purchases:** The general micro-purchase threshold in the FAR at this Handbook’s publication is \$15,000. For procuring construction and maintenance subject to the Davis Bacon and Related Acts (40 U.S.C. §§ 3141 et. seq.), the micro-purchase threshold is \$2,000. PHAs may establish a micro-purchase threshold higher than the FAR limit but must do so in accordance with 2 CFR 200.320(a)(1)(iv) (up to \$50,000) or 2 CFR 200.320(a)(1)(v) (higher than \$50,000). In addition to the requirements in these regulatory provisions, PHAs wishing to employ these higher thresholds must retain documentation justifying why acquiring goods or services through full and open competition would be unreasonable.

- B. **Small Purchases or Simplified Acquisitions:** The “floor” for Small Purchases or Simplified Acquisitions is a PHA’s micro-purchase threshold, and the ceiling is the PHA’s simplified acquisition threshold (currently a maximum of \$350,000 per the FAR, or any lower amount set by the State or locality with jurisdiction over the PHA). In all cases, PHAs must not adopt a State- or locally approved threshold exceeding \$350,000.

5.3 COMPETITION REQUIREMENTS

- A. **Micro-purchases (2 CFR 200.320(a)(1)).** PHAs may award micro-purchases without soliciting competitive quotations if the Contracting Officer considers the goods or services’ price to be reasonable based on recent research, experience, purchases, or other information and documents it files accordingly. To the maximum extent practicable, PHAs shall distribute micro-purchases equitably among qualified suppliers. Purchase cards can be used for micro-purchases if procedures are documented and approved by HUD.
- B. **Simplified Acquisitions (2 CFR 200.320(a)(2)).** The PHA must solicit price quotes from an “adequate” number of qualified sources. HUD has determined that no fewer than three qualified (responsible) sources are “adequate.” The PHA’s Procurement Policy shall in accordance with 2 CFR 200.320(a)(2) state any specific policy for what it considers to be “adequate” (e.g., a requirement for three offers).
- C. **Prohibition Against Bid Splitting.** The PHA cannot separate procurements which, in the aggregate, cost more than the simplified acquisition or micro-purchase threshold into multiple purchases that are individually less than the applicable threshold. This is called “bid splitting” or “unbundling,” and its underlying rationale is to permit informal procurement methods and/or avoid requirements that apply to purchases exceeding those thresholds. Section 200.320 (b) notes formal procurement methods, and the prohibition detailed here explains that a PHA can’t split or unbundle bids that are above the simplified acquisition threshold to avoid formal procurement methods.
- *Exception* – PHAs may separate larger requirements into smaller ones to give small and minority businesses, women’s business enterprises, veteran-owned businesses and labor surplus area firms the opportunity to participate in the PHA’s procurements (see 2 CFR 200.321(b)(3)). The Contracting Officer shall document the reasons for breaking larger requirements into smaller ones in the contract file.

5.4 METHOD OF SOLICITATION FOR SIMPLIFIED ACQUISITIONS

PHAs may obtain quotations for simplified acquisitions in writing (hard copy or email), orally, by fax, via catalogs, by letter, electronically (e.g., the Internet), through paid advertisement, or by displaying the solicitation in a public place. The method should be appropriate for the purchase (e.g., obtaining price quotes by phone for a commercially available item). PHAs may establish dollar thresholds or other requirements for when their staff must use written and oral solicitations in their procurement policies. PHAs should use written solicitations when they need to provide vendors with detailed information that

cannot be easily conveyed orally (e.g., by phone), or when the PHA needs to collect detailed quotation evaluation information.

5.5 QUOTATION EVALUATION

- A. **Price Reasonableness.** While 2 CFR 200.324(a) only requires cost analysis for purchases above the Simplified Acquisition Threshold, before making an award using an informal procurement method, the Contracting Officer should determine that the proposed price is fair and reasonable. For most micro-purchases and Simplified Acquisition Threshold purchases, an offeror's price or rate quotations provide Contracting Officers with sufficient information to make that determination. However, although not regulatorily required, in cases when the PHA purchases services or items of a noncommercial nature (e.g., a special training course for the PHA's employees), HUD encourages Contracting Officers to decide whether submitting cost details and a cost analysis is necessary. See Chapter 10, Section 10.3.
- 1) *Micro-Purchases.* Though not required, cost/price analysis normally consists of comparing the quoted price to prices recently paid for the same or similar items, price lists, or catalog prices. The Contracting Officer's signature on the purchase order or contract signifies their determination that the price is reasonable based on prior purchases of a similar nature or other sources of information.
 - 2) *Simplified Acquisitions.* Though not required, cost/price analysis consists of comparing quotations to each other and to other sources (e.g., past prices paid or catalog prices). If the Contracting Officer only receives one response to the PHA's solicitation, they should include a statement of reasonableness in the contract file based on market research, comparing the proposed price with reasonable prices on previous purchases, current price lists, catalogs, advertisements, similar items in a related industry, the ICE, or the Contracting Officer's personal knowledge at the time of purchase. Contracting Officers may also rely on any additional reasonable basis.
 - Please note that while the ICE is no longer Federally required for purchases below the simplified acquisition threshold unless preparing for a bid or proposal, Contracting Officers may still find it helpful and/or necessary to conduct an ICE in many cases.
- B. **Other Factors.** If using "price and other factors" to determine which offeror should receive the award, the Contracting Officer has broad discretion to fashion suitable evaluation procedures. In these situations, the Contracting Officer should ensure that they can evaluate quotations in an efficient and minimally burdensome fashion. Contracting Officers should not use competitive proposal-type procedures (e.g., formal evaluations, determining competitive ranges, conducting detailed negotiations, or requesting best and final offers) for informal procurement. Contracting Officers may use information to evaluate the quotation such as their knowledge of, and previous experience, with the supply or service being purchased, the contractor's past performance for the PHA, or customer surveys.
- C. **Evaluating Contractor Responsibility.** PHAs must make awards only to responsible contractors possessing the ability to perform successfully under the proposed procurement's terms and

conditions. 2 CFR 200.318(h). Contracting Officers have broad latitude to evaluate contractor responsibility, including basing their evaluation on the officer's personal knowledge of, or past experiences with, the contractor, but must consider contractor integrity, public policy compliance, proper classification or employees, past performance record, and financial and technical resources. See 2 CFR 200.318(h). The Contracting Officer's signature on the purchase order or contract signifies that the Contracting Officer has determined the contractor is responsible. See Section 10.2 for more detailed information on contractor responsibility.

- D. Documentation (2 CFR 200.318(i)).** PHAs' documentation of informal procurements should be as minimal as practicable while still conforming to 2 CFR 200.318(i)'s requirements. See Section 3.3.
- 1) *Micro-purchases.* If a PHA requests a quotation from more than one source and makes an award to any party other than the lowest quote, the PHA's documentation to support its contractor selection or rejection should identify the solicited vendors and briefly explain why it awarded the contract to a more expensive vendor.
 - 2) *Simplified Acquisitions.* PHAs should retain information supporting their purchases (in paper or electronic form, as they see fit) to the minimum extent and duration needed for PHA management review purposes (tracking purchasing activity) and compliance with record retention requirements in 2 CFR 200.334. The following illustrate the extent to which PHAs should keep quotation information:
 - a. Oral solicitations/quotations. The Contracting Officer should establish and maintain written records of oral price quotations that clearly reflect the propriety of placing the orders at the price paid with the particular contractor. In most cases, this should be limited to writing down the Contacted Contractors' names, as well as the prices and terms and conditions they quoted.
 - b. Written solicitations/quotations. The Contracting Officer should limit the written records of solicitations or quotations to summaries showing the vendors contacted, the prices quoted, delivery, references to printed price lists used, and any other pertinent information.
 - c. Special situations. In the following circumstances, PHAs should include additional statements—
 - Explaining the absence of competition if only one offer is received; or
 - Supporting the award decision if the PHA considered more than price-related factors in selecting the contractor.

5.6 PETTY CASH PURCHASES

- A. General.** Petty cash purchases, an unofficial subset of micro-purchases, occur when PHAs make very small, one-time purchases using money from a "petty cash fund" (i.e., a small pool of money set aside to make these kinds of purchases). If PHAs wish to facilitate petty cash purchases, the PHA's Procurement Policy must establish a petty cash fund that is subject to a petty cash policy and contains enough funds to cover very small purchases over a reasonable period (e.g., one month).

- B. **Petty Cash Policy.** Before using petty cash, PHAs must approve written safeguards and procedures to ensure they are only used for intended purposes (e.g., limiting the types or number of purchases).

5.7 PURCHASE CARDS

- A. **General.** Purchase cards (e.g., debit or credit cards) are payment methods, not methods of procurement. Purchase cards can reduce transaction costs when used to pay for micro-purchases. Because they are simply a method of payment, PHAs wishing to use purchase cards to pay contractors must still follow all applicable rules for informal procurement.
- B. **Card Management/Internal Controls.** Before using purchase cards, PHAs must approve written safeguards and procedures to ensure they are only used for intended purposes (e.g., limiting the types or number of purchases with credit cards). See 2 CFR 200.320(a)(1)(ii). PHAs should make sure these procedures include guidelines for selecting purchase card merchants/vendors, tracking purchases, and card payment/settlement procedures.

5.8 BONDING REQUIREMENTS

Construction contracts over \$350,000 are subject to the same bonding requirements as formal procurements using sealed bids. See Section 6.11 of this Handbook for these requirements including 2 CFR 200.326 and 24 CFR 905.316(d).

5.9 PURCHASE ORDERS

- A. **General.** A purchase order is the buyer's first official offer to a seller indicating the types, quantities, and agreed prices for products or services. Most PHAs using informal procurement will send or give the contractor a purchase order to initiate an item's delivery or the performance of service(s). A PHA's issuance of a purchase order and its acceptance by the contractor (either through performance or signature) constitute a contract. Therefore, it is crucial that the purchase order clearly specify the item(s) or service(s) being purchased and the purchase's terms and conditions.
- B. **Form.** PHAs should issue purchase orders on a standard form. At minimum, the purchase order should contain information regarding the scope of work/service to be provided, the price for the work/item, when delivery will occur, the method of payment, how the PHA will inspect the service or item, and the PHA's desired method of acceptance. The PHA may add more terms and conditions depending on the work's nature and complexity. Regardless of whether the PHA chooses to use a standard form or not, PHAs must include all necessary contract clauses in their purchase orders (or request for quotes, providing the request will be referenced by and made part of the purchase order). These mandatory provisions are provided in Section 5.10 below.

- C. **Modification.** PHAs may wish to modify a purchase order before it is accepted. For more information about purchase order modification, please see Chapter 11.4 below.

5.10 MANDATORY CONTRACT CLAUSES

- A. **General.** Except for bid specifications and construction or maintenance contracts exceeding \$2,000 (see paragraphs B and C, below), any contract or purchase order for which the PHA used an informal procurement method only needs to include the mandatory clauses contained in Table 5.1 (see end of Chapter 5). State or local requirements may necessitate additional provisions. See Chapter 14.
- B. **Mandatory Requirements for Construction Contracts greater than \$2,000 but not more than \$350,000.** PHAs must incorporate the clauses contained in form HUD-5370-EZ, General Contract Conditions for Small Construction/Development Contracts, and the applicable Davis-Bacon wage decision. HUD designed Form HUD-5370-EZ for small construction jobs. PHAs may use Form HUD-5370 in lieu of HUD-5370-EZ if the former is more appropriate.
- C. **Mandatory Requirements for Maintenance Contracts (including non-routine maintenance work) greater than \$2,000 but not more than \$350,000.** PHAs must incorporate the clauses contained in Table 5.1, Section II of form HUD-5370-C, General Conditions for Non-Construction Contracts, and the applicable HUD wage decision.
- D. **Acceptable Methods of Incorporation.** PHAs may use either of the following methods to incorporate the mandatory clauses and applicable wage decisions into bid specifications and contracts but must use at least one. PHAs may:
- 1) Incorporate the clauses/text of the applicable HUD form and wage decision directly into the text of the PHA's own forms (and bid specifications, if applicable).
 - 2) Incorporate the HUD forms and/or any applicable Davis-Bacon or HUD wage decision by reference in the PHA's forms (and bid specifications, if applicable). The reference must specify the exact clauses or form(s) that are incorporated, and the form(s) must be attached to the document. A Davis-Bacon wage decision may be incorporated by reference to <https://SAM.gov/wage-determinations> and to the specific number, modification number, and the date of the wage decision. HUD maintenance wage decisions are not available at HUD's website; however, a PHA may post any applicable HUD wage decision to its own website and reference that site. PHAs must provide hard copies of any referenced clauses, forms, and/or wage decisions on request.

5.11 USE OF INDEFINITE-DELIVERY CONTRACTS

PHAs may avoid making repetitive small purchases by awarding indefinite-delivery contracts, sometimes referred to as “blanket” or “open-end” contracts. PHAs may use indefinite delivery contracts when the PHA has a recurring need for items or services (e.g., cleaning supplies) and wants to have them delivered as needed within a specific time period (e.g., one year). The contract specifies what the PHA may buy and

establishes the prices. The PHA then orders the supplies or services from the contractor as needed. This type of contract avoids the administrative cost of making numerous separate purchases. See Chapter 10, Section 10.1.C.3 for guidance on these contracts.

5.12 NEGOTIATIONS

Contracting Officers may, and are encouraged to, negotiate price and other terms of purchases when appropriate, other than the mandatory contract clauses (see Section 5.10). See Chapter 7 for more information on negotiations.

5.13 REJECTION & NOTIFICATION OF UNSUCCESSFUL OFFERORS

When rejecting offers, PHAs should follow good business practices. For example, for informal procurement, and particularly micro-purchases, it is a common business practice that vendors understand they did not receive an award if they are not notified quickly. In such situations, a formal rejection letter is not necessary. However, this may not be the accepted business practice in all fields or locales, and as such, PHAs should determine when such formality is appropriate.

5.14 APPEALS

The PHA's procurement policy should indicate the appeal processes for informal procurement methods. PHAs are encouraged to adopt informal appeal procedures for these methods.

5.15 RECEIVING GOODS & SERVICES & APPROVING PAYMENTS

PHAs must establish systems for ensuring that the contracted-for goods or services are received in accordance with contract terms. PHAs are highly encouraged to process payments promptly to allow for discounts, where applicable, and to maintain good relations with contractors. See Chapter 11.

TABLE 5.1 MANDATORY PROVISIONS FOR ALL PROCUREMENT CONTRACTS

In addition to other provisions required by HUD, all contracts made by the PHA under the Federal award must contain provisions covering the clauses in 2 CFR 200 Appendix II (and Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. HUD is permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy. The PHA and contractor is also subject to other Federal laws including the 1937 Act, as amended, Federal regulations, and State law and regulations.

CHAPTER 6 – SEALED BIDS

6.1 GENERAL

For all PHA contracting requirements above the Simplified Acquisitions Threshold, formal procurements are conducted by inviting sealed bids or by requesting competitive proposals. Both methods are effective ways of satisfying the PHA's contractual requirements. The requirements for sealed bidding are discussed in this chapter and requirements for competitive proposals are discussed in



Chapter 7. This chapter only applies to contracts in excess of the PHA Simplified Acquisitions Threshold.

6.2 DESCRIPTION

Under sealed bids, the PHA publicly solicits bids, and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. Sealed bidding is the preferred method for procuring construction, supply, and non-complex service contracts in excess of the Federal Simplified Acquisitions Threshold.

6.3 WHEN TO USE SEALED BIDS

The sealed bids method (2 CFR 200.320(b)(1)) is the preferred method for procuring construction, if the following conditions can be met:

- A. A complete, adequate, and realistic specification or purchase description is available;
- B. Two or more responsible bidders are willing and able to compete effectively for the business; and
- C. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

6.4 ALTERNATE BIDS

PHAs should not request alternate bids, i.e., two different systems or types of projects. Instead, when necessary because of limited available funding, a PHA may specify the most expensive system as the base bid and list deductive alternates in inverse priority order. Thus, in the case of limited funding, deductive alternates may be taken in numerical order as listed until the award can be made within available funds.

Example: If the full-scope base bid included complete repainting and cleaning of 75 apartments, *Deduct Alternate #1* might delete cleaning of 25 apartments and *Deduct Alternate #2* might delete all cleaning. In

this way, PHAs can maximize the amount of work to be completed within a limited budget. Without alternates the project may have to be re-bid if the full-scope price exceeds the available budget.

6.5 INVITATION FOR BIDS (IFB) (2 CFR 200.320(b)(1))

The IFB is the entire package of information necessary for potential bidders to submit a bid. The IFB includes a description of the supplies or services being purchased, any unique technical information, time and place of bid opening, time and place of site inspections or pre-bid conferences, a form for stating the bid price, and any required forms, as outlined below.

- A. **IFB Package.** The IFB packages for supplies, services, or construction are quite similar. The major difference is the length and complexity of the specifications or scope of work and the variety of attachments. All IFBs must be in writing. The basic documents to be included in an IFB package are:
- 1) *Cover Page with Table of Contents.* States the name, address and phone number of the PHA, a person to contact for information regarding the solicitation, the project name and solicitation number, and a table of contents for the complete solicitation package. A sample IFB cover page is shown at Appendix 4.
 - 2) *Bid Form.* This is the form on which bidders enter their bid or price(s). The form must be clear, accurate, and unambiguous.
 - 3) *Specification and Statement of Work.* Description of the work or items required. See Chapter 9.
 - 4) Form HUD-5369, Instructions to Bidders for Contracts, Public and Indian Housing Programs (construction) or Form HUD-5369-B, Instructions to Offerors Non-Construction.
 - 5) Form HUD-5369-A, Representations, Certifications, and Other Statements of Bidders, Public and Indian Housing Programs.
 - 6) Form HUD-5370, General Conditions of the Contract for Construction or Form HUD-5370-C, General Conditions for Non-Construction Contracts, along with any appropriate Davis-Bacon or HUD wage decision for construction and maintenance work.
- B. **Method of Solicitation.** While any of the following methods can be employed, the Contracting Officer should choose the method, which, considering matters of economy, provides for full and open competition.
- 1) Advertising in newspapers or other print mediums of local or general circulations. A sample advertisement is provided in Appendix 3.
 - 2) Advertising in various trade journals or publications.
 - 3) E-Procurement. PHAs may conduct their public procurements through the internet using e-procurement systems. However, all e-procurements must otherwise be compliant with 2 CFR 200.317 through 200.327, State and local requirements, and the PHA's own procurement policy. Steps must be taken to meet the requirements for full and open competition to avoid potential protests.
- C. **Time Period for Solicitation.** The solicitation must be run for a period sufficient to achieve effective competition, which, in the case of paid advertisements, should generally be run not less

than once each week for two consecutive weeks. State or local law may impose additional advertising requirements.

6.6 AMENDMENTS

If a change to the IFB, e.g., specifications, plans, date or time for bid opening becomes necessary after it has been issued, the change must be made by issuing a written amendment, sometimes called an addendum. The amendment must indicate the IFB number, project title, issue date of the original IFB, and formally detail each change. Each amendment must be noted on the PHA's solicitation log. A copy of the amendment should be mailed to each prospective bidder who was provided with the initial IFB package with acknowledgement required. If an amendment needs to be issued just before the scheduled bid opening date, the bid opening should be postponed for an adequate period of time to permit the potential bidders to fully analyze the change and to submit timely bids. A sample solicitation amendment is included in Appendix 5.

6.7 PRE-BID CONFERENCE

After the IFB is issued and before bids are due, the Contracting Officer may hold a pre-bid conference with prospective contractors to discuss the project requirements and details of the IFB. The conference should be attended by the Contracting Officer and supporting technical staff.

A pre-bid conference is normally conducted for large or complex procurements. Notice of any scheduled conference should be included in the IFB. The timing of the conference should allow bidders enough time to review the IFB before the conference and adequate time to prepare or revise their bids before the bid opening.

At the conference, the Contracting Officer should state that nothing said at the conference will change any of the terms of the IFB unless a subsequent written amendment to the solicitation is issued. A written summary of the conference should be made available to anyone requesting it. The summary should also be provided to all those who submitted IFBs or solicitations, not just those who attended the pre-bid conference.

Attendance by offerors at the pre-bid conference, while desirable, shall not be mandatory, and non-attendees should not be deemed non-responsive. The PHA should consider the need for all potential bidders to attend. Attendance may not be necessary for firms familiar with the work and others may be unable to schedule a representative to attend, although they may be well qualified to do the work at a reasonable price. To impose a requirement to attend a pre-bid conference could unnecessarily limit competition.

6.8 CANCELING AN IFB

- A. The PHA may cancel IFBs when necessary or when otherwise considered to be in the best interest of the PHA. A common reason for canceling an IFB is that the low bid significantly exceeds the

PHA's budget (note, this is a good reason to consider the use of deductive alternate bids) or when the scope of work or specifications are found to be ambiguous or flawed, e.g., by the submission of wildly different bids or offer prices. Cancellations must be done in accordance with the PHA's written procurement policy and procedures. While it is not prohibited, the repeated cancellation of a single IFB or cancellation of multiple IFBs only serves to create a lack of confidence in the PHA's bidding process. Such actions may create the appearance that either the PHA does not really know what it wants, or that the PHA may be seeking a particular bidder or bidders.

- B. The Contracting Officer or designated procurement official shall document the procurement file with the reasons and supporting facts for canceling the IFB (2 CFR 200.318(i)).


6.9 BID OPENING (2 CFR 200.320(b)(1))

The bid opening process shall be carried out as follows:

- A. **Time and Place Certainty.** Each physical paper bid must be dated and time-stamped immediately upon receipt by the PHA. Sealed bids should be stored in a locked bid box, cabinet, or safe to ensure that they are not opened or mishandled prior to the bid opening. A PHA staff person should standby just before the deadline to see that bids received at the proper location are date- and time-stamped expeditiously. Electronically submitted bids must have an electronic time stamp and must remain unopened until the appointed time and place. Sealed bids received after the time specified in the IFB should be recorded as a late bid and kept unopened in the contract file. A late bid received before the award is made may only be considered in accordance with the procedures listed in the form HUD-5369, Item 5, or form HUD-5369-B, Item 6.
- B. **Public Bid Opening Process.** To ensure fairness in the award process, anyone is permitted to attend the bid opening. Bids shall be publicly opened on the scheduled date and time shown in the solicitation. The bid opening official (usually the Contracting Officer) reads aloud the bidders' names and the bid prices. This information is recorded and may be made available for public inspection. No commitment or statement regarding contract award should be made to any bidder at the bid opening.
- C. **Recording the Bids.** As bids are publicly opened and read aloud, an abstract (sometimes referred to as a tabulation) of all bids is prepared showing the name of each bidder and their bid prices including alternates, if any. This abstract becomes part of the official contract file. The abstract is public information, and a copy may be sent to interested parties when requested.

6.10 MISTAKES IN BIDS

- A. **General.** Correction or withdrawal of bids requires careful consideration. The integrity of the competitive bidding system must be maintained, fairness ensured, and delays avoided. While bidders must be bound by their bids (the "firm bid rule"), circumstances may arise where correction or withdrawal of bids is proper and may be permitted.

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- B. **Mistakes Before Bid Opening.** Unless otherwise prohibited by State or local law, bidders shall be permitted to withdraw or modify their bids by written or facsimile notice prior to bid opening (see form HUD-5369, Item 5, and form HUD-5369-B, Item 6).
- C. **Review of Bids for Mistakes.** After the bid opening, the Contracting Officer should carefully review all bids to ensure that the bidders have not made any obvious mistakes in their bids, e.g., the sum of individual bid line items does not equal the total bid price. An item-by-item recalculation of the bid costs will often reveal the miscalculation or error. If a bidder appears to have made a mistake, the Contracting Officer should immediately notify a bidder of any apparent mistake in their bid and request verification of the bid as submitted. If the bidder is not present at bid opening, or if the Contracting Officer performs the bid review after opening takes place, the Contracting Officer should notify the bidder by phone. PHAs are strongly advised to confirm phone notifications with a follow-up letter containing the information communicated by phone. The Contracting Officer should place a copy of the letter or otherwise document the procurement file.
- D. **Mistakes after Bid Opening.** In general, bidders should not be permitted to change a bid after bid opening. In rare cases, the Contracting Officer may permit the revision of a bid if the bidder is able to present clear and convincing evidence, acceptable to the Contracting Officer, of a mistake and the intended bid price. Allowing changes to bids without appropriate evidence may compromise the integrity of the public bid process and serve to undermine public confidence in the PHA's bidding process. Therefore, the Contracting Officer should request as much evidence as he or she deems necessary. Examples of evidence may include original work papers, bids from suppliers and subcontractors used to develop the bid, bonding or insurance evidence supporting a different bid price. Failure or refusal by a bidder to provide adequate evidence shall result in the original bid remaining unchanged. PHA personnel should consult with their legal counsel before allowing a change in bid. If justified, a low bidder can be replaced with the next lowest bidder.
- E. **Withdrawal of Bids.** Withdrawal of a bid is permissible if there is an obvious error in the bid such as a math error, but the mistake must be readily apparent from the bid itself. A bidder may be permitted to withdraw a low bid if a mistake is clearly evident on the face of the bid document, but the intended correct bid is not similarly evident. A bidder may also be permitted to withdraw a low bid if the bidder submits written evidence that clearly and convincingly demonstrates that a mistake was made. The PHA should require written supporting evidence before allowing withdrawal by the bidder. If the PHA allows withdrawal, the bid bond should be returned to the bidder upon verification of the error. In cases of alleged mistakes or requests for withdrawal, the decision to allow a correction or withdrawal should only be made after consultation with the PHA's legal counsel.

6.11 BONDS/GUARANTEES (2 CFR 200.326 & 24 CFR 905.316)

This section describes the specific bonding requirements for construction contracts over \$350,000 (using the current Simplified Acquisition Threshold).

- A. **General.** In sealed bid construction contracts, three types of bonds or guarantees are required: a bid bond or guarantee, a performance bond, and a payment bond. The purpose of these bonds is to ensure bidders will honor their bids, complete work as contracted, and pay their subcontractors and suppliers.
- B. **Definitions.**
- 1) *Bid Bonds/Guarantees.* A bid bond or guarantee is included in the bid package submitted by each bidder. The bonds or guarantees ensure if awarded the contract, the bidder will accept and perform the work under the contract. It also ensures that the bidder will not attempt to withdraw or otherwise not fulfill the contract. Finally, the bid bond ensures that the bidder will execute the contractual documents that are required within the time specified in the solicitation or forfeit all or part of the guarantee.
 - a. A certified check, bank draft, U.S. Government Bonds at par value, bid bond secured by an acceptable surety company, or other negotiable instrument may be accepted as a bid guarantee.
 - b. If the successful bidder refuses to sign the contract after award, the bid bond is forfeited, and the award will go to the next lowest responsive, responsible bidder. If there is not a responsive and responsible next lowest bidder, the procurement should be re-bid.
 - c. If a bid bond or guarantee is not submitted with the bid, the PHA should reject the bid as non-responsive. The PHA should not return any bid bonds until the contract has been awarded and the required performance and payments bonds have been furnished, until all bids have been rejected, or the time specified for acceptance of bids has expired.
 - d. For Capital Fund work, a bid guarantee from each bidder equivalent to 5 percent of the bid price is required for each construction contract over \$100,000. See 24 CFR 905.316(d)(1) and one of the following:
 - i. A performance bond and payment bond for 100 percent of the contract price;
 - ii. A performance bond and a payment bond, each for 50 percent or more of the contract price;
 - iii. A 20 percent cash escrow;
 - iv. A 10 percent irrevocable letter of credit with terms acceptable to HUD; or
 - v. Any other payment acceptable to HUD.
 - 2) *Performance Bonds.* Performance bonds are means to ensure that the contract is successfully completed. The performance bond guarantees that if the contractor is unable to complete the contract, the surety company will step in to finish the work. In the case of a letter of credit or cash escrow, the PHA may use these funds to complete the contract work.
 - 3) *Payment Bonds.* The payment bond is a method of ensuring that the contractor pays the subcontractors and suppliers. By requiring payment bonds, the PHA avoids becoming entangled in disputes concerning payment of subcontractors and suppliers by the general contractor.
 - a. The surety underwriting the payment bond ensures the contractors and suppliers will be paid. Often, performance and payment bonds are combined into a single document.
 - b. Failure to pay subcontractors for work performed in commercial contracts may often lead to the subcontractor filing a mechanic's lien against property owners to obtain payment for services rendered.

- c. PHA contracts require payment bonds to prevent this problem and ensure that no liens will be filed against any PHA building or lot of ground. Clause 24 of form HUD-5370, General Conditions of the Contract for Construction, clearly forbids the placement of liens and is binding on any contractor, subcontractor, and material supplier.

- C. **Bonding Companies.** An acceptable surety (bonding) company is one that is authorized to do business in the State where the project is located and acceptable to HUD and the PHA. The surety must be listed on the most recently published U.S. Treasury Circular 570 (often referred to as the T-List). Individual sureties are not permitted. Circular 570 is available from the U.S. Department of the Treasury, Bureau of Fiscal Service, Surety Bond Program, 3700 East West Highway, Room 6D22, Hyattsville, MD 20782. The T-List may also be accessed at: <https://www.fiscal.treasury.gov/surety-bonds/circular-570.html>.
- D. **Inadequate Surety.** If the low bidder fails to provide an acceptable assurance of completion (payment and performance bonds) after award of the contract, the PHA should consider the bid guarantee forfeited and notify the surety company. The contract is then terminated for default. The amount to be recovered from the bid bond or guarantee should equal at least the difference between the defaulted bid and the next higher acceptable bid or the amount by which the bid accepted by re-soliciting exceeds the defaulted contract.

6.12 CONTRACT AWARD (2 CFR 200.320(b)(1))

The following steps should be used in awarding a contract based on the sealed bids method of procurement:

A. Evaluate Bids & Any Alternates.

- 1) The apparent low bid should be evaluated according to the procedures outlined in the paragraphs below. If the apparent low bid exceeds the project budget, any deduct alternates should be applied to the bid prices, one at a time, to identify the bidder whose resulting price falls within the budget. If the first deduct alternate does not produce an acceptable bid, then the second alternate should be applied, and so on, until an acceptable price and bidder is identified.
- 2) If alternates are employed, and the apparent low bid falls below the available budget, a similar process of applying the alternates one at a time may be employed to identify the low bidder who includes the greatest number of alternates within the available funding.
- 3) The PHA should not use alternate prices as a way to select a preferred bidder.

B. Determining Responsiveness & Contractor Responsibility.

The next step in the contract award process is to review the low bid for responsiveness.

- 1) *Responsiveness (2 CFR 200.318(h)).* To be considered responsive, a bid must conform to the material requirements of the IFB. The Contracting Officer must examine the low bid to be sure that the bidder did not alter the specifications or other terms and conditions (e.g., delivery schedules, payment terms) or attempt to impose different terms and conditions. If the bid does not conform to the solicitation, it must be rejected and the next lowest bid examined for

responsiveness. Allowing a bidder to alter the material requirements of a solicitation gives the bidder an unfair advantage over the other bidders and destroys the integrity of the sealed bidding process. It also limits the PHA's rights in the contract. The Contracting Officer shall document his/her findings regarding the low bidder's responsiveness in the procurement file. Minor informalities (see paragraph D) are not grounds for determining a bid to be non-responsive.

- 2) *Responsibility*. After determining the responsiveness of the low bid, the Contracting Officer shall determine if the bidder is responsible. See Chapter 10, paragraph 10.2.A, for detailed guidance on assessing responsibility.
- C. **Equal Bids**. When two or more low bids are equal in all respects, the award should be decided by drawing lots or other random means of selection. Authority to use this method should be included in the PHA's Procurement Policy and stated in the IFB.
- D. **Minor Informalities**. The Contracting Officer may waive minor informalities or allow the bidder to correct them. Minor informalities are matters of form rather than substance. They are insignificant mistakes that can be waived or corrected without prejudice against the other bidders and have little or no effect on price, quantity, quality, delivery, or contractual conditions. Examples include failure to: return the number of signed bids required by the bid package; sign the bid, provided that the unsigned bid is accompanied by other documents indicating the bidder's intent to be bound (e.g., a signed cover letter or a bid guarantee); complete one or more certifications; or acknowledge receipt of an amendment or addendum, provided that it is clear from the bid that the bidder received the amendment/addendum and intended to be bound by its terms, or the amendment/addendum had a negligible effect on price, quantity, quality, or delivery.
- E. **Rejection of Bids (2 CFR 200.318(i))**. Rejection of any bid during the evaluation process shall be fully documented, including all reasons for the rejection. Minor informalities in the bid may be waived, as described above. Any bid may be rejected if the Contracting Officer determines that the price is unreasonable. Determining a bid price to be unreasonable includes not only the total price of the bid, but the prices for individual items as well. Any bid may be rejected if the prices for any of the items are materially unbalanced (such as bidding a high price for the first items to be provided and then low prices for subsequent items). A bid is materially unbalanced if there is a reasonable doubt that the bid would result in the lowest overall cost to the PHA, even if it is the lowest bid, or if the bid is so grossly unbalanced that accepting it would amount to an advance payment.
- F. **Award to the Lowest Responsive and Responsible Bidder (2 CFR 200.320(b)(1)(ii)(D))**. After the Contracting Officer evaluates each bid, the responsive and responsible bidder that submits the bid whose dollar value is the lowest overall and meets all specified requirements shall be awarded the contract. A sample contract award letter is included in Appendix 6. Unsuccessful bidders also should be notified in writing of the contract award. A sample notice is shown as Appendix 7.

6.13 BID PROTESTS

Protests against the award of contracts shall be handled as described in Chapter 10, Section 10.4.

6.14 MULTI-STEP BIDS

PHAs may use two-step or multi-step sealed bidding procedures where appropriate and if permitted by their procurement policy. The two-step procedure is designed to obtain the benefits of sealed bidding by awarding a contract to the lowest responsive, responsible bidder. Simultaneously, this procedure is designed to obtain the benefits of the competitive proposals method through soliciting technical offers and conducting discussions that evaluate and determine the acceptability of technical offers. Under the two-step sealed bidding process, technical proposals alone are requested first. Then the proposals are evaluated for acceptability and negotiations or discussions held, if necessary.

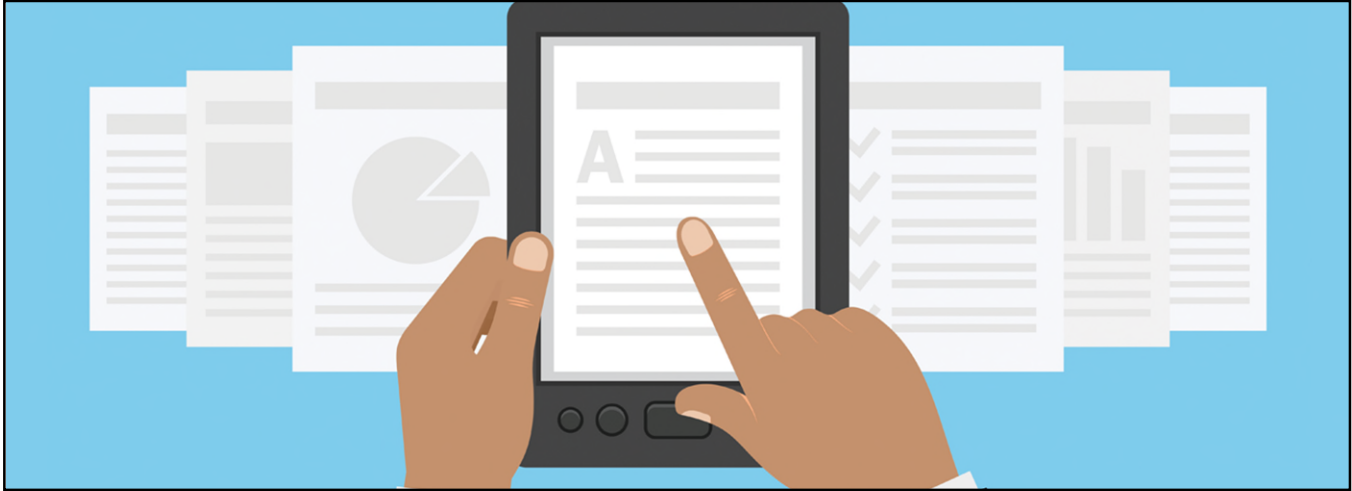
In the second step, the normal sealed bid process is followed except that only bidders with acceptable technical proposals may bid, and each bidder's price is based on its own technical proposal. An example of this method would be equipment contracts with performance specifications rather than detailed design specifications, where the PHA needs a certain level of performance but does not specify how this performance is achieved.

These procedures offer certain advantages. First, two-step sealed bidding encourages competition for contracts since contractors who might not have competed based on strict specifications under sealed bidding, may participate in the first step of two step sealed bidding because alternative approaches to the project or the design specifications are encouraged. Second, because of the price competition of step two, the general aims and benefits of price competition are achieved. Third, step one allows the PHA to take full advantage of the industry's experience and creativity.

Note: Two-step sealed bidding also has significant disadvantages. The process is generally time-consuming and costly for both the PHA and bidders who must draw up detailed technical proposals to meet the specifications or statement of work. In addition, the two-step procedure may result in the procurement of a product or service that is not necessarily the best or most cost effective overall. In step two, bidders will generally bid on their least costly design in order to maximize their chances of success. Since the PHA is to accept the least costly proposal in step two, it may be compelled to turn down proposals which, though a bit higher priced, are superior technically to the lowest cost proposal. In addition, the flexibility and general unfamiliarity of the process lead to a greater likelihood of bid protests and contract disputes.

It is also noted here that the Federal government has issued procedures in construction contracting for using a concept known as two-phase design-build selection procedures, like the two-step process outlined above. The process is described in detail in the Federal Acquisition Regulation (FAR) 48 CFR Chapter 1, Part 36, Subpart 36.3. PHA procurement is not regulated by FAR. This reference to the direction provided in it is purely for informational purposes.


CHAPTER 7 – COMPETITIVE PROPOSALS



7.1 GENERAL

The **competitive proposal method** (also commonly referred to as “negotiated procurement”) is the primary alternative to sealed bidding for contract requirements that exceed a PHA’s Simplified Acquisition Threshold. While the instructions in this chapter apply only to contracts above a PHA’s Simplified Acquisition Threshold, PHAs may adopt and adapt any of these procedures for Simplified Acquisitions if they choose. However, they should not overly complicate the Simplified Acquisitions process with laborious and unnecessary processes.

- A. **Sealed Bidding vs. Competitive Proposals.** Unlike sealed bidding, the competitive proposal method permits:
- 1) Consideration of technical factors other than price;
 - 2) Discussion with offerors concerning offers submitted;
 - 3) Negotiation of contract price or estimated cost and other contract terms and conditions;
 - 4) Revision of proposals before the final contractor selection; and
 - 5) The withdrawal of an offer at any time up until the point of award.
 - 6) Awards are normally made on the basis of the proposal that represents the best overall value to the PHA, considering price and other factors, e.g., technical expertise, past experience, quality of proposed staffing, set forth in the solicitation and not solely the lowest price. (See Chapter 6, Section 6.3 for additional guidance on when to use sealed bidding.)
- B. **Conditions For Use (2 CFR 200.320(b)(2)).** The conditions for using competitive proposals rather than sealed bidding should be established in the PHA’s procurement policy. Generally, the competitive proposals method should be used whenever any of the following conditions exist:
- 1) The requirement cannot be described specifically enough to permit the use of sealed bidding. In other words, the work is not definite enough to accurately estimate the total cost of the contract. Therefore, the contractor would have to build monetary contingencies into his/her price to ensure that his/her costs were covered. The PHA, in turn, would end up paying for the increase in price due to the contingency costs.

