

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

### 17.1 GENERAL

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



### 17.2 APPLICATION

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

### 17.3 DEFINITIONS

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

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

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

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

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

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

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

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

## 17.4 SELECTION OF DEVELOPER/DEVELOPMENT PARTNER

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

## 17.5 HUD REVIEW OF HOPE VI PROCUREMENT ACTIONS

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

## 17.6 PROCUREMENT REQUIREMENTS OF DEVELOPER

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

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

## 17.7 OTHER REQUIRED EFFORTS

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

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

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

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

#### B. Identity of Interest.

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

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

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

## 17.8 PROCUREMENT BY PARTIES OTHER THAN THE PHA OR THE DEVELOPER

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

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

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

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

## 17.9 RESIDENT INVOLVEMENT

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

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

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

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

## 17.11 ISSUES ARISING IN CSS PROCUREMENT ACTIVITY

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

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

## 17.12 CONTRACTING WITH SUBGRANTEES

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

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

## 17.13 MANDATORY CONTRACT CLAUSES

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

## 17.14 FEES AND GUARANTEES

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

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

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