

Travaux, Inc.



Procurement Policies

Resolution No.:

Adopted: November 12, 2018

Travaux, Inc. is a subsidiary of the Housing Authority of the City of Milwaukee (HACM). Procurement Activities relating to Contracts between Travaux and HACM shall be guided by HACM Federal Procurement Policy and PIH-2007-15 (HA); “Applicability of Public Housing Development Requirements to Transactions between Public Housing Agencies and their Related Affiliates and Instrumentalities(Attached).” On contracts with funding from Housing and Urban Development (HUD), Travaux shall follow the HACM established Procurement Policies and Procedures when required by HUD regulations.

This Procurement Policy applies to procurement activities where Travaux, Inc. is the contracting party.

I. GENERAL PROVISIONS.

Purpose. The purpose of this policy is to:

- (a) Provide a procurement system of quality and integrity;
- (b) Provide fair and equitable treatment of all persons or firms involved in purchasing by Travaux;
- (c) Assure that supplies, services, and construction are procured efficiently, effectively, and at the most favorable prices available to Travaux;
- (d) Promote competition in contracting integrity; and
- (e) Assure that Travaux’s purchasing and procurement actions are in full compliance with established State Law and regulations, whenever applicable. State and Local Law will prevail when conflict exist.

Applicable Law and Funding. References to CFR, HUD, state regulations, and other federal regulations or agencies within this Policy are only to establish a standard for the particular article or clause at hand and do not imply federal funding or jurisdiction.

Application. This Policy applies to all contracts for procurement of supplies, services, and construction entered into by Travaux as of the effective date of this Policy for which Travaux expends non-federal funds (“Non-Federally funded Procurement”). The term “procurement,” as used herein, includes both contracts and modifications (including change orders) for construction or services, as well as, the purchase, lease or rental of supplies and equipment.

Public Access to Procurement Information. Procurement information may be a matter of public record to the extent required by any applicable federal, state, or local laws and shall be available to the public as required thereby.

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

services; and (5) other services. The term “Contracting Officer” shall mean the President, Procurement Director, or the any executive officer or senior staff of Travaux designated by the President on per specific project basis.

Changes in Laws and Regulations. In the event an applicable law or regulation is modified or eliminated, or a new law or regulation is adopted, the revised law or regulation shall, to the extent inconsistent with this Policy, automatically supersede this Policy.

Public Access to Procurement Information. Most procurement information that is not proprietary is a matter of public record and shall be available to the public to the extent provided in the Wisconsin Public Records Law, Wis. Stat. s.19.31, *et.seq.*

II. ETHICS IN PUBLIC CONTRACTING

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

Conflicts of Interest . No employee, officer, Board member or agent of Travaux shall participate directly or indirectly in the selection, award or administration of a contract if a conflict of interest, either real or apparent, would be included. It is considered a conflict of interest when one of the persons listed below has a financial or any other type of interest in a firm competing for the award:

- (1) An employee, officer, Board member, or agent involved in making the award;
- (2) His/her relative (including father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, or half-sister);
- (3) His or her partner; or

- (4) An organization which employs, or is negotiating to employ, or has an arrangement concerning prospective employment of any of the above.

Gratuities, Favors, and Kickbacks. Travaux officers, employees, Board members or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements, and shall not knowingly use confidential information for actual or anticipated personal gain. Travaux may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State and local laws or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the officers, employees, or agents, or by contractors or their agents.

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

III. PROCUREMENT PLANNING

Planning is essential to managing the procurement function properly. Hence, Travaux will periodically review its record of prior purchases, as well as future needs, to:

- (1) Find patterns of procurement actions that could be performed more efficiently or economically;
- (2) Avoid unnecessary or duplicative items;
- (3) Maximize competition and competitive pricing among contracts and decrease procurement costs;
- (4) Reduce administrative costs;
- (5) Ensure that supplies and services are obtained without any need for re-procurement, e.g., resolving bid protests; and
- (6) Minimize errors that occur when there is inadequate lead time.

Consideration should be given to storage, security, and handling requirements when planning the most appropriate purchasing actions. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

IV. PURCHASING METHODS

Petty Cash Purchases. Regular purchases under \$200 and purchases for materials and services related to construction projects up to \$1,000 may be handled through the use of a petty cash account. Petty Cash Accounts may be established in an amount sufficient to cover small purchases made during a reasonable period, e.g., one month. For all Petty Cash Accounts, Travaux shall ensure that security is maintained and only authorized individuals have access to the account. These accounts shall be reconciled and replenished periodically.

Small Purchase Procedures. For any amounts above the Petty Cash threshold, but not exceeding \$150,000, Travaux may use small purchase procedures. Under small purchase procedures, Travaux shall obtain a reasonable number of quotes (preferably three). When State Law requires, appropriate notice of the solicitation shall be complied. However, for purchases of less than \$3,000, also known as Micro Purchases, only one reasonable quote is required. Quotations for Small Purchases (“QSP”), or quotes, may be obtained orally (either in person or by phone), by fax, or in writing. Award shall be made to the responsive and responsible vendor that submits the lowest cost to Travaux. If the award is made for reasons other than lowest price, documentation shall be provided in the contract file. Travaux shall not break down requirements aggregating more than the small purchase threshold (or the Micro Purchase threshold) into several purchases that are less than the applicable threshold merely to permit use of the small purchase procedures or avoid any requirements that apply to purchases that exceed the Micro Purchase threshold.

Sealed Bids. Sealed bidding, also known as Invitation for Bids (“IFB”), shall be used for all contracts that exceed the small purchase threshold and that are not competitive proposals or non-competitive proposals, as these terms are defined in this Policy. Under sealed bids, Travaux publicly solicits bids, and awards a fixed-price contract (lump sum or unit price) to the responsive and responsible bidder whose bid is in conformance with all the material terms and conditions of the IFB and is the lowest price. Sealed bidding is the preferred method for procuring construction, supply, and non-complex service contracts that are expected to exceed \$150,000.