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- 2) The nature of the requirement is such that the PHA needs to evaluate more than just price to be sure that the prospective contractor understands the PHA's needs and can successfully complete the contract, especially when contracting for professional services (e.g., legal or accounting) where the PHA needs specific expertise and experience.
 - 3) The requested work lends itself to different approaches, e.g., proposals.
- C. **Justification.** The rationale for choosing competitive proposals rather than sealed bidding procedures should be documented in the procurement file.
- D. **Bonding.** PHAs will generally need to require bid or performance bonds for competitive proposals for construction or facility improvements.
- E. **Types of Competitive Proposals.** There are two types of competitive proposals: Request for Proposals (RFPs) and Requests for Qualifications (RFQs). The latter may only be used in more limited circumstances (i.e., A/E contracts), as described in paragraph 7.3 of this chapter.
- F. **Method of Solicitation.** While any of the following methods can be employed, the Contracting Officer should choose the method, which, considering matters of economy, provides for full and open competition.
- 1) Advertising in newspapers or other print mediums of local or general circulations. A sample advertisement is provided in Appendix 3.
 - 2) Advertising in various trade journals or publications.
 - 3) E-Procurement. PHAs may conduct their public procurements through the internet using e-procurement systems. However, all e-procurements must otherwise comply with 2 CFR 200.317 through 200.327, State and local requirements, and the PHA's own procurement policy. Steps must be taken to meet the requirements for full and open competition to avoid potential protests.
- G. **Time Period for Solicitation.** The solicitation must be run for a period sufficient to achieve effective competition, which, in the case of paid advertisements, should generally be run not less than once each week for two consecutive weeks. State or local law may impose additional advertising requirements.

7.2 COMPETITIVE PROPOSAL PROCESS (2 CFR 200.320(b))

- A. **Format.** Provided below is a suggested format for RFPs:
- 1) Cover Page;
 - 2) Table of Contents;
 - 3) Statement of Work (SOW);
 - 4) Submission Requirements, including pricing instructions;
 - 5) Evaluation Factors; and
 - 6) Attachments (including mandatory forms – see paragraph 7.2.B below).

- B. Mandatory Forms/Contract Provisions.** The PHA must include with the solicitation package the following forms containing required solicitation procedural clauses and certifications for contract compliance as well as mandatory contract clauses. These forms are for non-construction services. Only under limited circumstances, such as design-build contracts, would construction services be procured by competitive proposals.
- 1) Form HUD-5369-B, Instructions to Offerors – Non-Construction.
 - 2) In addition, the PHA may want to include solicitation Form HUD-5370-C, General Conditions for Non-Construction Contracts.
- C. Submission Requirements.** The PHA should make sure that the submission requirements: (1) include all HUD-required forms and certifications and (2) are consistent with the factors used for evaluation. For example, if the RFP indicates that proposals will be evaluated based on similar experience in the particular activity, the PHA should make sure that it requests respondents to include information on relevant past experience.
- D. Evaluation Factors, Non-Price (2 CFR 200.320(b)(2)).**
- 1) The RFP must contain a clear statement of the evaluation factors to guide the offerors in structuring their proposal. Non-price factors are also called “technical factors.”
 - 2) The written statement of evaluation factors and their relative values clarifies each important factor to the offerors and ensures a fair selection process.
 - 3) The evaluation criteria should be tailored to fit each procurement.
 - 4) Typical evaluation criteria include the following:
 - a. Demonstrated understanding of the requirement;
 - b. Appropriateness of the technical approach in the proposal (including labor categories, estimated hours, and skill mix);
 - c. Quality of the work plan;
 - d. Technical capabilities (in terms of personnel, equipment, and materials) and management plan (including staffing of key positions, method of assigning work, and procedures for maintaining level of service);
 - e. Demonstrated experience in performing similar work; and
 - f. Demonstrated successful past performance (including meeting costs, schedules, and performance requirements) of contract work substantially similar to that required by the solicitation as verified by reference checks or other means.
- E. Evaluation Factors, Price (2 CFR 200.320(b)(2), 2 CFR 200.324).** Price must be a factor in making awards. In terms of evaluating price, a PHA has two options, which must be indicated in the RFP:
- 1) Where Price is Assigned an Explicit Point(s). Under this method, the PHA may award the price a specific number of points. For example, the PHA may rank proposals on a 100-point scale. Of the total points, the PHA may award, for example, 80 points for technical merit and 20 points for price. In using this method, the PHA will need to determine the weight given to price versus technical factors and how to convert price into a point scale.
 - 2) Where Price and Other Technical Factors are Considered. Under this method, technical factors are first determined, and offerors are ranked. Then, prices are evaluated. The PHA can award the offeror whose price and technical factors are the most advantageous to the PHA. This

method is also known as the "trade-off" method in that the PHA trades-off, or weighs the importance of, price versus technical factors. All amendments must be in writing.

- F. **Amending and Canceling the RFP.** PHAs may amend or cancel RFPs when necessary or when otherwise considered to be in the best interest of the PHA.
- 1) *Amendments Before the Proposal Due Date.* If changes to the RFP are needed after it has been issued but before proposals are due, the Contracting Officer should issue a written amendment to all potential offerors who were furnished a copy of the original solicitation. The amendment should then be provided with the original RFP to those who request the RFP after the amendment is made.
 - 2) *Amendments After the Proposal Due Date.* If changes to the RFP are needed after the due date for receipt of proposals, the Contracting Officer should provide the amendment to all offerors who submitted a proposal. If the changes are significant enough that potential offerors who did not submit offers might have done so if the changes had been made before the proposal due date, the PHA should provide them the amendment as well. In both cases a new proposal due date must be established.
 - 3) *Amendments After Determination of the Competitive Range.* If a Contracting Officer has determined the competitive range (see paragraph 7.2.N) and has found that changes are necessary, the Contracting Officer should provide the amendment to all offerors determined to be within the competitive range. If the changes may have had an impact on the acceptability of any offeror who was not included in the competitive range, the Contracting Officer should provide them with the amendment as well. In both cases a new proposal due date must be established.
 - 4) *Changes Requiring Cancellation of the RFP.* If at any time in the process any needed changes are substantial enough to constitute an essentially new requirement, the Contracting Officer should cancel the RFP, make the needed changes, and issue a new RFP with a new proposal due date. This will be a judgment call on the part of the Contracting Officer.
 - 5) *Canceling an RFP.* Cancellations must be done in accordance with the PHA's written procurement policy and procedures. While it is not prohibited, the repeated cancellation of a single RFP or frequent cancellation of RFPs serves to create a lack of confidence in the PHA's contracting process. Such actions may create the appearance that either the PHA does not really know what it wants, or the PHA may be seeking the participation of a particular contractor.
 - 6) *Documenting Amendments and Cancellations.* The Contracting Officer shall document the procurement file providing the rationale and supporting facts for amendments and cancellations, where necessary.
- G. **Pre-proposal conferences.** See Chapter 6, Section 6.7 for instructions on pre-proposal conferences. Please note that for the purposes of this paragraph, "pre-bid" means "pre-proposal," and "IFB" means "RFP."
- H. **Receiving Proposals.** Proposals are to be date-time stamped when they are received and held unopened in a secure place until the established date for receipt of proposals has passed. Since proposals are submitted in confidence and may contain proprietary information (such as trade

secrets or other confidential business information regarding the offeror's approach to the work), they are not opened publicly. After the closing date, all proposals received are opened and evaluated in confidence. Proposals and any changes to those proposals are shown only to PHA personnel who have been authorized by the Contracting Officer as having a legitimate interest in them on the condition that information in the proposals will not be released to anyone who has not been so authorized.

- I. **Late Submissions.** Any offer received at the designated place after the specified time should not be considered unless it is the only proposal received.
- J. **Confidentiality.** No information regarding any of the proposals, including the names of the offerors or the number of proposals received, should be provided to anyone without the Contracting Officer's permission. Offerors submit proposals in confidence and expect their proposals to be protected from disclosure to other offerors or individuals. The PHA could be subject to liability if proprietary information is disclosed. Each member of the evaluation committee (see below) and any advisors to the evaluation committee should be required to sign a certification of nondisclosure. A sample is provided as Appendix 9.
- K. **Evaluation Process (2 CFR 200.320(b)(2)).**
 - 1) *Evaluation Plan.* An evaluation plan is an essential tool to ensure that proposals or qualifications are evaluated in a uniform and objective manner. Such a plan should be written and established for each procurement for the evaluation of technical and cost/price proposals before the RFP or RFQ, i.e., see Request for Qualifications under Qualification Based Selection (QBS) - paragraph 7.3, is issued. While the cost or price evaluation is typically handled exclusively by the Contracting Officer, the technical evaluation portion of the plan requires a sufficient level of detail to successfully guide the evaluation committee through the evaluation process.
 - a. This plan should include rating/evaluation sheets used in the evaluation of each offeror's proposal, which detail the evaluation criteria and weight assigned to each evaluation/ technical factor.
 - b. The evaluation criteria for each factor should be clearly stated (for example, a rating of "Excellent" or 20 points out of 20 available for a particular evaluation factor means...; "Good" or 15 of 20 points means...).
 - c. The rating/evaluation sheets should require the technical evaluator to assign both numerical (or similar) ratings and narrative justifications to support the ratings given for each evaluation/technical factor.
 - 2) *Evaluation Committee/Panel.* Depending on the complexity of the procurement, the Contracting Officer will appoint an evaluation committee made up of an odd number of members, three or greater. The Contracting Officer should identify committee members who will be independent with the necessary experience and knowledge related to the type of services being procured to successfully evaluate submitted proposals or qualifications from offerors. Also, the Contracting Officer and all committee members must disclose any potential conflict of interest and recuse themselves if any conflict of interest arises. It is recommended that a conflict of interest certification be signed by each committee member along with a required non-disclosure certification, as mentioned in paragraph J above, prior to the receipt of

proposals or qualifications. The evaluation committee or panel performs the following functions: Performs an individual evaluation of each technical proposal using the designated rating/evaluation sheets in accordance with the established evaluation plan and the RFP's evaluation factor criteria as standards; meets to perform a consensus rating/evaluation of each technical proposal, again using the designated rating/ evaluation sheets as well as performs a numerical ranking of the offerors; prepares a formal written report to the Contracting Officer; participates in negotiations, if requested by the Contracting Officer; evaluates best and final offers, if required, and provides an amended evaluation report based on the final evaluation. Note: The main purpose of the consensus rating/evaluation is for the committee to arrive at a consensus rating and ranking through discussion and agreement. Hence, a consensus rating/evaluation that is based on the averaging of scores among evaluation committee members is not considered a consensus.

- 3) *Evaluation*. The evaluation shall be based on the evaluation factors set forth in the RFP. Factors not specified in the RFP shall not be considered. Initially, proposals should be evaluated on an individual basis against the requirements stated in the RFP; at this point, proposals are not analyzed in comparison with each other. Also, during the initial evaluation, the committee evaluates only the content of the proposals. No personal knowledge of the offeror not based on the contractor's written submission is or should be part of the written proposals' initial evaluation; however, the contractor's prior performance with the PHA should be included as part of the standard review of offeror responsibility.
- 4) Unlike sealed bids, which are opened publicly, the results of proposal evaluation may or may not be disclosed; either before or after the contract is awarded. Disclosure will depend on State or local law.
 - a. In the case of protests or litigation, evaluation documentation will almost certainly be made available to the protestor or litigant and their legal counsels. Therefore, evaluators should be especially careful to make the evaluations as thorough, objective, and well documented (e.g., citing the specific areas of the proposal that led to the particular portion of the evaluation) as possible.
 - b. The Contracting Officer is responsible for ensuring that the evaluation results are sufficiently documented and included in the contract file. To be safe, the Contracting Officer should always assume that an award will be protested.
- 6) Contracting Officers must be aware of attempts by offerors to change the requirements of an RFP by inserting conditions in their offers or otherwise altering the contract's requirements. While proposals are not required to be "responsive," as that term is used in sealed bidding (see Chapter 6), offerors may not impose conditions or change requirements to suit their own needs or desires. Examples of conditioning offers include:
 - a. Adding special terms or clauses to impose State or local laws not applicable to the PHA's contracts;
 - b. Inserting "hold harmless" clauses to avoid certain liabilities;
 - c. Making provision for attorney's fees (to attempt to make the PHA pay the contractor's legal costs if the PHA sues the contractor); or,
 - d. Taking exception to clauses, in whole or in part.

When possible, Contracting Officers should be willing to negotiate changes unless the changes violate Federal, State or local law or regulation, are required by HUD policy, or prejudice the other offerors (e.g., making a change that benefits a single offeror).

- L. **Evaluation Report (2 CFR 200.318(i)).** The PHA shall prepare an evaluation report to document the ranking of the proposals by technical merit, using point scores, or similar methodology. (If price is included in the point scoring, the evaluation report will also include the price or cost analysis, as appropriate.) In addition, a narrative should accompany the scores to explain how the scores were derived, detailing the significant strengths, weaknesses, and deficiencies in the proposal. The level of detail for the evaluation report will be influenced by the complexity of the procurement, with more complex procurements likely requiring more detailed reports.
- M. **Evaluation of Price (2 CFR 200.324).** The evaluation of price is made using the cost and price analysis techniques in Chapter 10 and other evaluation processes described in the RFP.
- N. **Competitive Range.**
- 1) After the evaluation committee has evaluated all proposals, the Contracting Officer should determine a competitive range. The competitive range includes the proposals that have a reasonable chance of being selected for award considering their technical evaluation results and their proposed costs or prices.
 - 2) The Contracting Officer examines the evaluation results contained in the evaluation report to decide if each offer is technically acceptable (i.e., appears to be able to perform the technical requirements of the contract). The Contracting Officer analyzes the proposed cost or pricing information (see Chapter 10, Section 10.2) to decide if the offers propose a reasonable total cost or price. The Contracting Officer then considers the combination of technical and cost (the "total package") presented by each proposal to decide if it should be kept in the running for negotiations and possibly award.

Example: A high scoring, technically acceptable offeror proposes a price that far exceeds all the competition and the PHA's ICE. The Contracting Officer would be justified in not including it in the competitive range. It would be highly likely that once the costs were negotiated down to a reasonable level, the technical quality would be much lower, too. Therefore, the offer does not truly stand a reasonable chance of award.

- 3) Before conducting negotiations, technical proposals included in the competitive range should be classified as:
 - a. "Acceptable." This means that based upon the proposal as submitted, the PHA could contract with the offeror and expect that the work would be completed. The proposal is not perfect, but it contains no significant weaknesses.
 - b. "Potentially acceptable." This means that the technical part of the proposal contains weaknesses that keep it from being acceptable, but with relatively minor changes or additional information from the offeror, it might be made acceptable. Once additional information is obtained via initial negotiations, this type of proposal must become either acceptable or unacceptable.
 - c. "Unacceptable." This means that the proposal is seriously flawed to the point that no amount of negotiation would lead to improve it, or the offer would have to be

substantially rewritten to be found acceptable. Either the offeror simply did not understand the PHA's requirement or did not elect to prepare a sufficient proposal.

Technically unacceptable proposals should never be included in a competitive range.

- 4) The competitive range, including the Contracting Officer's rationale for it, must be documented in the contract file.
- 5) The Contracting Officer may re-determine the competitive range after the initial round of negotiations. For example, a potentially acceptable offer becomes unacceptable. In that case, the Contracting Officer should not ask the offeror for a Best and Final offer (see paragraph Q below). Instead, the Contracting Officer should re-determine the range and remove that proposal. This may be done after successive rounds of negotiation, if more than one is used.

O. Pre-negotiation Objectives.

- 1) Pre-negotiations objectives are the Contracting Officer's negotiating positions. Normally, the Contracting Officer should develop target objectives (e.g., best case, expected, highest acceptable price) for the contract price. Objectives may also be established for technical aspects of proposals. For example, the Contracting Officer may have included a "potentially acceptable" offer in the competitive range (see paragraph 7.2N).
- 2) The technical pre-negotiation objectives would then include obtaining answers or clarification relative to the areas of the proposal that made it potentially acceptable. The Contracting Officer should establish specific pre-negotiation objectives for each offer in the competitive range.

P. Negotiations with Offerors.

- 1) Negotiations are exchanges (in either competitive or single source environment) between the PHA and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining.
- 2) Bargaining includes persuasion, alteration of assumptions and positions, and give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.
- 3) When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.
- 4) Discussions are tailored to each offeror's proposal and shall be conducted by the Contracting Officer with each offeror within the competitive range.
- 5) The primary object of discussions is to maximize the PHA's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. The Contracting Officer shall indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the Contracting Officer, be altered or explained to enhance materially the proposer's potential for award.
- 6) The scope and extent of discussions are a matter of the Contracting Officer's judgment. The Contracting Officer may inform an offeror that its price is considered by the PHA to be too high or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible to indicate to all offerors the cost or price that the PHA's price analysis, market

research, and other reviews have identified as reasonable. "Auctioning" (revealing one offeror's price in an attempt to get another offeror to lower their price) is prohibited.

- 7) Profit shall be negotiated as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work (see 2 CFR 200.324(b)).

Q. Best and Final Offers.

- 1) After initial negotiations are complete, the Contracting Officer shall invite the offerors in the competitive range to submit their best and final offers, making any changes they wish in their technical proposal and the price. All offerors in the competitive range should be provided an opportunity to present best and final offers.
- 2) The best and final offers shall be evaluated in essentially the same manner as the initial offers. At his/her discretion, the Contracting Officer may have the entire evaluation committee or only a subset of the committee evaluate the best and final offers. In either case, the Contracting Officer shall ensure that a full evaluation is conducted sufficient to support the award decision.
- 3) Best and final offers are usually requested only once in a competition. However, in exceptional circumstances, the Contracting Officer may determine that it is in the PHA's best interest to conduct another round of negotiations and request a second best and final offer. (Note: The Contracting Officer may also re-determine the competitive range based upon the best and final offers. In that case, only those offerors still in the competitive range - but all of them - are asked to submit another revised best and final offer; see also paragraph N, above.) The Contracting Officer should document in the contract file his/her rationale for re-opening negotiations and requesting any additional best and final offers.
- 4) The Contracting Officer shall establish a common date and time for submission of offers. Late responses should be treated the same as late initial offers. When requesting best and final offers, the Contracting Officer shall clearly inform offerors that should they fail to submit a best and final offer, or fail to submit one by the due date, their initial offer will be deemed to be their best and final offer.

R. Award without Negotiations. If, after the initial evaluation of proposals, there is a clear winner, and there is no need to negotiate or obtain further clarification or information from that offeror (e.g., the price is reasonable), the Contracting Officer may proceed directly to award, provided that the RFP clearly stated that award could be made without negotiations (see paragraph 7 of Form HUD-5369-B).

S. Price Negotiation Memorandum. The Contracting Officer should prepare a price negotiation memorandum that summarizes the results of the negotiations and explains the basis of the award decision. For larger PHAs, the cost/price results could be shown in spreadsheet form, with columns for the offered cost/price, negotiation objectives, and final negotiated cost/price for each offeror in the competitive range. As mentioned in paragraph P.6. above, ensure profit is negotiated as a separate element and is indicated in the price negotiation memorandum.

T. Contract Award (2 CFR 200.318(h)).

- 1) *General.* Contracts shall be awarded only in accordance with the terms of the solicitation. Contracts awarded using the competitive proposals method are based on both price and technical merit of the proposal. Awards shall be made only to offerors who have been determined to be responsible contractors. Procedures for determining contractor responsibility are included in Chapter 10, and a sample Responsibility Determination Form is included in Appendix 10.
- 2) *Notice to Unsuccessful Offerors.* The Contracting Officer should notify each unsuccessful offeror and the awardee price in writing. In accordance with any applicable State or local law, the notice should identify the successful offeror and the contract price, and the basis for the offeror not being selected for contract award. The basis should clearly describe the offer's salient weaknesses and deficiencies that resulted in it not being considered for award (e.g., not simply state that the offeror's proposal did not receive a high enough score).
- 3) *Debriefing Unsuccessful Offerors.* The notice to unsuccessful offerors should also provide them with the opportunity to request a debriefing by the Contracting Officer. The notice should state any time frame during which the request must be made (e.g., within 10 business days after receipt of notice). The debriefing should explain how the offer was unsuccessful (e.g., by comparing it to the requirements of the RFP). The debriefing should not include a detailed point-by-point comparison with the successful offer or any other offer and may not reveal any information about another offer that is protected from disclosure (e.g., personal information, proprietary business information; see Chapter 1, Section 1.7).

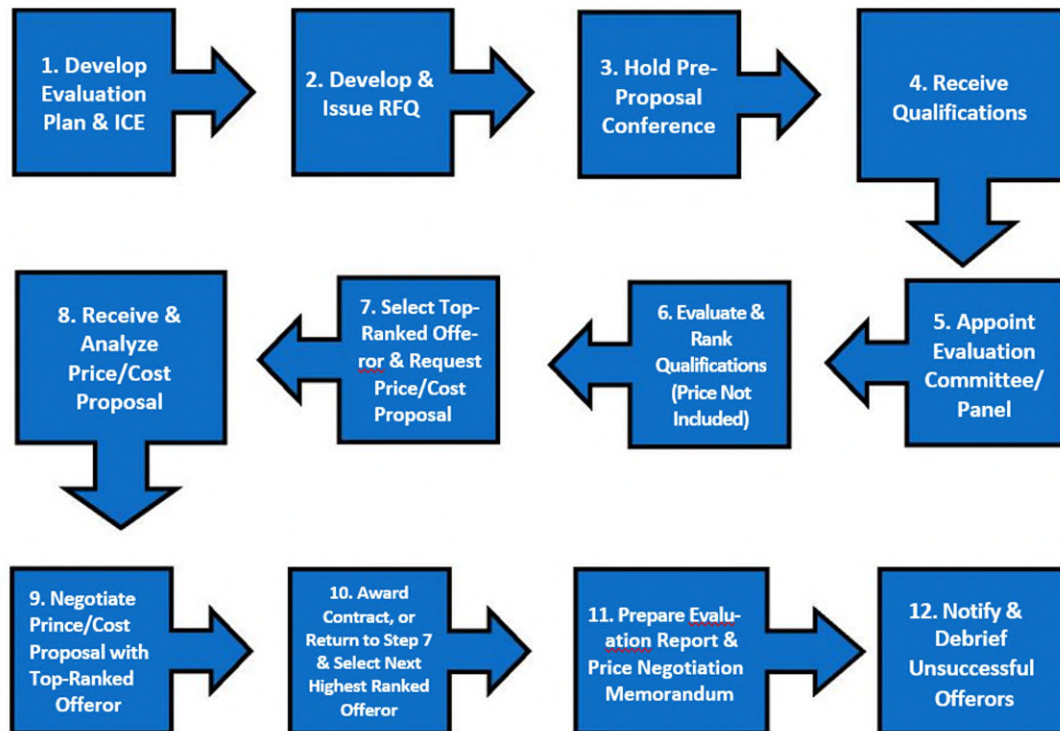


- U. Protests.** Protests against the award of contracts shall be handled as described in Chapter 10, Section 10.4. Below, in Figure 1, is a visual summary of the steps of the competitive proposal process described in Section 7.2.

FIGURE 1. COMPETITIVE PROPOSAL PROCESS

7.3 REQUESTS FOR QUALIFICATIONS & A/E CONTRACTING

- A. **General.** The Qualifications-Based Selection (QBS) method is conducted using an RFQ. Use of the QBS is limited and is different, primarily, from the RFP method in that the PHA first selects the highest-ranked respondent on technical factors and then negotiates price. The most common use of RFQs is for Architect/ Engineer (A/E) contracts. RFQs can also be used to select development partners for mixed-financed projects (Chapter 17). The discussion in this section references those special requirements/conditions in using RFQs.
- B. **Procedure.** Unlike other methods, the QBS method does not use price as an evaluation factor. The PHA requests technical qualifications statements from prospective firms and then evaluates and ranks the statements according to their qualifications as related to the project and the evaluation factors. The PHA then opens negotiations with the top-ranked firm with intentions to reach agreement on a fair and reasonable price. If agreement cannot be reached, the PHA terminates negotiations with this firm and proceeds to the next-highest rated firm until a price determined to be fair and reasonable to both parties is obtained. Once negotiations have been terminated with a firm, the PHA may not go back to that firm for additional negotiations even if the next lower ranked respondent is higher in price. Below, in Figure 2, is a visual summary of the Qualifications-Based Selection (QBS) process under competitive proposals, as described in Section 7.3. In addition to this Section, the same competitive proposal RFP procedures detailed under Section 7.2 will be used in the QBS process except for Section 7.2 parts D, E, and M.



- C. **Eligible Uses.** The QBS method can only be used for A/E services, or Developer's related contracts, or when specifically authorized by HUD. Further, in accordance with 2 CFR 200.320(b)(2)(iv), the

QBS method cannot be used to contract for other types of services provided by A/E firms, even though A/E firms are a potential source for performing the proposed effort.

FIGURE 2. QUALIFICATIONS-BASED SELECTION (QBS) OR RFQ PROCESS

- D. A/E Evaluation Factors.** The following evaluation factors are recommended for use for modernization and development A/E contracts:
- 1) Evidence of the A/E's or firm's ability to perform the work as indicated by profiles of the principals' and staffs' professional and technical competence/experience, and their facilities;
 - 2) Capability to provide professional services in a timely manner;
 - 3) If design work is involved, evidence that the A/E is currently registered in the State of the project's location and carries Errors and Omissions insurance. This is a "yes or no" criterion; no points are to be awarded. If the answer is no, the firm is automatically disqualified from competition. If the answer is yes, evaluation and scoring of the A/E firm's qualifications continues;
 - 4) Past performance in terms of cost control, quality of work, and compliance with performance schedules;
 - 5) Demonstrated knowledge of local building codes and Federal building alterations requirements; and
 - 6) Other factors determined to be appropriate by the PHA.
- E. Methods of Contracting A/E Firms (2 CFR 200.320(b)(2)(iv)).** PHAs may select A/E firms using either the RFP or RFQ methods. However, since competitive proposals is a complex form of procurement, the simpler RFQ (or QBS) method is recommended, particularly for general A/E procurements. Regardless of the type of competitive proposals procurement used, there are several alternatives available to PHAs when contracting for the full range of services offered by A/E firms:
- 1) *Direct Approach/Service Specific.* This method is used when the PHA wishes to procure A/E services related to a specific project or specified task (e.g. new construction or remodeling of building, the development of modernization plans or the production of technical reports). Depending on the method of competitive proposal procedures the PHA elects to utilize during the selection process, the PHA will follow the steps provided in either Section 7.2 or 7.3 of this Guidebook.
 - a. Cost Analysis. The PHA shall perform a cost analysis in connection with the procurement of professional services, including contract modifications. This analysis requires the PHA to make an independent cost estimate (ICE) of the contract cost before receiving cost proposals or negotiating price. When using QBS, the ICE, at a minimum, must include a breakdown of direct costs, indirect costs, overhead, and profit. Also, the offeror's proposal must include the same or similar breakdown to enable the PHA to adequately analyze and determine reasonableness of the proposal as well as effectively negotiate a fair and reasonable contract cost and profit.
 - b. The PHA is not to allow an A/E contractor, on a single-source basis, to prepare a grant (or development application) on a "no fee" basis and then compensate that A/E by

paying a contingent fee (or contracting on a single-source basis to do the design and construction phases).

- 2) *Options for Specific Contract.* If the PHA solicits offers for assistance in preparing modernization plans, with options for the follow-on design and construction phases for a specific contract, the evaluation criteria in the solicitation should address the qualifications and experience of prospective A/E firms for all tasks.
 - a. If QBS is used, the PHA evaluates the qualification statements for technical competence, selects the best-qualified A/E, and negotiates a fair and reasonable price for the initial task. If QBS is not used, price is considered along with technical qualifications and experience in the initial evaluation.
 - b. The PHA specifies the optional task (design/construction) in the contract without a price because the full scope of the A/E services is not yet known.
 - c. If the PHA then wishes to exercise its option for the additional services, the PHA notifies the A/E accordingly and requests a design proposal. The PHA conducts a cost/price analysis, enters negotiations, and establishes a mutually acceptable price for the design and construction phases. The PHA prepares a contract modification (supplemental agreement), executed and signed by both parties authorizing the A/E to begin the design/construction phase, or the PHA has no further obligation to the A/E and may issue a new competitive solicitation for the follow-on work.
- 3) *Multi/Separate Contract.* If the PHA wishes to separate the preliminary planning activities from the design/construction phase, the PHA first solicits and contracts for the initial services. Then, after selection approval, the PHA solicits and contracts for the design/ construction phase. The A/E who was awarded the initial planning contract may compete for the design/construction phase, provided that the PHA makes all application-related information available to all competing A/E firms and that there is no organizational conflict of interest. (For example, award of the contract to the A/E who participated in the planning of future activities would result in an unfair competitive advantage. This is because, by virtue of assisting in the development of future work, an unfair advantage exists through information which might not be available to others).
- 4) *Indefinite Quantity.* If the PHA wishes to procure A/E services for more than one specific project, the PHA may solicit for an indefinite quantity of A/E services, e.g., design of various administrative or maintenance buildings, where separate orders would be placed for each building as the need arises. Because this approach may provide the successful A/E with a substantial level of business and basically confers status as the "resident A/E," the contract should contain a clause precluding the successful A/E from competing on related A/E work services solicited by the PHA during the term of the contract that would result in an organizational conflict of interest, e.g., activities or work associated with program management.

F. **Forms for A/E Contracts.** Design Professional Model Form of Agreement Between Owner and Design Professional (form HUD-50915) is required for use by PHAs for A/E contracts that exceed the Simplified Acquisition Threshold. In preparing the solicitation, it should be noted that in States that mandate QBS, a price shall not be solicited for the initial competition but shall be requested from the best-qualified A/E firm after the evaluation of qualifications and ranking the firms (2 CFR 200.320(b)(2)(iv)). The A/E contract shall be either a firm fixed-price or a cost-plus-fixed-fee (which

includes an established ceiling) type. Cost-plus-a-percentage-of cost and percentage of construction cost-type contracts are prohibited.

- G. **Inadequate Response to A/E Solicitation.** If the PHA receives fewer than three proposals, the PHA should analyze and document the reasons for the inadequate response (such as if public notice advertising and outreach to potential offerors were insufficient, or if the solicitation was unduly restrictive or vague). Depending on the results of the analysis, the PHA may either reject the proposals and issue a revised solicitation, or the PHA may proceed to evaluate the proposals as deemed appropriate. If only one responsive proposal was received, the PHA should follow the procedures described in Chapter 10.

7.4 PROCUREMENT OF LEGAL SERVICES BY PHAS (2 CFR 200.318(a))

- A. **Purpose and Applicability.** The following information sets forth procedures for the procurement of legal services by PHAs. This guidance provides similar guidance to HUD staff and PHAs included in PIH Notice 2006-9, Procurement of Legal Services by PHAs or its successor guidance. The following information is not intended as the primary source of guidance in this area but is provided to remind all HUD Offices and PHAs of the proper procedures for procuring legal services and to briefly review areas of common interest and concern. This information applies to all PHA procurements of legal services that are funded with HUD grant funds subject to 2 CFR Part 200, e.g., Administrative Fees, Operating Funds, and Capital Funds.
- B. **Background.** PHAs obtain required outside legal services through procurement contracts. Such procurement is subject to the requirements set forth in 2 CFR Part 200, “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,” in particular, 2 CFR 200.317 through 200.327. In accordance with 2 CFR 200.403 - 200.405, the costs of legal services incurred under HUD grants (including those obtained under contract) must be reasonable and necessary. Section 200.403 contains a set of cost principles that PHAs must use for determining the allowability of costs they incur under Federal assistance and provides guidance in their use. Contracts for litigation services are also to meet the requirements of the HUD Litigation Handbook 1530.1 REV-5 dated May 2004 (the “Litigation Handbook”) as amended by HUD Office of General Counsel redelegations of authority.
- C. **Methods of Procurement.** 2 CFR 200.320 permits PHAs to use all of the contracting methods listed below. PHAs are expected to choose the method of procurement that is reasonable based on the facts surrounding the particular situation. The methods of procurement outlined in 2 CFR 200.320 are:
- 1) *Informal Procurement Methods.* If the relatively simple and informal Simplified Acquisition methods are used, price or rate quotations will be obtained from an adequate number of qualified sources.
 - 2) *Sealed Bids.* This method is normally not appropriate for securing legal services. Sealed bidding may only be used when it is possible to quantify the costs of the required services (e.g., number of hours) to permit the submission of firm bids and award a firm fixed-price contract to the

lowest responsive and responsible bidder considering only price and price-related factors. In addition, it is often critical to consider other factors besides price (e.g., experience) when selecting a legal services contractor. Sealed bidding does not permit the use of other factors.

- 3) **Competitive Proposals.** This method is generally preferred when procuring professional services because it allows for the consideration of technical quality or other factors (in addition to price) for securing services estimated to cost more than the Federal Simplified Acquisition threshold or a lower threshold as established by the PHA (e.g., to conform to State law). Competitive offers are solicited, proposals are evaluated, and award is made to the offeror whose proposal is most advantageous to the PHA, with price and other factors (as specified in the solicitation) considered. Either a fixed-price or cost reimbursement type contract may be awarded. This method is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the conditions in 2 CFR 200.320(b)(2) must be followed.
- 4) **Noncompetitive Proposals.** This method may only be used when the other methods of procurement are infeasible and the circumstances described in 2 CFR 200.320(c) are applicable (e.g., legal services are available from only a single source; public exigency or emergency for the requirements will not permit a delay resulting from competitive solicitation; after solicitation of a number of sources, competition is determined inadequate; or HUD authorizes the use of noncompetitive proposals. An example of a situation considered to violate the requirements of full and open competition in 2 CFR 200.317 through 200.327 would be noncompetitive award to an attorney for legal services on a retainer basis.

D. Time and Materials Contracts. Legal services can be procured on an hourly basis using a type of contract known as time-and-materials (or sometimes "labor-hour") contracts. Under these contracts, the contractor's services are pre-priced (usually, in terms of hours) in the contract, and the PHA orders services in unit amounts (e.g., hours) as needed until the funds in the contract are exhausted. PHAs may use this type of contract only after the PHA determines that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk.

E. Obtaining Legal Services by Procurement or Employment Methods. PHAs may employ an attorney directly (inhouse counsel as a PHA employee), or the PHA may enter into a procurement contract with an attorney or firm. The procurement of legal services shall follow the procedures outlined in paragraph C above. The employment of in-house counsel is not covered by 2 CFR 200.317 through 200.327. All services of a PHA in-house counsel would be part of his/her employment contract and are not to be procured separately. Where legal services are desired outside of the scope of services provided by the PHA house counsel, PHAs may use one of the procurement procedures described in paragraph C above.

F. Contracts for Litigation Services.

- 1) **General Requirements and Regional Counsel Approval.** In addition to the requirements described above in paragraph C, the Litigation Handbook sets thresholds for Regional Counsel and Headquarters Program Associate General Counsel approval of litigation service contracts. A PHA must submit to HUD Regional Counsel for prior written concurrence any litigation service contract where the fee is expected to exceed \$100,000 with a private attorney involving PHA program, project, or activity receiving loan, grant, or other subsidy assistance from HUD. Such

contracts shall make provision for reasonable fees and reimbursement of necessary expenses. If additional funding or budget revision is required to cover the cost of litigation services, the PHA shall consult appropriate Field and Regional Offices staff. Upon receiving a request for concurrence, if Regional Counsel is satisfied that the PHA has not violated HUD requirements or is otherwise not at fault, the Regional Counsel shall concur in a request received from the PHA for approval of a contract for litigation services if he/she is also satisfied that:

- a. The contract contains adequate protection against fraud and abuse;
 - b. The contract contains all mandatory provisions for professional service contracts for the program or activity giving rise to the litigation; and
 - c. The contract amount is reasonable. (Note: In cases where the PHA is at fault, the Regional Counsel may authorize the limited use of program funds for the PHA's defense to facilitate settlement or obtain judicial definition of the required relief.) The contract amount will be considered reasonable if it does not exceed the rates prevailing in the same or similar localities for the same or similar services, or the PHA can demonstrate special circumstances that require payment of a higher amount. Regional Counsel's concurrence signifies that the attorney's fee (proposed contract price) under the contract is an allowable project expense but is not a certification that there are sufficient project funds available to cover the contract amount.
- 2) Headquarters Program Associate General Counsel Approval. No contract for attorney's fees for litigation services entered into by any PHA, which calls for an estimated maximum price in excess of \$300,000 may be approved by the Regional Counsel without the prior concurrence of the Head-quarters Program Associate General Counsel.
 - 3) Use of Fixed-Price Contracts. Fixed-price proposals will be approved only where the issues are uncomplicated, extensive preparation probably is not required, and any trial that may ensue probably will not be lengthy. Ordinarily, a fixed-price proposal in excess of \$100,000 shall not be approved but Regional Counsel may approve a higher amount for a good cause. For additional information regarding the above litigation services requirements, consult paragraphs 2-3g(3), 3-3b(3) and 5-4 of the Litigation Handbook.

G. Contract Addendum - Legal Services Protocol. As indicated above, recent attention to the key role that attorneys play in PHA activities prompt the following guidance to promote and improve the Department's partnership with PHAs. See Appendix 11 for a template of an addendum to an engagement letter, which the Department urges PHAs to follow in procuring and utilizing legal services. The form of engagement letter is intended to set a course that will be helpful to both PHA and HUD partners, clarifying a method of operation for HUD's statutory oversight responsibilities while optimizing the statutory directive in Section 2(a)(1) (C) of the United States Housing Act of 1937 "to vest in PHAs that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public."

H. Legal Fee Management Service Contracts. PHAs may also find it helpful to engage a legal fee management firm when heavy demand or high local priorities or other conditions merit secure oversight of legal services.

7.5 EMPLOYMENT CONTRACTS

- A. **Employment vs. Independent Contracts.** There is a distinction between employing an individual (employment contracts), such as an employment contract for an executive director, and contracting for independent services (independent service contract). The former is part of the personnel process and is subject to those rules and regulations. The latter is considered a procurement action, subject to the standards in 2 CFR 200.320(b)(2). In an independent services contract, there is no employer-employee relationship. Employment contracts are not subject to 2 CFR 200.317 through 200.327 and need not be competitively procured.

- B. **Executive Directors.** Executive Directors may be hired as PHA employees or may be retained under an independent services contract. A PHA operating under the 1969 public housing ACC form HUD-53011 (11/69) may hire an Executive Director under a contract with a two-year term which can be extended by one year with HUD approval. Neither the 1995 public housing ACC form HUD-53012A (7/95) nor the 2023 public housing ACC form HUD-53012 specify a term, nor does the HCV Consolidated ACC (HUD-52520); however, as with other contracts of this length, the PHA can issue the contract for no more than five-years unless approved by HUD. HUD can question and disallow fees or salaries paid by PHAs that are determined to be in violation of the ACC and 2 CFR Part 200 provisions.

CHAPTER 8 – NONCOMPETITIVE PROCUREMENT



8.1 GENERAL

This chapter describes noncompetitive procurement, the conditions for their use, and the requirements for documentation.

8.2 DEFINITION

A noncompetitive procurement means a procurement that the PHA enters into after the PHA solicits offers from multiple sources but receives only one, or the competition is determined inadequate, or it is a micro purchase, or there is public exigency or emergency, or HUD approves the noncompetitive procurement. As described in Chapter 16, certain contracting with resident-owned businesses and resident management corporations is exempted from these restrictions on noncompetitive proposals.

8.3 RESTRICTIONS

- A. All noncompetitive awards must comply with 2 CFR 200.320(c). This method may be used only if one of the following circumstances applies:
 - The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold;
 - The item can only be fulfilled by a single source;
 - The public exigency or emergency for the requirement will not permit a delay resulting from providing public notice of competitive solicitation;
 - The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

- After solicitation of a number of sources, competition is determined inadequate.
- B. As described in Chapter 16, certain contracts with resident-owned businesses and resident management corporations are exempt from these restrictions on noncompetitive procurement. See 24 CFR Part 963.

8.4 PROCESS

- A. Award of contracts by noncompetitive procurement follows a process like that used for competitive proposals (see Chapter 7). The procurement must be evaluated. Technical and cost aspects may be negotiated. The offeror must be determined to be responsible at the time of award.
- B. Because there is no price competition, cost analysis (see Chapter 10) is required. Costs or price must be determined to be reasonable.
- C. PHAs are required to submit proposed noncompetitive contracts in excess of the simplified acquisition threshold to HUD for pre-award review and approval in accordance with 2 CFR 200.325, unless exempted under 2 CFR 200.325(c) (see Chapter 12 for more discussion.)

