

## 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](http://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](http://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](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.