Conditions for Using Sealed Bid. Travaux shall use the sealed bid method if the following conditions are present:

- (1) A complete, adequate, and realistic statement of work, specifications or purchase description is available;
- (2) Two or more responsible bidders are willing and able to compete effectively for the business; and
- (3) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the lowest price.

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

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

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

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

Conditions for Use. Where conditions are not appropriate for the use of sealed bidding, competitive proposals may be used. Competitive proposals are the preferred method for procuring professional services that will exceed the small purchase threshold. Construction services are only procured through competitive proposals under limited circumstances. Accordingly, construction services will most typically be procured utilizing the sealed bid (IFB) or small purchase procedures (“QSP”).

Form of Solicitation. Competitive proposals shall be solicited through the issuance of an RFP, except that A/E services, developer-related services and energy performance contracting may also be solicited through Qualifications-Based Selection (“QBS”) procedures, utilizing a Request for Qualifications (“RFQ”). The RFP shall clearly identify the importance and relative value of each of the evaluation factors as well as any sub factors and price. A mechanism for fairly and thoroughly evaluating the technical and price proposals shall be established before the solicitation is issued. Travaux may assign price a specific weight in the evaluation factors or Travaux may consider price in conjunction with technical factors; in either case, the method for evaluating price shall be established in the RFP.

Evaluation. The proposals shall be evaluated only on the factors stated in the RFP. Where not apparent from the evaluation factors, Travaux shall establish an Evaluation Plan for each RFP. Generally, all RFPs shall be evaluated by an appropriately appointed Evaluation Committee. An Evaluation Report, summarizing the results of the evaluation, shall be prepared prior to award of a contract.

Negotiations. Negotiations shall be conducted with all offerors who submit a proposal determined to have a reasonable chance of being selected for award, unless it is determined that negotiations are not needed with any of the offerors. This determination is based on the relative score of the proposals as they are evaluated and rated in accordance with the technical and price factors specified in the RFP. These offerors shall be treated fairly and equally with respect to any opportunity for negotiation and revision of their proposals. No offeror shall be given any information about any other offeror's proposal, and no offeror shall be assisted in bringing its proposal up to the level of any other proposal. A common deadline shall be established for receipt of proposal revisions based on negotiations. Negotiations are exchanges (in either competitive or sole source environment) between Travaux and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions. Discussions are tailored to each offeror's proposal, and shall be conducted by the contracting officer with each offeror within the competitive range. The primary object of discussions is to maximize Travaux's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. The contracting officer shall indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposer's potential for award. The scope and extent of discussions are a matter of the contracting officer's judgment. The contracting officer may inform an offeror that its price is considered by Travaux to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible to indicate to all offerors the cost or price that Travaux's price analysis, market research, and other reviews have identified as reasonable. "Auctioning" (revealing one offeror's price in an attempt to get another offeror to lower their price) is prohibited.

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

A/E Services. HACM may contract for A/E services using Qualifications-based Selection ("QBS") procedures, utilizing a Request for Qualifications ("RFQ") and Request for Proposals ("RFP"). Sealed bidding shall not be used for A/E solicitations. Under QBS procedures, competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. Price is not used as a selection factor under this method. QBS procedures shall not be used to purchase other types of services, other than Energy Performance Contracting and Developer services, though architectural/engineering firms are potential sources.

Noncompetitive Proposals. Procurement by noncompetitive proposals (sole-source procurements) may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, cooperative purchasing, or competitive proposals and if one of the following applies:

- (1) The item is available only from a single source, based on a good faith review of available sources;
- (2) An emergency exists that seriously threatens the public health, welfare, or, safety, or endangers property, or would otherwise cause serious injury to Travaux, as may arise by reason of a flood, earthquake, epidemic, riot, equipment failure, or similar event. In such cases, there must be an immediate and serious need for supplies, services or construction such that the need cannot be met through any of the other procurement methods, and the emergency procurement methods, and the emergency procurement shall be limited to those supplies, services or construction necessary simply to meet the emergency;
- (3) A situation exist that will seriously threatens or result in financial and legal consequences to Travaux or when time is of the essence to mitigate the threat of financial and legal consequences to occur.
- (4) A contractor default or non-performance that going through the normal competitive process would seriously undermine the over-all project schedule resulting in significant delay and cost.
- (5) The awarding agency authorizes noncompetitive proposals; or
- (4) After solicitation of a number of sources, competition is determined inadequate.

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

- (1) Description of the requirement;
- (2) History of prior purchases and their nature (competitive vs. noncompetitive);
- (3) The specific exception in 2 CFR 200.320(f)(1)-(4) which applies;
- (4) Statement as to the unique circumstances that require award by noncompetitive proposals;
- (5) Description of the efforts made to find competitive sources (advertisement in trade journals or local publications, phone calls to local suppliers, issuance of a written solicitation, etc.);
- (6) Statement as to efforts that will be taken in the future to promote competition for the requirement;
- (7) Signature by the Contracting Officer's supervisor (or someone above the level of the Contracting Officer); and

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

Cooperative Purchasing/Intergovernmental Agreements. Travaux may enter into State and/or local cooperative or intergovernmental agreements to purchase or use common supplies, equipment, or services. The decision to use an interagency agreement instead of conducting a direct procurement shall be based on economy and efficiency. If used, the interagency agreement shall stipulate who is authorized to purchase on behalf of the participating parties and shall specify inspection, acceptance, termination, payment, and other relevant terms and conditions. Travaux may use Federal or State excess and surplus property instead of purchasing new equipment and property, if feasible, and if it will result in a reduction of project costs. The goods and services obtained under a cooperative purchasing agreement must have been procured in accordance with 2 CFR 200.317 through 200.326.