8.5 JUSTIFICATION & DOCUMENTATION

Noncompetitive procurement shall be conducted only if a written justification is made as to the necessity of using this method in accordance with the procedures described in PHA's procurement policy (see Appendix 1 for sample). Approval to award a noncompetitive contract does not eliminate or alter any other requirements of 2 CFR 200.317 through 200.327 governing the contract. The justification should include the following information:

- Description of the requirement;
- History of prior purchases and their nature (competitive vs. noncompetitive);
- The specific circumstance in 2 CFR 200.320(c)(1) through (5) which applies;
- Statement as to the unique circumstances that require award by noncompetitive procurement;
- Description of the efforts made to find competitive sources, e.g., advertisement in trade journals or local publications, phone calls to local suppliers, and issuance of a written solicitation;
- Statement as to efforts that will be taken in the future to promote competition for the requirement; and,
- Signature of the Contracting Officer and any higher approving official as required by the PHA's policy.
- The Contracting Officer shall include the written justification and approval in the contract file.

CHAPTER 9 – SPECIFICATIONS & STATEMENTS OF WORK

9.1 GENERAL

This chapter describes the development of specifications and statements of work (“SOWs”)¹ and their uses in procurement. Properly prepared specifications and SOWs enhance competition and clarify the relationship between contractors and PHAs, resulting in improved contract administration.



9.2 REGULATORY REQUIREMENTS

2 CFR 200.319(a) states that all procurement transactions must be conducted in a manner providing for full and open competition². To comply with this requirement, specifications or SOWs must not restrict competition for the reasons including, but not limited to, those listed at 2 CFR 200.319(b)(1-7). SOWs are also required for noncompetitive procurements.

Furthermore, per 2 CFR 200.319(d)(1), when creating specifications or SOWs for solicitations, competitive or otherwise, PHAs must incorporate a clear and accurate description of the technical requirements for the material, product, or service they want to procure. This means the specification or SOW must set forth the minimum essential characteristics and standards to which the material, product, or service must conform to satisfy its intended use. However, PHAs must avoid establishing these minimum essential characteristics solely by relying on a brand name. This “brand name” requirement is described in more detail in Section 9.3 below.

In addition to the substantive requirements for specifications and SOWs established in 2 CFR 200.319(d)(1), PHAs must include the aforementioned requirements in their written policies and procedures for procurement transactions.

¹ “Scope of work” is a common synonym for “statement of work.” This Handbook primarily uses “statement of work.” However, any reference to “scope of work” refers to the same type of document, and PHAs may choose what they wish to call this particular kind of specification.

² Please note the exception by the HUD Appropriations Act for Fiscal Year 1992, which allows PHAs to purchase insurance coverage without competitive selection procedures when they purchase it from a nonprofit insurance entity owned and controlled by PHAs approved by HUD in accordance with standards established by 24 CFR 965.205.

9.3 SPECIFICATIONS

A specification is a detailed description of materials, supplies, equipment, pre-cuts, or construction work that tells vendors what the PHA wants to procure.

- A. **Specification Types.** There are three types of specifications that PHAs may use to prepare solicitations and contracts for equipment, supplies, or construction: functional or performance specifications, design specifications, and brand name or equal specifications. These categories are described in more detail below. However, specifications rarely fit into only one category. Most specifications contain a combination of design and performance requirements and may include brand name or equal descriptions as well.
- 1) *Functional or Performance Specifications.* These specifications describe the item's desired performance characteristics or identify how the item works. Detailed design criteria or exact measurements are not stated.
 - a. Functional or performance specifications are inherently risky because they only vaguely articulate what the PHA wishes to procure. This vagueness gives contractors leeway to meet the specification's minimum requirements without taking other important factors that are not described in the specification into account. This may impede the PHA's ability to select the most suitable offer because it may make it more difficult for the Contracting Officer to discern and appropriately weigh every deciding factor. For example, a performance specification for a new boiler can call for a gas-fired hot water boiler that will produce 100,000 British Thermal Units (BTU) per hour. It is easy to imagine a gas-fired boiler that can match this specification, but that may also require continuous and costly maintenance.
 - 2) *Design Specifications.* Design specifications describe the exact characteristics of the PHA's desired item. Design specifications may be as detailed as needed. Depending on the nature of the item, the design specifications may contain precise measurements, tolerances, materials, product tests, quality control, and other detailed information. The information furnished in the specification should be sufficiently detailed to ensure that all items manufactured to the specifications will be virtually the same. A detailed description of kitchen cabinets, giving dimensions, fastening details, materials, and hardware, is one example of this type of specification.
 - a. Design specifications are distinct from performance specifications because they are much more specific. Performance specifications simply describe the desired performance threshold for an item, while design specifications give much more additional precise information that allows vendors to determine whether they can provide the required item and thus should submit a bid.
 - 3) *Brand Name or Equal Specifications.* Per 2 CFR 200.319(d)(1), PHAs must only use "brand name or equal" specifications in limited situations "when it is impractical or uneconomical to make a clear and accurate description of the technical requirements" for the item the PHA is seeking to procure. In these circumstances, PHAs may use a "brand name or equivalent" description to define the item's performance or other salient requirements that the item must satisfy to comply with the PHA's desired procurement. Per 2 CFR 200.319(b)(6), when a PHA

uses brand name products in specifications, the words “or equal” and a description of the item’s essential characteristics must follow the brand name. Additionally, PHAs must inform vendors that they are only using such references to establish a design or quality standard; any other products that clearly and demonstrably meet the standard established by the named brand’s specific features are also acceptable. Descriptions or specifications shall not specify a particular product or feature particular to one manufacturer unless that feature or product is critical to the PHA’s intended use of the item.

- B. **Standardizing Inventory.** Many PHAs standardize their inventory of equipment and parts. PHAs must ensure that any specifications for items that are part of their “standard” inventory comply with 2 CFR 200.319(b)(6) and (d)(1) as described above. For example, a PHA may choose a particular type of equipment or part for a particular function. If the PHA needs to acquire more of those parts or pieces of equipment, the PHA endeavors to procure the same equipment or parts for that function. This is a permitted standardization approach without limiting selections to particular brands. In all cases, PHAs should give all offerors the opportunity to present reasons or data showing their product can meet the PHAs’ stated requirements.
- C. **Avoiding Manufacturers Specifications.** PHAs should avoid incorporating a particular manufacturer’s specifications into their own specifications. This may give the appearance of restricting competition by only permitting the use of that manufacturer’s products and suggest to vendors that the PHAs may not accept other manufacturers’ products. For example, if a PHA specifies a brand name kitchen cabinet with the essential features of solid wood doors and plywood frames, many available brands and styles of cabinets will meet the essential criteria. Therefore, all brands that provide cabinets with these characteristics should be acceptable. However, if for example the PHAs does not include a particular name brand in its specifications but says that kitchen cabinets must measure 3.12 x 1.12175 x 1.5245 and have bronze hinges shaped like bows and only one manufacture makes such cabinets, then the PHA is unduly restricting competition.
- D. **Contractor-Developed Specifications (2 CFR 200.319(b)).** To ensure objective contractor performance and eliminate unfair competitive advantage, contractors that PHAs pay to develop or draft specifications, requirements, statements of work, invitations for bid, or requests for proposals must be excluded from competing in the procurement.

9.4 STATEMENT OF WORK (SOW)

A SOW is a detailed document that clearly defines the specific tasks, deliverables, timelines and requirements for a project or contract. The SOW is commonly used in contracts for both professional services and construction.

- A. **Purpose and Functions of a SOW.** Like specifications, a SOW’s primary purpose is to help offerors understand the PHA’s requirements.
 - 1) SOWs should contain specific details about the service the PHA is seeking to procure (see 2 CFR 200.319(d)(1)). If the SOW does not provide specific details, some vendors may not

respond, either because of uncertainty about the risks involved or because they may not understand the requirements' relationship to their capabilities. This impacts the PHA's ability to garner the best possible services at the best possible price and may also be seen as restrictive to competition.

- 2) Because SOWs establish baseline tasks that are foundational for sound evaluation criteria, they are extremely useful for procuring services under the competitive proposals method described in Chapter 8 above.
- 3) The SOW also becomes useful for measuring contractor performance and resolving disputes during performance. When a question arises over whether an increase in the scope of work is appropriate, the SOW is the baseline document for resolving the question. If the SOW does not provide specific details about the services the contractor will render to the PHA, the PHA's ability to negotiate cost and schedule modifications will be impaired.

B. Elements of the SOW. The particular issues that a SOW will address will vary with the nature, purpose, size, and complexity of the work to be performed. However, at a minimum, every SOW should include:

- Detailed work and task requirements;
- End results and deliverables, including the criteria which a deliverable must meet to be acceptable;
- Delivery schedules/period of performance;
- Any reporting and compliance requirements;
- A precise statement of the work's objectives;
- Contact information for the PHA contact person/contract administrator; and
- Other special considerations (e.g., warranties, personnel and required classifications, testing procedures, and procedural safeguards).

CHAPTER 10 – MISCELLANEOUS REQUIREMENTS



10.1 CONTRACT PRICING & TYPES

This chapter includes miscellaneous procurement requirements.

- A. **General Guidance.** A wide selection of contract types is available to PHAs to provide needed flexibility in acquiring supplies and services.
- 1) Contract types vary according to: (a) the degree and timing of the responsibility assumed by the contractor for the costs of performance; and (b) the amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals.
 - 2) The contract types are grouped into two broad categories: Fixed-price contracts and cost-reimbursement contracts. The specific contract types range from firm-fixed-price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between are various incentive contracts, in which the contractor's responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.
 - 3) Contracts resulting from sealed bidding shall be firm-fixed-price contracts or fixed-price contracts with economic price adjustment.
 - 4) Contracts resulting from competitive proposals may be of any type or combination of types.
 - 5) In accordance with 2 CFR 200.324(c), the use of the following types of contracts is prohibited:
 - a. Cost-plus-percentage-of-cost. This type of contract is prohibited because it obligates the PHA to pay all costs incurred throughout the contract, plus a commission based on the percentage of future costs. In this type of pricing arrangement, the contractor's profit increases in proportion to its costs incurred in the performance of the contract. The contractor has a clear incentive to increase costs.
 - b. Cost-plus-percentage-of-construction-cost. The cost for individual construction-related services is determined by applying a percentage of actual construction costs as

a fee, such as an A/E contract in which the fee is determined based on the total construction cost. Such an arrangement allows the possibility of the contractor designing an overly expensive construction project in order to increase profits.

- B. Selecting Contract Type.** There are many factors that the Contracting Officer should consider in selecting and, when appropriate (e.g., using competitive proposals), negotiating the contract type. They include:
- 1) *Price competition.* Normally, effective price competition results in realistic pricing, and a fixed-price contract is ordinarily in the PHA's interest.
 - 2) *Price analysis.* Price analysis, with or without competition, may provide a basis for selecting the contract type. The degree to which price analysis can provide a realistic pricing standard should be carefully considered.
 - 3) *Cost analysis.* In the absence of effective price competition and if price analysis is not sufficient, the cost estimates of the offeror and the PHA provide the bases for negotiating contract pricing arrangements. It is essential that the uncertainties involved in performance and their possible impact upon costs be identified and evaluated, so that a contract type that places a reasonable degree of cost responsibility upon the contractor can be negotiated.
 - 4) *Type and complexity of the requirement.* Complex requirements, particularly those unique to the PHA, usually result in greater risk assumption by the PHA. This situation is especially true for complex development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk should shift to the contractor, and a fixed-price contract should be considered.
 - 5) *Urgency of the requirement.* If urgency is a primary factor, the PHA may choose to assume a greater proportion of risk or it may offer incentives to ensure timely contract performance.
 - 6) *Period of performance.* In times of economic uncertainty, contracts extending over a relatively long period may require economic price adjustment terms.
 - 7) *Contractor's technical capability and financial responsibility.* These can be based on the contractor's past performance on similar projects.
 - 8) *Adequacy of the contractor's accounting system.* Before agreeing on a contract type other than firm-fixed-price, the Contracting Officer should ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This factor may be critical when the contract type requires price revision while performance is in progress, or when a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis.
 - 9) *Concurrent contracts.* If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their pricing arrangements, should be considered.
 - 10) *Extent and nature of proposed subcontracting.* If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor should be selected.
 - 11) *Procurement history.* Contractor risk usually decreases as the requirement is repetitively acquired. Also, product descriptions or descriptions of services to be performed can be defined more clearly.

- C. Contract Types.** The following types of contracts are the most commonly used by PHAs. They are ranked in order of risk to the PHA, from lowest to highest. As used in this listing, the words "cost" and "price" have the following meanings: "Cost" is what a contractor would pay, and "price" is the higher amount that a contractor would charge. Other types and variations on these types may be used as appropriate in accordance with the limitations set forth in this Section 10.3.
- 1) *Fixed-Price.* Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by the operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.
 - a. Firm-fixed-price. This contract type requires the delivery of products or services at a specified price, fixed at the time of contract award and not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. It is appropriate for use when fair and reasonable prices can be established at time of award, definite design or performance specifications are available, products are off-the-shelf or modified commercial products or services for which realistic prices can be offered, and any performance uncertainties can be identified and reasonable cost estimated in advance. Its advantages are that it encourages contractor efficiency and places total responsibility and risk on the contractor. Its disadvantages are that it lacks flexibility in pricing and performance. It is the most preferred type of contract and the most commonly used, requiring the least amount of contract administration. However, as discussed below under other types, it is not always possible to use firm-fixed-price contracts. Usually there are two kinds of firm-fixed-price contracts – lump sum or unit price. Firm-fixed-price contracts factor in discounts, transportation, and lifecycle costs (see 2 CFR 200.320(b)(1)(ii)(D)).
 - b. Fixed-price with economic price adjustment. In cases where the market for a particular supply or service is especially volatile, and the PHA needs a contract for a term greater than just an initial quantity, this contract type allows for adjustment in the contract price based upon the occurrence of specified contingencies stated in the contract (e.g., changes in market conditions, the Consumer Price Index, or other commodity price indices that are not controlled by the contractor). The contract contains initial firm-fixed prices that may be adjusted upward or downward during the performance period. The contract must contain a clause explaining how the price adjustment will be made, identifying the price index to be used, the frequency of adjustment, and any overall ceiling price. A fixed-price contract with economic price adjustment may be used when:
 - There is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance; and
 - Contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. Price adjustments based on established prices should normally be restricted to industry-wide contingencies. Price adjustments based on labor and material costs should be limited to contingencies beyond the contractor's control.

2) *Cost-reimbursement*. Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the Contracting Officer. Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. A cost-reimbursement contract may be used only when the contractor's accounting system is adequate for determining costs applicable to the contract and appropriate surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used.

- a. Cost contract (no fee). This is a cost-reimbursement contract under which the contractor receives no fee. This type is often used when contracting with nonprofit organizations that may not receive any fee or profit.
- b. Cost-plus-fixed-fee. This is a type of cost-reimbursement contract that provides for payment to the contractor of a negotiated fee (profit) that is fixed at the time of contract award. The fixed fee does not vary with the contract's actual costs (e.g., the contractor will not receive a greater fee for incurring less cost) but may be adjusted as a result of changes in the work to be performed under the contract (e.g., as a result of a change order). This contract type permits contracting for efforts that might otherwise present too great a risk to contractors (e.g., there is a high degree of uncertainty in, or the ultimate costs of, accomplishing the contract's requirements). A cost-plus-fixed-fee contract presents the greatest risk to the PHA because it provides the contractor with minimum incentive to control the costs of contract performance. Therefore, it should be used only when no other type is feasible. Like all cost-reimbursement contracts it requires a significant amount of monitoring by the PHA to ensure contractor compliance.
 - There are two forms of cost-plus-fixed-fee contracts:
 - The completion form describes the scope of work by stating a definite goal or target and specifying an end product. This form of contract normally requires the contractor to complete and deliver the specified end product (e.g., a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee.
 - The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under this form, if the Contracting Officer considers the contractor's performance to be satisfactory, the fixed fee is payable at the expiration of the agreed-upon period.
 - Because of the differences in obligation assumed by the contractor, the completion form is preferred over the term form whenever the work, or specific milestones for the work, can be defined well enough to permit development of estimates within which the contractor can be expected to complete the work. The term form should not be used unless the contractor is obligated by the contract to provide a specific level of effort within a definite time period.

- 3) *Indefinite-delivery contracts. Government contracts for purchasing good and/or services over a set period, where the exact quantity or delivery date are unknown at the time of the contract award. This type of contract allow flexibility for goods and/or services to be ordered as needed, without committing to a fixed quantity upfront.*
- a. There are three types of indefinite-delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award.
 - i. Definite-quantity contracts provide for delivery of a definite quantity of specific supplies or services for a fixed period of time (e.g., one year), with deliveries or performance to be scheduled at designated locations upon order. A definite-quantity contract may be used when it can be determined in advance that:
 - o A definite quantity of supplies or services will be required during the contract period; and
 - o The supplies or services are regularly available or will be available after a short lead time.
 - ii. Requirements contracts provide for filling all of the PHA's purchase requirements for the supplies or services specified in the contract during a fixed period of time. The PHA may not buy the supplies or services from another source during the period of the contract. A requirements contract may be appropriate for acquiring any supplies or services when the PHA anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that it will need during a definite period.
 - iii. Indefinite-quantity contracts provide for delivery of an indefinite quantity, within stated limits (a minimum and maximum quantity), of supplies or services during a fixed period. Quantity limits may be stated in the contract as number of units or as dollar values. PHAs may use an indefinite-quantity contract when they cannot predetermine, above a specified minimum, the precise quantities of supplies or services that they will require during the contract period, and it is inadvisable to commit itself for more than a minimum quantity. PHAs should use an indefinite-quantity contract only when a recurring need is anticipated.
 - a) The contract must require the PHA to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The Contracting Officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.
 - b) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the PHA is fairly certain to order.
 - c) The contract may also specify maximum or minimum quantities that the PHA may order under each task or delivery order and the

maximum that it may order during a specific period of time. This ensures that the contractor knows what the potential maximum number of deliveries he/she may have to make and allows him/her to adequately prepare.

- d) The solicitation and resulting contract for an indefinite-quantity contract should:
 - Specify the period of the contract, including the number of options and the period for which the PHA may extend the contract under each option;
 - Specify the total minimum and maximum quantity of supplies or services the PHA will acquire under the contract. This may be expressed in units (e.g., number of items) or total dollar amount;
 - Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the PHA will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;
 - State the procedures that the PHA will use in issuing orders, including the ordering media (e.g., fax or email) and whether oral orders may be placed; and,
 - Identify the PHA personnel who are authorized to issue orders.
- b. Indefinite-delivery contracts:
- i. Specify the prices for the supplies or services, the period under which the PHA may place orders with the contractor, the ordering procedures, and the contract terms and conditions that govern the orders;
 - ii. Provide for obtaining the supplies or services when needed by placing orders with the contractor within the time period stated in the contract (e.g., one year);
 - iii. May be awarded using sealed bidding or competitive proposals as appropriate. Indefinite-delivery purchase orders should not be used unless the PHA knows that multiple orders for items or services will be needed, and the total amount of all orders will not exceed the PHA's simplified acquisition threshold; and
 - iv. May use any type of pricing arrangement (e.g., fixed-price) as appropriate to the supplies and/or services being purchased.
 - v. Orders placed under indefinite-delivery contracts are not considered purchase orders. Since the indefinite-delivery contracts are awarded competitively, no further competition is required for individual orders placed under it.
- 4) *Time and materials and labor-hour.*
- a. A time-and-materials contract provides for acquiring supplies or services on the basis of:
 - i. Direct labor hours charged at fixed hourly rates that include wages, general and administrative expenses, and profit; and

- ii. Materials at actual cost, including, if appropriate, material handling costs as part of material costs.
 - b. In accordance with 2 CFR 200.318(j)(1) a time-and-materials contract may be used only when the Contracting Officer has determined that no other type of contract is suitable (i.e., it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence) and the contract includes a ceiling price that the contractor exceeds at his/her own risk. The Contracting Officer shall document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price.
 - c. A time-and-materials contract provides no positive profit incentive to the contractor to control cost or labor use. The more the contractor's labor force works, the more profit the contractor realizes. Each contract must set a ceiling price that the contractor exceeds at its own risk. Therefore, the PHA must assert a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
 - d. A labor-hour contract is a variation of the time-and-materials contract. The only difference is that the contractor provides only labor and no materials.
- 5) *Letter contract.* A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately performing services or delivering supplies while the contract terms are negotiated. A letter contract is a form of negotiated contract (i.e., not sealed bidding) and may result in any contract type (e.g., fixed-price or cost-reimbursement). It should be used only in exceptional circumstances and is most appropriate for emergency work or other urgent and compelling needs. The single advantage of this method is that it expedites the procurement process. The contractor may begin performance on urgent requirements before the full requirements of the contract are made final, or "definitized." The disadvantage is that it provides no incentive for cost control by the contractor, and the PHA is in a very weak bargaining position at the time the final contract is negotiated. The contractor is already performing the work, and the work is usually critical.
- a. A letter contract may be used when:
 - i. The PHA's interests demand that the contractor be given a binding commitment so that work can start immediately; and
 - ii. Negotiating a definitive contract is not possible in sufficient time to meet the requirement. However, a letter contract should be as complete and definite as feasible under the circumstances. Letter contracts that are subject to Davis-Bacon or HUD-determined wage rate requirements shall so state, and where feasible, the applicable wage determination shall be attached.
 - b. When a letter contract award is based on price competition, the Contracting Officer should include an overall price ceiling in the letter contract.
 - c. Each letter contract should contain a negotiated definitization schedule including:
 - i. Dates for submission of the contractor's price proposal;
 - ii. A date for the start of negotiations; and
 - iii. A target for definitization. PHA's may establish maximum periods for negotiating final contracts (e.g., no more than 90 days after the issuance of the letter contract) in their procurement policies.

- d. The maximum liability of the PHA under a letter contract should be the estimated amount necessary to cover the contractor's requirements for funds before definitization. PHAs should establish limits on letter contract liability in their procurement policies (e.g., no more than 50% of the total estimated contract price).
- e. A letter contract should be used only after the Contracting Officer, or another official as designated in the PHA's procurement policy, determines in writing that no other contract is suitable. Letter contracts should not:
 - i. Commit the PHA to a definitive contract in excess of the funds available at the time the letter contract is executed;
 - ii. Be entered into without competition unless infeasible (see 2 CFR 200.319); or
 - iii. Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment should be subject to the same requirements and limitations as a new letter contract.
- f. A letter contract is not a letter of intent. A letter contract is a bona fide obligation on the part of the PHA. A letter of intent is a non-binding statement to a contractor about an intended future contract. Since a letter of intent has no legal effect, it should not be used as a form of contract.

10.2 CONTRACTOR RESPONSIBILITY

- A. **General Requirements and Definition.** PHAs shall not award any contract until the prospective contractor (i.e., low responsive bidder or successful offeror) has been determined to be responsible. A responsible bidder/offeror must:
 - 1) Have adequate financial resources to perform the contract, or the ability to obtain them;
 - 2) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
 - 3) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
 - 4) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all the bidder's/offeror's existing commercial and governmental business commitments;
 - 5) Have a satisfactory performance record;
 - 6) Have a satisfactory record of integrity and business ethics; and
 - 7) Be otherwise qualified and eligible to receive an award under applicable laws and regulations, including not be suspended, debarred, or under a HUD-imposed Limited Denial of Participation (LDP).
- B. **Acceptable Evidence of Responsibility.** It is incumbent upon bidders/offerors to provide acceptable evidence of their ability to meet the requirements in paragraph 10.2.A(1) through 10.2.A(3). Acceptable evidence normally consists of a commitment or explicit arrangement that will be in existence at the time of contract award to rent, purchase, or otherwise acquire the needed facilities, equipment, financing, personnel, or other resources.

- C. Researching Responsibility.** The Contracting Officer will need to conduct research to determine whether a prospective contractor is responsible. The size and complexity of the contract, the degree of prior experience of the PHA or the Contracting Officer with the offeror, and the extent to which the PHA can cancel the contract and install a replacement vendor will all influence the extent of research required. For example, a \$350,000 requirements contract for supplying appliances may require minimal research in that the vendor may be well-known. It is also the case that there are multiple alternate vendors in the event that the initial supplier was to be replaced due to non-performance. On the other hand, more research would be required of a vendor to design a new accounting software program for the agency. Only that information deemed necessary to determine the offeror's responsibility should be requested, obtained, and reviewed. Some methods include:
- 1) **Financial Capability.** Obtain financial information and credit bureau reports; require the offeror to provide information on and then verify their lines of credit and account balances with the financial institution officer servicing their account;
 - 2) **Compliance with Delivery and Performance Schedules.** Request information on all other active contracts the offeror is performing and verify their status with those buyers;
 - 3) **Performance Record.** Require offerors to submit contact information for recent contracts they have performed for other customers and contact them to ascertain the offeror's quality of performance, including timeliness of delivery/completion, quality of work, compliance with terms and conditions of the contract, and cost control, if applicable. Inquire of past customers whether or not they would contract with the offeror again and why. Research the offeror's performance history with the PHA;
 - 4) **Integrity and Business Ethics.** Contact the offeror's previous and current customers to verify their dealings with the offeror. Check with the local Better Business Bureau, local offices of Code Compliance and Business Licenses, or other regulatory agencies for business ethics record and compliance with public policy. Verify the offeror's compliance with payments, wage rates, and affirmative action requirements with other customers and with applicable State and Federal Government offices, e.g., DOL Wage and Hour Division;
 - 5) **Necessary organization, experience, accounting and operational controls, and technical skills.** Verify experience with other customers. Request copies of any audits. Verify that necessary personnel will be available to work on the PHA's contract;
 - 6) **Necessary production, construction, and technical equipment and facilities.** Request evidence that the offeror has all the equipment and facilities he/she will need or the capability to obtain them. Visit the offeror's place of business or other job sites to verify equipment and facilities. Contact equipment dealers and/or facility owners from whom the offeror indicates that he/she will rent or lease equipment or space; and
 - 7) **Eligible to Receive a PHA Contract.** Verify that the offeror has not been suspended, debarred or is under a HUD LDP (see paragraph H below).
- D. Responsible at Time of Award.** Bidders/offerors must be determined to be responsible at the time of award. For sealed bidding this means at the point where the low, responsive bidder has been determined. For the competitive proposal method, this means after the successful offeror has been selected for award. Bidders/offerors may be afforded the opportunity to provide acceptable evidence of their ability to meet the stated requirements after bid opening (sealed bidding) or

contractor selection (competitive proposal method) in accordance with the PHA's written procurement policy and procedures and applicable State or local law or regulation. The Contracting Officer must clearly indicate to potential bidders/offerors the timeframe in which they are required to submit evidence that they meet the above requirements.

- E. **Determination of Non-Responsibility.** With the exception of a finding that a bidder/offeror is suspended, debarred, or under a HUD LDP, a determination of non-responsibility will be a matter of judgment on the part of the PHA, given the preponderance of the evidence. If the facts indicate that the bidder/offeror fails to meet the requirements for responsibility, the Contracting Officer shall document the findings of fact that led him/her to make the determination (see paragraph G below).
- F. **Notifying Bidders/Offerors of Non-Responsibility.** The Contracting Officer should notify low bidders or otherwise successful offerors who are determined to be non-responsible. Some States require a hearing before a bidder or offeror may be determined to be non-responsible. The PHA should include guidance on any applicable hearing procedures in its solicitations.
- G. **Documenting the Responsibility Determination.** After all research is completed, the Contracting Officer shall document the results in the procurement file. Any determination of non-responsibility must be signed by the authorized official (if not the Contracting Officer) designated in the PHA's written procurement policy and procedures. A sample checklist format is provided in Appendix 10.
- H. **Limited Denials of Participation and Debarments and Suspensions.** PHAs should determine whether contractors have been restricted from participation in HUD or Government Services Administration (GSA) contracts.
- 1) *LDP.* HUD may impose an administrative sanction against a contractor known as a LDP. It is a temporary restriction on a contractor and is narrower in scope and effect than either suspension or debarment as prescribed in 2 CFR 2424.1100 - 2424.1165 and discussed below. Reasons that HUD may impose an LDP include irregularities in a contractor's past performance, failure to honor contractual obligations, deficiencies in ongoing construction projects, false certification or statements, or any other cause prescribed in 2 CFR 2424.1110. When HUD has issued an LDP, the contractor or firm becomes ineligible for participation in HUD programs (Multifamily or Public Housing) in which the violation occurred. The LDP is limited to the geographic jurisdiction of the office that imposed it. An LDP remains in effect until the causes for which it was imposed are eliminated and the action is withdrawn, or until the life of the sanction has lapsed (up to 12 months).
 - 2) *Suspensions and Debarment.* The PHA shall not make an award to any contractor or individual who has been suspended or debarred and whose name appears on the GSA List of Parties Excluded from Procurement and Non-Procurement Programs, i.e., debarred and suspended.
 - a. Debarment – Debarment is an exclusion from participation in all Federal programs for a reasonable and specified time period commensurate with the seriousness of the violation or failure to perform on other contracts. Debarment may be imposed for violation of contract clauses, including equal employment opportunity provisions, acceptance of contingent fees, or other serious contract violations. The Secretary of

Labor may also debar a contractor based on violation of the labor standards regulations.

- b. **Suspension** – Suspension means a disqualification from all Federal programs for a temporary time period because of adequate evidence that the contractor engaged in criminal, fraudulent, or other very serious misconduct. A contractor is suspended pending investigation and appropriate action. All suspensions are temporary, pending the completion of an investigation and such legal proceedings as may ensue.
- 3) **PHA Responsibility in LDPs, Debarment, and Suspension.** Before a contract is awarded, the PHA shall check to determine if HUD has issued an LDP or if a contractor has been debarred or suspended.
 - a. **LDP** – A list of persons and contractors for which LDPs have been issued may be found at: <https://www.hud.gov/hud-partners/limited-denial>.
 - b. **Debarment or Suspension** – All persons or contractors that have been suspended or debarred from Federal programs are listed on the GSA’s System for Award Management (SAM) website: <https://SAM.gov>. It is recommended that PHAs also check with their State agencies regarding debarred or suspended contractors.
 - c. **Subcontractors** – Prime contractors are responsible for determining that potential subcontractors are not on any of the above lists precluding participation in a PHA project. The PHA should advise potential contractors of their responsibility to confirm in their proposals the acceptability of their subcontractors; the PHA should also advise potential contractors of their responsibility to provide evidence that a check has occurred on each proposed subcontractor before the award is made or before new subcontractors will be allowed to participate in the contract. The PHA may check the subcontractor references. If a subcontractor is found to be under sanctions, the prime contractor must be notified that the subcontractor may not participate in the work.
 - 4) **Enforcement.** If a PHA materially fails to comply with any term of an award whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, there are a number of enforcement actions that HUD may exercise, including those listed at 2 CFR 200.339 and HUD statutes, regulations, and the ACC.

10.3 EVALUATING COST & PRICE (FOR PURCHASES ABOVE THE FEDERAL SIMPLIFIED ACQUISITIONS THRESHOLD)

- A. **General.** For every procurement above the Federal Simplified Acquisitions Threshold, including contract modifications, PHAs are required to perform a cost or price analysis to determine that the price is reasonable (2 CFR 200.324). A price analysis is where the proposed prices are compared to each other. A cost analysis is where the proposed prices are evaluated based on cost elements, including profit. The number of times a PHA will need to conduct a cost analysis will be limited given that most purchases will be of a commercial nature and based on adequate competition.
- B. **Price Analysis.** In competitive procurements, the force of competition is usually adequate to allow the PHA to make a price reasonableness determination (i.e., price analysis) based simply on a comparison of the offered prices. The method and degree of analysis conducted depend on the facts surrounding the particular procurement transaction.

- 1) PHAs should always compare the prices offered with the ICE for procurement above the Simplified Acquisition Threshold and at the Officer's discretion below the threshold. While this initial cost estimate may not be sufficient for price reasonableness, it can assist the Contracting Officer in determining the extent to which the offerors understand the PHA's requirements. Sometimes, the comparison of prices may point out the need for verification of bids (in sealed bid procurements) or negotiations (in the competitive proposals methods) if prices of the different offerors vary widely or seem unusually high (or low) compared to the ICE.
- 2) A comparison of proposed prices received in response to the solicitation to each other is generally sufficient to establish price reasonableness, assuming a sufficient number of competitive offers are received to constitute competitive pricing from the marketplace. If, after appropriate solicitation efforts, the PHA does not receive an adequate number of responses, the PHA may use one of the following alternative methods of establishing price reasonableness without having to conduct a formal cost analysis. In all such cases, the PHA should appropriately support and document its actions in the procurement file.
 - a. Compare prior proposed prices and contract prices with current proposed prices for the same or similar items/services. The PHA should factor in any market changes (e.g., commodity price changes or inflation) since the last time the item or service was purchased.
 - b. Compare with competitive price lists, published catalog or market prices of commodities and products, similar indices, and discount or rebate arrangements. The Contracting Officer should analyze the offered price in terms of its commerciality. This involves examining any catalog used by the contractor to ensure that catalog prices are bona fide prices charged to commercial customers. Any discounts offered to commercial customers should be offered to the PHA; however, consideration must be given to differing terms and conditions of commercial contracts as compared with public contracts. There may be justification for paying more than the catalog or market price if the PHA's contracts demand more of the contractor (such as services or warranties) than do those of commercial customers.
 - c. In some cases, there may be no catalog prices, but the offered price may qualify as a market price, meaning a price paid by buyers and sellers free to bargain. As with a catalog price, a market price should be verified independently before it is accepted as reasonable. The bidder should be asked to provide evidence of recent sales at the market price to the general public or provide a justification for not charging the PHA the same price or better. The volume of sales should be significant compared to the PHA's procurement to ensure that commercial sales are sufficient to establish a bona fide catalog or market price. The goal should be to ensure that the PHA does not pay more than other buyers, particularly commercial customers, normally pay for the same item.
 - d. Professional estimate, either one prepared by the PHA or outside party. The level of analysis should be commensurate with the extent and complexity of the procurement.

C. **Cost Analysis: Required and Recommended.** A cost analysis is an evaluation of the separate elements that make up a contractor's total cost proposal or price to determine if they are allowable, directly related to the requirement, and reasonable. A cost analysis must be conducted if the procurement value is higher than the Federal simplified acquisition threshold or a lower, i.e.,

stricter threshold, amount or threshold prescribed by State or local law or the PHAs procurement policy. The procurement regulations require that a cost analysis be performed if one or more of the following conditions apply:

- 1) All single source and noncompetitive proposals. In noncompetitive situations, no incentive exists for an offeror to submit a low price, and no price competition exists for determining the reasonableness of the price.
- 2) If, after soliciting bids/proposals, the PHA receives only one bid/proposal that it finds unreasonable and decides to cancel the solicitation and negotiate a contract price with the sole bidder.
- 3) If, under sealed bidding or competitive proposals, a sufficient number of bids was not received, and the PHA cannot establish price reasonableness through alternative means.
- 4) If, under competitive proposals, the PHA requested that bidders provide separate elements of their costs, e.g., labor, materials, overhead, or profit. (Note: it will not be necessary in most competitive procurements to ask for bidders to submit separate elements of their costs. For example, if a PHA is soliciting property management services, the PHA should not need to request a break-out of costs since one can generally evaluate the reasonableness of management fees without such breakdown.)
- 5) When there is a contract modification. When negotiating a modification to any contract (even if the basic contract was awarded competitively through sealed bidding) that changes the scope of work previously authorized and impacts the price or estimated cost, the PHA must use cost analysis to arrive at a reasonable cost. The only exception to this rule is a contract modification based on pricing terms already established in the contract document, e.g., exercising an option to buy additional items at preset prices. It is important to note that changes in a contract's scope do not always result in increased costs. Elimination or reduction of contract work may result in a decrease in the contract price. Regardless of the direction of the price change, these modifications require cost analysis using the cost principles to determine that the price change is fair and reasonable.
- 6) When making contract termination payments. When terminating a contract of any type (fixed-price or cost-reimbursement) for convenience, or terminating a cost-reimbursement contract for cause, the PHA must use cost analysis – and the appropriate cost principles – to negotiate the final amount of the termination settlement.
- 7) When awarding any construction contracts that were obtained through means other than sealed bidding. Construction contracts awarded using any method other than sealed bidding and modifications to construction contracts require cost analysis.

To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work. As mentioned above, situations lacking price competition include single source procurements, noncompetitive proposals, contract modifications, and receiving a cost/price proposal from the top-ranked A/E firm under QBS.

- D. Cost Analysis Criteria.** Where a formal cost analysis is required, PHAs should follow the instructions in this section. As indicated, the number of instances where a PHA will be required to conduct a formal cost analysis will be limited.

- 1) *Commercial Comparisons.* Where available, a PHA may use commercial comparisons in lieu of a formal cost analysis. Since the overall purpose of a cost analysis is to settle on total prices that are fair and reasonable, these comparisons provide a measure of that overall price reasonableness. The following examples illustrate this point.
 - a. A PHA is negotiating A/E fees with the architect for additional work pursuant to the changes clause in the contract. The PHA would not need to request that the A/E firm break out its hourly fees in terms of profit and overhead provided that the overall hourly fee was reasonable, i.e., fees normally charged in that community.
 - b. A PHA has a 6-unit scattered site project that is adjacent to its HOPE VI development. The HOPE VI development is operated by a private management company. The PHA determines that it is in the best interest of the PHA that the HOPE VI development and the scattered site project be managed jointly and is negotiating a single source procurement with the HOPE VI management company. The PHA would not need to request that the management company break out its proposed management fee in terms of profit and overhead provided that the overall management fee was reasonable, i.e., fees normally charged in that community.
 - c. The PHA has a security guard contract for its high-rise properties. The rates charged are \$14 per hour for non-armed guards. Because of a recent rise in security incidents, the agency is negotiating a change order to increase the coverage under the contract. The PHA would not need to request that the security company break out its proposed cost fee in terms of profit and overhead provided that the overall hourly rate was reasonable, i.e., rates normally charged in that community.
- 1) *Level of Detail and Analysis.* The level of detail and complexity of the cost analysis should be commensurate with the dollar value and complexity of the contract. For example, in a construction change order proposal for \$30,000, where the PHA's changes to the specifications only result in added labor hours for three skill categories, and the wage rates are at the Davis-Bacon wages, the PHA's cost analysis may be limited to determining the reasonableness of the number of hours proposed. If, however, the change order proposal was for \$350,000 and

Note: 2 CFR Part 200.324(b) requires PHAs "...to negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases in which cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work." As mentioned above, situations lacking price competition include sole source procurements, noncompetitive proposals, contract modifications, and receiving a cost/price proposal from the top-ranked A/E firm under QBS.

included added material, new subcontracts, and other items, the PHA should evaluate whether the costs proposed are allowable, allocable, and reasonable using the more detailed techniques described below.

- 2) *Conducting a Cost Analysis.* When conducting a cost analysis, PHAs should generally proceed in accordance with the following (see also Appendix 12 for a guideline).
 - a. Verify the cost and pricing information submitted and evaluate the following:
 - i. The necessity for, and reasonableness of, proposed costs, including allowances for contingencies. Proposed costs must meet three critical tests. The costs must be:
 - Allowable. The applicable cost principles (see discussion below) will usually state whether a type of cost is allowable or not.
 - Allocable. This means that the costs are logically related to or required in the performance of the contract. Many costs may be allowable but not related to the work required under the contract.
 - Reasonable. This term is generally defined as what a prudent business would pay in a competitive marketplace. A cost can be allowable, allocable, and still not be what a prudent businessperson would pay.
 - ii. The projection of the contractor's cost trends. Are his/her costs likely to increase or decrease?
 - iii. The assessment of proposed direct cost elements by a technical expert (e.g., engineer and architect) to determine their necessity to perform the contract and reasonableness, e.g., in comparison to market rates.
 - iv. The application of audited or pre-negotiated (e.g., by the Federal Government), indirect cost (e.g., overhead rates, labor and fringe benefit rates, or other factors).
 - v. The effect of the contractor's current practices on future costs. Does the contractor have a track record of containing costs (completing contracts at or "under cost")? Does he/she overrun costs?
 - b. Compare costs proposed by the offeror with:
 - i. Actual costs previously incurred by the same offeror. If it is a repetitive type of work or service, how much has it cost in the past? Apply any appropriate inflation factors for past work.
 - ii. Costs proposed by other offerors. This comparison may point out the need for negotiations if prices of the different offerors vary widely or seem unusually high (or low) compared to the ICE.
 - iii. Previous cost estimates from the offeror or other offerors for the same or similar items.
 - iv. The methods proposed by the offeror with the requirements of the solicitation (i.e., do the costs reflect the technical approach proposed and the work required, and are they cost efficient?).
 - v. The PHA's ICE, if determined necessary given the guidelines discussed above.
 - c. Verify that the offeror's cost submissions comply with the appropriate set of cost principles. When performing a cost analysis, PHAs shall use the applicable set of cost principles, which have been issued by the Federal Government, to determine the

allowability of proposed costs. (Note that cost principles are not used when performing a price analysis.) These cost principles set the standards for the allowability of a wide range of costs (e.g., salaries, travel, and advertising). Each set applies to contracts with a specific group or type of organizations, so one set will not work for all contracts. The cost principles are contained in 2 CFR Part 200, Subpart E.

