

## 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.

- 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.