V. INDEPENDENT COST ESTIMATE (ICE)

For all purchases above the Micro Purchase threshold, Travaux shall prepare an Independent Cost Estimate prior to solicitation. The level of detail shall be sufficient to address the cost and complexity of the item to be purchased.

VI. COST AND PRICE ANALYSIS

Travaux shall require assurance that, before entering into a contract, the price is reasonable, in accordance with the following instructions:

Petty Cash and Micro Purchases. No formal cost or price analysis is required.

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

Sealed Bids and Competitive Proposals. The presence of adequate competition should generally be sufficient to establish price reasonableness. Where sufficient proposals are not received, Travaux must conduct a cost analysis, to ensure that the price paid is reasonable.

Contract Modifications. A cost analysis, shall be conducted for all contract modifications for projects that were procured through Sealed Bids, Competitive Proposals, or Non-Competitive Proposals, or for projects originally procured through Small Purchase procedures where the amount of the contract modification will result in a total contract price in excess of \$150,000.

VII. SOLICITATION AND ADVERTISING

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

Small Purchases. Quotes may be solicited orally, through fax, or by any other reasonable method.

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

- (1) Advertising in newspapers or other print media of local or general circulations, or
- (2) Advertising in various trade journals or publications (construction).

Time Frame. For purchases of more than \$150,000, the public notice should run not less than once each week for two consecutive weeks.

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

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

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

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

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

- (1) The supplies or services (including construction) are no longer required;
- (2) Ambiguous or otherwise inadequate specifications were part of the solicitation;
- (3) All factors of significance to Travaux were not considered;
- (4) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (5) There is reason to believe that bids or proposals may not have been independently

determined in open competition, may have been collusive or may have been submitted in bad faith; or

- (6) For good cause of similar nature when it is in the best interest of Travaux.

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

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

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

If problems are found with the specifications, Travaux should cancel the solicitation, revise the specifications, and re-solicit using an IFB.

Credit (or Purchasing) Cards. Credit card usage should follow the rules for all other small purchases. For example, the Contracting Officer may use a credit card for Micro Purchases without obtaining additional quotes provided the price is considered reasonable. However, for amounts above the Micro Purchase level, the Contracting Officer needs to obtain a reasonable number of quotes before purchasing via credit card. When using credit cards, Travaux shall adopt reasonable safeguards to assure that they are used only for intended purposes (for instance, limiting the types of purchases or the amount of purchases that are permitted with credit cards).

VIII. BONDING REQUIREMENTS

The standards under this section apply to construction contracts that exceed \$150,000. There are no bonding requirements for small purchases or for competitive proposals. To ensure that all potential bidders have serious intent and have the capacity to perform the solicited product or services, Travaux may require guarantees in the forms outlined below.

A. **Bid Bonds.** For construction contracts exceeding \$150,000, offerors shall be required to submit a bid guarantee from each bidder. This bid guarantee shall provide assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. This bid bonds could be in the form of:

1. Five percent (5%) of the bid price in a form of a Bid Bond, Certified Check, or other form of Negotiable Instruments acceptable to Travaux.
2. Five percent (5%) of the bid price in a form of cash escrow.
3. Five percent (5%) of the bid price in a form of irrevocable letter of credit
4. A Performance and Payment Bond described in item B, below.

B. Performance and Payment Bonds. For construction contracts exceeding \$150,000, the successful bidder may be required to furnish an assurance of completion. This assurance may be any one of the following four at the discretion of the Contracting Officer:

1. A performance and payment bond in a penal sum of 100% of the contract price; or
2. Separate performance and payment bonds, each for 50 % or more of the contract price; or
3. A 15 % cash escrow; or
4. A 15 % irrevocable letter of credit.

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

In an effort to support small contractors and for cost efficiencies, Travaux may waive Payment and Performance (PP) Bond from sub-contractors. The VP-Construction shall evaluate the need for PP Bond based on the amount of the contract, time to complete, nature of the job, experience with and reputation of the sub-contractor, and overall sub-contractor capacity. Justification shall be provided to the Contracting Officer for such decision.

IX. CONTRACTOR QUALIFICATIONS AND DUTIES

Contractor Responsibility. Travaux 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. 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;
3. Have a satisfactory performance record;
4. Have a satisfactory record of integrity and business ethics;
5. Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
6. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and,

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

Suspension and Debarment. Contracts shall not be awarded to debarred, suspended, or ineligible contractors. Contractors may be suspended, debarred, or determined to be ineligible by HUD in accordance with HUD regulations or by other Federal agencies, e.g., Dept of Labor for violation of labor regulations.

X. CONTRACT PRICING ARRANGEMENTS

Contract Types. Any type of contract which is appropriate to the procurement and which will promote the best interests of Travaux may be used, provided the cost-plus-a-percentage-of-cost and percentage-of-construction-cost methods are not used. All solicitations and contracts shall include the clauses and provisions necessary to define the rights and responsibilities of both the contractor and Travaux. **Cost-plus-a-percentage-of-cost and percentage-of-construction-cost methods are not to be used unless approved by the Board. For all cost reimbursement contracts, including "Cost-plus Contracts,"** Travaux must include a written determination as to why no other contract type is suitable. Further, the contract must include a ceiling price that the contractor exceeds at its own risk.

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

1. The option is contained in the solicitation;
2. The option is a unilateral right of Travaux;
3. The contract states a limit on the additional quantities and the overall term of the contract;
4. The options are evaluated as part of the initial competition;
5. The contract states the period within which the options may be exercised;
6. The options may be exercised only at the price specified in or reasonably determinable from the contract. Contracts that exceed five years, including options require board approval; and
7. The options may be exercised only if determined to be more advantageous to Travaux than conducting a new procurement.