- E. **Documentation.** With respect to price reasonableness, the procurement file should be documented to support the actions taken. In the case of sealed bids where there was adequate competition, no additional documentation is required in that the bid tabulation sheet, or equivalent, will serve as the test of price reasonableness. Similarly, in the case of competitive proposals where: (1) there was adequate competition, (2) the scope of work was not complex (easy to evaluate competing bids), and (3) the PHA did not ask the vendor to break out **elements** of costs separately, no additional documentation is required for price reasonableness other than the comparison of prices offered. However, documentation is required to demonstrate price reasonableness, including any cost analyses, whenever: (1) adequate competition did not exist, (2) adequate competition existed but the PHA received only one bid/proposal, or (3) the price obtained varied significantly from the ICE, in which case the Contracting Officer should notate/explain the reasons for the difference (e.g., poor estimate).
- F. **Audit.**
- 1) When cost analysis is required and the usual means of analysis (e.g., comparison historical cost data) is insufficient, the PHA may need to audit or review the contractor's/offeror's financial records. Such a review should be limited to the needs of the immediate procurement action (new contract award and modification) and not be overly broad in scope or intrusive. The audit should provide an independent verification that the costs proposed by the contractor are legitimate. The PHA may conduct the audit using its own employees, obtain the services of other governmental agencies to perform the audit, or contract with a private firm for audit services.
 - 2) The audit should examine each element of cost relevant to the procurement action, indicating whether it should be accepted, questioned, or further documented. The audit should also analyze the contractor's accounting system to ensure that it is adequate to properly allocate costs in accordance with the applicable cost principles and, in the case of new contract awards or significant modifications, will permit timely development of all necessary cost data in the form required by the contract type contemplated.
 - 3) Audit reports should always be written and maintained in the contract file.
 - 4) The Contracting Officer's cost analysis shall document how and the degree to which the audit results were relied upon. In accordance with 2 CFR 200.337, contractors (i.e., firms under contract to the PHA) may not deny access to their records for the purpose of audits. A competing offeror's denial of access may disqualify it from contract award. In the case of competitive proposals, offerors may withdraw their offer, unless they have been notified that they have been selected for award. Then it is up to the PHA's discretion to permit the withdrawal. In the case of a single bid received under the sealed bidding method (the most likely scenario under which cost analysis would be needed), the bidder may not withdraw their

bid once it has been opened. The Contracting Officer should seek advice from legal counsel when a contractor or offeror denies access to records.

10.4 PROTESTS

Disagreements over the award of a PHA contract, referred to as protests, may occasionally arise between the PHA and an offeror. Usually, the protester asserts that he/she should have received the contract award and alleges that the PHA did not conduct the competition appropriately. (Note: While protests are commonly referred to as "bid protests," any type of contract award, including simplified acquisitions, competitive proposal, or sealed bid, may be protested by an unsuccessful offeror.) For simplified acquisition procedures see Chapter 5.

- A. **Responsibility (2 CFR 200.318(h)).** PHAs, in accordance with sound business judgment, are responsible for the settlement of protests arising from the procurement process.

- B. **Written Protest Procedures.** Providing a formal, objective means for offerors to receive an unbiased hearing of their concerns is critical to preserving the integrity and confidence in the PHA's procurement operations. PHAs are no longer required to have written procedures for handling and resolving protests against their contract awards. However, bid protests and contract dispute clauses and requirements are still contained in HUD forms such as the HUD-5369 and HUD-5370. Therefore, it is recommended that protest procedures be included in the PHA's procurement policy to clearly outline the responsibilities of PHA employees and protesters. The procedures should include:
 - 1) *Designation of Protest Officials.* The procedure should identify:
 - a. The PHA employee responsible for receipt of protests (e.g., Contracting Officer), This information should be included in written solicitations;
 - b. The PHA employee or a designee (e.g., an independent third party who can render an impartial opinion) who will decide the protest; and
 - c. The official or third party who will hear any appeal of the initial protest decision.
 - 2) *Requirement for written protests.* Protesters should be required to submit protests in writing, clearly stating the basis for their protest. Protests should include, at a minimum, the following information:
 - a. Name, address, and phone number(s) of the protester;
 - b. Solicitation number and project title;
 - c. A detailed statement of the basis for the protest;
 - d. Supporting evidence or documents to substantiate any arguments; and
 - e. The form of relief requested (e.g., reconsideration of their offer).
 - 3) *Submission Time Period.* The procedure should state the time period during which a protest must be submitted. Generally, the time period should begin on the date that the protestor has knowledge, or may be presumed to have knowledge, of the basis for his/her protest (e.g., the date the solicitation was issued or the date he/she receives notification from the PHA that his/her proposal did not win). The protest submission period should be stated in solicitations. Protests against the terms of a solicitation should be considered late if submitted after the due date for offers.

- 4) *Remedial Action*. The PHA's procedures should provide remedies when a protest is decided in favor of the protestor, and the PHA should take appropriate action in accordance with those procedures. For example, if the contract has not been awarded, the PHA may cancel or revised the solicitation or proposed contract award, or if the contract has been awarded, the contract may be terminated for convenience and awarded to the protestor, or the procurement may be canceled and offers resolicited.
 - 5) *Emergencies or Unusual and Compelling Circumstances*. PHA protest procedures should provide for allowing contracts to remain in place despite a successful protest in cases of emergency or unusual and compelling need for the supplies or services. However, if the PHA determines, based on compelling circumstances such as an emergency or serious disruption of the PHA's operations, that termination or re-solicitation would not be in the best interest of the PHA, the PHA may allow the award to stand and pay the successful protestor costs associated with preparing the bid along with the cost of filing and pursuing the protest and other damages determined.
 - 6) *Denials*. The PHA's protest procedures should require the Contracting Officer to notify the protestor in writing of the PHA's decision and state the basis for the denial. The notification should apprise the protestor of any appeal rights in accordance with the PHA's protest procedures.
 - 7) *Appeal Procedures*. The PHA's protest procedures should provide for hearing appeals by unsuccessful protestors including, but not limited to: requirements for written appeals, designation of appeal official(s) and timeframes for submitting and resolving appeals. Appeals should contain a statement of the factual and legal grounds on which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered.
- C. **Documentation**. The Contracting Officer shall fully document the protest decision in writing in the contract file. The PHAs protest procedures should describe the requirements for such documentation.
- D. **Informal Resolution Processes**. PHAs are encouraged to resolve potential and actual protests outside of a formal protest process or litigation (e.g., through mediation).

10.5 MANDATORY CONTRACT CLAUSES (FOR PURCHASES ABOVE THE FEDERAL SIMPLIFIED ACQUISITION THRESHOLD (CURRENTLY SET AT \$350,000)*)

- A. **Mandatory Requirements for Construction/Development Contracts Greater than \$350,000***. PHAs must incorporate the clauses contained in form HUD-5370, General Conditions of the Contract for Construction, and the applicable Davis-Bacon wage decision.
- B. **Mandatory Requirements for Non-Construction Contracts (Without Maintenance Work) Greater than \$350,000***. PHAs must incorporate the clauses contained in Section I of form HUD-5370-C, General Conditions for Non-Construction Contracts.

- C. Mandatory Requirements for Maintenance Contracts (including Non-Routine Maintenance Work) Greater than \$350,000*.** PHAs must incorporate the clauses contained in Sections I and II of Form HUD-5370-C, General Conditions for Non-Construction Contracts.
- D. Acceptable Methods of Incorporation.** PHAs may utilize any one or any combination of the following methods to incorporate mandatory clauses and applicable wage decisions into bid specifications and contracts. PHAs may:
- 1) Attach the HUD form(s) and/or wage decisions, as printed;
 - 2) Incorporate the clauses/text of the applicable HUD form and wage decision into other documents (e.g., into the PHA's own forms) that are bound/attached to the contract (and bid specifications, if applicable) or incorporated by reference (see paragraph 3, below).
 - 3) Incorporate the clauses or HUD forms and/or any applicable Davis-Bacon or HUD wage decision by reference. The reference must be specific as to the exact clauses or form(s) that are incorporated, and where the clauses or forms(s) may be accessed or obtained (e.g., HUDClips, PHA website). A Davis-Bacon wage decision (applicable to construction/development work) may be incorporated by reference to www.wdol.gov and to the specific number, modification number, and date of the wage decision. HUD wage decisions (applicable to maintenance work) are not available at HUD's website; however, a PHA may post any applicable HUD wage decision to its own website and reference that site. PHAs must provide hard copies of any referenced clauses, forms, and/or wage decisions on request.

10.6 USE OF OPTIONS

- A. General.** In many cases, the PHA may have a recurring need for specific supplies or services. One method of obtaining firm commitments from contractors for additional quantities or longer time periods is to include an option clause in the contract. The advantage of awarding a contract with options is that it gives the PHA a continued source of supply or services under the contract at known prices.
- B. Definition.** "Option" means a unilateral right in a contract by which, for a specified time, the PHA may elect to purchase additional supplies or services at a set price called for by the contract or may elect to extend the term of the contract. The option to extend the term of the contract or to order additional supplies or services is the unilateral right of the PHA. The additional supplies or services are ordered at the prices specified in the original contract. A clause that allows an option to be exercised by the contractor is not a legitimate option clause.
- C. Limitations.**
- 1) *Price.* The option to extend the term of the contract or to order additional quantities may only be exercised if the contract contained an options clause and if a price for the additional supplies or services was included. An unpriced option is considered a new procurement and, therefore, may not be used. In the case of a cost-reimbursement contract, an estimated cost for the option periods or additional quantities must be negotiated and included in the contract award; otherwise, the option will need to be treated either as a change order or a new contract.

- 2) *Time and Quantity.* Contracts shall not exceed a period of five years, including options for renewal or extension. (For PHAs still operating under the 1969 public housing ACC – Form HUDs-53010 and 53011 – the maximum contract term is two years with a one year extension approved by HUD.) Contracts, other than energy performance contracts or other contracts approved by HUD with terms, plus extensions, that exceed a total of five years are viewed as restrictive of competition and in violation of 2 CFR 200.319. Energy performance contracts may be for a period not to exceed 20 years in accordance with 24 CFR 990.185 and Notice PIH 2024-27. A PHA must also follow its own procurement policy and any applicable local or State laws and regulations. There must be a finite period for a contract, including all options, and a specific limit on the total quantity or maximum value of items to be purchased under an option.
- 3) *Option to Extend.*
 - a. Any contract containing options must specify the timeframe within which the option to extend the term of the contract must be exercised.
 - b. If the PHA decides to include options in a solicitation, the pricing of the options should be evaluated as part of the overall contract award.
 - c. Contractors should be notified of the PHA's likely intention to exercise the option to extend the term of the contract approximately 90 days before the expiration date of the contract. This notice does not obligate the PHA to extend the contract; however, it allows PHA staff time to assess the need for and advisability of extending the contract. It also makes the contractor aware of the potential extension.
 - d. The Contracting Officer should notify the contractor at least 30 days before the contract expiration date of the specific intention to exercise the option and then issue a formal modification extending the contract.
 - e. Options may not be exercised after the term of the contract has expired; technically, there is no longer a legal and binding contract to extend.
 - f. The option to extend the term of the contract or to order additional supplies or services is the unilateral right of the PHA. The additional supplies or services are ordered at the prices specified in the original contract. A clause that allows an option to be exercised by the contractor is not a legitimate option clause.

D. Exercising Options. Before exercising an option, the PHA should document the written determination in the contract file. At least the following items should be included:

- 1) Fund availability;
- 2) Statement that the option was included in and evaluated as part of the basic contract;
- 3) A brief review of market prices to justify price reasonableness, indicating whether the option is still economical for the PHA; and
- 4) Any other factors that support the PHA's decision to exercise the option. For example, the PHA avoids the cost of a new procurement and ensures continuity in service.

10.7 FEDERAL LABOR STANDARDS & WAGE RATES – CONSTRUCTION

A. General. All laborers and mechanics (including apprentices and other workers trained by PHAs, Resident Management Corporations (RMCs), or other contractors under HUD's "Step-Up" or similarly approved training initiatives) involved in prime construction contracts in excess of \$2,000

awarded by non-Federal entities must be paid wages in accordance with the Davis-Bacon Act (40 U.S.C. 3141-3144 and 3146-3148), as supplemented by Department of Labor (DOL) regulations (29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In addition, the overtime requirements of the Contract Work Hours and Safety Standards Act are applicable to construction contracts in excess of \$100,000. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. See also DOL regulations at 29 CFR Parts 1, 3 and 5. Additional information about labor standards administration and enforcement is contained in HUD Handbook 1344.1, REV 3.

- B. Solicitations and Contracts.** Solicitations (e.g., Invitations for Bids) and contracts subject to Davis-Bacon wage requirements must contain a copy of the current prevailing wage determination issued by DOL and labor standards provisions. Davis-Bacon Wage Decisions can be obtained at no charge from www.dol.gov.
- C. Reporting.** As provided by DOL regulations (29 CFR Parts 3 and 5), each construction employer (the contractor and any/all subcontractors) shall submit a payroll report and statement of compliance to the PHA for each week during which work is performed under the contract. Such reports may be submitted on the DOL Payroll Form WH-347, which includes on its reverse side the required Statement of Compliance. These forms, WH-347 and instructions, may be obtained from HUD’s Labor Relations field staff and are also available in “fillable” Portable Document Format (PDF) online through HUDClips or the DOL directory at : <https://www.dol.gov/whd/forms>. Employers are not required to use Form WH-347 and may substitute other payroll formats, including computer-generated forms, provided that all of the required information and the exact language of the Statement of Compliance (reverse side of the WH-347) is included.
- D. Compliance.** The contractor and any/all subcontractors are responsible, on no less than a weekly basis, for paying not less than the applicable wage rates to all laborers and mechanics under their employment who are engaged in work under the contract. The contractor is responsible for its own full compliance, and for the full compliance of any/all subcontractors, with all wage, overtime, and reporting requirements included in the contract.
- E. Enforcement.** The PHA is responsible for the administration and enforcement of labor standards requirements as provided in HUD Handbook 1344.1, REV 3 and as required by DOL regulations applicable to Davis-Bacon covered work (29 CFR Part 5). These activities include:
- 1) *Posting Wage Rates.* The PHA must ensure that a copy of the applicable Davis-Bacon wage decision and the DOL poster Notice to All Employees (WH-1321) are displayed at the job site in a place accessible to all laborers and mechanics and placed in an area that is protected from inclement weather. The WH-1321 poster is available through HUDClips or directory at DOL’s website at: <https://www.dol.gov/whd/programs/dbra/wh1321.htm>.
 - 2) *On-Site Interviews.* The PHA is responsible for conducting interviews with the laborers and mechanics on the jobsite to determine if the work performed and wages received are consistent with the job classifications and wage rates contained in the applicable wage determination and the classifications and wages reported by the employer on certified payrolls. On-site interviews

are documented on Form HUD-11, Record of Employee Interview, which can be found at HUDClips.

- 3) *Certified Payroll Review.* The PHA must review the certified payroll reports submitted by the contractor for itself and any subcontractors to ensure that all laborers and mechanics are classified and paid in accordance with the applicable wage determination and must compare information collected during on-site interviews to ensure consistency with such interview data. Any discrepancies found must be corrected, and wage restitution must be required wherever underpayments are disclosed. In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week.
- 4) *Recordkeeping.* The PHA shall retain all payroll reports and statements of compliance for three years from the date of contract completion and acceptance by the PHA, or from the date of resolution of any standards issues outstanding at contract completion.

- F. **Safety.** No laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market or contracts for transportation or transmission of intelligence.

10.8 FEDERAL LABOR STANDARDS & WAGE RATES – MAINTENANCE

- A. **General.** All maintenance laborers and mechanics employed under contracts in excess of \$2,000 for the operation of public housing must be paid no less than prevailing wages determined or adopted by HUD. In addition, the overtime requirements of the Contract Work Hours and Safety Standards Act are applicable to maintenance contracts in excess of \$100,000. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week.
- B. **Employment of apprentices or trainees.** PHAs, RMCs, or other contractors on work subject to HUD-determined wage rates may employ apprentices or trainees. Apprentices and trainees may be compensated at less than the prevailing wage rate for their craft, provided they are individually registered in an apprenticeship or trainee program that has been approved by HUD, DOL's Bureau of Apprenticeship and Training (BAT), or a BAT-recognized State apprenticeship agency. PHAs, RMCs, or other contractors who wish to discuss the development of such training programs may contact HUD Labor Relations staff for assistance. Unless otherwise directed, RMCs and other contractors should submit all requests to develop approved training/apprenticeship programs and proposed program descriptions to the HUD Labor Relations field staff with jurisdiction over the PHA.
- C. **Exclusions for professional service contracts.** Contracts for certain professional services are excluded from coverage by HUD-determined (or HUD-adopted) prevailing wage rates. These exclusions include periodic inspections or testing of equipment without repairs; testing for lead-based paint; warranty inspections; installation, service or maintenance of leased equipment,

fixtures, or appliances; and installation, inspections, maintenance, or service on equipment or fixtures which are owned by a utility. Examples include, but are not limited to, local code or performance inspections of elevators or escalators, gas lines or equipment, or fire hydrants or water lines; inspections or routine servicing of fire extinguishers, smoke detectors, security systems, boilers, heating systems, water heaters, air conditioners, water testing, or treatment; soil testing or treatment; energy use or conservation analyses; routine garbage removal; and pest control (without attendant repairs).

- D. **Solicitations and Contracts.** Solicitations (e.g., Invitations for Bids) and contracts for all maintenance services subject to HUD wage rates must contain the applicable HUD wage decision and labor standards provisions. HUD wage decisions are obtained from the HUD Labor Relations staff via the local HUD field office. For all maintenance contracts of more than \$2,000, but less than the Federal simplified acquisition threshold, PHAs should use the clauses found in Table 5.1 and the clauses in Section II of Form HUD-5370-C. For all maintenance contracts of more than the Federal simplified acquisition threshold, PHAs should use the clauses in Sections I and II of Form HUD-5370-C.
- E. **Reporting.** Unlike construction contracts subject to Davis-Bacon wage provisions, maintenance contracts subject to HUD-determined wage rates do not require the submission of payroll reports. Contractors and subcontractors are still required to maintain payroll records and must make such records available to the PHA and/or to HUD, on request (see NoticeLR-04-01).
- F. **Compliance.** The contractor and any/all subcontractors are responsible, on no less than a semi-monthly basis, for paying not less than the applicable wage rates to all maintenance laborers and mechanics under their employment who are engaged in work under the contract. The contractor is responsible for its own full compliance, and for the full compliance of any/all subcontractors, with all wage, overtime, and recordkeeping requirements included in the contract.
- G. **Enforcement.** The PHA is responsible for the administration and enforcement of labor standards requirements as provided in Notice LR-04-01. These activities include:
- 1) *Posting Wage Rates.* The PHA must ensure that a copy of the applicable HUD wage decision is displayed at the job site in a place accessible to all laborers and mechanics and placed in an area that is protected from inclement weather.
 - 2) *On-site Interviews.* The PHA is responsible for conducting interviews with the laborers and mechanics on the jobsite to determine if the work performed and wages received are consistent with the job classifications and wage rates contained in the applicable wage determination and the classifications and wages reported by the employer on certified payrolls. On-site interviews are documented on Form HUD-11, Record of Employee Interview, which can be found at HUDClips.
 - 3) *Enforcement.* The PHA must perform contractor compliance monitoring with such frequency and depth as appropriate (based upon the scope and duration of the contract involved) to ensure that all laborers and mechanics are paid no less than the HUD prevailing wage rate for the type of work they perform.

- 4) *Recordkeeping.* The PHA shall retain all compliance monitoring records, including employee interview records, for three years from the date of contract completion and acceptance by the PHA, or from the date of resolution of any labor standards issues outstanding at contract completion.
- 5) *Safety.* No laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market or to contracts for the transportation or transmission of intelligence.

10.9 GUIDANCE ON FEDERAL LABOR STANDARDS REQUIREMENTS

Additional guidance on Federal labor standards is available on the Office of Labor Relations webpage at: https://www.hud.gov/program_offices/davis_bacon_and_labor_standards. This webpage offers the latest in HUD policy guidance and instructional materials regarding labor standards, including two guides concerning Davis-Bacon, Making Davis-Bacon Work: A Practical Guide for States, Indian Tribes and Local Agencies and Contractor's Guide to Prevailing Wage Requirements, and Labor Relations Letters.

10.10 PROCUREMENT OF RECOVERED MATERIALS

PHAs must give preference to EPA-listed recovered materials in their own procurement practices, in accordance with the provisions in Section 6002 of the Solid Waste Disposal Act. See EPA regulations in 40 CFR Part 247 and 2 CFR 200.323. Required language relating to procurement of recovered materials is included with the mandatory contract clauses/forms.

CHAPTER 11 – CONTRACT ADMINISTRATION




While the regulation does not explicitly require PHAs to have a contract administration system, it does require PHAs to maintain adequate contract oversight. A contract administration system allows a PHA to efficiently and effectively maintain adequate contract oversight, which will allow the PHA to provide complete answers to any questions or issues that arise.

11.1 GENERAL

This chapter provides guidance on contract administration. “Contract administration” refers to PHAs’ management of arrangements with contractors after contract award to ensure the PHAs receive supplies or services in accordance with the contract. 2 CFR Part 200 requires PHAs to maintain contract oversight (see 2 CFR 200.318(b), (k); see also 2 CFR 200.329(a)). Effective contract administration systems are the best way for PHAs to comply with this regulatory mandate. Additionally, successful contract administration is an integral part of PHAs’ organizational management, as PHAs can serve their residents and communities by ensuring they receive supplies and services in accordance with their contracts. Finally, PHAs can use contract administration systems to efficiently and effectively address questions or issues that arise during or after the term of their agreements.

11.2 ADMINISTERING CONSTRUCTION CONTRACTS

The following instructions pertain to administering construction contracts. Instructions for administering non-construction contracts are in Section 11.3. Information regarding contract administration for PHA development contracts is in Chapter 12.

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- A. **Definition.** A “construction contract” is a procurement that involves the building from scratch, alteration, or repair (including substantial rehabilitation) of buildings, structures, or other real property. Generally (but not always), PHAs will use Capital Funds to pay for these contracts (see 42 U.S.C. 1437g(d)(1)). If a contract falls within this definition, PHAs should apply the methodology described in this subchapter.
- B. **Pre-Construction Conference and the Notice to Proceed.** Following the award of a construction contract (but within 10 calendar days of contract execution and prior to the commencement of work), PHAs should hold a pre-construction and safety conference with their contractor(s) to thoroughly discuss construction and contract-related issues. Before this conference, the PHA should draft a Notice to Proceed containing the starting and anticipated contract completion dates and other contract-related information. The PHA’s Contracting Officer should sign an “original” notice and at least two additional copies and then issue all three notices to the contractor. The notices may be issued to the contractor at the conference. Upon receipt, the contractor should countersign and retain the original, and countersign, date, and return the copies. The PHA should retain the signed-and-countersigned copies for the contract file and, if requested, send one copy to HUD. See Appendix 14 for a sample Notice to Proceed. Once the Notice to Proceed is signed, received by the contractor, and countersigned, the contractor may begin work.
- C. **Progress Meetings.** The PHA should meet with its architect and contractor(s) on a regular basis (ideally weekly for large or complex projects but subject to the PHA’s discretion) to discuss work progress, payments, any problems or deficiencies noted during inspection visits, overdue reports, and the construction schedule. The PHA or A/E should prepare a written record of what the parties discussed at each meeting and place it in the contract file.
- D. **Inspections.** If the PHA retained an A/E firm to administer the contract, the PHA must hold the A/E firm accountable for performing its inspection and monitoring functions. The quality of the inspections is critical, and the PHA should ensure that either the A/E firm or the designated person responsible for inspections is fully qualified and performs the inspections thoroughly and on schedule.
- 1) *A/E Qualification.* As part of the PHA’s procurement of A/E services, the PHA should ensure the A/E firm it chooses is fully qualified to perform the inspection and monitoring work.
 - 2) *Inspection Records.* PHAs should keep inspection records to document whether the A/E firm is performing the required inspections frequently and thoroughly. All progress inspections should be documented including a description of the work completed as of the date of each inspection and a determination as to whether the work is acceptable. If the contract is a firm fixed-price contract under which payment is to be made on a unit price basis, the quantities of units procured thus far must be verified by the PHA. If the contract is a time-and-materials contract, the report should show how the time charged was spent on PHA work and that materials were charged at cost. A copy of each inspection report should be included in the contract file. Based on the progress report, the Contracting Officer should initiate follow-up actions as necessary to ensure the terms of the contract are being fulfilled.
 - 3) *Deficiencies.* Upon being notified by its A/E firm or HUD of construction deficiencies, the PHA shall promptly notify the contractor in writing of the deficiencies observed. This notification should also advise the contractor that failure to make timely corrections will be a breach of the

contract and that the contractor will be held liable for any resulting losses or delays. Please see Chapter 11.6(C) below for additional information.

- E. **Labor Standards.** The PHA is responsible for administering and enforcing labor standards requirements as provided in HUD Handbook 1344.1, REV, Chapter 5 and as required by the DOL regulations applicable to Davis-Bacon-covered work (29 CFR Part 5). See Chapter 10.8(E) of this Handbook.
- F. **Progress Payments.** A “progress payment” is a partial payment that a contractor receives before contract completion upon finishing certain pre-specified intermediate steps or phases. Progress payments are required for construction contracts valued above the Simplified Acquisition Threshold but may be included in any construction contract. If construction contracts at or below this threshold provide for progress payments, HUD encourages PHAs to adhere to the procedures and requirements described in this section. Some state laws impose mandatory progress payment schedules that may not be consistent with HUD’s holdback requirements at Section 27(f) of Form HUD-5370. Any problems arising from these inconsistencies should be resolved before soliciting bids for a contract. For Capital Fund and public housing development projects, including mixed-finance development (24 CFR Part 905, Subpart F), progress payments shall be determined and made as follows:
- 1) *Preparing and Approving Construction Progress Schedule.* Within five days of commencing work under the contract (or a longer period as determined by the Contracting Officer), the PHA shall require the contractor to prepare a construction progress schedule for each project.
 - a. The PHA may require the contractor to use Form HUD-5372, Construction Progress Schedule, but any form the PHA determines to be appropriate is acceptable as long as it adheres to the requirements in Section 6(a) of Form HUD-5370. The information must be realistic and consistent with the information the contractor will provide on the PHA-approved Schedule of Amounts for Contract Payments (see below) and the HUD-approved Project Implementation or Development Schedule, as applicable.
 - b. The PHA’s architect should review the Construction Progress Schedule to ensure the scheduled dates and amount of work to be completed are reasonable and consistent with the contract. If the architect finds it acceptable, the architect shall sign the Schedule and forward it to the PHA for approval. After receiving the Schedule from the architect, the PHA will review the Schedule. If the PHA approves it, the Construction Progress Schedule shall be returned to the contractor and the PHA shall file copies in the contract file.
 - 2) *Preparing and Approving Schedule of Amounts for Contract Payments.* The PHA shall require the contractor to prepare a Schedule of Amounts for Contract Payments per HUD-5370 before issuing the first progress payment under the contract.
 - a. The contractor must use Form HUD-51000, Schedule of Amounts for Contract Payments, for this purpose.
 - b. The PHA and its architect shall review the Schedule per HUD-5370 to determine that both the scheduled work to be completed by the specified dates and the amount(s) of payment for such work are reasonable. If acceptable, the PHA must approve and return the schedule to the contractor. HUD review is not required.

- c. If more than one project is covered by a contract, the parties must prepare a Schedule for each project per HUD-5370.
- 3) *Making Progress Payments.* The PHA is responsible for making progress payments to the contractor based on the Schedule of Amounts for Contract Payments. Generally, progress payments for acceptable work and materials delivered and stored on site are made at 30-day intervals. The PHA does not need HUD authorization to make progress payments based on the Schedule of Amounts.
- a. The contractor must submit a request for payment to the PHA on form HUD-51001, Periodic Estimate for Partial Payment. If the contractor is working on more than one project, the contractor shall submit a separate form for each project. The request shall be accompanied by the contractor's written designation of the Contracting Officer per Section 6 of the HUD-5370. In addition, the contractor should submit the following HUD forms or other appropriate forms, if applicable, with each Periodic Estimate for Partial Payment: Form HUD-51002, Schedule of Change Orders; Form HUD-51003, Schedule of Materials Stored; and Form HUD-51004, Summary of Materials Stored.
 - b. The PHA and PHA's architect must review each contractor request and should approve the payment if the following conditions have been met:
 - i. The contractor's request is consistent with the Schedule of Amounts for Contract Payments;
 - ii. The request does not include the amount the PHA will retain under the contract;
 - iii. The contractor has performed the work covered by the payment in accordance with the construction documents;
 - iv. The contractor has properly executed Form HUD-51001, Periodic Estimate for Partial Payment, and has submitted all applicable supporting documentation; and
 - v. The contractor has submitted all required reports, such as payroll reports.

The PHA shall retain the original Form HUD-51001 and any applicable supporting documentation for its contract file and return a copy of the PHA-approved forms to the contractor. If the contractor requests payment for items that have not been acceptably completed, the PHA should delete those items and adjust the payment accordingly.

- G. Delays and Time Extensions.** The contractor is responsible for completing the work within the time established in the contract. The PHA is responsible for monitoring the contractor to ensure that the work will be completed as scheduled. The PHA may authorize justifiable time extensions without prior HUD review and approval unless the PHA is subject to prior HUD approval under a HUD-established administrative enforcement threshold that is less than the requested amount. The "default" clause on Forms HUD-5370 and 5370-EZ describes the conditions under which a time extension may be granted. The basic principle is that delays arising from unforeseeable causes beyond the contractor's control and/or that were not the contractor's fault may be grounds for granting a time extension. The PHA should formalize time extensions in written contract modifications and include the executed modifications in the contract file. See Chapter 11.4 below for more information about contract modifications.


- 1) *Construction Log.* The PHA should maintain a construction log to record potential causes of delays. The construction log should contain daily reports that record at least the following:

- a. The daily temperature;
 - b. The daily amount and kind of precipitation;
 - c. Any delays in obtaining labor and materials, including the duration and the applicable construction trade;
 - d. Delays experienced by others in completing non-contract public improvements (whether on-site or off-site); and
 - e. Other causes for delays, such as fires, floods, vandalism, or court orders.
- 2) *Requests for Time Extension Criteria*. To be considered, requests for time extensions must meet the following criteria:
- a. The contractor must submit a written notice to the PHA within 10 calendar days of the start of any delay;
 - b. The written notice must describe the cause(s) of the delay, quantify the amount (i.e., the actual or anticipated duration) of the delay and justify this quantification, and explain how the cause of the delay was beyond the contractor's control; and
 - c. If the delay is weather-related, the contractor should specify the weather condition that caused the delay and describe why the contractor could not have reasonably foreseen the severity and/or extent of the adverse weather (e.g., abnormal seasonal levels of rain, snow, cold, or heat that were not or could not have been reasonably forecasted ahead of time).
- 3) *Letter of Acknowledgment*. Immediately upon receiving the contractor's request for a time extension, the PHA should send a letter of acknowledgment to the contractor. The PHA's letter should indicate its determination to the contractor's request and, if necessary, indicate how the PHA is willing to work with the contractor to resolve the delays.
- 4) *Decision*. The Contracting Officer should review the contractor's submission and determine the extent to which the Contracting Officer agrees with the facts the contractor presents. The Contracting Officer should verify this information to the extent practicable by reviewing documents in the contract file, including the construction log. After review, the Contracting Officer shall issue a written decision explaining the PHA's approval or disapproval of the contractor's request. This written decision shall contain the PHA's factual determinations (i.e., "findings of fact") concerning the contractor's submission. The Contracting Officer may approve the contractor's request if:
- a. The information the contractor provided is accurate and complete; and
 - b. The additional time requested by the contractor is reasonable based on the nature and duration of the delay.

H. **Completion of Work**. To officially "complete" a construction contract, PHAs and contractors must follow a formal procedure. Until the parties have carried out these procedures, the PHA should not advance any of the retainage or make the final payment to the contractor. The formal procedures for completing construction contracts are as follows:

- 1) *Notification*. The contractor should provide the PHA with written notification when all work is substantially complete and ready for inspection. This notification must contain the date on which work was completed. The contractor should send this notification promptly (i.e., as quickly as reasonably possible after ascertaining the project has reached substantial completion).

- 2) *Final Inspection.* Upon receipt of the contractor's notification of completion, the PHA or its representative (e.g., the architect) should conduct a final inspection within 10 calendar days of the stated date of completion.
- 3) *Post-Inspection Meeting.* The inspection team should meet after completing the final inspection to determine whether the work has been completed in accordance with the construction documents and to identify any items of incomplete or unsatisfactory work (or seasonal work such as planting shrubs and lawns) that the contractor must address. The team should reach agreement on the minor items to be included on the PHA's final punch list (i.e., a list of the items to test, add, fix, and/or remove that the contractor must complete).
 - a. If the inspection team agrees that the contractor still has major incomplete work to finish, the parties should restart the formal procedures for project completion. The contractor should complete the major incomplete work and re-submit its notification, and the PHA or its representative will re-conduct a final inspection and hold another post-inspection meeting. If the contractor fails to promptly replace or correct the unfinished or unsatisfactory work, the PHA may replace or correct the work and charge the contractor for the excess costs or terminate for default the contractor's right to proceed. See Chapter 11.6 below for more information.
- 4) *Draft Certificate of Completion.* Following the post-inspection meeting, if the parties do not identify any major work that remains incomplete, the PHA or its architect should draft a Certificate of Completion for the construction project. This Certificate should identify the amount of the proposed final payment. Additionally, this Certificate should identify any minor and/or seasonal outstanding items discussed at the post-inspection meeting that have been included on the punch list. The PHA should submit the draft of this Certificate to the contractor for its review.
- 5) *Documentation.* Following final inspection and the resolution of any items identified at the post-inspection meeting, the contractor should submit the following documents to the PHA:
 - a. A certificate of occupancy issued by the responsible local agency for each building (if the locality issues such certificates based on the work performed);
 - b. One notarized original and two copies of the contractor's release, including a certification that indicates:
 - i. The work was completed in accordance with the construction documents, including contract modifications, except any minor items identified on the PHA's or its architect's proposed Certificate of Completion;
 - ii. The total amount the PHA owes to the contractor and a separately stated amount for each unsettled claim against the PHA, if any;
 - iii. The PHA is released of all claims (as described below in Chapter 11.5), other than those stated; and
 - iv. Wages paid to laborers or mechanics were consistent with the contract's wage rate requirements, and there are no outstanding claims for unpaid wages.
 - c. Assignment of all guarantees and warranties to the PHA;
 - d. Either edits to the draft Certificate of Completion (which the PHA and contractor should reach agreement on and sign at this stage) or written confirmation that the Certificate of Completion is acceptable as drafted accompanied by signature; and

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- e. All required certified payrolls with any discrepancies and/or wage underpayments corrected.

 - I. **Partial Occupancy Before Completion.** The PHA may accept part of a project for occupancy before contract completion if the following conditions are met:
 - 1) The dwelling units to be accepted (except items the PHA has approved for delayed completion) have been completed and are ready for occupancy;
 - 2) The general contractor agrees to early occupancy and completion of items approved for delayed completion;
 - 3) Early occupancy will not unduly inconvenience or represent a safety risk to tenants while the unfinished work is being completed;
 - 4) The PHA has obtained occupancy permits from the responsible local agency for each unit to be accepted (if applicable); and
 - 5) The PHA has executed an occupancy agreement with the general contractor indicating that the PHA accepts the specified work, provided that the contractor accepts the responsibility for completing the project by the established completion date.

 - J. **Final Payment.** Before making a final payment, the PHA should ensure it has received all appropriate documentation as described in Section 11.2(H)(5) above. Upon receiving the contractor's approval of and signature on the Certificate of Completion, the PHA is authorized to pay the contractor. The PHA payment to the contractor should be the amount specified in the Certificate of Completion, but it should not include any amount to be retained for disputed items and incomplete work, such as the work included on the punch list or seasonal items.

 - K. **Construction Warranties.** The contractor is fully responsible for correcting all legitimate deficiencies reported within the warranty period. The warranty period for all construction work should be at least 365 calendar days from the date of final acceptance of the work (or from the date the PHA takes possession, if the PHA does so before final acceptance, at least for the work of which the PHA takes possession). For complex equipment or systems (such as boilers, air conditioning units, thermal paned windows, or membrane roofs), the PHA should consider using a two-year warranty. The extra year will help ensure that the PHA can discover and report any hidden or latent deficiencies while the warranty is still in force. Warranty periods are also useful for replaced or repaired items; one full additional year is generally reasonable and appropriate.
 - 1) *Warranty Inspections.* The PHA is responsible for performing required warranty inspections, including the 11-month inspection, during the warranty period and promptly notifying the contractor in writing to remedy any defects relating to manufacturer or contractor warranties on equipment and systems and contractor warranties on materials and workmanship. PHAs have historically overlooked this area. Failure to enforce warranties is a violation of the public housing ACC requirement for economy and efficiency and can end up costing the PHA money. After the warranty expires, the PHA will have to use its own funds to correct defects that were the contractor's responsibility under the warranty.
 - 2) *Corrective Action.* Upon receipt of the PHA's written notice of a defect, the contractor must promptly remedy the defect. The contractor is also responsible for paying for any damage to

other work resulting from such defects. If the contractor fails to resolve such warranty issues, the PHA should contact the bonding company.

11.3 ADMINISTERING NON-CONSTRUCTION CONTRACTS

PHAs must create and oversee strong contract administration systems for non-construction contracts. Non-construction contracts are those related to the procurement of maintenance of buildings and fixtures (as opposed to rehabilitation), as well as goods, supplies, equipment, services, or any other activity or item not encompassed by construction contracts.

- A. **Post-award Conference.** For all contracts above the micro-purchase threshold, PHAs should meet with the contractor soon after awarding the contract. The parties should thoroughly discuss the contract's terms to ensure there is mutual understanding about the parties' rights and responsibilities. Also at this meeting, the contractor may present the PHA with samples (if necessary or required), and the PHA may introduce the contractor to its inspection personnel. Any changes to the contract resulting from this meeting must be reflected in a formal written modification to the contract (see Chapter 11.4 below). The parties should keep formal meeting minutes and should issue these minutes to all attendees.
- B. **Prohibition of Contract Assignment.** Contractors must not assign or transfer any interest in a contract with a PHA. PHAs must ensure that no assignment or transfer occurs for the duration of the contract. The only exceptions are:
 - 1) Contractors may assign their rights in claims for money due or to become due under the contract to a bank or other financial institution; and
 - 2) If the contractor is a partnership, and the partnership is set to dissolve, the PHA must select a surviving member (or members) to whom the contract will transfer.
- C. **Establishing a System for Receiving Goods and Accepting Services.** The PHA should establish a system for ensuring that contracted-for goods are delivered to an appropriate location where PHA personnel can make certain that the receipt of goods is properly handled and documented. For example, a contract for supplies should indicate where delivery should be made (e.g., what room or location, such as a management office) and how the PHA's receipt of the supplies will be documented and provided to the contractor. PHAs are encouraged to use "receiving reports" for this purpose.

The receiving report should contain, at a minimum, the following information: contract number, item quantity/description, date of receipt, place received, receiving official (printed name, signature, and date), date of inspection, inspection official (printed name, signature, and date), whether the item was accepted (and, if not accepted, reasons for rejection), and accepting official (printed name, signature, and date). The receiving, inspecting, and accepting official may, in certain circumstances, be the same individual, particularly under project-based management.

- D. **Monitoring and Inspecting Goods and Services.** PHAs have a right to inspect goods and services prior to payment and acceptance. PHAs should monitor or inspect the goods or services they obtain to ensure the contractors are providing them in accordance with the contract.

- 1) If contractors comply with the terms of their contracts, but perform poorly (i.e., provide PHAs with inferior goods or services), PHAs should document this in the contract file to provide institutional knowledge of the poor performance. PHAs should consider the poor performance when awarding future contracts.
- 2) If a PHA has a serious complaint about a contractor, or determines a contractor may have violated or failed to comply with Federal, State, or local laws and regulations in the performance (or non-performance) of its contract, the PHA should contact the HUD field office for review and provide any evidence it possesses (see Chapter 10, Evaluating Contractors and Analyzing Cost and Price).

E. Accepting or Rejecting Goods and Services. After inspection, the Contracting Officer must determine within 30 days whether to accept or reject goods or services. The PHA can:

- 1) *Reject the goods or services if they do not conform to the specifications and timelines contained in the contract.* If a PHA prematurely accepts deficient or late goods or services, it may waive its right to enforce compliance or receive a remedy such as discounted pricing. Additionally, such acceptance may waive the PHA's right to protest a similar deficiency in the future. If goods or services are rejected, the contractor is subject to being declared in default unless it can provide conforming items or services within the required delivery schedule/completion time.
- 2) *Require correction of nonconforming goods or services so that they conform with the contract.* Contractors have seven days to do so, although PHAs may give contractors more time. If the PHA asks the contractor to correct the defects, the PHA may not terminate the contract for default until the contractor has had a reasonable opportunity to correct the defects. If the contractor does not correct the defects within the required timeframe, the PHA may still accept the defective items or deficient services but should negotiate a commensurate reduction in price.
- 3) *Make partial payment on acceptable goods or services, withholding payment for unsatisfactory goods or services.* This option allows a PHA to receive the goods or services it needs to some extent while waiting for the contractor to provide the rest of its promised performance. This is also advantageous because it allows the PHA to preserve its options—if the contractor does not respond in a timely manner, the PHA can cancel the remainder of the contract and procure the remaining goods or services from another source.
- 4) *Accept the goods or services.* The Contracting Officer should accept goods or services if they conform to the specifications and timelines described in the contract. Acceptance of goods or services is assumed to have occurred if, after 30 days, the PHA does not protest the delivery and/or makes a payment in full. This acceptance should not be delayed since prompt payment will help to ensure good relations with contractors. In addition, many contracts allow a discount for prompt payment if this payment is made within a specified number of days.


PHAs may combine options 2 and 3 as applicable.

F. Control of Payments. To the extent practicable, and to help eliminate disputes that arise when shortages or damages are not discovered until after payment has been made, PHAs should only pay for goods and services after they are inspected and accepted.

- G. **Final Payments.** Prior to final payment under a non-construction contract, the Contractor must execute and deliver a certificate and release to the PHA. This certificate and release must contain the following:
- 1) A statement that the goods were delivered or services rendered in accordance with the contract, including any contract modifications;
 - 2) The total amount the PHA owes to the contractor and a separately stated amount for each unsettled claim against the PHA, if any;
 - 3) The PHA is released of all claims (as described below in Chapter 11.5) under and by virtue of the contract, other than those specifically excepted (with a list of outstanding claims and their stated amounts); and
 - 4) If applicable (i.e., for maintenance contracts exceeding \$2,000), wages paid to laborers or mechanics were consistent with the contract's wage rate requirements and there are no outstanding claims for unpaid wages.
- H. **Labor Standards.** Maintenance contracts exceeding \$2,000 require the payment of HUD-determined wage rates per Section 12(a) of the 1937 Act (42 U.S.C. § 1437j(a)). See HUD Handbook 1344.1, REV 3, Ch. 8 for more information.
- 1) *Posting Wage Rates.* PHAs must ensure that a copy of the applicable HUD wage decision is displayed at the job site in a place accessible to all maintenance laborers and mechanics and placed in an area that is protected from inclement weather.
 - 2) *Compliance Monitoring.* PHAs have certain compliance monitoring and enforcement responsibilities for maintenance contracts subject to HUD-determined wage rates. In addition to the Handbook cited above, see Chapter 10.9 of this Handbook for a discussion of the wage and recordkeeping requirements and the enforcement requirements of the PHAs.

11.4 CONTRACT MODIFICATIONS

- A. **General.** PHAs may modify contracts to reflect changes in their desired scope of work, supplies, service, period of performance, price, or other details. Contracting Officers have the authority to modify contracts and shall issue contract modifications in writing.
- B. **Process.** PHAs and contractors must follow the contract modification process to ensure their contract modifications are effective. Contractors and PHAs must cooperate with each other throughout this process, as it is, by necessity, a bilateral undertaking. However, PHAs may unilaterally modify contracts to make administrative changes (i.e., modifications that do not affect the parties' substantive rights, like amending the address of the paying office) or make preauthorized modifications (e.g., executing an option described in the contract). In all other circumstances, PHAs and contractors must adhere to the following procedures:
- 1) To begin the contract modification process, Contracting Officers should issue a change order. Contracting Officers do so unilaterally.
 - a. Change orders should include at least the following:
 - i. a detailed description of the proposed change in work;
 - ii. a reference to the applicable working drawings and specifications, when applicable;

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- iii. an estimated price (including a notation of no change) for the change in contract work; and
 - iv. estimate of additional time to complete the work, if any.
 - b. Change orders may be issued bilaterally (thereby skipping the steps below) if the contractor agrees to the change in advance. When the parties mutually agree to a change, including any commensurate equitable adjustment, the parties should prepare and execute a written contract modification and include this modification in the contract file. See Appendix 15 for a Sample Contract Modification.
 - c. Contractors (rather than the PHA's Contracting Officer) may only initiate contract modification if they receive communication from the PHA that would materially change the contract in a way that should be accomplished by a change order. If this is the case, the contractor must send the PHA a written notification within 20 days of receiving the communication explaining the circumstances under which it received the communication and that the contractor considers the communication to be a change order. These are referred to as "constructive change orders."
 - 2) After receiving and reviewing the change order, the contractor must submit a written proposal to the PHA for an equitable adjustment to the contract price (up or down) within 30 days of receiving the change order or submitting a constructive change order. This written proposal must include the lump sum amount of the suggested equitable adjustment and must also include an itemized breakdown of this lump sum into changes to:
 - a. Direct costs (e.g., materials, transportation, labor, equipment, any other associated costs (e.g., preparation, tax/fee, bond costs, and insurance), including for any applicable subcontractors);
 - b. Indirect costs (e.g., overhead, general and administrative expenses, and fringe benefits normally treated as direct costs); and
 - c. Profit (merely suggested at this point; should be negotiated through the modification process).
 - 3) The Contracting Officer will review the contractor's submission in accordance with the Contract Cost Principles at 2 CFR 200, Subpart E in effect on the date of the contract. The Contracting Officer should endeavor to review the submission within 30 days of receipt or inform the contractor of any delay and the date on which the Contracting Officer expects to render a decision.
 - 4) Once the Contracting Officer renders its decision, the parties should create and execute a supplemental agreement containing all the information above as agreed upon between the parties. This act makes the contract modification bilateral. If the parties cannot reach an agreement, the parties should follow the dispute resolution procedure described in their contract.
 - 5) The Changes clause in Forms HUD-5370 (for construction above the simplified acquisition threshold), HUD-5370-C Section I (for non-construction contracts above the simplified acquisition threshold), and HUD-5370-EZ (for small construction/development contracts above \$2,000 but below the simplified acquisition threshold) describes the procedure for modifying contracts that fall into these categories in additional detail, including details on time extensions and cost analysis of modifications. Any non-construction contracts below the simplified

acquisition threshold should refer to the provisions for modification in their individual contracts for more detail.

C. Propriety of Modification Versus New Procurement. Contract modification is a useful tool for PHAs and contractors to adapt to changing needs and circumstances during their contracts' terms. However, PHAs and contractors must not use contract modification to circumvent 2 CFR Part 200's requirements governing competition. Specifically, PHAs and contractors may try to use contract modifications to circumvent the requirement for competition at 2 CFR 200.319(a), giving contractors with whom the PHA has pre-existing contracts significant additional work without engaging in a new procurement or adhering to the requirements for noncompetitive procurement under 2 CFR 200.320(c).

- 1) *Work Within the General Scope of the Contract.* As described in Chapter 11.4(B) above, PHAs may initiate contract modification by issuing change orders. These change orders are only intended to change work within the general scope of the contract. HUD considers "work within the general scope of the contract" to be the provision of goods or services that: (1) does not significantly increase the quantity of goods or services being provided and either (2) is of like kind with the goods or services already being provided under the contract or has a reasonably strong connection to the current provision of goods and services.
 - a. Significant Increase. PHAs should use their sound business judgment to determine what a "significant" increase in the quantity of supplies or services may be. Generally, however, HUD considers a "significant" increase to be more than 10 percent of the original quantity of goods, estimated time required to provide services, or coverage of services, as applicable.
 - i. For service contracts, contract modifications need only fall below either the 10 percent threshold for estimated time required to provide the service or the estimated coverage of the services. For example, a PHA has procured a maintenance contract for 4 buildings that will take 100 hours to perform. If the PHA wants to add a fifth building requiring similar maintenance that would take an additional 5 hours to perform, the PHA could proceed with the contract modification because, while adding a building would result in a 25 percent increase over the contract's original coverage, the time to provide the maintenance is only 5 percent of the original contract time. However, if the new maintenance work is estimated to take 20 hours, the modification would not fall below either threshold. As such, the proposed modification would be a "significant" increase, thus requiring re-procurement rather than modification.
 - b. Like Kind or Reasonably Strong Connection. "Like kind" refers to goods or services that are virtually identical to the goods or services already being provided under the contract. A "reasonably strong connection" between the provided and proposed goods or services can be more attenuated, but the goods or services should not add new types or categories of goods or services that the contract does not contemplate. For example, if a PHA has entered into a modernization contract and wants to modify the contract to construct a new building, that would not be a "reasonably strong connection" because engaging in new construction adds a new service onto the contract that is not the same as rehabilitation.

- 2) *Work Outside the General Scope of the Contract.* If a proposed contract modification would not comply with the criteria described in 11.4(C)(1) above, a PHA must either submit the proposed contract modification to HUD for review to comply with 2 CFR 200.325(b)(5) (when the contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold) or re-engage in the procurement process to acquire the supplies or services it desires.
- a. Submission to HUD. Please see Chapter 11.4(E) below for additional detail.
 - b. Re-Procurement. If a proposed contract modification would not comply with the criteria described in 11.4(C)(1) above, in lieu of submitting the modification to HUD for review, a PHA may re-engage in the procurement process to acquire the goods or services it desires.
 - i. **Noncompetitive Procurement.** 2 CFR 200.320(c) provides specific scenarios in which PHAs may engage in noncompetitive procurement. If a proposed contract modification does not comply with the criteria in 11.4(C)(1) above but meets one of the situations in 2 CFR 200.320(c), the PHA may enter into the contract modification as a form of noncompetitive procurement. This includes the ability to submit a written request to HUD for permission to enter into the contract modification as a noncompetitive procurement as described below. PHAs should refer to Chapter 8 of this Handbook for more information on noncompetitive procurement and how to submit a written request to HUD for approval.
- 3) *Modifications Exceeding the Simplified Acquisition Threshold.* In addition to the requirements above, per 2 CFR 200.325(b)(5), if the estimated value of a contract modification exceeds the simplified acquisition threshold, HUD review is required. See Chapter 11.4(E) below for additional detail.

D. **Modification Documentation.** To comply with 2 CFR 200.318(i) and 2 CFR 200.334, the PHA should maintain accurate records and documentation regarding contract modifications by including written evidence of contract modifications in each contract file. This should include a modification register documenting every modification made to a contract. This register is necessary to provide an easily accessible and understandable record of all actions taken in connection with each contract. For each modification, the modification register should generally include:

- the number of the modification,
- a brief description of the change,
- the cost of the modification (increase or decrease),
- the date submitted to HUD for approval, if applicable,
- any critical deadline dates,
- the date of HUD approval or disapproval, if applicable, and
- the amount of additional time required by the contractor to fulfill the terms of the modification, if any.

E. **HUD Review of Modifications.** Pursuant to 2 CFR 200.325(b)(5), upon HUD's request, PHAs must make available to HUD any proposed contract modifications that change the scope of the contract or increase the contract by more than the simplified acquisition threshold. HUD hereby requests

that all PHAs submit any current or future proposed contract modifications covered by this subparagraph to the appropriate HUD office unless exempted from doing so under Chapter 12.5 of this Handbook.

11.5 CONTRACT CLAIMS

- A. **General.** The term “contract claim” refers to the contractor or PHA’s assertion of a right to damages under the contract, to adjust interpretation of a contractual term, or to any other dispute arising under or related to the contract. While contractors more frequently submit claims, both PHAs and contractors have the right to do so. Some examples of disputes are breach of contract, mistake, misrepresentation, and difficulties arising from contract modifications. The “Disputes” clauses of Forms HUD-5370, 5370-C, and 5370-EZ provide additional details about the types of disputes and how claims will be processed. HUD recommends that PHAs explain how they will handle claims and disputes in their procurement policies.
- B. **Process.** All disputes should be resolved in accordance with the process described below. The only exception is for disputes arising under the contract provisions related to labor standards. Please see the “Labor Standards” clauses in forms HUD-5370, 5370-C, and 5370-EZ for additional details on these processes.
- 1) *Filing Claims.* PHAs should make every effort to resolve claims informally and expeditiously by mutual agreement with contractors. However, if this is not possible, claimants should file their claims with the PHA’s Contracting Officer in writing within the timeframe specified in the contract documents, if any. The claim should identify the nature and scope of the claim, including extra costs a contractor has incurred or time extensions sought. Claimants should endeavor to include all relevant information so the Contracting Officer can speak to elements (a) through (c) described immediately below.
 - 2) *Rendering Decisions on Claims.* The Contracting Officer should review the facts and documentation pertinent to the claim and secure any necessary assistance from legal, technical, or other advisors. The Contracting Officer shall issue a final written decision promptly and within the timeframe stated in the contract documents. The written decision should include:
 - a. A description of the claim;
 - b. A reference to the pertinent contract clauses;
 - c. A statement of the factual areas of agreement or disagreement;
 - d. A statement of the Contracting Officer’s decision with supporting rationale; and
 - e. A statement referencing appeal rights as provided in the PHA’s procurement policy and the construction contract.

The Contracting Officer should immediately furnish a copy of the decision to the claimant by certified mail with return receipt requested.

- 3) *Appeal.* While claimants shall consider Contracting Officers’ decisions final, claimants have the right to appeal the Contracting Officer’s decision to: (1) a higher level in the PHA, (2) an independent mediator or arbitrator, or (3) a court of competent jurisdiction, as applicable. Claimants are encouraged to refer to their contracts (including applicable provisions in Forms

HUD-5370, 5370-C, and 5370-EZ) to determine the appropriate time frame and process for filing an appeal, and may consider consulting legal counsel.

- C. **Continued Contract Performance.** For the duration of the claim resolution process, including any appeal resulting from the Contracting Officer's decision, the parties must proceed diligently with the remaining performance of the contract.
- D. **Records of Claims.** In accordance with 2 CFR 200.334, PHAs shall maintain a complete written and dated record of any actions that may result in a dispute or claim for damages. Records must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of submission of the quarterly or annual financial report, respectively, as reported to HUD. PHAs must retain records of all claims started before expiration of the three-year period until all litigation, claims, or audit findings involving the records have been resolved and final action taken. An example would be records of weather conditions during the course of a contract, delays in receiving materials the PHA ordered, or other situations that may result in requests for time delays that may be disputed. These records protect the PHA's interests during any litigation that may arise. At a minimum, the PHA should maintain records of the following:
- 1) A complete and detailed job record; and
 - 2) Any disputes and claims filed, including a cross-reference to other pertinent files (such as a separate file for a particular subcontractor), any correspondence related to a dispute, written minutes of meetings between the PHA and architects, or job meetings where decisions or agreements were made regarding disputes.

11.6 CONTRACT TERMINATIONS

- A. **General.** Most contracts are terminated either for default or convenience. The termination clauses in Forms HUD-5370, 5370-C, and 5370-EZ contain additional information on contract terminations beyond what is discussed here. If these forms apply to a PHA's contract, the PHA should consult the form attached to their contract to ensure they have all relevant information. If these forms do not apply, PHAs should review their contract and apply any termination procedures described therein.
- B. **Termination for Convenience.** PHAs may terminate contracts for convenience when doing so is in the PHA's best interests. Examples of terminations in the PHA's best interest include when the PHA no longer needs or desires the goods or services under contract or can no longer fund the procurement.
- 1) *Procedure.* To terminate a contract for convenience, the parties must adhere to the following procedures:
 - a. The PHA must deliver a Notice of Termination to the contractor. These Notices are discussed in more detail in 11.6(D) below.
 - b. Upon receiving this Notice, the contractor incurs responsibilities that vary with the type of contract at issue:

- i. If the contract is a construction contract (i.e., uses Forms HUD-5370 or 5370-EZ), the contractor must present the PHA with a claim. This claim must be presented within the timeframe described in the contract and must contain the details described in the contract. The Contracting Officer has 60 days to process the contractor's claim unless the parties agree otherwise.
 - ii. If the contract is a non-construction contract (i.e., uses Form HUD-5370-C), upon receiving the Notice, the contractor must immediately terminate all services the Notice covers (unless the Notice specifies otherwise) and deliver all information, reports, papers, and other materials accumulated or generated in performing the contract, whether completed or in process, to the PHA. The contractor may, but does not have to, submit an estimate of the value of the services it has rendered for the PHA.
 - c. If the contractor does not respond to the PHA's Notice or does not answer in a timely manner (i.e., within the time for submitting claims in the contract), the Contracting Officer may settle the termination by unilateral determination.
- 2) *Compensation.* The requirements for compensation depend on whether a contract is a construction or non-construction contract.
- a. Construction contract (HUD-5370 and 5370-EZ). PHAs settling claims resulting from a termination for convenience must pay contractors for reasonable and proper costs resulting from the termination. This means that when evaluating contractors' claims, Contracting Officers should use their prudent business judgment, as opposed to strict accounting principles, to arrive at an amount of compensation. The parties may agree to a total amount to be paid to the contractor.
 - b. Non-construction contract (HUD-5370-C, Part I). When PHAs terminate non-construction contracts for convenience, they are only liable to the contractors for the value of the service rendered before the termination's effective date. PHAs may rely on their own records to ascertain this value. If a contractor submits an estimate of the value of these services to the PHA, the Contracting Officer may evaluate this estimate using their prudent business judgment. In all cases, the Contracting Officer should issue a decision to the PHA explaining the basis for the amount it plans to pay.

C. Termination for Default (Cause). A PHA may terminate a contract for default because of a contractor's actual or anticipated failure to perform its contractual obligations. Such failures include, but are not limited to, a contractor's refusal or failure to prosecute the work with diligence or the contractor's actual failure to complete the work within the agreed-upon time. When a PHA terminates a contract for default, the PHA is not liable for the contractor's costs on undelivered work and may be entitled to the repayment of progress payments.

- 1) *Procedure.* The procedure for terminating a contract for default is as follows:
- a. Cure Notice. If the PHA has notice that the contractor is endangering performance of the contract or has already failed to perform, the Contracting Officer should issue a written notice to the contractor (generally called a "Cure Notice") specifying the failure, calling the contractor's attention to the contractual liabilities if the contract is terminated for default, and providing 10 days (or longer, at the PHA's discretion) for the

contractor to “show cause” as to why the contract should not be terminated/allow the contractor to remedy the failure.

- b. Notice of Termination. After 10 days have passed, if the response to this Cure Notice is inadequate or insufficient, the Contracting Officer may issue a Notice of Termination for default. Once this Notice is issued, the contract has been terminated. For all terminations for default of construction contracts, to be effective, this Notice must terminate the contractor’s right to proceed with the work.
- 2) *Post-Termination Options for Construction Contracts*. Once a PHA terminates a contractor’s right to proceed, the PHA may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, equipment, and plant on the work site necessary for completing the work. Terminations for default may also require the contractor to pay damages, depending on the context. PHAs should consult the terms of their contract and assess the specifics of their situation to determine what damages, if any, are appropriate.
 - 3) *Post-Termination Options for Non-Construction Contracts*. After terminating a non-construction contract, a PHA may require the contractor to do any of the following:
 - a. Deliver to it all information, reports, papers, and other materials accumulated or generated in performing the contract, whether completed or in process, with compensation determined by the Contracting Officer through an equitable adjustment as discussed in Chapter 11.4(B) and the Changes clause of Form HUD-5370-C, Part I;
 - b. Take over the work and prosecute it to completion by contract or otherwise, and bill the contractor for any additional cost the PHA incurs in doing so; and/or
 - c. Withhold any payments to the contractor to offset or partially pay, as applicable, any money the contractor owes to the PHA.
 - 4) *Alternatives to Termination*. PHAs may negotiate alternatives to termination for default. Such alternatives include the following:
 - a. Allow alternative dispute resolution (e.g., arbitration or mediation) as agreed to by both parties;
 - b. Allow the contractor or surety to continue performance of the contract under a revised delivery schedule (in exchange for a reduced price or other consideration) (see Chapter 11.4 regarding contract modification above);
 - c. Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the PHA are adequately protected; or
 - d. If the contractor is not liable to the PHA for damages, execute a no-cost termination settlement agreement.

Please note that if the PHA allows the contractor to continue performance, and the contract is a construction contract for over \$350,000, the contractor may nevertheless be liable for liquidated damages. Please refer to the applicable construction contract to determine the appropriate damages.

- 5) *Re-procurement*. When the goods, services, or construction activities related to the contract are still required after termination, the Contracting Officer should seek to procure the same or similar items as soon as possible. The Contracting Officer must use the appropriate form of procurement (i.e., formal or informal) with the appropriate level of competition depending on

the dollar value of what is needed. The PHA may bill the terminated contractor for any costs above the value of the PHA's procurement with the contractor at the time of termination. Please note that unless there are other facts, termination of a contract is not a public exigency or emergency as described at 2 CFR 200.320(c)(3) and this does not automatically trigger the ability to use noncompetitive procurement.

D. **Notice of Termination.** To terminate contracts for convenience and default, the Contracting Officer must give contractors written notice. This notice is called a Notice of Termination. The Notice should be sent by certified mail with a return receipt requested. Copies of the Notice should be sent to the contractor's surety, if any, and any assignee. The Notice should state, at a minimum, the following:

- 1) The contract is being terminated for default or the convenience of the PHA, as applicable, under a cited contract clause (or clauses) authorizing the termination;
- 2) Whether the contract is terminated in whole or in part (for partial terminations, identify the specific items or clauses being terminated);
- 3) If terminated for default, the acts or omissions constituting the default, the rationale behind the Officer's determination that failure to perform is not excusable (e.g., based on the factors laid out at clause 32(b) of Form HUD-5370), the PHA's rights to charge excess costs of re-procurement to the contractor, and the contractor's appeal rights;
- 4) The effective date of the termination;
- 5) If terminated in part, the contractor's right to proceed under the non-terminated portion of the contract; and
- 6) Any special instructions.

CHAPTER 12 – HUD REVIEW REQUIREMENTS

HUD review of a PHA's procurement activity is limited to those actions funded with Federal program grant funds.



12.1 GENERAL

HUD review of a PHA's procurement activity is limited to those actions funded with Federal program grant funds.

12.2 CONTRACTING ACTIONS REQUIRING HUD APPROVAL

Except as exempted under paragraph 12.5, the following contracting actions should have HUD approval if requested by HUD:

- A. Noncompetitive procurements expected to exceed the Federal simplified acquisition threshold (2 CFR 200.325(b) (2));
- B. Brand name-only procurements expected to exceed the Federal simplified acquisition threshold (2 CFR 200.325 (b)(3));
- C. Awards over the Federal simplified acquisition threshold to other than the apparent low bidder under a sealed bid (2 CFR 200.325(b)(4));
- D. Proposed contract modifications that change the scope of the contract (as per the "Changes" clause in Forms HUD-5370, HUD-5370-C, or HUD-5370-EZ) or increasing the contract amount by more than the Federal simplified acquisition threshold (2 CFR 200.325(b)(5));

- E. Use of the qualification-based selection (QBS) method of procurement for other than A/E services, joint venture partners or developers, or energy service contracts;
- F. For PHAs operating under the 1969 public housing ACC 53010 and 53011, any agreement or contract for professional, management, fee accountants, legal, or other professional services with any person or firm if the total period or term of the contract, including renewal option provisions, exceeds two years;
- G. Procurements for legal or other non-personal services in connection with litigation, per HUD's Litigation Handbook, that exceed \$100,000;
- H. Procurements that exceed the amount included in: (1) the HUD-approved Development Cost Budget or (2) where HUD has required prior approval on a Notice of Deficiency or corrective action order under the Capital Fund Program;
- I. Contracts that exceed five years, including options. To approve terms of more than five years, HUD must determine there is no practical alternative;
- J. PHAs operating under the 1969 public housing ACC who enter into a transaction with any joint venture, affiliate, or other identity-of-interest entity. Section 515 of the 1969 public housing ACC specifies that such transactions must comply with the conflict of interest provisions that apply to the PHA. PHAs and their instrumentalities operating under the 1995 or 2023 public housing ACCs must comply with the conflict of interest provisions under the ACC;
- K. Solicitations, and any resulting contracts, related to energy performance contracting and utility add-ons, as per Chapter 18 of this Handbook; and
- L. Solicitation and contracts by any PHA whose procurement procedures or operations fail to comply with the procurement standards in 2 CFR 200.317-327.

12.3 PHA SUBMISSION REQUIREMENTS FOR ACTIONS REQUIRING HUD APPROVAL

The PHA shall submit all paperwork necessary for HUD to review the contracting actions identified in 12.2 if requested by HUD. The HUD field office shall review this information, and shall indicate what additional information may be necessary, as appropriate, to ensure compliance with 2 CFR 200.317-327 and the applicable sections of this Chapter. For non-competitive proposals, specifically, the PHA should comply with the instructions in Chapter 8. Any changes to HUD forms or waivers to this Handbook must be sent to HUD Headquarters' Office of Public Housing for review and approval.

12.4 DEVELOPMENT

The PHA shall submit to the HUD field office for prior approval A/E contracts, fee appraiser contracts, development manager contracts, construction solicitations, construction contracts, and contract modifications.

12.5 EXEMPTION FROM PRE-AWARD REVIEW

- A. A PHA shall be exempt from the pre-award review required in paragraph 12-2.A-F if:
 - 1) The PHA requests, and HUD subsequently certifies, that its procurement system be reviewed by HUD to determine if its systems meet the standards under 2 CFR 200.317-327 and the essential requirements of this Handbook and HUD Handbook 7485.1 (2 CFR 200.325(c)(1)); or
 - 2) The PHA self-certifies that its procurement system meets the standards under 2 CFR 200.317-327 and the essential requirements of this Handbook and HUD Handbook 7485.1 (2 CFR 200.325(c)(2)). However, this certification does not limit HUD's right to review the PHA's procurement policy.

- B. Exemptions are granted for a one-year period and may be automatically renewed each year unless the PHA is found not to be in compliance with 2 CFR 200.317-327 or the PHA requests that the exemption be rescinded.

CHAPTER 13 – WAIVERS, EXCEPTIONS, ENFORCEMENT DISCRETION & DISASTER

Waiver or exemption requests are submitted before a noncompliant action occurs. If the noncompliant action has already occurred, HUD retains all discretion to determine the extent to which it will take additional enforcement action (including nonenforcement) against noncompliant procurement practices.

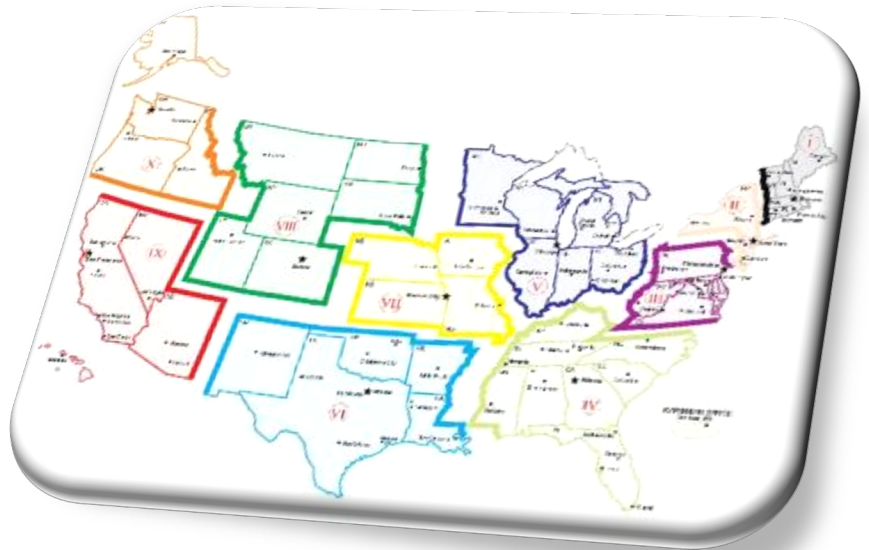
13.1 GENERAL

There are circumstances in which PHAs may be granted exceptions from portions of the Office of Management and Budget's (OMB) procurement regulations of 2 CFR 200.317-327. Pursuant to 2 CFR 200.102(b), HUD may grant exceptions to 2 CFR Part 200 procurement requirements on a case-by-case basis (i.e., contract by contract) for individual PHAs, except as otherwise required by law. For example, HUD cannot grant a waiver or exceptions to audit requirements.

If a PHA requests an exception to a 2 CFR Part 200 rule, HUD processes an "exception." If a PHA requests an exception to another rule, e.g., 24 CFR 905.316 or 905.604(h), then HUD processes a "waiver." HUD processes 2 CFR Part 200 exception requests in the same manner as regulatory waiver requests. Certain procurement regulatory requirements have already been waived through rulemaking (see 24 CFR 905.316 and 905.604(h)). Granting a waiver or an exception to procurement requirements necessitates that the PHA acted in good faith and has a "good cause" reason for requesting the exception or waiver.

Waiver or exemption requests are submitted before a noncompliant action occurs. If the noncompliant action has already occurred, HUD retains all discretion to determine the extent to which it will take additional enforcement action (including nonenforcement) against noncompliant procurement practices.

This chapter discusses the process for submitting waiver or exception requests as well as the process for issuance of a nonenforcement letter and, when applicable, protocols to close out inspector general (IG) audit findings.



13.2 PROCESS FOR SUBMITTING A HUD REGULATORY WAIVER OR A 2 CFR PART 200 EXCEPTION REQUEST BEFORE A NONCOMPLIANT ACTION OCCURS

When a PHA is going to take an action noncompliant with procurement regulations and wishes to be granted a waiver of a HUD regulation or an exception of a 2 CFR Part 200 regulation, they must submit a waiver or exception request. PHAs should follow the process below to request a waiver or an exception to the procurement regulations:

- A. The PHA Contracting Officer determines which procurement regulation to which the PHA will not be able to comply.
- B. The PHA Contracting Officer completes a waiver or exception request on PHA letterhead, signed by the PHA official, and submits the request and backup documentation to the HUD field office. It is recommended that PHAs contact their local HUD field office for their preferred method of communication.
 - 1) The following information must be included in the waiver or exception request:
 - a. The section of the regulation the PHA wishes to be waived or excepted. HUD will not accept requests for blanket or complete exceptions from 2 CFR Part 200 or complete waivers from HUD regulations;
 - b. The timeline of procurement actions;
 - c. Description of the "good cause" justification to validate reason for request; and
 - d. Supporting documentation and contact information.
- C. The HUD field office determines whether the information provided meets the regulatory authority to waive or except the PHA from the requested provision of HUD regulations or 2 CFR Part 200.
- D. The HUD field office processes the request accordingly and sends the request memo and backup documentation to the PIH Office of Field Operations or the appropriate office in PIH headquarters.
- E. The OGC and any other HUD appropriate office reviews the request memo and documentation and sends the request package to the PIH Assistant Secretary or to the appropriate official that has the delegated authority to approve or deny requests.
- F. The PIH Assistant Secretary or the official with delegated authority either approves or denies the request and informs the HUD field office that received the request of the decision. The HUD field office then informs the PHA of the decision in writing.
- G. Not less than quarterly, the Secretary must notify the public of all waivers and exceptions of regulations that HUD has approved, by publishing a notice in the Federal Register. These notices (each covering the period since the most recent previous notification) shall:
 - 1) Identify the project, activity, or undertaking involved;
 - 2) Describe the nature of the provision waived and the designation of the provision;
 - 3) Indicate the name and title of the person who granted the waiver or exception request;

- 4) Describe briefly the grounds for approval of the request; and
- 5) State how additional information about a particular waiver or exception may be obtained.

13.3 PROCESS FOR ISSUANCE OF A NONENFORCEMENT LETTER & AUDIT CLOSEOUT RELATED TO NONCOMPLIANT PROCUREMENT ACTIVITY

A nonenforcement letter could be issued in response to any activity noncompliant with procurement regulations. HUD has flexibility in determining whether and when to initiate an enforcement action against a regulated third party, such as a PHA, for violations of a regulation the agency is charged with administering. This type of enforcement discretion gives HUD the freedom to set enforcement priorities, allocate resources, and make specific strategic enforcement decisions. Discretionary enforcement activities might include any range of actions, including, but not limited to, the imposition of penalties or the initiation of an agency investigation, lawsuit, or audit.

HUD retains the discretion to not take enforcement actions in response to non-compliant procurement activity when the non-compliance is not material or substantial to the award. The purpose of nonenforcement is to ensure that the enforcement action taken is appropriate for the level of non-compliant procurement activity. If HUD determines that it does not wish to take enforcement actions for a non-compliant procurement activity, HUD will follow the steps below:

HUD drafts a letter of nonenforcement containing the following information:

- A. The decision to not take additional enforcement actions against the PHA.
 - 1) The audit findings or non-compliant procurement activity conducted by the PHA and the associated regulatory language in 2 CFR Part 200.
 - 2) The timeline and brief description of procurement actions taken by the PHA.
 - 3) If applicable, the actions taken to correct the procurement misstep.
 - 4) A description of how the noncompliant procurement activity is not material or substantial to the award.
 - 5) An explanation of any differences between HUD's findings and other findings by third parties (e.g., auditors, Office of Inspector General (OIG), or Office of Public Housing's findings).
- B. The HUD official who has been delegated authority concurs with the letter and it is sent to the PHA.
- C. If applicable, the appropriate HUD office will work with OIG to close out audit findings by the action deadline noted by the auditor.

CHAPTER 14 – STATE, LOCAL LAWS, & REGULATIONS GOVERNING PHA PROCUREMENT

This chapter discusses the relationship between these Federal, State, and local rules as they relate to procurement and also lists suggested resources and other guidance to help PHAs remain current in these various requirements.

14.1 GENERAL



In addition to Federal law and regulations, PHAs are governed by a wide assortment of state and local requirements. PHAs comply with State and local requirements unless those requirements violate 2 CFR 200 procurement rules. In general, where these rules conflict, the more stringent law or rule applies (see exceptions in Section 14.2). For example, the Federal statutory limit on Simplified Acquisition is \$350,000. That does not prohibit a State from imposing a more stringent limit, e.g., \$25,000, on simplified acquisitions. A PHA governed by that State's law would comply with the \$25,000 limit. However, if another State limit on Simplified Acquisitions is \$300,000, a PHA governed by that State's law would still need to comply with the Federal \$350,000 limit.

Pursuant to the public housing ACC, HUD requires a standard form of Cooperation Agreement (Form HUD-52481) between a PHA and the Local Governing Body (LGB) under which the LGB is required to furnish the same public facilities and services to the PHA and its tenants as to other dwellings. The LGB is required to cooperate with the PHA in the development and administration of its projects; to accept dedications of lands for roads, alleys, and sidewalks; and to provide water, storm, and sanitary storm services for which the PHA shall pay the same amount as private owners. These arrangements may require some flexibility on the part of the LGB in complying with PHA procurement requirements.

This chapter discusses the relationship between these Federal, State, and local rules, as they relate to procurement, and also lists suggested resources and other guidance to help PHAs remain current in these various requirements.

14.2 APPLICATION OF STATE & LOCAL PROCUREMENT LAWS

In general, as stated above, a PHA must comply with state or local procurement rules if they are more stringent than Federal procurement rules. However, there are instances when Federal rules always apply to PHAs, regardless of conflicting state or local procurement rules. One example is:

- A. **State Prevailing Wage Requirements.** Federal wage determinations (either Davis-Bacon or HUD-Determined Maintenance Wage Rates) preempt any State prevailing wage rate when the State wage rate is higher than the applicable Federally imposed wage rate (24 CFR 965.101). Appropriate Federal preemption language is included in the labor standards clauses found in Forms HUD-5370, 5370-EZ, and 5370-C.

14.3 STATE LAW

Typically, PHAs are governed by two sets of state laws. One set is called “state-enabling legislation” and the second is a separate set of state statutes or codes that describe requirements PHAs must follow.

- A. State public housing laws generally describe the creation and operation of PHAs within the state (also referred to as “Local Housing Authorities,” “Municipal Housing Authorities,” “Regional Housing Authorities,” “County or City Housing Authorities,” “Consolidated Housing Authorities,” and in some cases a “State PHA”). Some State public housing laws also provide guidance on specific operational tasks, such as procurement actions with which PHAs must comply.
- B. The separate State statutes or codes sometimes apply to local governments, including PHAs, but in other states, the State statutes or codes do not apply.
- C. The laws that enable the establishment of PHAs and other State requirements that impact procurement activities differ from state to state, as follows:
 - 1) State-enabling legislation may include specific guidance on how the various procurement regulations apply to PHA contracts within that State; or
 - 2) The State law creating public housing may be silent on procurement, and:
 - a. The State procurement code applies to units of local government, including PHAs;
 - b. The State procurement code does not apply to local governments, including PHAs;
 - c. Adoption of the state procurement statutes is not mandatory for units of local government;
 - d. A State’s procurement code generally does not apply to PHAs because they are not State agencies; however, specific clauses in the regulations may apply; and
 - e. The State procurement code may mandate certain practices but specifically exempt PHAs from one or more of the requirements.
- D. Some States have passed laws on procurement but specifically exempt contracts awarded with Federal funds.
- E. Some States have passed very detailed “Procurement Codes” based on the American Bar Association’s Model Procurement Code for State and Local Governments, which apply to local governments, including PHAs. In these States, detailed procedures are provided for nearly all key aspects of public contracting ranging from types of specifications to contract administration.

14.4 LOCAL LAW


Some local governments pass laws applicable to public housing contracts, others do not.

- A. In cases where State procurement laws do not specifically apply to PHAs, local government laws on public contracts should be consulted and PHAs should establish their policy and procedures based on the most stringent requirements, either Federal or local; and
- B. When applicable local laws, in addition to State law, exist on procurement, the most stringent of the three applies as long as the procurement conforms to Federal requirements.
- C. Local jurisdictions frequently pass ordinances on specific construction practices and bonding requirements that a PHA must follow in addition to any State or local laws as long as they conform to Federal requirements.