XI. CONTRACT MODIFICATIONS THROUGH CHANGE ORDERS

The President shall establish procedures for approving Change Orders resulting from changes in the scope of works, materials, quantities and pricing.

XII. CONTRACT CLAUSES

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

XIII. CONTRACT ADMINISTRATION

Travaux shall maintain a system of contract administration designed to ensure that contractors perform in accordance with their contracts. These systems shall provide for inspection of supplies, services, or construction, as well as monitoring contractor performance, status reporting on major projects including construction contracts, and similar matters.

XIV. SPECIFICATIONS

All specifications shall be drafted so as to promote overall economy for the purpose intended and to encourage competition in satisfying Travaux's needs. Specifications shall be reviewed prior to issuing any solicitation to ensure that they are not unduly restrictive or represent unnecessary or duplicative items. Function or performance specifications are preferred. Detailed product specifications shall be avoided whenever possible. Consideration shall be given to consolidating or breaking out procurements to obtain a more economical purchase.

Limitation. The following types of specifications shall be avoided:

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

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

XV. APPEALS AND REMEDIES

It is Travaux's policy to resolve all contractual issues informally and without litigation. When appropriate, a mediator may be used to help resolve differences.

Appeals Procedure. Travaux shall adopt a bid protest/appeal procedure for all contracts.

Bid Protest. Any actual or prospective contractor may protest the solicitation or award of a contract for serious violations of the principles of this Policy. Any protest against a solicitation must be received before the due date for the receipt of bids or proposals, and any protest against the award of a contract must be received within ten (10) calendar days after the contractor receives notice of the contract award, or the protest will not be considered. All bid protests shall be in writing and submitted to the Contracting Officer or designee. The Contracting Officer or designee shall issue a written decision on the matter. The Contracting Officer may, at his/her discretion, suspend the procurement pending resolution of the protest if the facts presented so warrant.

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

XVI. ASSISTANCE TO SMALL AND OTHER BUSINESSES

Goals. As maybe required by funding source, goals may be established periodically for participation by small businesses, minority-owned businesses, women-owned business enterprises, and labor surplus area businesses in Travaux prime contracts and subcontracting opportunities.

Definitions

1. A **small business** is defined as a business that is independently owned, not dominant in its field of operation, and not an affiliate or subsidiary of a business dominant in its field of operation. The size standards in 13 CFR Part 121 should be used to determine business size.
2. A **minority-owned business** is defined as a business which is at least 51% owned by one or more minority group members, or, in the case of a publicly-owned business, one in which at least 51% of its voting stock is owned by one or more minority group members, and whose management and daily business operations are controlled by one or more such individuals. Minority group members include, but are not limited to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Asian Indian Americans, and Hasidic Jewish Americans.
3. A **women's business enterprise** is defined as a business that is at least 51% owned by a woman or women who are U.S. citizens and who control and operate the business.
4. A **labor surplus area business** is defined as a business which, together with its immediate subcontractors, will incur more than 50% of the cost of performing the contract in an area of concentrated unemployment or underemployment, as defined by the DOL in 20 CFR Part 654, Subpart A, and in the list of labor surplus areas published by the Employment and Training Administration.

XVII. BOARD APPROVAL OF PROCUREMENT ACTIONS

Other than approval of this Procurement Policy, approval by the Board of Directors is not required for any procurement action under \$150,000, unless State and local law requires. Rather, it is the responsibility of the President to make sure that all procurement actions are conducted in accordance with the policies contained herein.

XVIII. DELEGATION OF CONTRACTING AUTHORITY

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

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

XIX. DOCUMENTATION

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

1. Rationale for the method of procurement (if not self-evident);
2. Rationale of contract pricing arrangement (also if not self-evident);
3. Reason for accepting or rejecting the bids or offers;
4. Basis for the contract price;

5. A copy of the contract documents awarded or issued and signed by the Contracting Officer;
6. Basis for contract modifications; and
7. Related contract administration actions.

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

Records are to be retained for a period of seven years, pursuant to Wis. Stat. s.19.21 (4)(b), after final payment and all matters pertaining to the contract are closed.

XX. DISPOSITION OF SURPLUS PROPERTY

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

XXI. FUNDING AVAILABILITY

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

Attachment: PIH 20017-15 (HA)



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

Special Attention of:
Public Housing Directors;
Public Housing Agencies;

NOTICE: PIH-2007- 15 (HA)

Issued: June 20, 2007

Expired: June 30, 2008

Subject: Applicability of Public Housing Development Requirements to Transactions between Public Housing Agencies and their Related Affiliates and Instrumentalities

I. Introduction

- A. **Purpose.** The U.S. Department of Housing and Urban Development (Department) has encouraged the formation of new and innovative public and private partnerships to ensure long-term sustainability of public housing developments and the leveraging of public and private resources to transform communities. Public Housing Agencies (PHAs) continue to form and expand their relationships with private partners, including partnerships with entities related to the PHA.

The Office of Inspector General (OIG) in report No. 2004-AT-0001 has alleged violations of the Annual Contributions Contract (ACC) and regulations in agreements regarding development activities and PHA relationships with affiliated housing development entities and non-profit organizations. This notice intends to reaffirm the requirements of Public and Indian Housing Programs including the United States Housing Act of 1937 (Act), the ACC, and regulations (collectively, public housing requirements) that apply to public housing activities, including mixed-finance development activities. This notice will also assist PHAs in avoiding violations of existing requirements in development transactions with their partners. The Department intends to use this notice to focus on existing development related requirements applicable to administrative fees and development cost allocation; prohibition of conflicts of interest; the procurement of related entities; and disposition and encumbrance of public housing property. Moreover, this Notice will focus on these requirements as they pertain to Affiliates and Instrumentalities, entities through which PHAs are conducting development activities.

Additionally, this notice will provide guidance to the Department's Headquarters and field office staff on identifying transactions that have not been approved by the Department and addressing the issues that arise in the transactions.

- B. **Applicability.** This notice applies to public housing development activities pursuant to 24 CFR Part 941. This notice does not apply to development or management of non-public housing programs that are not funded with public housing funds, even if carried out by entities related to the PHA. This notice also does not apply to PHA instrumentalities, affiliates, consortia or joint ventures providing administrative management, supportive or social services pursuant to Section 13 of the Act and its implementing regulations at 24 CFR Part 943. Notwithstanding any provision of this notice, Moving to Work (MTW) participants may continue to operate in accordance with their MTW Agreements with the Department.
- C. **The Department's policy.** The Department encourages PHAs to take innovative approaches to implementation of public housing programs including the creation of partnerships to increase the capacity and experience of the PHA. PHAs have diverse experience and skills and must evaluate what is in the interest of the PHA and its clients prior to utilizing an Affiliate or Instrumentality for development and/or the operation of public housing programs.¹ If the PHA determines that the use of an Affiliate or Instrumentality to assist in the development of public housing and to administer and manage PHA programs is in the best interest of the PHA, the Department encourages PHAs to use Affiliates and Instrumentalities, so long as the implementation of the public housing program is consistent with the applicable public housing requirements.
- D. **Program requirements.** Similar to PHAs themselves, Affiliates and Instrumentalities are created under state laws, so their basic powers and functions are governed by state and local law and further defined in their organizational documents, rather than being defined by federal statutes and regulations. The Department's regulatory authority over PHAs and their Affiliates and Instrumentalities derives from the requirements of the Department's programs that are administered by the PHA, Affiliate or Instrumentality. Thus, when an Affiliate or Instrumentality participates in a public housing development program it becomes subject to existing requirements.
- E. **Terms.** While the Department's regulations permit the PHA to develop public housing through a variety of ownership structures, the following are types of entities that are used in the practice of public housing development:

¹ This notice only covers development activities and activities related thereto.

1. An **“Affiliate/Affiliated entity”** is 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 this notice, an Affiliate is treated like an unrelated third party contractor.
2. An **“Instrumentality”** is an entity related to the PHA whose assets, operations, and management are legally and effectively controlled by the PHA, through which PHA functions or policies are implemented and that utilize public housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. For the Department’s purposes, 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. See 24 CFR 5.10, definition of a PHA. Instrumentalities must be authorized to act for and to assume such responsibilities. In addition, an instrumentality must abide by the public housing requirements that would be applicable to the PHA.

F. **Definitions.** For the purpose of this notice the following terms and phrases apply:

1. **“Public housing assets”** means public housing property, including real and personal property, tangible and intangible; and, tenant rents, used in connection with public housing that has been developed, acquired, or assisted with public housing funds.
2. **“Public housing units”** is the same term used in 24 CFR Part 941 and includes homeownership units developed with public housing funds prior to the transfer of title to the homebuyer.
3. **“Public housing funds”** means funds appropriated to implement programs authorized under the Act, including funds appropriated under Section 9 and 24 of the Act, excluding funds appropriated under Section 8 of the Act.

4. **“Public housing requirements”** means all requirements applicable to public housing, including without limitation, requirements pertaining to public housing under the Act, the Department’s implementing regulations and the ACC.

II. Formation of Instrumentalities and Affiliates

This section provides guidance on the fiduciary and organizational linkages between Affiliates, Instrumentalities and PHAs. It describes the extent to which public housing funds can be used to form Affiliates and Instrumentalities. The second part of this section specifically focuses on the relationship between PHAs and Instrumentalities that were formed with public housing funds.

Under the existing public housing structure there is usually one PHA in a jurisdiction. Therefore, any entity that does business with the PHA is presumed to be a contractor. An entity will be treated as a contractor unless it is made clear by the PHA that it should be treated differently, e.g., as an Instrumentality. The PHA may obtain a private legal opinion, an opinion from the local government, or guidance from the Department that the entity is an Instrumentality under HUD regulations and has the requisite powers and delegated authority to carry out the responsibilities of the PHA for development purposes under the applicable public housing requirements. If no such opinion is obtained, the PHA should look to the indicia of control over the entity as the basis for the PHA treating the entity as an Instrumentality (see Section B.1 below). Otherwise, the entity will be treated as a contractor.

- A. **Use of Federal funds to form Affiliates and Instrumentalities.** Public housing funds may be used for administrative expenses incurred in the formation of an Affiliate or Instrumentality created to develop and operate a PHA’s public housing development programs.
 1. Public housing funds may be used for costs related to forming an Affiliate or Instrumentality. If an Affiliate or Instrumentality is formed with public housing funds solely for developing a mixed-income and/or mixed-use development, the development must contain public housing units, although it may contain Low Income Housing Tax Credit (LIHTC) units, other affordable units, market rate housing, and commercial development. (See section 9 of the Act). Subject to the requirements discussed in Section III, the PHA may also use public housing funds for the costs of preparing and submitting a tax credit application, where it is developing public housing units in a mixed-income project, a mixed-use project, or a project that consists solely of public housing units, some of which are also LIHTC units.