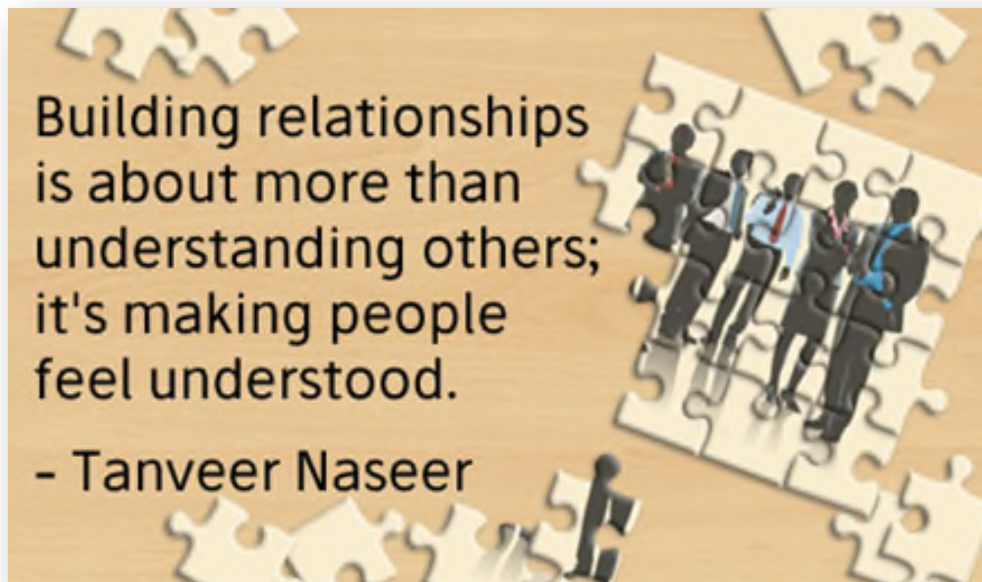
14.5 GUIDANCE ON STATE & LOCAL PROCUREMENT LAWS

The complex structure of Federal, State, and local laws pertaining to procurement and contracting activities (including applicable labor rates) requires that a PHA have a comprehensive understanding of the combination of rules and regulations with which it must comply. A PHA's procurement policy and procedures must incorporate and reflect the relationship between each set of laws and procurement practices. To properly carry out the procurement function and ensure compliance with all applicable Federal, State, and local procurement regulations, PHAs should take the following steps:

- A. Create a procurement resource center that includes copies of all applicable laws and regulations. Update those resources as necessary. Consult the following to locate applicable Federal, State, and local documents:
 - 1) <https://www.hud.gov/hudclips>;
 - 2) www.statelocalgov.net;
 - 3) The state legislation that creates your state's Housing Authorities (State enabling legislation);
 - 4) State procurement laws, State procurement codes, or State statutes pertaining to contracting and procurement;
 - 5) Local government laws on public contracts;
 - 6) Most recent State or local prevailing wage rates;
 - 7) Most recent Davis-Bacon rates for your area (www.wdol.gov); and
 - 8) The current HUD Maintenance Wage Decision (HUD-52158) for the PHA.
- B. Ensure that PHA staff involved in contracting and procurement are familiar with all Federal and State laws (or regulations) and local ordinances relating to procurement activities.
- C. Before submitting a policy for adoption by the Board, it is advisable to consult with your legal counsel and/or HUD field counsel to ensure that policy language adequately covers all applicable rules. Update the policy as pertinent regulations change.

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- D. Tailor an existing procurement policy (or develop a new procurement policy) that reflects all procurement laws applicable to your PHA.
 - E. Develop detailed plans of implementation for procurement procedures and train the staff. Update your plans as necessary.

CHAPTER 15 – COOPERATIVE BUSINESS RELATIONSHIPS



15.1 GENERAL

PHAs can choose to coordinate, collaborate, partner, or contract with various types of public or private entities to administer or manage any or all of their programs or to handle procurement matters. This chapter assists PHAs in recognizing the benefits of these relationships and explains how the Federal procurement regulations apply.

Please note that, for PHAs to access various interagency purchasing agreements, the underlying contract(s) must have been procured in accordance with 2 CFR 200.317-327 and 2 CFR 200.417. This is a particularly important requirement if PHAs are entering into intergovernmental agreements with states rather than local governments; the state would not otherwise be required to comport with 2 CFR 200.317-327 when procuring services or property for its own use; therefore, if the PHA is intending to use the underlying State contract, the PHA is responsible for meeting all of its usual 2 CFR 200.317-327 requirements.

To foster greater economy and efficiency, 2 CFR 200.318(e) encourages PHAs to enter into state and local intergovernmental agreements or inter-entity agreements, where appropriate, for procurement or use of common or shared goods and services. Use of cooperative and interagency agreements can often greatly simplify and expedite the procurement process by relieving the PHA of developing specifications or issuing solicitations. These cooperative arrangements can also offer substantial discounts over what a PHA might be required to pay if it purchased the items on its own. However, these intergovernmental agreements must still meet the requirements of 2 CFR 200.317-327. The difference will be the economies of scale and efficiency and another local entity assist in the procurement process. These agreements must follow the procedures of either competitive or noncompetitive procurement methods.

Please note that requirements of a PHA associated with a mixed-finance development process are addressed separately in Chapter 17 of this Handbook.

15.2 INTERGOVERNMENTAL AGREEMENTS FOR PROCUREMENT ACTIVITY

- A. **Requirements.** A PHA may enter into intergovernmental or interagency purchasing agreements as long as they meet the competitive or non-competitive procurement requirements of 2 CFR Part 200 and provided the following conditions are met:
- 1) The agreement provides for greater economy and efficiency and results in cost savings to the PHA. Before utilizing an interagency agreement for procurement, the PHA should compare the cost and availability of the identified supplies or services on the open market with the cost of purchasing them through another unit of government to determine if it is the most economical and efficient method;
 - 2) The agreement is used for common supplies and services that are of a routine nature only. In deciding whether it is appropriate for the PHA to obtain supplies or services through an intergovernmental agreement rather than through a competitive procurement, the nature of the required supplies or services will be a determining factor. Intergovernmental agreements may be used only for the procurement and use of common supplies and services. If services, required by the PHA, are provided by the State or locality and are part of that government's normal duties and responsibilities, it is permissible for the PHA to share the services and cost of staff under an agreement. For example, a PHA could enter into an intergovernmental agreement to use the services of a local government's accounting office to conduct an annual audit of its books or to use the services of a city health agency to provide advice about drug abuse prevention strategies;
 - 3) PHAs must take steps to ensure that any supplies or services obtained using another agency's contract are purchased in compliance with 2 CFR 200.317-327;
 - 4) A PHA's procurement files should contain a copy of the Intergovernmental Agreement and documentation showing that cost and availability were evaluated before the agreement was executed, and these factors are reviewed and compared at least annually with those contained in the agreement; and
 - 5) The agreement must be between the PHA and a state or local governmental agency, which may be another PHA.
- B. **Examples.** Types of intergovernmental agreements may include but are not limited to:
- 1) Paying a city for the cost of additional police patrols (i.e., special "community policing" efforts) so long as those patrols are above and beyond those that the police department would provide under the PHA's Cooperation Agreement with the city (see Appendix 16 for sample intergovernmental agreement);
 - 2) Using the city's recreation department to operate an afterschool sports program for residents of public housing;
 - 3) Using the services of the city's accounting office to conduct an internal audit;
 - 4) Sharing warehouse space with the city;

- 5) Purchasing supplies and services through a local, county, or State government's supply, service, or equipment contractor;
- 6) Using a local, county, or State governmental unit, including another PHA, to perform procurement activities for the PHA; or
- 7) Using bonding services from a state Housing Finance Agency.

C. Process for Using Intergovernmental Agreements. Typically, the process for entering into intergovernmental agreements is as follows:

- 1) The government agency solicits bids or proposals, then enters into contracts with vendors for a variety of supplies or services;
- 2) The PHA enters into an agreement with the government agency whereby the PHA is able to order supplies and services from the vendors who have a contractual agreement to furnish the supplies and services to the government agency. Note: some States/localities allow for PHAs to access State/ local contracts directly without any formal agreement between the PHA and the lead agency;
- 3) The PHA orders the supplies or services covered by the government contract at the prices specified;
- 4) Depending on the agreement structure, PHAs may order the supplies or services either directly from the vendor or indirectly from the government agency; and
- 5) Again, depending on the agreement structure, the vendor will bill the PHA directly and payment will be made to the vendor or, if ordered through the sponsoring agency, the PHA will reimburse the agency directly.

D. Terms of Agreement. Most government agencies will have their own intergovernmental agreement forms. However, the PHA should review any standard agreements to make sure that all applicable procurement regulations are met and that the PHA's interests are protected. PHAs should consider inclusion of the following provisions in their intergovernmental agreements:

- 1) Identification of the parties;
- 2) Effective date;
- 3) Basic purpose of the agreement;
- 4) Procedures for providing lists of needed items;
- 5) Description of items to be purchased;
- 6) Identification of lead party in the procurement;
- 7) Rules or codes that should be followed in the procurement (i.e., PHA procurement policy, State procurement code, and Federal Regulations);
- 8) Delivery terms;
- 9) Types of contract (e.g., indefinite quantity);
- 10) Warranty terms;
- 11) Any fees to be paid to the lead agency;
- 12) Procedures for resolving disputes with contractors;
- 13) Procedures for resolving disputes between the parties;
- 14) Procedures for bilateral modification or early termination of the agreement.
- 15) Any provisions for meetings on specification issues;

- 16) Non-exclusivity clause (right to conduct separate procurements, notwithstanding the existence of a cooperative purchasing agreement); and
- 17) Authorized signatures and titles.

- E. **Evaluating the Use of Intergovernmental Agreements.** PHAs should compare cost and availability of the items procured using the intergovernmental agreement annually to determine if the terms of the agreement continue to pass the tests of economy and efficiency.
- F. **Federal Supply Schedule Contracts.** The Federal government's General Services Administration (GSA) awards a wide variety of contracts under which Federal agencies may purchase supplies and services from pre-priced schedules: [https://www.acquisition.gov/far/part-38#:~:text=\(a\)%20The%20Federal%20Supply%20Schedule,using%20competitive%20procedures%20to%20firms.](https://www.acquisition.gov/far/part-38#:~:text=(a)%20The%20Federal%20Supply%20Schedule,using%20competitive%20procedures%20to%20firms.)

Note: These contracts may provide supplies or services despite the name Federal Supply Schedule. Section 211 of the E-Government Act of 2002 only allows for State and local government entities (including PHAs) to purchase from GSA Schedule 70, Information Technology (IT), and Consolidated (formerly Corporate Contracts) Schedule contracts containing IT Special Item Numbers. State and local government entities may not purchase information technology from any other GSA Schedules. No other schedule contracts are available to PHAs. In addition, PHAs may not purchase items from GSA Schedule contractors on a noncompetitive basis. PHAs may solicit GSA contractors for prices for supplies and services when conducting competitive procurements, but they shall be considered only another potential source.

15.3 INTER-ENTITY AGREEMENTS FOR JOINT PROCUREMENT ACTIVITY

The procedure described in Section 15.2 usually applies when one entity already has a procurement relationship that meets the requirements of 2 CFR 200.317-327. In other instances, two or more non-Federal entities may agree to enter into an agreement to use a single solicitation and enter into a single contract with a vendor. These solicitations and contracts must meet the competitive or non-competitive procurement requirements of 2 CFR Part 200. These agreements should also meet the economy and efficiency requirements as described above in Section 15.2.

15.4 SELECTING JOINT VENTURE PARTNERS

Pursuant to 24 CFR 943.148(b), in connection with the provision of PHA administrative or management functions of public housing, or the provision of supportive and social services, PHAs may use one of the following options for the selection of joint venture partners:

- A. The QBS method, using an RFQ, subject to the negotiation of a fair and reasonable price; or
- B. The solicitation of a single-source proposal, under the following conditions:
 - 1) The proposed joint venture partner has under its control and will make available to the partnership substantial, unique, and tangible resources or other benefits that would not

otherwise be available to the PHA on the open market (such as planning expertise, program experience, or financial or other resources). In this case, the PHA must carefully and thoroughly document both the cost reasonableness and the unique qualifications offered by its proposed partner; or

- 2) A resident group or a PHA affiliate is willing and able to act as the partner in performing the administrative or management function or to provide supportive or social services. A resident group or a PHA affiliate must comply with the requirements of 2 CFR Part 200 (if the entity is a nonprofit or a State or local government) in selecting members of the team. Team members must be paid on a cost reimbursement basis only. The PHA must document the cost reasonableness of its selection of a resident group or affiliate and the group's ability to act as a PHA partner.

15.5 CONFLICT OF INTEREST CONSIDERATIONS FOR JOINT VENTURES, SUBSIDIARIES, & AFFILIATES

Federal, and often State and local procurement laws, contain various conflict of interest provisions barring PHAs from obtaining supplies and services from persons or entities with certain conflicts.

- A. In addition, the PHA, recipients, and subrecipients must follow the conflict-of-interest provisions of 2 CFR 200.318(c) if Federal grant funds are involved.
- B. In addition to Federal conflict-of-interest provisions in the public housing ACC and in 2 CFR 200.318(c), all joint venture partners and the joint venture as a whole must comply with State and local procurement and conflict of interest requirements in conducting activities to acquire supplies and services. A person who is a member of both a PHA's Board of Commissioners and another entity's governing board may not participate in actions by the PHA Board that are incidental agreements with the entity and may present a conflict of interest, real or apparent.
- C. Disclosures of conflict must be made to HUD and waivers of conflict under the public housing ACC and exceptions under 2 CFR 200.318(c) must be submitted to the HUD field offices for approval by HUD Headquarters if the field office recommends approval. HUD Headquarters will determine if good cause exists for approving a waiver under the public housing ACC or an exception under 2 CFR 200.318(c).
- D. Exceptions (24 CFR 943.150): If the joint venture partner is an affiliate or identity-of-interest party of the PHA, it is subject to the requirements of 2 CFR Part 200. HUD may, on a case-by-case basis, exempt such a joint venture partner from the need to comply with requirements under 2 CFR Part 200 if HUD determines that the joint venture has developed an acceptable alternative procurement plan. For purposes of part 943, identity-of-interest party means a party that is wholly owned or controlled by, or that is otherwise affiliated with the partner or the PHA. The PHA may use an independent organization experienced in cost valuation to determine the cost reasonableness of the proposed contracts.

- E. Contracting with identity-of-interest parties. A joint venture partner may contract with an identity-of-interest party for goods or services, or a party specified in the selected bidder's response to a RFP or RFQ (as applicable), without the need for further procurement if:
 - 1) The PHA can demonstrate that its original competitive selection of the partner clearly anticipated the later provision of such goods or services;
 - 2) Compensation of all identity-of-interest parties is structured to ensure there is no duplication of profit or expenses; and
 - 3) The PHA can demonstrate that its selection is reasonable based upon prevailing market costs and standards, and that the quality and timeliness of the goods or services is comparable to that available in the open market.
- F. The ability of a PHA Board to act at all in these cases will be determined by whether a quorum of Board members is left after the abstentions of common board members who have conflicts.

15.7 CONTRACTING WITH PHA SUBSIDIARIES, AFFILIATES, & JOINT VENTURE PARTNERS

A PHA may, in connection with public housing, contract with a joint venture partner or affiliate to perform: (1) administrative or maintenance services, (2) the provision of social and supportive services, or (3) other services only after compliance with 2 CFR 200.317-327 (i.e., full and open competition).

15.8 CONSORTIA


The 1998 Quality Housing and Work Responsibility Act (QHWRA) created a new Section 13 of the Housing Act of 1937 that authorizes PHAs to form a special type of consortium, called a Section 13 Consortium. Regulations on Consortia can be found at 24 CFR Part 943, Subpart B.

- A. Under a Section 13 Consortium, participating PHAs enter into a consortium agreement, submit joint PHA Plans to HUD, and may combine all or part of their funding and program administration.
- B. Although PHAs do not need to comply with 2 CFR 200.317-327 to enter into consortia, the consortium itself must comply.

15.9 CONSIDERATIONS

A PHA should consider several factors before deciding to participate in a particular type of operating organization, including:

- A. The complexity of the program(s) to be managed and administered;
- B. Technical capability of staff;
- C. PHA financial strength;
- D. PHA willingness to assume financial risk;

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- E. PHA statutory and contractual powers;
 - F. Identity-of-interest and conflict of interest issues; and
 - G. State law. PHAs are typically created through State-enabling legislation and governed by State statutes. As a result, contractual powers may vary significantly. For this reason, PHAs should have legal counsel investigate the specific limitations, liabilities, and authority available under State law before entering into any cooperative business relationship.

CHAPTER 16 – EMPLOYMENT & TRAINING OPPORTUNITIES & CONTRACTING WITH RESIDENTS, RESIDENT-OWNED, SMALL, MINORITY, & OTHER DISADVANTAGED BUSINESSES

The purpose of Section 3 is to ensure that, to its best efforts, employment, training, and business opportunities created by HUD financial assistance be directed to low- and very-low income persons, particularly those who are recipients of government assistance for housing or residents of the community in which the Federal assistance is spent. Efforts to promote Section 3 objectives must be consistent with existing Federal, State, and local laws and regulations.

16.1 GENERAL

HUD strongly supports a policy of providing training and employment opportunities to residents and contracting with residents and resident-owned businesses, including RMCs, whenever possible. In addition, HUD encourages PHAs to establish goals for contract awards to small and minority-owned businesses and minority business enterprises (MBEs), women's business enterprises (WBEs), and businesses in labor surplus areas.



16.2 SECTION 3 OF THE HOUSING & URBAN DEVELOPMENT ACT OF 1968 (24 CFR 75)

- A. **Overview.** The purpose of Section 3 is to ensure that, to the greatest extent feasible, employment, training, and business opportunities created by HUD financial assistance be directed to low- and very-low income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low- and very low-income persons, or residents of the community in which the Federal assistance is spent. Efforts to promote Section 3 objectives must be consistent with existing Federal, State, and local laws and regulations.

- B. **Covered Programs.** Section 3 requirements apply to training, employment, contracting, and other economic opportunities arising in connection with the expenditure of public housing assistance for public housing development, operations, and Capital Fund programs. In addition, certain Notification of Funding Opportunity (NOFO) and grant agreements governing assistance to PHAs may contain Section 3 requirements.
- C. **Covered Contract.** Section 3 covers contracts for activities that are funded by Section 3-covered assistance and does not apply to material supply contracts. If the contract includes installation of purchased equipment (supplies and materials), the contract would be covered by Section 3.
- D. **Mandatory Section 3 Contract Clause.** The mandatory Section 3 contract clause can be found at 24 CFR 75.17, which applies to all contracts covered by Section 3. Covered contracts described at 24 CFR 75.3(b) include developments, operating, and modernization assistance. This clause is included in Forms HUD-5370, HUD-5370C, and HUD-5370-EZ.
- E. **Annual Report.** Pursuant to 24 CFR 75.15(a), PHAs must report the total number of labor hours worked, the total number of labor hours worked by Section 3 workers, and the total number of hours worked by Targeted Section 3 workers. Additional reporting is required by 24 CFR 75.15(b) if the labor benchmarks are not met. Small PHAs may elect to use the optional reporting allowed by 24 CFR 75.15(d).

16.3 RESIDENT-OWNED BUSINESSES

- A. A resident-owned business is any business concern (as defined in Chapter 1) that is owned and controlled by public housing residents.
- B. HUD strongly encourages PHAs to contract with resident-owned businesses to its best efforts.
- C. The regulation at 24 CFR 963.12 allows PHAs to use an alternative procurement process when contracting with businesses owned in substantial part by public housing residents (resident-owned businesses) for public housing services, supplies, or construction. The alternative procurement process must comply with procedures and requirements as set forth in HUD's procurement regulations at 2 CFR 200.317-327, except that solicitations are limited to resident-owned businesses. Use of this alternative procurement process is not a requirement. The alternative procurement process under 24 CFR Part 963 is as follows:
 - 1) It is recommended that the PHA prepares an ICE for the procurement.
 - 2) The PHA selects the appropriate method of procurement (simplified acquisition, sealed bidding, competitive proposals, or non-competitive proposals).
 - 3) The PHA solicits a bid, proposal, or offer from one or more resident-owned businesses.
 - 4) The PHA receives offer(s) from one or more resident-owned businesses and ensures that:
 - a. The offeror has submitted the required certification described in 24 CFR 963.10(d) regarding previous contracts received under the alternative procurement process and the total amount of such previous contracts is less than \$1,000,000;
 - b. The PHA performs a cost or price analysis of the offer(s) received and determines that the price is reasonable, i.e., the price that normally would be paid for comparable supplies, services, or construction in the project area;

- c. The PHA makes an award to the responsive and responsible bidder/offeror/respondent whose bid/offer/proposal is most advantageous overall to the PHA, consistent with the evaluation factors stated in the solicitation. The resident-owned business must be capable of performing satisfactorily; and
- d. The PHA documents the procurement file and complies with all other procurement requirements of 2 CFR 200.317-327, including the requirement for economy and efficiency.

16.4 CONTRACTING WITH A RESIDENT MANAGEMENT CORPORATION (RMC)

- A. A PHA may enter into a contract with an RMC to provide property management under 24 CFR Part 964, Tenant Participation and Tenant Opportunities in Public Housing. As with any other property management contract, the management agreement must specify the functions for which the RMC will be responsible.
- B. The property management contract between the PHA and the RMC is administered as any other contract for services and is subject to any collective bargaining agreement provisions. However, the requirements for competitive procurement and prior written contract approval by HUD, where applicable (see Chapter 12), do not apply to the decision of a PHA to contract with an RMC for property management.
- C. For the PHA to make a single source award to an RMC, certain conditions must be met that differentiate an RMC from a resident-owned business. They are:
 - 1) The duly elected resident council or councils of the development(s) and a majority of the residents must officially approve the RMC;
 - 2) If no resident council exists, a majority of the residents of the development must approve the RMC;
 - 3) The RMC's voting members must be 18 years of age, or heads of households (of any age) whose name appears on the lease of the development to be represented by the RMC;
 - 4) The RMC must be a validly incorporated nonprofit organization; and
 - 5) The RMC must be governed by an elected Board of Directors and include representatives from each participating resident council. It must have bylaws stating qualifications of officers, frequency of elections, and procedures for recall. Elections must be held at least every three years.
- D. Before making a single source award, the PHA must ensure that the organization meets all criteria to qualify as an RMC, that the RMC can demonstrate that it can perform the proposed work, and that the price is reasonable.
- E. The RMC is obligated to provide fidelity bond coverage and insurance or equal protection to the PHA and HUD against loss, theft, embezzlement, or fraudulent acts by the RMC or its employees.

- F. In performing services, the RMC must comply with the requirements of 2 CFR Part 200. The RMC must also be audited each year by a licensed CPA and submit the audit report to HUD and the PHA within 30 days of issuance.

16.5 ASSISTANCE TO SMALL AND OTHER DISADVANTAGED BUSINESSES

- A. **Required Efforts.** Consistent with Executive Orders 11625, 12138, and 12432, the PHA shall make every feasible effort to ensure that small businesses MBEs, WBEs, and labor surplus area businesses participate in PHA contracting. Suggested steps are included in the sample procurement policy in Appendix 1.
- B. **Goals.** PHAs are encouraged to establish goals by which they can measure the effectiveness of their efforts in implementing programs in support of Section 3 and contracting with disadvantaged firms. It is important to ensure that the means used to establish these goals do not have the effect of limiting competition and should not be used as mandatory set-aside or quota, except as may otherwise be expressly authorized in regulation or statute. Some localities have adopted minority contracting set-aside policies or geographic limitations, which may conflict with Federal requirements for full and open competition.
- C. When developing an outreach program for small, WBE, MBE, or labor surplus area, or Section 3 businesses, consider how to ensure that the program has the effect of enhancing competition by increasing the number of potential bidders and contractors capable of competing effectively for work generated by the PHA. Among the steps that have proved effective in some PHAs are:
 - 1) Study the existing barriers facing low-income persons and disadvantaged businesses;
 - 2) Examine PHA policies and procedures that may contribute to these barriers and determine how to improve those policies and procedures;
 - 3) Target participants in a PHA's workforce development program that may also include HUD-funded grants, e.g., Family Self-Sufficiency, Jobs Plus, etc.
 - 4) Communicate directly with disadvantaged firms and resident-owned businesses about contracting opportunities, the standards the PHA requires for quality work at a reasonable cost, and how to succeed in bidding for PHA work;
 - 5) Maintain a list of disadvantaged and resident-owned firms and notify them of planned procurement activities;
 - 6) Establish partnerships with other community agencies, Federal, State and local agencies, and educational institutions. Many have as their mission the fostering of job creation, training, and business development; and
 - 7) Consider partnering in a consortium or interagency agreement with other PHAs or units of local government to enhance capacity to achieve Section 3 and disadvantaged contracting goals.
 - 8) Remember that the best programs will serve the needs of the PHA, assist resident-owned businesses and low-income persons, and promote a more competitive environment. A list is provided in Appendix 16 that includes sources of information on working with resident-owned businesses.

CHAPTER 17 – PUBLIC/PRIVATE PARTNERSHIPS & MIXED-FINANCE DEVELOPMENT

17.1 GENERAL

This chapter discusses the special provisions associated with selecting Choice Neighborhood mixed-financed partners and, once selected, the procurement rules that apply to these different partners, including the PHA.



17.2 APPLICATION

- A. Unless otherwise indicated in this Chapter, OMB procurement requirements found at 2 CFR 200.317-327 apply to HOPE VI grants (no longer being awarded by HUD and only remaining funds under previous HOPE VI grants are available) and mixed-finance procurement activity whenever HUD or other Federal funds are used in either the development or operations of the public housing project.
- B. If public and private funds are comingled, 2 CFR 200.317-327 applies.
- C. 2 CFR 200.317-327 does not apply when the PHA is not spending HUD or other Federal funds.

17.3 DEFINITIONS

The following terms, as used in this chapter, have the following definitions:

- A. **Community and Supportive Services (CSS).** The portion of a HOPE VI revitalization plan that addresses the service needs of residents of the severely distressed public housing including activities undertaken by the PHA, community partners, and subgrantees. Under the terms and conditions of a HOPE VI grant, PHAs are obligated to provide (either directly or through partnership and/or contractors) a range of services designed to help HOPE VI residents and residents relocated from the distressed site make effective progress toward self-sufficiency.
- B. **CSS Partner.** A community entity or social service provider offering supportive services to residents of a HOPE VI site or relocated residents as part of the overall implementation of the HOPE VI grant. PHAs are encouraged to form CSS partnerships during the grant application development process.

When specific nonprofit service providers are named as CSS partners in the grant application, they may qualify as subgrantees rather than contractors. For-profit providers or entities selected for CSS roles after grant award must generally be competitively procured.

- C. **Development Partner.** A for-profit or nonprofit partner of the PHA or a development affiliate of the PHA, carrying out the physical revitalization of a mixed-finance project site and bearing financial risk. A Development Partner is an entity with whom the PHA enters into a partnership or other contractual arrangement to provide for the mixed-finance development of public housing units. The Development Partner has primary responsibility with the PHA for the development of the housing units and/or non-residential structures under the terms of the approved mixed-finance proposal. The Development Partner other than a PHA Instrumentality (such as a PHA affiliate) must also be procured in accordance with 2 CFR 200.317-327, with the exception in 24 CFR 905.604(h)(1).
- D. **Instrumentality.** An entity related to the PHA whose assets, operations, and management are legally and effectively controlled by the PHA, and through which PHA functions or policies are implemented, and which utilizes public housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. An instrumentality assumes the role of the PHA, and is the PHA under the Public Housing Requirements, for purposes of implementing public housing development activities and programs, and must abide by the Public Housing Requirements. Instrumentalities must be authorized to act for and to assume such responsibilities. For purposes of development, ownership of public housing units by an instrumentality would be considered mixed-finance development (see 24 CFR 905.604(b)(3)).
- E. **Affiliate.** An entity, other than an Instrumentality, formed by the PHA under State law in which a PHA has a financial or ownership interest or participates in their governance. The PHA as an institution has some measure of control over the assets, operations, or management of the Affiliate, but such control does not rise to the level of control to qualify the entity as an Instrumentality. In addition, for the purpose of this notice, the definition of Affiliates includes only those entities that use public housing funds to carry out public housing development functions of the PHA. Except as specified in Notice PIH 2007-15, an Affiliate is treated like an unrelated third-party contractor (see 24 CFR 905.604(b)(4)).
- F. **Mixed-Finance.** The development (through new construction or acquisition, with or without rehabilitation) or modernization of public housing, using public housing, nonpublic housing, or a combination of public housing and nonpublic housing funds, where the public housing units are owned in whole or in part by an entity other than the PHA. A mixed-finance development may include 100 percent public housing (if there is an Owner Entity other than the PHA) or a mixture of public housing and nonpublic housing units (see 24 CFR 905.604(b)(1)).
- G. **NOFO.** The notification of funding availability that invites applications from PHAs for a grant and describes the conditions for grant award in any given grant cycle (see 2 CFR 200.204 and 205, and Appendix 1).

H. Owner Entity. An entity that owns public housing units. In mixed-finance development, the Owner Entity may be the PHA, an entity in which the PHA owns a partial interest, or an entity in which the PHA has no ownership interest. The Owner Entity is subject to the applicable requirements of 24 CFR Part 905, Subpart A (24 CFR 905.108).

I. Operating Subsidy-Only Projects. The development of public housing replacement units financed without the use of HUD public housing capital assistance or HOPE VI funds, but for which HUD agrees to provide operating subsidies under Section 9(e) of the Housing Act. The PHA must procure developers and/or owners of an Operating Subsidy-Only Project using the competitive procurement process required by 24 CFR 905.316 and 2 CFR 200.317-327. For additional information, refer to 24 CFR 905.604(j).

J. Program Manager. An entity a PHA procures in accordance with 2 CFR 200.317-327 to represent its interests and to assume responsibility for coordinating all participants including the PHA, HUD, third party consultants, and financing sources. A program manager may also assist the PHA in its negotiations with a developer.

K. Subgrantee. A nonprofit entity, acting as a CSS provider, named in a HOPE VI grant application, playing an integral role in grant implementation and not procured. A subgrantee may also be a governmental entity that does development work on behalf of the PHA.

17.4 SELECTION OF DEVELOPER/DEVELOPMENT PARTNER

- A. HUD permits the QBS method of procurement to select a development partner, under an exception that parallels the selection of an A/E and where price is negotiated with the highest-ranked offeror based on responses to an RFQ. Requirements and guidance governing the selection of a development partner (or master developer) can be found in 24 CFR 905.604(h)(1) of the Capital Fund rule covering mixed finance development.
- B. All procurement transactions must be conducted in a manner that provides full and open competition.
- C. A cost or price analysis must be completed for all procurements, prior to the submission of proposals to determine an estimated value for the requested services. An explanation of Cost and Price analysis is found in Chapter 10.
- D. The QBS method is not permitted for the procurement of Choice Neighborhoods Program Managers, Mixed-Finance Program Managers, and legal services.

17.5 HUD REVIEW OF HOPE VI PROCUREMENT ACTIONS

Except where old grant agreements specifically require HUD approval, HUD does not approve procurement actions for the HOPE VI program. Each grantee should consult their individual grant agreement.

17.6 PROCUREMENT REQUIREMENTS OF DEVELOPER

The developer must be selected in accordance with 2 CFR 200 and allowable exceptions in 24 CFR 905.604(h). Actions that are considered exercising significant functions are:

- 1) When a PHA or its PHA instrumentality is acting as the sole or managing general partner in the owner entity.
 - 2) When a PHA or PHA instrumentality is acting as developer.
- A. The following are examples of actions taken by a PHA or its PHA instrumentality that are not considered significant functions:
- 1) Monitoring units receiving operating subsidy to ensure compliance with various regulations.
 - 2) Coordinating communications with agencies regarding project financing and operations.
 - 3) Providing CSS services.
 - 4) Attending construction meetings, reviewing and approving draws.
 - 5) Maintaining the waiting list.
 - 6) Reviewing and approving operating and capital budgets.
- B. As private entities, developers, procured by a PHA in accordance with 2 CFR 200.317-327 and 24 CFR 905.600, are not required to comply with 2 CFR 200.317-327 in selecting their subcontractors (see also paragraph 17.7.B.2 and 24 CFR 905.316).

17.7 OTHER REQUIRED EFFORTS

The complex nature of public/private partnerships and mixed-finance development require that the PHA and its partners adhere to certain provisions to avoid even the appearance of impropriety. Important provisions include, but are not limited to, the following:

- A. **Conflict of Interest Provisions.** Federal and often State and local statutes and regulations contain conflict of interest provisions that prohibit the PHA from obtaining supplies and services from persons or entities with certain conflicts. These prohibitions are included in NOFOs; ACCs; the Choice Neighborhoods Grant Agreement; 2 CFR Part 200; 24 CFR Part 905, Subpart F; as well as at the State and local level. The HOPE VI Grant Agreement includes requirements for identifying conflicts and identity of interest. The following is a list of general requirements. PHAs should consult the applicable Choice Neighborhoods Grant Agreement for specific language relating to conflicts of interest.
- 1) In addition to the conflict of interest requirements in 2 CFR Part 200, no person who is an employee, agent, consultant (excluding an independent contractor), officer, or elected or appointed official of the grantee who participates in any facet of the decision-making process may obtain a financial interest or benefit from the procurement. This limitation continues for one year after the procurement. Relatives and family members of the decision-makers are also excluded from benefiting from the procurement.
 - 2) In addition to the conflict of interest requirements in 2 CFR Part 200, no person who is an employee, agent, officer, or elected or appointed official of the grantee and who exercises or

has exercised any functions or responsibilities with respect to activities assisted under the Choice Neighborhoods Grant, or who is in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from the activity, or have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds thereunder, either for himself or herself or for those with whom he or she has family or business ties, during his or her tenure or for one year thereafter.

- 3) The Department may grant an exception to the exclusion in paragraph 17.7A.1, above, on a case-by-case basis. However, the PHA must provide a disclosure of the nature of the conflict, accompanied by: 1) an assurance that there has been public disclosure of the conflict, 2) a description of how the public disclosure was made, and 3) an opinion of the grantee's attorney that the interest for which the exception is sought does not violate State or local laws.

B. Identity of Interest.

- 1) PHAs must ensure that all partners participating in the development, regardless of any identity of interest, have no conflict of interest (see 24 CFR 905.604(h)(2)(i)).
- 2) If a partner and/or owner entity (entity in which it has an identity of interest) wants to serve as the general contractor, it may award itself the construction contract only if it can demonstrate that its bid is the lowest bid submitted in response to a public request for bids and the PHA must seek HUD approval through the development proposal approval process.

C. Required Contract Clauses. 2 CFR Appendix II to Part 200 lists 12 required clauses in a contract.

As some of these clauses may directly affect negotiations with partners, these clauses must be included in the solicitation documents so that all potential offerors are aware of them.

17.8 PROCUREMENT BY PARTIES OTHER THAN THE PHA OR THE DEVELOPER

A Choice Neighborhoods or mixed-finance project typically involves many parties other than the PHA, some of whom will be procuring supplies and services in connection with grant implementation. The following guidelines apply to such PHA partners:

- A. **Private Property Managers.** If a PHA has procured a developer in accordance with 2 CFR 200.317-327, the developer does not need to comply with 2 CFR 200.317-327 in selecting a private property manager. Further, in this case, the private property manager does not need to comply with 2 CFR 200.317-327 when selecting subcontractors or procuring supplies and services. However, if the PHA is the developer, it must comply with 2 CFR 200.317-327 in selecting private property managers, unless the property manager is the PHA or its instrumentality;
- B. **Program Managers (PMs).** Although Program Managers are private entities, their role in a Choice Neighborhoods or a mixed-finance development places them in the role of agent for or adjunct staff to the PHA. If the Program Manager is subcontracting out a portion of its duties or entering into direct contracts to accomplish tasks it is required to perform under its contract with the PHA (and provided such duties and tasks are within the scope of tasks the Program Manager was procured to perform), the PM is not bound by the procurement requirements of 2 CFR 200.317-327. However,

when the Program Manager is procuring a provider for the PHA, i.e., by developing an RFP for supplies or services that the PHA will purchase, then 2 CFR 200.317-326 applies. Even if the Program Manager enters into such a contract, but the PHA retains involvement and control over all the decisions and other aspects of the contract (beyond approval or veto over the actions of the PM), HUD will most likely consider such a procurement to be subject to 2 CFR 200.317-326;

- C. **Resident Groups.** Nonprofit resident groups receiving HUD grants are subject to 2 CFR Part 200; and
- D. **Resident-Owned Businesses.** Resident-owned businesses are governed by 24 CFR Part 963 Subpart B, which allows the PHA to limit competition on certain procurement actions to resident owned businesses. Additional guidance on contracting with resident-owned businesses may be found in Chapter 16 of this Handbook, unless the property manager is the PHA or its instrumentality.

17.9 RESIDENT INVOLVEMENT

- A. RMCs, as distinguished from Resident-Owned Businesses, may qualify for a single-source award for property management contracts only, provided that the RMC is duly constituted and qualified as such. See Chapter 16 for guidance.
- B. As part of HUD's guidance on resident and community involvement in Choice Neighborhoods redevelopment projects and mixed-finance developments, HUD has encouraged the inclusion of residents on selection panels provided that the PHA constitutes the majority membership on the panels and the residents have been trained in the procurement process.
 - 1) Resident members of, or advisors to, selection panels are acting as agents of the PHA and therefore are subject to the conflict-of-interest provisions of 2 CFR 200.318(c)(1). PHAs are advised to seek HUD guidance on this issue before creating a selection panel.
 - 2) Localities are frequently involved as key community partners with PHAs in carrying out Choice Neighborhoods and mixed-finance projects, particularly when the local planning or redevelopment agency has experience in the management of public-private ventures, negotiating with developers, and managing large scale development projects. PHAs often include local government staff on selection panels. In these cases, care should be taken to ensure that PHA representation constitutes the majority of the panel membership and that all panel members must comply with conflict-of-interest requirements.
- C. Despite the relative experience or expertise of local government or redevelopment agency staff, the PHA, as the grantee, is obligated to carry out its own procurement and must not delegate that responsibility to another agency.

17.10 PROCUREMENT BY THE PHA AS DEVELOPER WITH OWNERSHIP INTEREST IN THE DEVELOPMENT OR OWNERSHIP ENTITY

Generally, whenever the PHA or Instrumentality is acting as the development entity or performs a significant role in the actions and decision-making of such an entity (as through a partnership with a private entity), the requirements of 2 CFR 200.317-327 apply to procurement. HUD may make a case-by-case exception if such an entity presents an acceptable alternative procurement plan that adequately protects the public interest.

PHA Procurement of Instrumentalities – A PHA’s procurement with its instrumentality is not subject to 2 CFR Part 200. However, the instrumentality must procure other members of the operational or development team, subject to the same procurement rules as the PHA (i.e., 2 CFR Part 200).

17.11 ISSUES ARISING IN CSS PROCUREMENT ACTIVITY

- A. A PHA must comply with 2 CFR 200.317-327 when selecting an administrator for its community supportive services program.
- B. Social service providers that are nonprofit or governmental agencies may be subgrantees if included in the grant application. Such subgrantees do not have to be competitively procured. However, pursuant to the Choice Neighborhoods Grant Agreement, a PHA must gain HUD approval of the subgrantee agreement with a social service provider.
- C. Choice Neighborhoods Administrative Requirements for Contractors and Subcontractors and Related Contracts**
 - a. **Grantee Responsibilities Regarding Contractors and Subcontractors.** Grantees that are subject to 2 CFR Part 200 and will be responsible for the following:
 - i. Obtaining the services of a for-profit entity through a competitive procurement under 2 CFR Part 200. However, if the grantee can demonstrate to HUD that the services to be provided by the for-profit entity can be obtained only from that one source, the grantee may request HUD approval to select the entity under a non-competitive procurement in accordance with 2 CFR 200.320(c).
 - ii. Obtaining consultant services provided under an independent contractor relationship pursuant to 2 CFR Part 200.
- D. Choice Neighborhood Administrative Requirements for Subrecipients and Related Agreements**
 - i. PHA, local government, Indian tribe, and nonprofit subrecipients are subject to the requirements of 2 CFR Part 200.
 - ii. For-profit subrecipients are subject to the requirements of 2 CFR Part 200, Subparts A-E. The Grantee is responsible for establishing audit requirements consistent with 2 CFR 200.501(h).

- iii. Suspension and Debarment. Subrecipients are subject to the requirements of 2 CFR 200.214.
 - iv. Grantee Responsibilities Regarding Subrecipients. Grantees will be responsible for:
 - a. ensuring that subrecipients are aware of the requirements imposed upon them by Federal statutes, regulations, and the Grant Agreement;
 - b. ensuring that all subrecipient agreements include any clauses required by Federal statutes and their implementing regulations and executive orders; and
 - c. monitoring subrecipients' performance to ensure compliance with the Grant Agreement.
- E. In each Choice Neighborhoods grant year, there have been changes in the CSS portion of the Choice Neighborhoods program and applicable procurement requirements. These changes appear in the NOFO and the Choice Neighborhoods Grant Agreement for the applicable grant year. PHAs should consult the NOFO and the Choice Neighborhoods Grant Agreement for requirements that may pertain to that specific year's grant awards.