2. Public housing funds **may not** be used to pay the cost of forming an Affiliate/Instrumentality created for the sole purpose of developing LIHTC or market rate developments that do not include any public housing units. In this event, the organizational costs must be paid with non-public housing funds, which includes de-federalized fees paid to the Central Office Cost Center.
3. Where multiple projects are contemplated, the first project must contain some public housing units. Public housing funds can be used, subject to the requirements discussed in Section III, to establish an Affiliate or Instrumentality that intends to develop multiple projects, some of which may not include public housing units as long as the first project includes public housing units. However, public housing funds appropriated under the Act must not be used to finance or develop the projects or phases that do not include any public housing units.

B. **Indicia of control necessary to determine an Instrumentality.**

Instrumentalities will be considered, for purposes of the public housing program, to be the PHA. As such, the Instrumentality must have the authority to carry out proposed activities of the PHA. Generally, the requirements are assumed to be met where the Instrumentality is created as a division within the existing structure of the PHA. The following factors should be considered in the formation and operation of an Instrumentality of the PHA which is a separate legal entity from the PHA.

- a. The Instrumentality is directed or managed by the same persons who constitute the board of directors or governing body of the PHA or who are employees of the PHA.
- b. Board positions on the Instrumentality may be associated with an employment position at the PHA or appointed by such persons. In the event of a PHA staff change, the PHA would appoint another employee to the board of the Instrumentality.
- c. The organizational documents of the Instrumentality contain provisions that in the event of a change in the controlling interest of the Instrumentality, all public housing assets of the Instrumentality are returned to the PHA or are otherwise protected.
- d. The organization is a component unit of a primary government using the suggested criteria and tests included

in the Government Accounting Standards Board Statement 14.

2. An Instrumentality must abide by the public housing requirements that would be applicable to the PHA.

III. Allocation and Source of Funds for the Cost of Shared Resources

This section includes allocation of formation costs discussed in Section II of this notice, and provides guidance on fiscal management and cost allocation when public housing funds are involved in a development activity. As a general rule, public housing funds may only be used for the development, administration, or management of a project that contains public housing units subject to the authority by which the funds were appropriated. The costs to carry out the administrative, management, or development functions for a project containing no public housing units shall be paid for with funds other than public housing funds. The PHA has the option of using the cost allocation system as outlined in this section or a fee based approach in lieu of cost allocation as outlined in Section B.

- A. **Basic cost allocation requirements.** Where staff, facilities, equipment, or other resources are shared between a PHA and an Affiliate/Instrumentality, or between the public housing program and non-public housing programs, the costs must be equitably allocated to each entity or program. This is the cost allocation principle that is the norm for both public and private business practices, and it applies to the development of public housing. The same cost allocation requirements apply where a PHA's employee performs work for an Affiliate as a consultant or other type of contractor. In the case of mixed-finance development the number of public housing units must be approximately proportionate to the PHA's contribution compared to the number of non-public housing units and the contribution from other sources. (See section 35 of the Act). OMB Circular A-87, Cost Principles for State and Local Governments (A-87), (2 CFR part 225) contains several provisions on this subject, including the following:
 - Attachment A, Sec. C.3.a. "A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received."
 - Attachment A, Sec. D.1. "The total cost of Federal awards is comprised of the allowable direct cost of the program, plus its allocable portion of allowable indirect costs, less applicable credits."
 - Attachment B, Sec. 8.h.(4). "Where employees work on multiple activities or cost objectives, a distribution of their salaries or wages will be supported by personnel activity reports or equivalent documentation... unless a statistical sampling system... or other

substitute system has been approved by the cognizant Federal agency.”

- B. **Fee based structure.** PHAs may use a fee based structure in lieu of cost allocation systems. Where the PHA earns certain fees, as detailed in the Financial Management Handbook, it may use the fees as the PHA wishes, including to pay Affiliate or Instrumentality costs. This structure is permitted under Section A(2)(b) of Attachment A of A-87 as an alternative to reduce the administrative burden regarding the establishment of overhead rates.

1. *Reasonable fee amount.* This section is applicable to mixed-finance development activities approved under 24 CFR 941 Subpart F that include the use of Capital Funds, HOPE VI funds, or other public housing capital assistance eligible to be used for development. When using public housing funds, a reasonable administrative fee is 3% of the total project budget. The administrative fee may be paid with public housing funds and covers the PHA’s administrative cost for the mixed-finance development activities. (See the Department’s Cost Control and Safe Harbor Standards for Rental Mixed-Finance Development, Revised April 9, 2003.) The total project budget includes all hard and soft development costs paid with both public and private financing. The total project budget should exclude Community and Supportive Services (CSS) costs for the purpose of calculating the administrative fee. If the administrative fee is at or below the 3% safe harbor standard, no further review is required. Alternatively, the PHA may charge up to a 6% administrative fee provided the PHA demonstrates to the Department, in writing, that the fee is appropriate for the scope of work, specific circumstances of the project, and local or national market for the services provided.
2. *Treatment of fees.* Under OMB Circular A-87, a PHA that receives federal and non-federal funds must assure that it is not disproportionately allocating overhead to federal programs. In the case where the PHA is charging within the approved amount for administrative fees for mixed-finance development, this concern is assumed to be satisfied.
 - a. For PHAs undertaking development, any administrative fee that the PHA charges for mixed-finance development programs is considered non-program income for purposes of A-87 and 24 CFR Part 85, provided that the fees charged are reasonable under the criteria established by the Department; however, other state and local restrictions may

still apply. Consequently, any reasonable fees earned by the PHA will be treated as local revenue subject only to the controls and limitations imposed by the PHA's management, board or other authorized governing body. The PHA is not required to document or demonstrate actual costs to earn the administrative fee. Additionally, the PHA is not required to distinguish or separately account for the expenses or costs associated with the administrative fee earned from its public housing development programs.