17.12 CONTRACTING WITH SUBGRANTEES

A PHA may decide to use sub-grantees to complete elements of the CSS aspects of the project.

- A. The PHA is responsible for ensuring that subgrantees are aware of the requirements imposed on them by Federal statutes and regulations as well as any requirements of Grant Agreements.
- B. The PHA must ensure that subgrants include any clauses required by Federal statutes and executive orders and their implementing regulations.
- C. Subgrantees are considered to be acting as the PHA. Subgrantees who procure supplies or services paid for by Choice Neighborhoods or other grant funds will be subject to 2 CFR Part 200 if the subgrantee is a State or local governmental agency, a nonprofit subgrantee, or institutions of higher education.
- D. The PHA will monitor compliance by subgrantees.

17.13 MANDATORY CONTRACT CLAUSES

Contracts with developers and others must contain the applicable requirements of 2 CFR Appendix II to Part 200, the Choice Neighborhoods Grant Agreement, the ACC, and other contract provisions that may be applicable to the Choice Neighborhoods program. The mandatory Section 3 contract clause can be found at 24 CFR 75.17, which applies to all contracts covered by Section 3. Forms HUD-5370, HUD-5370C and 5370-EZ must be used where applicable.

17.14 FEES AND GUARANTEES

- A. **Guarantees.** PHAs must not provide completion, operating deficit, or other guarantees to investors from funds received by the PHA under the public housing development program, the Capital Fund

program, the Operating Fund, operating receipts of the PHA derived from public housing property (which means property which is owned by the PHA and must be subject to a Declaration of Trust/Declaration of Restrictive Covenants (DORC) in favor of HUD (Form HUD-52190), including any operating reserve of the PHA funded from the Operating Fund or operating receipts, if any, derived from public housing property). The PHA needs to have a non-HUD source to pay guarantees.

- B. **Developer Fees.** HUD has developed cost control and safe harbor guidelines for acceptable development fees in Choice Neighborhoods and mixed-finance projects. HUD reserves the right to review and reject a negotiated fee if it does not meet the cost control guidelines.
- C. **Developer Fees to PHAs.** A PHA acting as developer or co-developer of a Choice Neighborhoods project may be entitled to a fee, provided the fee is returned to the project. Only in cases where the project or subsequent phases of the project cannot benefit from the reinvested developer fee, may the PHA use the developer fee for other low-income housing purposes. The PHA must disclose the fee and its use in the Program Income Certification described in Exhibit H of the Mixed-Finance ACC Amendment or Choice Neighborhoods Program Income Certification.

CHAPTER 18 – UTILITY PURCHASING, ENERGY CONSERVATION LOANS, & ENERGY PERFORMANCE CONTRACTING

The PHA receives a subsidy add-on under 24 CFR 990.185 to cover the cost of amortizing the improvement loan during the term of the contract.

18.1 GENERAL



This chapter discusses the contracting methods associated with energy conservation loans (subsidy add-on), energy performance contracting and utility purchasing. For additional information related to energy conservation opportunities, project planning, monitoring, performance contracting models, financing, and other related energy subjects, refer to the resources section cited in 18.6.

18.2 ENERGY CONSERVATION LOANS (OPERATING SUBSIDY ADD -ON)

Under this financing incentive, a PHA obtains a loan to finance energy improvements. The PHA receives a subsidy add-on under 24 CFR 990.185 to cover the cost of amortizing the improvement loan during the term of the contract. The add-on must not exceed the lesser of AOS project Costs or AOS Cost savings generated each year by the energy conservation measure(s) installed under this contract.

Before initiating an energy conservation loan, a PHA must procure a Comprehensive Energy Analysis (CEA) from a qualified vendor and must have the CEA, along with the list of identified improvements, reviewed and approved by HUD. HUD must also review and approve the loan document. The improvements are procured in the same manner as any other purchases addressed in this Handbook with the exception for

extensions in 24 CFR 990.185(a) to EPC contracts without the re-procurement of energy procurement contractors.

18.3 ENERGY PERFORMANCE CONTRACTING (FROZEN ROLLING BASE INCENTIVE)

- A. **General.** Energy performance contracting allows the PHA to qualify for the incentive to freeze the utility rolling base (see 24 CFR 990.185 and Notice PIH 2024-27). A PHA's utility expense level (UEL) will be calculated at the pre-retrofit consumption level. The PHA keeps 100 percent of the savings that result from the decreased consumption due to the energy efficiency measures installed, of which 75 percent must be used to pay off the debt and related project costs.
- B. **Third-Party Energy Performance Contracts (EPCs).** With a third-party EPC, the energy performance contractor must be procured in a manner that provides full and open competition consistent with the instructions in this handbook and 2 CFR 200.317-327 with the term and re-procurement exception in 24 CFR 990.185(a). Typically, this means procurement by competitive proposals. For third-party EPCs, HUD approval is required of:
- 1) The CEA, which the PHA must procure from a qualified vendor.
 - 2) The RFP for the energy contractor, prior to advertisement. Approval will be based upon a determination by HUD that payments under the contract can be funded from the reasonably anticipated energy cost savings.
 - 3) The final energy performance contract negotiated between the PHA and the energy performance contractor.
- C. **Self-Managed Energy Performance Contracts.** PHAs may, at their discretion, seek to self-manage an energy performance contract. The energy improvements are procured in the same manner as any other purchases addressed in this handbook. PHAs must be designated Standard Performers or High Performers under the Public Housing Assessment System (PHAS) to complete energy projects without an energy services company. HUD will consider requests on a case-by-case basis from PHAs designated as Troubled under PHAS when the PHA is able to show it has the appropriate capabilities to successfully complete the project. For self-managed EPCs, HUD approval must be secured for the following:
- 1) In lieu of the RFP commonly used with third-party EPCs, the PHA must provide a detailed energy project plan. The project plan will include an assessment of its facility needs; PHA statement of capabilities and internal project processes; an assessment of the agency's energy opportunities, including capital costs and estimated savings; financial cash flow projections; a project commissioning and preventative maintenance plan; and a Measurement and Verification (M&V) plan. PHAs must have on their team a licensed (bonded) professional engineer familiar with performance contracting, commissioning, M&V standards, State, and local codes.
 - 2) An initial plan must be submitted to the HUD field office for review and approval to proceed. After a detailed engineering study is completed, the PHA will submit its detailed project plan for field office review and approval. The detailed study will be based on actual quotes for

construction, finance, maintenance, and other costs. The PHA must also identify how it will complete design and construction and integrate the energy project with its ongoing modernization program. Included in its energy project plan the PHA will include a detailed description of its construction management practices and associated financial controls. The description should include protocols for design, construction inspections, construction draws, and requisition approvals.

18.4 UTILITY PURCHASING

Deregulation and restructuring in the utility industry allows utility providers to operate like other open markets, with greater competition and choices. These changes offer utility consumers such as PHAs an opportunity to achieve lower utility costs by purchasing energy directly from the utility providers at lower rates based on a direct rate reduction or from new consumer rate strategies. Where deregulation has occurred and there are multiple providers, PHAs must competitively procure utilities in accordance with 2 CFR 200.317-327.

Alternately, where deregulation has not occurred (a publicly regulated rate environment where there is one utility provider for gas, electric, fuel, oil, and/or water), the PHA is not required to competitively procure utilities. Further, unlike other single source procurements, the PHA does not need to justify the reasonableness of the price charged or require HUD approval.

18.5 RATE REDUCTION INCENTIVE

The Rate Reduction Incentive (RRI) is a financial incentive for PHAs that pursue special and significant efforts beyond what is required by statute and/or regulations to reduce their utility rate. The PHA's action must exceed the activities required by statute and/or regulation. Pursuant to HUD regulation 24 CFR 990.185(a), a PHA will be eligible for a rate reduction if a PHA takes action beyond normal public participation in rate-making proceedings, such as wellhead purchase of natural gas, administrative appeals, or legal action to reduce the rate it pays for utilities. Generally, the RRI evenly divides the financial benefit of the lower utility rate between the PHA and HUD (i.e., 50 percent to the PHA and 50 percent to HUD). RRI financial benefits, which are provided through the Public Housing Operating Fund Grant, increase funding eligibility, and thus may be used for any eligible Operating Fund Grant activities allowable under Section 9(e) of the Housing Act.

18.6 POWER PURCHASE AGREEMENTS

Power Purchase Agreements (PPAs) are contracts that are procurement funding tools that allow a third-party to develop and construct a solar power facility which is a proven vehicle to accelerate the development and production of energy from renewable sources and reduce electricity generated from high-emitting fossil fuels. PHAs have used a mixture of finance methods to procure solar energy. PPAs may be executed within an EPC or as a separate agreement under regulatory conditions specified below. Some PHAs are seeking PPAs due to the benefits that intrinsically exist within a PPA: no large upfront capital cost, greenhouse gas emission reduction through using solar power, low or no operations and maintenance

costs, a fixed or known price for electricity for 10-25 years depending on the PPA term, low operational risks, and sometimes increased property value due to solar power production.

Power Purchase Agreements are funding tools that allow a third-party developer to develop and construct a solar power (or other renewable energy) facility either on-site (PPA) or off-site (Virtual PPA or VPPA) of the customer's property. The developer assumes ownership operations and maintenance responsibilities as well as risk for the project. PPAs eliminate the need for large up-front capital investment by the customer(s), permitting the owner to recover the project costs through the term of the PPA/VPPA via fixed or expected electricity rates to the customer(s). If there is excess production (solar energy not used on site) for PPAs and all the offsite production for VPPAs, the electricity is sold to the local utility provider through interconnection to the power grid, the distribution of the solar credit is included in the PPA/VPPA, and the customer receives a solar credit with their utility invoice from their utility provide.

18.7 CONTRACTING CONDITIONS FOR PPAS

- A. **Contracts for PPAs may be executed within an EPC.** The PIH Energy Branch will review when there is an agreement related to an energy performance contract. The energy conservation measures must be financed by an entity other than HUD (that is, a private loan); and the reasonably anticipated energy savings must be sufficient to cover all of the EPC-related debt service that will accrue within 20 years under the contract. Process is subject to EPC Approvals pursuant to Notice PIH 2024-27 or most recent notice.
- B. Contracts shall not exceed a period of five years, including options for renewal or extension.
- C. Contracts, other than energy performance contracts, with terms, plus extensions, that exceed a total of five years are viewed as restrictive of competition and in violation of 2 CFR Part 200 procurement requirements and pursuant to 2 CFR 200.319 (a): "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 the standards of this section and § 200.320."
- D. HUD's field office may approve contracts of more than five years if PHA provides evidence that there is no practical alternative. In such cases, supporting documentation for the evidence (e.g. comparative market options from several solar developer vendors per 2 CFR Part 200) is required showing why no practical alternative exists, how it was determined, and cost analysis to show "cost reasonableness" per 2 CFR 200.404. If a contract exceeds five years, a provision for "termination for convenience" must be included. The provision must explicitly address termination payments, if applicable. For termination payments, the provision must use reasonable cost standards described in 2 CFR 200.404. Termination payments cannot be structured in a way that makes termination uneconomical or serves as a barrier.
- E. Consistent with Section 9(e) of the Housing Act and 24 CFR 990.185, the contract period shall not exceed 20 years.

18.8 ONSITE PRODUCTION

In situations where the solar or renewable energy production facility is built onsite, there are additional considerations:

- A. A request for solar energy producing equipment on public housing property is subject to HUD requirements of the ACC and may be subject to 24 CFR Part 970.

- B. A number of provisions in the Housing Act authorize HUD to restrict the use of real property and authorize the use of deed restrictions to ensure the low-income character of public housing and (see for example Section 6(a), 9(d), and 9(e) of the Housing Act), and to regulate the disposition of public housing property (see Section 18 of the Housing Act). HUD establishes and enforces its right to restrict the property through various means (e.g., the ACC, and the Declaration of Trust (or Restrictive Covenants) (DOT/DORC)). Under the ACC, PHAs are prohibited from disposing or encumbering public housing property without prior written approval from HUD, except for dwelling leases with eligible families for units covered by the ACC and normal uses associated with the operation of the project.

- C. Section 18 of the Housing Act governs the demolition and disposition of public housing property. Disposition means the conveyance or other transfer by the PHA, by sale or other transaction, of any interest in the real estate of a public housing project (see 24 CFR 970.5 for the definition of disposition) and subject to the exceptions stated in 24 CFR 970.3. These exceptions include but are not limited to the following:
 - 1) Leasing of dwelling or non-dwelling space incidental to the normal operation of the project for public housing purposes (see 24 CFR 970.3(b)(4)).
 - 2) Easements, rights-of-ways, and transfers of utility systems incidental to the normal operation of the public housing (see 24 CFR 970.3(b)(7)).
 - 3) Units or land leased for non-dwelling purposes for one year or less (see 24 CFR 970.3(b)(10)).

- D. **Required HUD Approvals.** PHAs are responsible for determining if a third-party agreement is subject to HUD review and, if so, whether such review must be done by HUD's Special Applications Center (SAC) under 24 CFR Part 970 or the local HUD field office under the ACC and Notice PIH 2017-24 or current PIH notice. PHAs analyze the following in making this determination:
 - 1) *PHA Disposition.* Defined by 24 CFR 970.5 as the agreement that conveys or otherwise transfers any interest in real estate of the public housing and does not fall into one of the exceptions in 970.3(b). Dispositions require SAC approval. Even when SAC approval is not required, field office approval may be required such as with third party agreements (e.g., easements) impacting the use of the public housing property (see Notice PIH 2017-24). If SAC approval is not required, the PHA needs to perform the ACC analysis below.
 - 2) *PHA ACC Analysis.* Does the agreement fall into an exception in the ACC? Specifically, is the agreement for "normal uses associated with the operation of the project(s)"? If yes, HUD approval is generally not required and the PHA may enter into the agreement. If no, field office approval is required (see Notice PIH 2017-24).

- E. Below is a list of some of the factors and questions that HUD must consider before approving or recommending approval of third-party agreements and the creation of encumbrances on public housing property.
- 1) *Site or Premises*. Third-party agreements should specify the type of land or structure the tenant may use and how they will access the property. For example, will there be a facility, tower, or solar panels on open land, or equipment on an existing structure? A facility, tower, or solar panels on an otherwise vacant piece of public housing property may prevent future development of the site, and the length of time in which it may be encumbered will determine if it is a disposition. Generally, a lease for a period of more than a year (unless it falls under the 970.3(b)(10) exception) is a disposition. Equipment on the roof may involve a lease for the rooftop, but there will also be an easement or some kind of right-of-way giving the third-party access to the rooftop. Specifying exactly where the tower or other equipment will be and exactly how the third-party may access the premises will prevent the third-party obtaining the right to an entire public housing parcel of land and ensure that the encumbrance is properly identified and limited in scope. The lease should also specify the purpose and type of equipment. For example, is the equipment a cell phone tower, rooftop antennae, or solar panels?
 - 2) *Rent or Proceeds*. HUD generally defers to PHAs to negotiate the rent or proceeds of a third-party agreement. Rent payments will either be Section 18 proceeds or Section 9(k) of the Housing Act nonrental program income. Section 18 proceeds must be used in accordance with 24 CFR 970.19, and non-rental program income must be used in accordance with Section 9(k) of the Housing Act. Furthermore, if the third-party agreement constitutes a Section 18 disposition, then PHAs must be cognizant that Section 18 requires disposition proceeds to be at fair-market value unless there is commensurate public benefit (see 24 CFR 970.19(a)).
 - 3) *Term*. What is the term of the third-party agreement? How are renewals or extensions structured? Typically, third-party agreements involving cell towers, cell antenna, or solar farms will have terms of 5 to 20 years (often in the form of an initial five-year term with one to three renewals at the third-party's option). Thus, most third-party agreements will not be able to fall into the Section 18 disposition exception at 24 CFR 970.3(b)(10) for "[u]nits or land leased for non-dwelling purposes for one year or less." Even a third-party agreement that initially appears to fall into 24 CFR 970.3 (b)(10) may require a Section 18 disposition review if the lease contains automatic renewals at the third-party's option (see the example in Footnote 1, Notice PIH-2017-24). Automatic renewals are particularly problematic if the third-party agreement stems from a procurement because HUD typically considers contracts for more than five years as "anti-competitive," in violation of procurement requirements.
 - 4) *Interference with the Operation of Public Housing*. PHAs are required to operate their public housing programs in compliance with the Housing Act and the public housing ACC. The public housing ACC states that PHAs "shall at all times develop and operate each [public housing] project solely for the purpose of providing decent, safe, and sanitary housing for eligible families in a manner that promotes serviceability, economy, efficiency, and stability of the projects, and the economic and social well-being of the tenants." Thus, third-party agreements cannot make the public housing use secondary to that of the third-party; public housing operations must be paramount. The agreement should not conflict with or impair the operations of the PHA's public housing program. For example, the agreement should address: (1) the temporary relocation of equipment to permit project maintenance and (2) the access a

third party will have to the site or premises (e.g., escorted, pre-approved). Although not a requirement, PHAs should consider including a provision that ensures the agreement will not adversely impact the operation of the public housing property, including the impact on residents (health and safety) and the impact on the physical property (structural integrity) (see Section 6, page 3 of Notice PIH 2017-24).

- 5) *Assignment*. Does the third-party agreement permit assignment? Generally, if the agreement involves a Section 18 disposition of vacant public housing property, HUD does not prohibit assignment because the property is being removed from the PHA's public housing inventory. However, assignment of public housing property could not be entered into unless approved under Section 30 of the Housing Act.
- 6) *Termination*. Can the PHA terminate the third-party agreement for convenience? If so, will the PHA need to pay an early termination fee to the third-party? Generally, if the agreement involves a Section 18 disposition of vacant public housing property, HUD does not dictate termination provisions because the property is being removed from the PHA's public housing inventory. However, if the agreement stems from a competitive procurement process, the agreement must address and provide for a PHA's termination for convenience (see 8B of Appendix II of 2 CFR Part 200 regarding contracts more than \$10,000). If the agreement requires the PHA to pay an early termination fee, the PHA may not use public housing funds (or public housing program income) to pay the fee. If the PHA has plans to redevelop or dispose of the public housing property, it should scrutinize its termination rights under the agreement and plan accordingly.
- 7) *Use of Public Housing Funds*. Public housing funds (Capital and Operating Funds), Section 18 proceeds, and Section 9(k) nonrental program income can only be used for eligible activities as defined in the Housing Act. Thus, no public housing funds, Section 18 proceeds, or Section 9(k) nonrental program income will be expended in connection with a third-party agreement. For example, HUD will not permit a PHA to use public housing funds, Section 18 proceeds, or Section 9(k) nonrental program income to: (1) purchase liability insurance to cover liabilities associated specifically with the agreement; (2) indemnify the third-party (including a pledge with public housing property); (3) provide utilities to the third-party's equipment (including providing equipment lighting); (4) maintain the third-party's equipment; or (5) pay for attorney's fees associated with the agreement. Although not a requirement, PHAs should consider including a conflict clause that states that the third-party agreement does not impose on the PHA any duty, obligation, or requirement which conflicts with statutes, regulations, ACC, and other HUD requirements.
- 8) *Amendments*. Third-party agreements should state when agreement amendments require HUD approval. Generally, if the agreement involves a Section 18 disposition of vacant public housing property, HUD does not require HUD approval of any amendments because the property is being removed from the PHA's public housing inventory. However, if the agreement involves an encumbrance that is less than a Section 18 disposition (e.g., rooftop lease), HUD approval of amendments is required.
- 9) *Subordination*. Third-party agreements should contain a clause that subordinates the agreement to the public housing ACC and the DOT recorded on the affected public housing property. HUD will not consent to subordinating the DOT and will not approve a non-disturbance clause or agreement. If a memorandum of lease is being recorded against the public housing property, a memorandum of termination must be recorded at the end of the

lease. The termination of lease memorandum would, ideally, be held in escrow pending lease termination or expiration. Prior to HUD approval of a third-party agreement, the PHA must provide evidence that there is an effective DOT/DORC recorded on the affected public housing property, that any other agreements are in subordinate position to the DOT/DORC and that the PHAs right to ensure its public housing residents' right to use and quiet enjoyment of the property is preserved.

- F. **SAC Approval.** SAC will be required to approve dispositions as described in 24 CFR Part 970 and PIH notices.

18.9 PROCUREMENT REGULATIONS PERTAINING TO ENERGY CONSERVATION LOANS & ENERGY PERFORMANCE CONTRACTING

Conceptually, both strategies are nothing more than financing methods that result in energy savings over a period. Both operate within the guidelines of all Federal procurement regulations specified elsewhere in this Handbook.

- A. PHAs must adhere to applicable State and local procurement requirements, as well as the PHA's procurement policy. For example, the PHA must include the Form HUD-5370*, General Conditions of Contracts for Construction, with all construction contracts for more than \$350,000 or Form HUD-5370-EZ* for construction contracts between \$2,000 and \$350,000;
- B. PHAs must treat the energy conservation measures as any capital program and follow requirements for Federally funded construction projects;
- C. In capturing the savings, PHAs must conform to the requirements defined in the Operating Fund rule (24 CFR Part 990); and
- D. With respect to third-party EPCs, negotiating terms and conditions can be a crucial component of the procurement process.

18.10 RESOURCES

Additional information and expertise on energy conservation loans, energy performance contracting, and other energy conservation measures can be found at:

A. Relevant Public Housing Notices and Guidebooks

- 1) The Public Housing Energy Branch webpage at: <https://www.hud.gov/helping-americans/public-housing-energy-branch>
- 2) Funding Information is available at:
 - a. Database of State Incentives for Renewables and Efficiency (DSIRE): <https://www.dsireusa.org>
- 3) Guidance on Energy Performance Contracts prepared by HUD 7/11. Notice PIH 2024-27 and Notice PIH 2024-31 provide supplementary guidance on financial incentives to promote energy

conservation and is available at: <https://www.hud.gov/sites/dfiles/OCHCO/documents/2024-27pihn.pdf>

- 4) Any successor or related notices, handbooks, or guidebooks available on HUDClips at: <https://www.hud.gov/hudclips>

- B. **Local HUD.** From the beginning of the planning process, view the local HUD field office as a partner in the process. Involving the HUD field office early and throughout the project should help to obtain a timely review and approval by HUD. HUD is required to approve key documents in the process and will be able to provide guidance proactively to expedite the approval process. The local HUD field office will be able to provide information on other PHAs using performance contracting and sources of technical assistance in the area.
- C. **Consultants.** If no relevant technical expertise exists within the PHA, the PHA should consider engaging the services of a qualified consultant. These fees can be paid from the savings generated or the capital budget. (Note: Such an individual or firm may not later be included, or compete, in a solicitation for the energy performance contract. Other Federal and private energy-conservation programs or local utility providers.
- D. **Energy Branch, Financial Management Division, Office of Public Housing Programs.** For questions regarding utilizing Operating Fund Incentive Programs (Energy Performance Contract (EPC); Utility Partnership Program (UPP); Rate Reduction Incentive (RRI); or Small Rural Frozen Rolling Base (SR-FRB)) contact the Energy Branch at PHFMDEnergyBranch@Hud.gov.
- E.

E. Other PHAs, who have successfully implemented these utility conservation measures.

APPENDIX 1 – SAMPLE PROCUREMENT POLICY

As stated in Chapter 2, Section 2.2, here is a sample of a written procurement policy. PHAs should modify the contents of this policy so that dollar thresholds are consistent with State and local laws.

PROCUREMENT POLICY FOR “ANYTOWN” HOUSING AUTHORITY

This Public Housing Procurement Policy complies with the Public Housing ACC and Section 8 ACC between Anytown Housing Authority (AHA) and the HUD, Federal Regulations at 2 CFR 200.317-326, the procurement standards of the Procurement Handbook for PHAs, HUD Handbook 7460.8, Rev. 3, and applicable State and local laws.

GENERAL PROVISIONS

GENERAL

The AHA shall: provide for a procurement system of quality and integrity; provide for the fair and equitable treatment of all persons or firms involved in purchasing by the AHA; ensure that supplies and services (including construction) are procured efficiently, effectively, and at the most favorable prices available to the AHA; promote competition in contracting; and assure that AHA purchasing actions are in full compliance with applicable Federal standards, HUD regulations, State, and local laws.

APPLICATION

This Procurement Policy applies to all procurement actions of the Authority, regardless of the source of funds, except as noted under “exclusions,” below. However, nothing in this Policy shall prevent the AHA from complying with the terms and conditions of any grant, contract, gift, or bequest that is otherwise consistent with the law. When both HUD and non-Federal grant funds are used for a project, the work to be accomplished with the funds should be separately identified prior to procurement so that appropriate requirements can be applied, if necessary. If it is not possible to separate the funds, HUD procurement regulations shall be applied to the total project. If funds and work can be separated and work can be completed by a new contract, then regulations applicable to the source of funding may be followed.

DEFINITION

The term “procurement,” as used in this Policy, includes the procuring, purchasing, leasing, or renting of: (1) goods, supplies, equipment, and materials; (2) construction and maintenance; (3) consultant services, (4) Architectural and Engineering (A/E) services; (5) social services; and (6) other services.

EXCLUSIONS

This policy does not govern the selection of applicants under the HCV and PBV programs, the selection of projects or proposals to attach vouchers under the PBV program, the execution of HAP contracts under the HCV and PBV programs, or non-program income, e.g., fee-for-service revenue under 24 CFR Part 990. These excluded areas are subject to applicable State and local requirements.

CHANGES IN LAWS AND REGULATIONS

In the event an applicable law or regulation is modified or eliminated, or a new law or regulation is adopted, the revised law or regulation shall, to the extent inconsistent with these policies, automatically supersede these policies.

PUBLIC ACCESS TO PROCUREMENT INFORMATION

Most procurement information that is not proprietary is a matter of public record and shall be available to the public to the extent provided in the (State) Freedom of Information Act.

ETHICS IN PUBLIC CONTRACTING

GENERAL

The AHA hereby establishes this code of conduct regarding procurement issues and actions and shall implement a system of sanctions for violations. This code is consistent with applicable Federal, State, or local law.

CONFLICTS OF INTEREST

In addition to any other applicable conflict of interest requirements, neither the AHA nor any of its contractors or their subcontractors may enter into any contract, subcontract, or arrangement in connection with a project in which any of the following classes of people has an interest, direct or indirect, during his or her tenure or for one year thereafter:

- Any present or former member or officer of the governing body of the AHA or any member of the officer's immediate family. There shall be excepted from this prohibition any present or former tenant commissioner who does not serve on the governing body of a resident corporation and who otherwise does not occupy a policymaking position with the resident corporation, the AHA, or a business entity.
- Any employee of the AHA who formulates policy or who influences decisions with respect to the project(s), or any member of the employee's immediate family, or the employee's partner.
- Any public official, member of the local governing body, State or local legislator, or any member of such individual's immediate family, who exercises functions or responsibilities with respect to the project(s) of the AHA.

Any member of these classes of persons must disclose the member's interest or prospective interest to the AHA. The provisions of this shall not apply to the General Depository Agreement entered into with an institution regulated by a Federal agency, or to utility service for which the rates are fixed or controlled by a State or local agency. Nothing in this section shall prohibit a tenant of the AHA from serving on the governing body of the AHA.

The AHA may not hire an employee in connection with a project if the prospective employee is an immediate family member of any person belonging to one of the following classes:

- Any present or former member or officer of the governing body of the AHA. There shall be excepted from the prohibition any former tenant commissioner who does not serve on the governing body of a resident corporation and who otherwise does not occupy a policymaking position with the AHA.
- Any employee of the AHA who formulates policy or who influences decisions with respect to the project(s).
- Any public official, member of the local governing body, or State or local legislator, who exercises functions or responsibilities with respect to the project(s) or the AHA.

The prohibition shall remain in effect throughout the class member's tenure and for one year thereafter. The class member shall disclose to the AHA the member's familial relationship to the prospective employee. The requirements may be waived by the AHA Board of Commissioners for good cause, provided that such waiver is permitted by State and local law.

For purposes of this section, the term "immediate family member" means the spouse, mother, father, brother, sister, or child of a covered class member (whether related as a full blood relative, or as a "half" or "step" relative, e.g., a half-brother or stepchild).

GRATUITIES, KICKBACKS, AND USE OF CONFIDENTIAL INFORMATION

No officer, employee, Board member, or agent shall ask for or accept gratuities, favors, or items of more than \$25 in value from any contractor, potential contractor, or party to any subcontract, and shall not knowingly use confidential information for actual or anticipated personal gain. Disciplinary actions will be applied for violations of these standards by officers, employees, or agents of the AHA.

PROHIBITION AGAINST CONTINGENT FEES

Contractors wanting to do business with the AHA must not hire a person to solicit or secure a contract for a commission, percentage, brokerage, or contingent fee, except for bona fide established commercial selling agencies.

PROCUREMENT PLANNING

Planning is essential to managing the procurement function properly. Hence, the AHA will periodically review its record of prior purchases, as well as future needs, to find patterns of procurement actions that could be performed more efficiently or economically; maximize competition and competitive pricing among contracts and decrease the AHA's procurement costs; reduce AHA administrative costs; ensure that supplies and services are obtained without any need for re-procurement, e.g., resolving bid protests; and minimize errors that occur when there is inadequate lead time. Consideration should be given to storage, security, and handling requirements when planning the most appropriate purchasing actions.

PURCHASING METHODS

PETTY CASH PURCHASES

Purchases under \$50 may be handled through the use of a petty cash account. Petty cash accounts may be established in an amount sufficient to cover simplified acquisitions made during a reasonable period, e.g., one month. For all petty cash accounts, the AHA shall ensure that security is maintained and only

authorized individuals have access to the account. These accounts should be reconciled and replenished periodically.

INFORMAL PROCUREMENT METHODS

For any amounts above the petty cash ceiling, but not exceeding \$350,000, the AHA may use simplified acquisitions procedures. Under informal procurement methods, the AHA shall obtain a reasonable number of quotes (preferably three); however, for purchases of less than \$15,000 for goods and services, also known as micro-purchases, only one quote is required provided the quote is considered reasonable. To the greatest extent feasible, and to promote competition, informal procurements should be distributed among qualified sources. Quotes may be obtained orally (either in person or by phone), by fax, in writing, or through e-procurement. Award shall be made to the qualified vendor that provides the best value to the AHA. If award is to be made for reasons other than lowest price, documentation shall be provided in the contract file. The AHA shall not break down requirements aggregating more than the simplified acquisition threshold (or the micro-purchase threshold) into several purchases that are less than the applicable threshold merely to: (1) permit use of the simplified acquisitions procedures or (2) avoid any requirements that applies to purchases that exceed the micro-purchase threshold.


SEALED BIDS

Sealed bidding shall be used for all contracts that exceed the simplified acquisition threshold and that are not competitive proposals or non-competitive proposals as these terms are defined in this document. Under sealed bids, the AHA publicly solicits bids and awards a firm fixed-price contract (lump sum or unit price) to the responsible bidder whose bid, conforming with all the material terms and conditions of the Invitation for Bid (IFB), is the lowest in price. Sealed bidding is the preferred method for procuring construction, supply, and non-complex service contracts that are expected to exceed \$350,000.

Conditions for Using Sealed Bids. AHA shall use the sealed bid method if the following conditions are present: a complete, adequate, and realistic statement of work, specification, or purchase description is available; two or more responsible bidders are willing and able to compete effectively for the work; the contract can be awarded based on a firm fixed price; and the selection of the successful bidder can be made principally on the lowest price.

Solicitation and Receipt of Bids. An IFB is issued which includes the specifications and all contractual terms and conditions applicable to the procurement, and a statement that award will be made to the lowest responsible and responsive bidder whose bid meets the requirements of the solicitation. The IFB must state the time and place for both receiving the bids and the public bid opening. All bids received will be date and time-stamped and stored unopened in a secure place until the public bid opening. A bidder may withdraw the bid at any time prior to the bid opening.

Bid Opening and Award. Bids shall be opened publicly. All bids received shall be recorded on an abstract (tabulation) of bids and then made available for public inspection. If equal low bids are received from responsible bidders, selection shall be made by drawing lots or other similar random method. The method for doing this shall be stated in the IFB. If only one responsive bid is received from a responsible bidder, award shall not be made unless the price can be determined to be reasonable based on a cost or price analysis.



Mistakes in Bids. Correction or withdrawal of bids may be permitted, where appropriate, before bid opening by written or telegraphic notice received in the office designated in the IFB prior to the time set for bid opening. After bid opening, corrections in bids may be permitted only if the bidder can show by clear and convincing evidence that a mistake of a nonjudgmental character was made, the nature of the mistake, and the bid price actually intended. A low bidder alleging a nonjudgmental mistake may be permitted to withdraw its bid if the mistake is clearly evident on the face of the bid document, but the intended bid is unclear or the bidder submits convincing evidence that a mistake was made. All decisions to allow correction or withdrawal of a bid shall be supported by a written determination signed by the Contracting Officer. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the AHA or fair competition shall not be permitted.

COMPETITIVE PROPOSALS

Unlike sealed bidding, the competitive proposal method permits consideration of technical factors other than price, discussion with offerors concerning offers submitted, negotiation of contract price or estimated cost and other contract terms and conditions, revision of proposals before the final contractor selection, and the withdrawal of an offer at any time up until the point of award. Award is normally made on the basis of the proposal that represents the best overall value to the Public Housing Authority (PHA), considering price and other factors (e.g., technical expertise, past experience, quality of proposed staffing) set forth in the solicitation and not solely the lowest price.

Conditions for Use. Where conditions are not appropriate for the use of sealed bidding, competitive proposals may be used. Competitive proposals are the preferred method for procuring professional services that will exceed the simplified acquisition threshold.

Form of Solicitation. Other than A/E services, competitive proposals shall be solicited through the issuance of a Request for Proposals (RFP). The RFP shall clearly identify the importance and relative value of each of the evaluation factors as well as any subfactors and price. A mechanism for fairly and thoroughly evaluating the technical and price proposals shall be established before the solicitation is issued. Proposals shall be handled so as to prevent disclosure of the number of offerors, identity of the offerors, and the contents of their proposals until after award. The AHA may assign price a specific weight in the evaluation criteria or the AHA may consider price in conjunction with technical factors; in either case, the method for evaluating price shall be established in the RFP.

Evaluation. The proposals shall be evaluated only on the criteria stated in the RFP by a team of at least three people. Where not apparent from the evaluation criteria, the AHA shall establish an Evaluation Plan for each RFP. Generally, all RFPs shall be evaluated by an appropriately appointed Evaluation Committee. The Evaluation Committee shall be required to disclose any potential conflicts of interest and to sign a Non-Disclosure Statement. An Evaluation Report, summarizing the results of the evaluation, shall be prepared prior to award of a contract.

Negotiations. Negotiations shall be conducted with all offerors who submit a proposal determined to have a reasonable chance of being selected for award, unless it is determined that negotiations are not needed with any of the offerors. This determination is based on the relative score of the proposals as they are evaluated and rated in accordance with the technical and price factors specified in the RFP. These offerors shall be treated fairly and equally with respect to any opportunity for negotiation and revision of their proposals. No offeror shall be given any information about any other offeror's proposal, and no offeror shall

be assisted in bringing its proposal up to the level of any other proposal. A common deadline shall be established for receipt of proposal revisions based on negotiations. Negotiations are exchanges (in either competitive or sole source environment) between the PHA and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, and give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after the establishment of the competitive range and are called discussions. Discussions are tailored to each offeror's proposal and shall be conducted by the Contracting Officer with each offeror within the competitive range. The primary objective of discussions is to maximize the FHA's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. The Contracting Officer shall indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the Contracting Officer, be altered or explained to enhance materially the proposer's potential for award. The scope and extent of discussions are a matter of the Contracting Officer's judgment. The Contracting Officer may inform an offeror that its price is considered by the PHA to be too high or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible to indicate to all offerors the cost or price that the government's price analysis, market research, and other reviews have identified as reasonable. Auctioning (revealing one offeror's price in an attempt to get another offeror to lower their price) is prohibited.

Award. After evaluation of the revised proposals, if any, the contract shall be awarded to the responsible firm whose technical approach to the project, qualifications, price, and/or any other factors considered are most advantageous to the AHA provided that the price is within the maximum total project budgeted amount established for the specific property or activity.

A/E Services. The AHA must contract for A/E services using Qualification-Based Selection (QBS) procedures, utilizing a RFQ. Sealed bidding shall not be used for A/E solicitations. Under QBS procedures, competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. Price is not used as a selection factor under this method. QBS procedures shall not be used to purchase other types of services, though architectural/engineering firms are potential sources.

NONCOMPETITIVE PROPOSALS

Conditions for Use. Procurement by noncompetitive proposals (sole source) may be used only when the award of a contract is not feasible using simplified acquisition procedures, sealed bids, cooperative purchasing, or competitive proposals, and if one of the following applies:

- The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold;
- The item is available only from a single source, based on a good faith review of available sources;
- An emergency exists that seriously threatens the public health, welfare, or safety; endangers property; or would otherwise cause serious injury to the FHA, as may arise by reason of a flood, earthquake, epidemic, riot, equipment failure, or similar event. In such cases, there must be an immediate and serious need for supplies, services, or construction such that the need cannot be

met through any of the other procurement methods, and the emergency procurement shall be limited to those supplies, services, or construction necessary simply to meet the emergency;

- HUD or a pass-through entity expressly authorizes the use of noncompetitive proposals in response to a written request from the AHA; or
- After solicitation of a number of sources, competition is determined inadequate.

Justification. Each procurement based on noncompetitive proposals shall be supported by a written justification for the selection of this method. The justification shall be approved in writing by the responsible Contracting Officer. Poor planning or lack of planning is not justification for emergency or sole-source procurements. The justification, to be included in the procurement file, should include the following information:

- Description of the requirement;
- History of prior purchases and their nature (competitive vs. noncompetitive);
- The specific exception in 2 CFR 200.320(c)(1)-(5) that applies;
- Statement as to the unique circumstances that require award by noncompetitive proposals;
- Description of the efforts made to find competitive sources (e.g., advertisement in trade journals or local publications, phone calls to local suppliers, issuance of a written solicitation);
- Statement as to efforts that will be taken in the future to promote competition for the requirement; and
- Signature by the Contracting Officer's supervisor (or someone above the level of the Contracting Officer).

Price Reasonableness. The reasonableness of the price for all procurements based on noncompetitive proposals shall be determined by performing an analysis, as described in this Policy.

COOPERATIVE PURCHASING/INTERGOVERNMENTAL AGREEMENTS

The AHA may enter into State and/or local cooperative or intergovernmental agreements to purchase or use common supplies, equipment, or services. The decision to use an interagency agreement instead of conducting a direct procurement shall be based on economy and efficiency. If used, the interagency agreement shall stipulate who is authorized to purchase on behalf of the participating parties and shall specify inspection, acceptance, termination, payment, and other relevant terms and conditions. The AHA may use Federal or State excess and surplus property instead of purchasing new equipment and property if feasible and if it will result in a reduction of project costs. The goods and services obtained under a cooperative purchasing agreement must have been procured in accordance with 2 CFR 200.317-326.

INDEPENDENT COST ESTIMATE (ICE)

For all procurements above the Authority's simplified acquisition threshold (i.e., sealed bid procurements, and for all competitive and noncompetitive proposal procurements) regardless of price, the AHA shall prepare an ICE prior to receiving bids and price/cost proposals. Although not required by regulation, an ICE should be prepared prior to all purchases deemed sufficiently complex by the Contracting Officer. The level of detail shall be commensurate with the cost and complexity of the item to be purchased.

COST AND PRICE ANALYSIS

The AHA shall require assurance that, before entering into a contract, the price is reasonable, in accordance with the following instructions.

PETTY CASH AND MICRO-PURCHASES

No formal cost or price analysis is required. Rather, the execution of a contract by the Contracting Officer (through a purchase order or other means) shall serve as the Contracting Officer's determination that the price obtained is reasonable, which may be based on the Contracting Officer's prior experience or other factors.

SIMPLIFIED ACQUISITION

A comparison with other offers shall generally be sufficient determination of the reasonableness of price and no further analysis is required. If a reasonable number of quotes is not obtained to establish reasonableness through price competition, the Contracting Officer shall document price reasonableness through other means, such as prior purchases of this nature, catalog prices, the Contracting Officer's personal knowledge at the time of purchase, comparison to the ICE, or any other reasonable basis.

SEALED BIDS

The presence of adequate competition should generally be sufficient to establish price reasonableness. Where sufficient bids are not received, when the bid received is substantially more than the ICE, and where the AHA cannot reasonably determine price reasonableness, the AHA must conduct a cost analysis, consistent with Federal guidelines, to ensure that the price paid is reasonable.

COMPETITIVE PROPOSALS

The presence of adequate competition should generally be sufficient to establish price reasonableness. Where sufficient bids are not received, the AHA must compare the price with the ICE. For competitive proposals where prices cannot be easily compared among offerors, where there is not adequate competition, or where the price is substantially greater than the ICE, the AHA must conduct a cost analysis, consistent with Federal guidelines, to ensure that the price paid is reasonable.

CONTRACT MODIFICATIONS

A cost analysis, consistent with Federal guidelines, shall be conducted for all contract modifications for projects that were procured through Sealed Bids, Competitive Proposals, or Non-Competitive Proposals, or for projects originally procured through Simplified Acquisition procedures and the amount of the contract modification will result in a total contract price in excess of \$350,000.

SOLICITATION AND ADVERTISING

METHOD OF SOLICITATION

Petty Cash and Micro-Purchases. The AHA may contact only one source if the price is considered reasonable.

Simplified Acquisitions. Quotes may be solicited orally, through fax, or by any other reasonable method.

Sealed Bids and Competitive Proposals. Solicitation must be done publicly. The AHA must use one or more following solicitation methods, provided that the method employed provides for meaningful competition.

Advertising. Advertising in:

- Newspapers or other print mediums of local or general circulations; or
- Various trade journals or publications (for construction).

E-Procurement. The AHA may conduct its public procurements through the Internet using e-procurement systems. However, all e-procurements must otherwise be in compliance with 2 CFR 200.317-326, State and local requirements, and the Authority's procurement policy.

TIMEFRAME

For purchases of more than \$350,000, the public notice should run not less than once each week for two consecutive weeks.

FORM

Notices/advertisements should state, at a minimum, the place, date, and time that the bids or proposals are due, the solicitation number, a contact who can provide a copy of and information about the solicitation, and a brief description of the needed items(s).

TIME PERIOD FOR SUBMISSION OF BIDS

A minimum of 30 days shall generally be provided for preparation and submission of sealed bids and 15 days for competitive proposals. However, the Contracting Officer may allow for a shorter period under extraordinary circumstances.

CANCELLATION OF SOLICITATIONS

An IFB, RFP, or other solicitation may be cancelled before bids/offers are due if:

- The supplies, services, or construction are no longer required;
- The funds are no longer available;
- Proposed amendments to the solicitation are of such magnitude that a new solicitation would be best; or
- Other similar reasons.

A solicitation may be cancelled and all bids or proposals that have already been received may be rejected if:

- The supplies or services (including construction) are no longer required;
- Ambiguous or otherwise inadequate specifications were part of the solicitation;
- All factors of significance to the AHA were not considered;
- Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

- There is reason to believe that bids or proposals may not have been independently determined in open competition, may have been collusive, or may have been submitted in bad faith; or
- For good cause of a similar nature when it is in the best interest of the AHA.

The reasons for cancellation shall be documented in the procurement file and the reasons for cancellation and/or rejection shall be provided upon request.

A notice of cancellation shall be sent to all bidders/offerors solicited and, if appropriate, shall explain that they will be given an opportunity to compete on any re-solicitation or future procurement of similar items.

If all otherwise acceptable bids received in response to an IFB are at unreasonable prices an analysis should be conducted to see if there is a problem in either the specifications or the AHA's cost estimate. If both are determined adequate and if only one bid is received and the price is unreasonable, the Contracting Officer may cancel the solicitation and either:

- Re-solicit using an RFP; or
- Complete the procurement by using the competitive proposal method. The Contracting Officer must determine, in writing, that such action is appropriate, must inform all bidders of the AHA's intent to negotiate, and must give each bidder a reasonable opportunity to negotiate.

If problems are found with the specifications, AHA should cancel the solicitation, revise the specifications and resolicit using an IFB.

CREDIT (OR PURCHASING) CARDS

Credit card usage should follow the rules for all other small purchases. For example, the Contracting Officer may use a credit card for micro-purchases without obtaining additional quotes provided the price is considered reasonable. However, for amounts above the micro-purchase level, the Contracting Officer would generally need to have obtained a reasonable number of quotes before purchasing via a credit card.

When using credit cards, the AHA should adopt reasonable safeguards to ensure they are used only for intended purposes (for instance, limiting the types of purchases or the amount of purchases that are permitted with credit cards).

BONDING REQUIREMENTS

The standards under this section apply to construction contracts that exceed \$350,000. There are no bonding requirements for simplified acquisitions or for competitive proposals. The AHA may require bonds in these latter circumstances when deemed appropriate; however, non-construction contracts should generally not require bid bonds.

All uses of Capital Funds shall have bonding in accordance with 24 CFR 905.316(d). Other bond and guarantee requirements shall be in accordance with 2 CFR Part 200.

These bonds must be obtained from guarantee or surety companies acceptable to the U. S. Government and authorized to do business in the State where the work is to be performed. Individual sureties shall not be considered. U. S. Treasury Circular Number 570 lists companies approved to act as sureties on bonds securing government contracts, the maximum underwriting limits on each contract bonded, and the States in which the company is licensed to do business. Use of companies on this circular is mandatory.

CONTRACTOR QUALIFICATIONS AND DUTIES

CONTRACTOR RESPONSIBILITY

PHAs shall not award any contract until the prospective contractor, i.e., low responsive bidder or successful offeror, has been determined to be responsible. A responsible bidder/offeror must:

- Have adequate financial resources to perform the contract, or the ability to obtain them;
- Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all the bidder's/offeror's existing commercial and governmental business commitments;
- Have a satisfactory performance record;
- Have a satisfactory record of integrity and business ethics;
- Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
- Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and,
- Be otherwise qualified and eligible to receive an award under applicable laws and regulations, including not be suspended, debarred, or on the HUD Limited Denial of Participation List.

If a prospective contractor is found to be non-responsible, a written determination of non-responsibility shall be prepared and included in the official contract file, and the prospective contractor shall be advised of the reasons for the determination.

SUSPENSION AND DEBARMENT

Contracts shall not be awarded to debarred, suspended, or ineligible contractors. Contractors may be suspended, debarred, or determined to be ineligible by HUD in accordance with HUD regulations (24 CFR 200.213) or by other Federal agencies (e.g., Department of Labor (DOL) for violation of labor regulations) when necessary to protect housing authorities in their business dealings.

VENDOR LISTS

All interested businesses shall be given the opportunity to be included on vendor mailing lists. Any lists of persons, firms, or products which are used in the purchase of supplies and services (including construction) shall be kept current and include enough sources to ensure competition.

CONTRACT PRICING ARRANGEMENTS

CONTRACT TYPES

Any type of contract which is appropriate to the procurement and which will promote the best interests of the AHA may be used, provided the cost-plus-a-percentage-of-cost and percentage-of-construction-cost methods are not used. All solicitations and contracts shall include the clauses and provisions necessary to define the rights and responsibilities of both the contractor and AHA.

For all cost reimbursement contracts, AHA must include a written determination as to why no other contract type is suitable. Further, the contract must include a ceiling price that the contractor exceeds at its own risk.

OPTIONS

Options for additional quantities or performance periods may be included in contracts, provided that:

- The option is contained in the solicitation;
- The option is a unilateral right of the Authority;
- The contract states a limit on the additional quantities and the overall term of the contract;
- The options are evaluated as part of the initial competition;
- The contract states the period within which the options may be exercised;
- The options may be exercised only at the price specified in or reasonably determinable from the contract; and
- The options may be exercised only if determined to be more advantageous to AHA than conducting a new procurement.

CONTRACT CLAUSES

All contracts should identify the contract pricing arrangement as well as other pertinent terms and conditions, as determined by the AHA.

Additionally, Forms HUD-5369, 5369-A, 5369-B, 5369, 5370, 5370C, and 51915-A , which contain all HUD-required clauses and certifications for contracts of more than \$350,000, as well as any forms/clauses as required by HUD for simplified acquisitions, shall be used in all corresponding solicitations and contracts issued by this Authority.

CONTRACT ADMINISTRATION

The AHA shall maintain a system of contract administration designed to ensure that contractors perform in accordance with their contracts. These systems shall provide for inspection of supplies, services, or construction, as well as monitoring contractor performance, status reporting on major projects including construction contracts, and similar matters. For cost-reimbursement contracts, costs are allowable only to the extent that they are consistent with the cost principles in HUD Handbook 2210.18.

SPECIFICATIONS

GENERAL

All specifications shall be drafted so as to promote overall economy for the purpose intended and to encourage competition in satisfying AHA needs. Specifications shall be reviewed prior to issuing any solicitation to ensure that they are not unduly restrictive or represent unnecessary or duplicative items. Function or performance specifications are preferred. Detailed product specifications shall be avoided whenever possible. Consideration shall be given to consolidating or breaking out procurements to obtain a more economical purchase. For equipment purchases, a lease versus purchase analysis should be performed to determine the most economical form of procurement.



LIMITATION

The following types of specifications shall be avoided:

- Geographic restrictions not mandated or encouraged by applicable Federal law (except for A/E contracts, which may include geographic location as a selection factor if adequate competition is available); and
- Brand name specifications (unless the specifications list the minimum essential characteristics and standards to which the item must conform to satisfy its intended use).

Nothing in this procurement policy shall preempt any State licensing laws. Specifications shall be reviewed to ensure that organizational conflicts of interest do not occur.

APPEALS AND REMEDIES

GENERAL

It is AHA policy to resolve all contractual issues informally and without litigation. Disputes will not be referred to HUD unless all administrative remedies have been exhausted. When appropriate, a mediator may be used to help resolve differences.

INFORMAL APPEALS PROCEDURE

The AHA shall adopt an informal bid protest/appeal procedure for contracts of \$350,000 or less. Under these procedures, the bidder/contractor may request to meet with the appropriate Contracting Officer.

FORMAL APPEALS PROCEDURE

A formal appeals procedure shall be established for solicitations/contracts of more than \$350,000.

Bid Protest. Any actual or prospective contractor may protest the solicitation or award of a contract for serious violations of the principles of this policy. Any protest against a solicitation must be received before the due date for the receipt of bids or proposals, and any protest against the award of a contract must be received within the amount of time after the contract receives notice of the contract award specified in the solicitation or the protest will not be considered. All bid protests shall be in writing, submitted to the Contracting Officer or their designee, who shall issue a written decision on the matter. The Contracting Officer may, at his/her discretion, suspend the procurement pending resolution of the protest if the facts presented so warrant.

Contractor Claims. All claims by a contractor relating to performance of a contract shall be submitted in writing to the Contracting Officer for a written decision. The contractor may request a conference on the claim. The Contracting Officer's decision shall inform the contractor of its appeal rights to the next higher level of authority in AHA. Contractor claims shall be governed by the changes clause in Form HUD-5370.

ASSISTANCE TO SMALL AND OTHER BUSINESSES

REQUIRED EFFORTS

Consistent with Presidential Executive Orders 11625, 12138, and 12432, and Section 3 of the HUD Act of 1968, all feasible efforts shall be made to ensure that small and minority-owned businesses, women's business enterprises, and other individuals or firms located in or owned in substantial part by persons residing in the area of the AHA project are used when possible. Such efforts shall include, but shall not be limited to:

- Including such firms, when qualified, on solicitation mailing lists;
- Encouraging their participation through direct solicitation of bids or proposals whenever they are potential sources;
- Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such firms;
- Establishing delivery schedules, where the requirement permits, which encourage participation by such firms;
- Using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce;
- Including in contracts, to the greatest extent feasible, a clause requiring contractors, to provide opportunities for training and employment for lower income residents of the project area and to award subcontracts for work in connection with the project to business concerns which provide opportunities to low-income residents, as described in 24 CFR Part 75 (so-called Section 3 businesses); and
- Requiring prime contractors, when subcontracting is anticipated, to take the positive steps listed above.

Goals shall be established periodically for participation by small businesses, minority-owned businesses, women-owned business enterprises, labor surplus area businesses, and Section 3 business concerns in AHA prime contracts and subcontracting opportunities.

DEFINITIONS

A small business is defined as a business that is independently owned, not dominant in its field of operation, and not an affiliate or subsidiary of a business dominant in its field of operation. The size standards in 13 CFR Part 121 should be used to determine business size.

A minority-owned business is defined as a business which is at least 51 percent owned by one or more minority group members; or, in the case of a publicly-owned business, one in which at least 51 percent of its voting stock is owned by one or more minority group members, and whose management and daily business operations are controlled by one or more such individuals. Minority group members include, but are not limited to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Asian Indian Americans, and Hasidic Jewish Americans.

A women's business enterprise is defined as a business that is at least 51 percent owned by a woman or women who are U.S. citizens and who control and operate the business.

A "Section 3 business concern" is as defined under 24 CFR Part 75.

A labor surplus area business is defined as a business which, together with its immediate subcontractors, will incur more than 50 percent of the cost of performing the contract in an area of concentrated unemployment or underemployment, as defined by the DOL in 20 CFR Part 654, Subpart A, and in the list of labor surplus areas published by DOL's Employment and Training Administration.

BOARD APPROVAL OF PROCUREMENT ACTIONS

Other than approval of this Procurement Policy, approval by the Board of Commissioners is not required for any procurement action, as permitted under State and local law. Rather, it is the responsibility of the Executive Director to make sure that all procurement actions are conducted in accordance with the policies contained herein.

DELEGATION OF CONTRACTING AUTHORITY

While the Executive Director is responsible for ensuring that the AHA's procurements comply with this Policy, the Executive Director may delegate all procurement authority as is necessary and appropriate to conduct the business of the Agency.

Further, and in accordance with this delegation of authority, the Executive Director shall, where necessary, establish operational procedures (such as a procurement manual or standard operating procedures) to implement this Policy. The Executive Director shall also establish a system of sanctions for violations of the ethical standards described in Section III below, consistent with Federal, State, or local law.

DOCUMENTATION

The AHA must maintain records sufficient to detail the significant history of each procurement action. These records shall include, but shall not necessarily be limited to, the following:

- Rationale for the method of procurement (if not self-evident);
- Rationale of contract pricing arrangement (also if not self-evident);
- Reason for accepting or rejecting the bids or offers;
- Basis for the contract price (as prescribed in this handbook);
- A copy of the contract documents awarded or issued and signed by the Contracting Officer;
- Basis for contract modifications; and
- Related contract administration actions.

The level of documentation should be commensurate with the value of the procurement.

Records are to be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity in the case of a subrecipient.

DISPOSITION OF SURPLUS PROPERTY

Property no longer necessary for the AHA's purposes (non-real property) shall be transferred, sold, or disposed of in accordance with applicable Federal, state, and local laws and regulations.



FUNDING AVAILABILITY

Before initiating any contract, the AHA shall ensure that there are sufficient funds available to cover the anticipated cost of the contract or modification.

SELF-CERTIFICATION

The AHA self-certifies that this Procurement Policy, and the AHA's procurement system, complies with all applicable Federal regulations and, as such, the AHA is exempt from prior HUD review and approval of individual procurement action.

APPENDIX 2 – PROCUREMENT FILE CHECKLIST

The following table lists the types of documentation that generally should be included in the contract file for each procurement. Note, however, that the circumstances of each procurement will dictate the documentation required.

For example, a Request for Proposals (RFP) for Property Management Services would not necessarily require a separate cost analysis if there were an ample number of price proposals and the costs (management fees) were within the range established in the Independent Cost Estimate (ICE). Similarly, for Simplified Acquisition Threshold contracting, the issuance of a purchase order will likely serve as a Notice to Proceed; however, for some very technical services acquired under the Simplified Acquisitions Threshold, the Public Housing Authority (PHA) might want to hold a post-award meeting and then issue a Notice to Proceed. In all, the contract file should contain all significant documentation relating to the specific procurement. Any shaded item would generally not apply for that type of purchase.

Item	Micro-Purchase	Simplified Acquisitions	Sealed Bid	Competitive Proposals	Non-Competitive Proposals
Pre-Solicitation					
Independent Cost Estimate					
Individual Procurement Plan					
Rationale for Contract Method (if not apparent)					
Rationale for Contract Type (if not apparent)					
Evaluation Plan					
Solicitation					
Sources (mailing lists, advertisements, etc.)					
Solicitation Notice and Amendments					
IFB/RFP					
Notes of Pre-Bid/Proposal Conferences					
IFB/RFP Correspondences					
Record of Bids/RFPs Requested					
Quotes, Bids or Proposals Received					
Justification for Other than Full/Open Competition					

Item	Micro-Purchase	Simplified Acquisitions	Sealed Bid	Competitive Proposals	Non-Competitive Proposals
Evaluation					
Bid Opening					
Evaluation Panel Disclosures and Ethics Statement					
Technical Evaluation					
Price Evaluation					
Competitive Range Determinations					
Evaluation Report					
Memo of Negotiation and Selection Decision					
Pre-award Survey and Responsibility Determinations					
Award					
Contract and Award Documents					
Notification to Unsuccessful Bidders					
Appeals (all correspondence)					
Post-Award and Contract Administration					
Insurance and Bonding Requirements					
Records of Post-Award Conferences					
Notice to Proceed					
Contract Modifications and Supporting Documentation					
Receiving Reports					
General Contract Correspondence					
Payment Record/Documentation					
Inspections and Field Reports					
Completion Certificate					

APPENDIX 3 – SAMPLE ADVERTISEMENT

The Anytown Housing Authority (AHA) invites sealed bids from contractors for the snow removal at Anytown Manor, located at 56 Anytown Lane, Anytown, USA, 56789.

Bids are subject to State law.

Bids will be received until 2:00 p.m. on MM/DD/YY and publicly opened, forthwith, at Anytown Housing Authority, Property Management Division, 727 Robin Place, Anytown, USA 56789. General bids shall be accompanied by a bid deposit that is not less than five percent (5%) of the greatest possible bid amount (considering all alternatives) and made payable to the Anytown Housing Authority.

A bid package will be available for pickup from _____ at 727 Robin Place after 2:00 p.m., MM/DD/YY. The cost of plans and specifications is \$25.00. Company checks are required.

APPENDIX 4 – SAMPLE IFB COVER SHEET

IFB Number: _____

Date of Issuance: _____

Sealed bids will be accepted at the Anytown Housing Authority (AHA), Property Management Division, until the date and time noted below. Bids will be publicly opened and recorded immediately thereafter in the Conference Room, 727 Robin Place, Anytown, USA, 56789.

SNOW REMOVAL AT ANYTOWN MANOR

Pre-Bid Meeting will be held: _____ (date) _____ (time)

Bid Opening: _____ (date) _____ (time)

Property Management Division
727 Robin Place
Anytown, USA 56789

Point of Contact: Mary Jane, (987) 654-3210

Table of Contents:

- A. Bid/Price Form
- B. Specifications/Scope of Work
- C. Instructions to Bidders
- D. Required Certifications
- E. General Contract
- F. Other Attachments

APPENDIX 5 – SAMPLE SOLICITATION AMENDMENT

**ANYTOWN HOUSING AUTHORITY
PROPERTY MANAGEMENT DIVISION
727 ROBIN PLACE
ANYTOWN, USA 56789**

1. Amendment number:
2. Issued by:
3. Amendment of solicitation number: _____ dated: _____
4. The hour and date specified for receipt of bids/proposals is _____ is not _____ extended to the following new hour and date:
5. The above-numbered solicitation is amended as set forth below. Bidders/offerors must acknowledge receipt of this amendment prior to the hour and date specified for receipt of bids/proposals, by signing this form below or by completing the acknowledgement on the form titled “Solicitation, Bid/Proposal and Award.”
6. Description of amendment:
7. {Cite specific sections and/or pages of the solicitation that are being amended.}
8. Except as provided herein, all terms and conditions of the solicitation remain unchanged and in full force and effect.
9. Name and title of signer:

Signature and date:

APPENDIX 6 – SAMPLE CONTRACT AWARD

**ANYTOWN HOUSING AUTHORITY
PROPERTY MANAGEMENT DIVISION
727 ROBIN PLACE
ANYTOWN, USA 56789**

1. Contract Number: _____ 2. Effective Date: _____

3. Solicitation Number/ Project Title: _____

4. Name & Address of Contractor: _____

5. Contract Amount: \$ _____ 6. Accounting Code: _____

7. Table of Contents:

[X]	SECTION	Description	[Pages]	[X]	SECTION	Description	[Pages]
	A	CONTRACT AWARD FORM	1		F	DELIVERIES OR PERFORMANCE	
	B	SUPPLY/SERVICE & PRICES			G	CONTRACT ADMINISTRATION DATA	
	C	STATEMENT OF WORK/SPECS			H	SPECIAL CONTRACT REQUIREMENTS	
	D	PACKAGING & MARKING			I	CONTRACT CLAUSES	
	E	INSPECTION & ACCEPTANCE			J	LIST OF ATTACHMENTS	

8. Award: Your bid/offer on Solicitation Number _____ including additions or changes made by you, which additions or changes are set forth in full within the sections listed above, is hereby accepted as to the items listed in Section B and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the PHA’s solicitation, (b) your bid/offer, and (c) this award document/contract. No further contract document is necessary.

9. Name of Contracting Officer: _____

Signature of Contracting Officer: _____

Date Signed: _____

10. Name/Title of Authorized Signer/Contract Representative:

Signature of Contracting Representative: _____

Date Signed: _____

APPENDIX 7 – SAMPLE NOTICE TO UNSUCCESSFUL BIDDERS

(Letterhead)

Re: IFB# _____

1. Receipt of your bid is acknowledged in response to our invitation for bid referenced above.
2. The contract was awarded after competition by sealed bidding to the lowest responsive and responsible bidder. The total amount of the awarded contract was \$_____. The award was made to (Insert Bidder Name).
3. Enclosed is the bid bond your company submitted for the above-referenced solicitation.
4. The Anytown Housing Authority appreciates your time and effort in preparing and submitting your bid. We hope that your firm will participate in future solicitations.

Name

Date

Contracting Officer

APPENDIX 8 – SAMPLE PROCEDURES FOR EVALUATION COMMITTEES

(FOR AMOUNTS ABOVE THE FEDERAL SIMPLIFIED ACQUISITION THRESHOLD)

INTRODUCTION

This document establishes the procedures for the evaluation review process and shall apply to the evaluation of all competitive proposals. The evaluation process must be impartial, consistent, and fair.

ESTABLISHMENT OF AN EVALUATION PANEL

A committee will be appointed by the Contracting Officer to evaluate technical proposals in accordance with a written evaluation plan. The Contracting Officer may serve as a panel member.

A minimum of three persons (or a larger group having an odd number of designated voting members) must be selected.

A designated chairperson shall be responsible for the deliberations of the committee and other duties as outlined below. The Contracting Officer may serve as Chairperson.

Panel members who have a conflict of interest or relationship, financial or otherwise, or that may be construed as a conflict of interest, must disclose the existence of the conflict and, if necessary, excuse themselves from the panel.

ESTABLISHMENT OF A WRITTEN PLAN

Prior to the issuance of the Request for Proposals (RFP), a written plan for evaluating technical and cost proposals should be established. However, where practical, the evaluation criteria set forth in the RFP can serve as the written plan for the evaluation.

The evaluation criteria as set forth in the RFP shall be the basis for all evaluations. Factors not specified in the RFP shall not be considered.

CONDUCT OF EVALUATION

Prior to a formal meeting to discuss the proposals and evaluations, the Contracting Officer shall provide each evaluator with a copy of each qualified proposal, a rating sheet and a nondisclosure certificate, which must be executed by the panel member and returned to the Chairperson. The rating sheet will list each evaluation criterion and the weights assigned to it, as reflected in the RFP. The rating sheets should require

the evaluator to assign both an adjectival rating for each evaluation criterion and a narrative justification to support the ratings given.

The evaluation committee will then meet to discuss the proposals. Initially the proposals should be compared on an individual basis, separately, against the requirements stated in the RFP and not analyzed in comparison with each other. During the evaluation, the committee members should only evaluate the content of the proposals; personal knowledge that is not based on the proposer's written submission, except for relevant past performance information, should not be part of the initial technical evaluation.

The evaluation committee members will perform the following functions: 1) review all of the proposals using as the standard the evaluation criteria as set forth in the RFP; 2) meet to discuss the evaluations, the ratings of each evaluator, and the reasons for such ratings; and 3) complete the ratings sheet including both an adjectival and narrative justifications for each proposal submitted.

The Chairperson is responsible for collecting the individual rating sheets from each committee member, preparing a summary rating sheet which reflects an overall adjectival rating for each rating criterion, and preparing a formal written report to the Contracting Officer regarding the evaluation committee meeting and discussions (such as the minutes from the evaluation committee meeting). This written report shall rank the proposers and shall describe how the scores were determined. The Chairperson shall then forward the individual rating sheets, the summary rating sheet and the written narrative report to the Contracting Officer.

NEGOTIATIONS

If necessary, negotiations will be conducted with all proposers in the competitive range. The extent of involvement of committee members in these negotiations will be determined by the Contracting Officer. These negotiations will be conducted in accordance with applicable agency policies/procedures.

DISCLOSURE OF INFORMATION

The evaluators shall not disclose any information included in any of the proposals (such as the names and number of proposers or rating scores) to anyone during the solicitation and evaluation period. Proposers submit proposals in confidence and expect their proposals and proprietary information contained therein to be protected from disclosure to other proposers or individuals. At the appropriate time, the Contracting Officer and/or their designee shall discuss information regarding the solicitation and award.

APPENDIX 9 – CERTIFICATION OF NONDISCLOSURE

(FOR USE IN COMPETITIVE PROPOSALS METHOD OF PROCUREMENT)

As a condition of serving as an evaluator of offers under _____ [insert solicitation number or other identification, e.g., task order number], I hereby certify that I will:

Use the information³ provided to me for the intended evaluation purposes only and will not disclose this information to any individual outside of the evaluation panel, including my supervisor or manager, without the express authorization of the evaluation panel chairperson or the Contracting Officer;

Not solicit or accept any information other than that provided to me by the evaluation panel chairperson or the Contracting Officer;

Report to the evaluation panel chairperson or the Contracting Officer any attempt by other parties to obtain from or provide to me any information described in this certification;

Honor any authorized restrictive legends placed on the information by prospective contractors or subcontractors or by the PHA and apply them to any reproductions or abstracts I may make or order to be made; and

Return all copies of the information whether originally provided to me by the HA or made or ordered by me in the course of my evaluation, and any abstract thereof, to the evaluation panel chairperson.

I understand that my unauthorized release of information may result in the termination of my participation in this procurement and/or administrative, civil, and criminal penalties. I also understand that this certification will be made part of the source selection record and the official contract file and does not relieve me of the responsibility for any other disclosure or certification required by law, regulation, or other directive.

Typed or Printed Name

Signature

Date

³ Information includes but is not limited to the acquisition strategy, acquisition timeline, source selection criteria, evaluation plan, identity and number of offers, contents of offers, evaluation results, and other documentation resulting from the evaluation process.

APPENDIX 10 – SAMPLE CHECKLIST FOR DETERMINATION OF CONTRACTOR RESPONSIBILITY

Public Housing Agency Name:

Solicitation Number:

Contractor Name and Address:

Circle all applicable statements:

- A review of the GSA and HUD websites data dated _____ has been conducted and the contractor does/ does not appear as suspended, debarred, or operating under a LDP.
- The Contractor has/ has not performed satisfactorily on other contract(s) awarded by this PHA.
- A survey of other agencies and companies doing business with the contractor was performed. Adverse/ no adverse information has been received that would bring the contractor's present responsibility and technical capability into question. List the agencies/companies contacted, dated contacted and person providing information.
- A review of the Contractor's financial and technical resources indicates/ does not indicate that it is capable of performing the contract. List documentation reviewed: _____
_____.
- State/local government agencies were contacted, and the contractor does/ does not have a record of any outstanding code violations, improper business practices, or similar history of noncompliance with public policy. List agencies contacted: _____
_____.
- Other pertinent information received does/ does not affect the Contractor's responsibility. List parties contacted and results of contact (e.g., Better Business Bureau, Business Licenses, Dunn and Bradstreet, other credit agencies): _____
_____.

In accordance with 2 CFR 200.318(h), the contractor is considered to be responsible/ non-responsible and possesses/ does not possess the ability to successfully perform under the terms and conditions of this contract.

Name
Contracting Officer

Signature

Date

APPENDIX 11 – SAMPLE LEGAL SERVICES ENGAGEMENT LETTER

HUD urges inclusion of the following provisions into all legal services contracts executed and/or administered by PHAs, unless no Federal funds will be used to administer the contract.

ADDENDUM TO ENGAGEMENT AGREEMENT

The [name of PHA] and [name of legal service individual or firm] Legal Service Personnel (LSP) engaged to provide professional legal services to the PHA in connection with [briefly and precisely describe the nature, scope and limits of the legal services to be provided by the LSP] agree that the provisions of this Addendum to the Engagement Agreement are hereby incorporated into PHA and LSP’s engagement agreement as if they had been set forth at length therein.

During the pendency of the legal services engagement, LSP shall not, without HUD approval, represent any officer or employee of PHA, in her/his individual capacity, in connection with potential civil liability or criminal conduct issues related to PHA operations.

LSP has an obligation not to, and shall not, interfere with, disrupt, or inappropriately delay or hinder any authorized monitoring, review, audit, or investigative activity of HUD (including the Office of Inspector General), the General Accounting Office (GAO), or the officers and employees of HUD and GAO. Any and all representation by LSP cannot be inconsistent with the foregoing obligation. Specifically, LSP shall not deny access to HUD, GAO, or the officers and employees of HUD and GAO, to PHA records in response to document demands by HUD, GAO, or the officers and employees of HUD and GAO, notwithstanding possible discovery privileges that would otherwise be available to PHA. HUD requires PHAs to provide HUD, GAO, or the officers and agents of HUD and GAO, with “full and free” access to all their books, documents, papers and records (see 2 CFR 200.337(c)).

PHA and LSP shall make available for inspection and copying, by HUD (including the Office of Inspector General), GAO, and the officers and employees of HUD and GAO, all invoices, detailed billing statements, and evidence of payment thereof relating to LSP’s engagement. Such records constitute “PHA records” and are subject to Section 3, above.

If HUD or PHA determines that LSP is violating any provision of this Addendum to the Engagement Agreement, it shall timely notify LSP of such violation. LSP will have 48 hours following its receipt of the notice of violation to cease and desist from further violation of the addendum. If LSP fails to adequately cure the noticed violation within 48 hours: (A) HUD, in its discretion, may demand that PHA terminate the professional legal services engagement for breach, or, henceforth, satisfy all costs associated with the engagement with non-Federal funds; and/or (B) PHA, in its discretion, may terminate the professional legal services engagement for breach. Additionally, HUD may sanction LSP pursuant to 24 CFR Part 24.

Should any part, term, or provision of this Addendum to the Engagement Agreement be declared or determined by any court of competent jurisdiction to be illegal or invalid, the validity of the remaining parts, terms, and provisions shall not be affected.

APPENDIX 12 – GUIDELINES FOR CONDUCTING COST ANALYSIS

A cost or price analysis must be performed in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation. An independent estimate must be made before receiving bids or proposals.

- When evaluating competitive proposals;
- When there is a sole source (or non-competitive proposal);
- When after soliciting bids, only one bid is received, the PHA does not have sufficient data on costs to establish price reasonableness (such as prior purchases of similar nature), and the PHA is considering making an award to the sole bidder;
- When negotiating modifications to contracts that impact the price or estimated cost;
- When terminating a contract and the contractor is entitled to payment of reasonable costs incurred as a result of termination; or
- When awarding a cost-reimbursement contract.

The following lists the basic steps in conducting a cost analysis (please refer to Chapter 10 for more when a cost analysis is required):

- A. Verify cost and price information, including:
 - 1) The necessity for, and reasonableness of, the proposed cost;
 - 2) Technical evaluation or appraisal of the proposed direct cost elements; and
 - 3) Application of audited or pre-negotiated indirect cost rates, direct labor rates, etc.
- B. Evaluate the effect of the offeror/contractor's current practices on future costs;
- C. Compare costs proposed by the offeror/contractor with the following:
 - 1) Actual costs previously incurred by the same firm;
 - 2) Previous cost estimates from the same firm or other firms for the same or similar items;
 - 3) The methodology to be used to perform the work (are the costs consistent with the technical approach being proposed?); or
 - 4) The independent cost estimate (ICE).
- D. Verify that the offeror/contractor's cost proposal complies with the appropriate cost principles; and
- E. Verify that costs are allowable, allocable, and reasonable.

The major categories of costs are:

- A. Direct Costs, which include:
 - 1) Direct Labor (personnel)
 - 2) Equipment
 - 3) Supplies
 - 4) Travel and Per Diem
 - 5) Subcontractors
 - 6) Other Direct Costs

- B. Indirect Costs, which include:
 - 1) Overhead
 - 2) General and Administrative Expenses
 - 3) Profit (or Fee)

In the process of analyzing costs, profit should be analyzed separately. In analyzing profit, consideration should be given to:

- A. Complexity of the work to be performed;
- B. Contractor’s risk in performing the contract;
- C. Contractor’s investment in the contracted effort;
- D. Amount of subcontracting;
- E. Contractor’s record of past performance; and
- F. Industry profit rates in the general area for similar work.

Remember: The objective is to establish overall cost reasonableness and not individual components.

COST PROPOSAL	COST PRINCIPLE
For-profit or commercial organization	FAR 48 CFR Chapter 1, Subpart 31.2
State or local governments	2 CFR 200
Private, non-profit organizations	2 CFR 200
Educational institutions	2 CFR 200

APPENDIX 13 – SAMPLE NOTICE TO PROCEED

PHA NAME: _____

DATE: _____

To: Contractor name and address

Re: Contract number

Project name/description

A. NOTICE TO PROCEED

Pursuant to the terms of the above contract, you are hereby notified to commence work at the start of business on (date). The time for completion, including the starting day, as established by the contract, is (date).

It is the responsibility of the contractor to meet the schedule as set forth and in accordance with the terms and conditions of the contract. Failure to comply with the schedule will result in the enforcement of the liquidated damages stated in the contract.

Please note carefully and fulfill the requirements of the contract regarding the submittal and approval of Workmen's Compensation and Manufacturers' and Contractors' Public Liability Insurance.

The contractor shall also contact the PHA in writing within three days prior to mobilization on the project to enable the PHA to coordinate this work with others.

The contractor shall within ten days after receipt of this notice send to the PHA copies of all required permits for work to be performed under this contract. Failure to comply with these instructions shall constitute a breach of contract.

Your cooperation on this construction to its conclusion is of the utmost importance to the PHA.

Sincerely,

Contracting Officer

cc: Contract file

Other PHA files

APPENDIX 14 – SAMPLE CONTRACT MODIFICATION

1. Modification Number: _____
2. Effective Date: _____
3. Contract Number: _____ Dated: _____
4. This Modification Modifies the Contract as Described Below:

This Change Order is Issued Pursuant To:

(Cite Contract Clause) _____

The Contract Is Modified to Reflect the Following Administrative Changes (e.g., Changes in Payment Office) _____

This Supplemental Agreement is Entered into Pursuant

To: _____

(Cite Contract Clause or Mutual Agreement of The Parties)

Other (Specify Type of Modification and Authority):

5. The contractor ___ [is] or ___ [is not] required to sign this document and return ___ copies to the Contracting Officer.
6. Description of Modification: (Include Section, Clause, Page Number, and Subject Matter)

Except As Provided Herein, All Terms and Conditions of The Contract Remain Unchanged and In Full Force and Effect.

Name and Title of Signer: _____

Date: _____

8. Name and Title of Contracting Officer: _____

Date: _____

APPENDIX 15 – INTERGOVERNMENTAL AGREEMENT FOR SUPPLEMENTAL COMMUNITY POLICING SERVICES

A. General

This Agreement, between the Anytown Housing Authority (AHA) and the Anytown Police Department, is for the purpose of providing supplemental community policing services at Turner Towers, a 150-unit family property owned and managed by the AHA. This Agreement is made pursuant to the authority in 2 CFR 200.317-326 [and any other applicable law or regulation].

B. Services

In consideration of the mutual promises contained in this Agreement, the parties agree as follows:

- 1) This agreement does not affect the normal, baseline services provided to the AHA through its Cooperation Agreement with the City of Anytown.
- 2) This community policing program will consist of the assignment of (the equivalent of) one full-time police officer to Turner Towers.
- 3) To the extent practical, the hours of the community policing program will be from 11:00 a.m. to 7:00 p.m., Monday-Friday. However, the days and times may change based on the needs of the property, as authorized by the Housing Manager.
- 4) To the extent possible, and to allow for continuity, the GPD will try to maintain regularity in the personnel assigned to this program.
- 5) The primary emphasis of the program will be on crime prevention and youth intervention.

C. Compensation

For the services rendered, the AHA will compensate the GFD an amount equal to \$49,400 annually. This amount covers all costs associated with the assignment of the equivalent of one full-time officer. It includes, for example, the cost of the officer's vehicle.

D. Invoicing and Payment

The GPD shall invoice the AHA monthly. The invoice should include a listing of the hours worked, by personnel, and along with a summary of monthly activities. Invoices should be sent to:

Housing Manager
Turner Towers
999 Taylor Place
Anytown, USA 56789

The AHA will process invoices within two weeks of receipt.

E. Term

The parties may bilaterally modify this Agreement in writing at any time.

This agreement shall be in effect for one year, from _____ (date) until _____ (date).

Either party may withdraw from this Agreement at any time upon written notice to the other party with 30 days' notice.

IN WITNESS WHEREOF, the parties to this Memorandum have caused their names to be affixed hereto by their proper officers this _____ day of _____ 20____.

Anytown Housing Authority

By _____

City of Anytown Police Department

By: _____

Attest: _____

APPENDIX 16 – DISADVANTAGED BUSINESS ENTERPRISE RESOURCE LIST

Small Business Development Centers (SBDC)

SBDCs provide businesses with management, marketing, and financial counseling. The centers assist in the development of business and marketing plans, improving business ownership skills, financial analysis of businesses, accessing specialized services including export and government marketing, and other business management needs.

Women’s Business Centers (WBC)

Each WBC provides assistance and/or training in finance, management, marketing, procurement, and the internet, as well as addressing specialized topics such as home-based businesses, corporate executive downsizing, and welfare-to-work. All provide individual business counseling and access to the Small Business Administration’s (SBA’s) programs and services; a number of centers are also intermediaries for the SBA’s MicroLoan and Loan Prequalification programs. Each WBC tailors its programs to the needs of its constituency; many offer programs and counseling in two or more languages.

Minority Business Development Centers (MBDC)

The MBDCs provide business development services to aid in the creation, expansion, and preservation of minority-owned businesses. It is MBDC’s largest client services program and is structured to cover areas that contain approximately 80 percent of the country’s minorities.

Native American Business Development Centers

The Department of Commerce’s Minority Business Development Agency (MBDA) established the Native American Program (NAP) to address the special problems of the Native American firms and individuals interested in entering, maintaining, or expanding their efforts in the competitive marketplace.

Resources

- To view a list of over 800 Trade Associations and similar organizations, visit the HUD Office of Small and Disadvantaged Business Utilization website at <https://www.hud.gov/stat/sdb/forecast>.
- To locate local SBA district/field offices, SBDCs, and other resources, visit SBA’s website at <https://www.sba.gov/regions/states.html>.
- To locate local MBDA regional offices, MBDCs, and other resources, visit MBDA’s website at <https://www.mbda.gov>.
- Small businesses that are eligible for Federal awards must be registered in a database named System for Award Management (SAM). SAM can provide you with listings of small businesses that offer the products and services that you procure. Visit <https://sam.gov>.
- To facilitate searches for small businesses in particular industries, refer to the North American Industry Classification System (NAICS). Visit the website at <http://naics.com>.
- To assist you in advertising your contracting opportunities, include your upcoming contracting requirements in MBDA’s “Opportunity Database” called Phoenix. Phoenix matches Minority Business Enterprises with contracts and other business opportunities at <https://www.mbda.gov>.