- b. A PHA may use the administrative fee for any purpose appropriate for local revenue, including PHA, Instrumentality, or Affiliate costs, such as to pay the Central Office Cost Center or to hire external consultants including a program manager, development advisors, or relocation specialists. The administrative fees or costs incurred must be within the administrative fee limits.
- c. PHA fees and or assets derived from non-public housing funds and non-public housing assets are not subject to the provisions of this notice.

- C. **Accounting and reporting requirements.** PHAs and Instrumentalities must comply with Generally Accepted Accounting Principles (GAAP) reporting requirements (24 CFR 5.801). This includes the Instrumentality providing the PHA and the Department with audited financial statements and financial performance reviews. If an Affiliate is included as a component unit or, to the extent that these accounting and reporting requirements apply to unrelated third party contractors, then Affiliates must also comply. (See PHA GAAP Flyer, Vol. 1, Issue 3, July 1999).

IV. Conflicts of Interest

PHAs are bound by conflict of interest provisions found in both the ACC and in HUD regulations at 24 CFR Part 85. Instrumentalities and Affiliates are also bound by these requirements. Conflict-of-interest questions can arise in transactions by PHAs, their Affiliates and Instrumentalities. This section highlights contractual and regulatory provisions that address conflicts of interest.

We discuss below the overarching standards for Part 85 and the ACC, respectively. As a practical matter, the Department is most concerned with conflicts of interest resulting in an actual or perceived personal financial benefit to agents of the PHA, Instrumentality and Affiliate involving public housing funds. Such instances create, at a minimum, a perception of abuse of authority and self-dealing in a federal program. In such instances the Department will closely scrutinize the transactions and will consider all available remedies for resolving these conflicts.

The following provides an overview of conflict-of-interest concepts generally and provides excerpts from the ACC and other Department regulations.

A. **Conflict of Interest.** PHAs and Instrumentalities are to avoid situations in which agents of those entities participate in contracting related decision making that results in a benefit received by that agent or person linked to that agent. In addition, the PHA's Instrumentalities and Affiliates may not contract with a third party in which certain PHA officials, their immediate family and certain local officials have an interest. Participation by a representative of the PHA (e.g., board member, employee, officer) in the PHA's Instrumentality is not, per se, a conflict; nor is a representative's participation in an Affiliate, so long as the representative and certain persons related to that representative do not have an interest in the Affiliate. Under the Departments regulations, the PHA, and therefore its Instrumentality, must develop standards for determining whether someone has a conflict of interest in a matter involving the PHA and any other party.

1. *Prohibited individuals.* The conflict-of-interest provision applies to an individual that is a member of the prohibited class as listed in Section 19 of the ACC or 24 CFR section 85.36(b)(3) (e.g., a PHA employee, officer or agent, any member of his or her immediate family, his or her business partner, or an organization which employs or is about to employ any of the above). Personal financial interests of an individual not specifically enumerated as covered, or individuals specifically exempted (e.g., tenant commissioners, under the ACC) do not constitute a conflict of interest under either the ACC or Part 85.
2. *Decision making capacity.* Under Part 85, a conflict of interest exists if an agent of the PHA/Instrumentality will participate in the award or administration of the contract supported by federal funds, and the decision, influence, award, or administration results in a benefit, actual or perceived, to the prohibited individual. However, the ACC strictly prohibits, without a waiver, contracting with an entity in which a prohibited individual has any financial interest regardless of the individual's decision making capacity.
3. *Applicability to Employment Sharing Arrangements* There is no conflict of interest where an agent of the PHA, Affiliate, or Instrumentality receives a normal and customary compensation package for employment by the PHA or the Affiliate/Instrumentality, including compensation provided to the employee by the PHA or the Affiliate/Instrumentality. For

example, a bonus provided by the PHA to the development director or payrolled employee for their service to the Instrumentality/Affiliate would not be considered a financial interest, if consistent with the PHA's customary compensation package. Where the PHA permits its staff to provide services to an Affiliate or Instrumentality the allocation of the salary expenses between these entities do not create a conflict of interest for the individual employee.

B. Consolidated Annual Contributions Contract (ACC) – Section 19.

Affiliates/Instrumentalities are not exempt from the conflict-of-interest prohibition that applies to public housing in general. As discussed in Section I.E, an Instrumentality is construed as the PHA and an Affiliate is considered a contractor. The prohibition of conflicts of interest is stated in Section 19 Part A of the ACC, Form HUD-53012A (7/95).² “(1) In addition to any other applicable conflict-of-interest requirements, neither the PHA nor any of its contractors or their subcontractors may enter into any contract, subcontract, or arrangement in connection with a project under this ACC in which any of the following classes of people has an interest, direct or indirect, during his or her tenure or for one year thereafter.”

1. “(A)(1)(i) Any present or former member or officer of the governing body of the HA [housing authority] or any member of the officer's immediate family. There shall be excepted from this prohibition any present or former tenant commissioner who does not serve on the governing body of a resident corporation, and who otherwise does not occupy a policymaking position with the resident corporation, the HA or a business entity.”
2. “(A)(1)(ii) Any employee of the HA who formulates policy or who influences decisions with respect to the project(s), or any member of the employee's immediate family, or the employee's partner.”
3. “(A)(1)(iii) Any public official, member of the local governing body, or State or local legislator, or any member of such individuals' immediate family, who exercises functions or responsibilities with respect to the project(s) or the HA.”

² PHAs should examine their ACCs as some PHAs may still be operating under older versions of the ACC and those terms will apply.

C. **The Department's Regulations: 24 CFR Part 85**

The Department's regulations that apply to procurement by a PHA or its subgrantees, 24 CFR Part 85, contain a similar prohibition against real or apparent conflict of interest. The prohibition of conflicts of interest is stated in 24 CFR 85.36(b)(3).

“Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- (i) The employee, officer or agent,
- (ii) Any member of his immediate family,
- (iii) His or her partner, or
- (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.”

D. **Waiver.** If the Department determines there is good cause, the PHA may obtain from the Department a written waiver of Section 19 of the ACC and an exception to the conflict-of interest provisions in 24 CFR Part 85.36(b)(3).

E. **Applicability to Instrumentalities.** An Instrumentality is construed as the PHA in conjunction with public housing development activities. As such, there is no inherent conflict of interest regarding transactions between a PHA and its Instrumentality within the sphere of activity. An Instrumentality is required to follow the ACC and Part 85 conflict-of-interest provisions in its contracting with third parties, as though it were the PHA.

V. PHA Selection of Affiliates/Instrumentalities/Owners Entities and Procurement by Those Entities.

In all cases, when a PHA or its Instrumentality expends public housing funds as part of a development activity, procurement of development partners is governed by 24 CFR Part 85 and 24 CFR 602(d)(1). This section provides an overview of how the procurement requirements apply to Affiliates/Instrumentalities and mixed-finance owner entities engaged in development activities with the PHA.

A. Instrumentality

1. *Selecting the Instrumentality.* A PHA's selection of an Instrumentality for development is not subject to 24 CFR Part 85. The Instrumentality is essentially the PHA under the public housing program and is controlled by the PHA. Therefore, the PHA need not procure an Instrumentality.
2. *Procurement by the Instrumentality.* An Instrumentality of the PHA that is created or selected to complete a public housing development activity is subject to 24 CFR Part 85 in selection of its partners and subcontractors. An Instrumentality must procure third party members of its operational or development team, i.e., architects, consultants, contractors, attorneys, etc. because the Instrumentality is subject to the same procurement requirements as the PHA (see 24 CFR Part 85 and 24 CFR Part 941).

B. Affiliate

1. *Procurement of the Affiliate.* PHA procurement of a PHA Affiliate is subject to the applicable provisions of 24 CFR Part 85 and 24 CFR Part 941. The PHA may choose to implement any of the methods of procurement outlined in 24 CFR 85.36, including procurement by noncompetitive proposals, as long as the preconditions to the use of that method are met. For purposes of mixed-finance development the affiliate may be procured in accordance with 24 CFR 85.36 as modified by 24 CFR 941.602(d).
2. *Selections by the Affiliate.* An Affiliate that has been procured by the PHA in accordance with Part 85 is not subject to Part 85 when the Affiliate contracts for goods or services, including services of the other members of its operational or development team, e.g., architects, consultants, contractors, and attorneys.

- C. Selection by an owner entity.** 24 CFR 941.602(d)(2) refers to the exercise of "significant functions" within the owner entity by the PHA or

an Instrumentality in order to determine whether the procurement of subcontractors is subject to 24 CFR Part 85.³ In a mixed-finance transaction, the procured developer typically forms the owner entity and assumes a role in the partnership. The following are examples of PHA or Affiliate/Instrumentality involvement in the owner entity.

1. If the PHA or its Instrumentality (by virtue of having been selected and not procured by the PHA) is a general partner or managing member of the owner entity or occupies a position that allows either the PHA or the Instrumentality to exercise significant functions as to the management of the development, then selections by the owner entity are subject to the provisions of 24 CFR Part 85.
2. If an Affiliate or any other entity (by virtue of having been procured by the PHA or Instrumentality) is the general partner or managing member of the owner entity (even if the Affiliate is occupying a position that allows it to exercise significant functions as to the management of the development), then the owner entity is not subject to the provisions of 24 CFR Part 85.
3. A PHA, Instrumentality, or Affiliate that has limited rights as a limited partner or minority member, including a purchase option or right of first refusal, does not qualify as exercising significant functions within the owner entity.

VI. Section 30, Capital Fund Financing and Public Housing Development

The following is a summary of the key program requirements affecting PHAs and their Affiliates/Instrumentalities participating in the development of public housing.

- A. **Section 30 of the 1937 Act: Public housing mortgages and security interests.** Private development firms, PHAs, Affiliates and Instrumentalities providing development functions for public housing development and/or mixed-finance housing development projects must conform to the requirements of section 30 (42 U.S.C. 1437z-2) to the extent they mortgage or grant a security interest in any public housing asset. In general, entities may not mortgage or otherwise grant a security interest in any public housing project, asset, or other property of the PHA without the prior written approval of the Assistant Secretary for Public and Indian Housing or the Deputy Assistant Secretary for the Office of Public Housing Investments (OPHI). With the exception of security interests in

³ The Procurement Process chapter of the Mixed-Finance Guidebook provides additional detail on this topic.

public housing appurtenances such as administration buildings, the Declaration of Trust (pursuant to section 8 of the ACC and section 9 of the Act) must be recorded before any mortgage or security interest on a public housing project.

- B. **Capital Fund Financing Program.** PHAs may participate in the financing element of the Capital Fund under the Capital Fund Financing Program (CFFP). A PHA may borrow private capital to make improvements and pledge, subject to the availability of appropriations, a portion of its future year annual Capital Funds to make debt service payments for either a bond or conventional bank loan transaction. The loans or bonds are obligations of the PHA. The Department does not guarantee or insure these loans or bonds. No action taken under CFFP or section 30 shall result in any liability to HUD. The PHA obligation is subject to the availability of appropriations by Congress and compliance with statutory and regulatory requirements. A PHA must obtain written approval from the Department prior to executing any document that would encumber or pledge as collateral any public housing asset. This includes both physical assets and future public housing funding, such as Operating Funds or Capital Funds. In order to receive approval from the Department, a PHA must submit a financing proposal that includes a term sheet, financial documents, and a justification for the use of Capital Funds for financing.
- C. **Public housing and mixed-finance development.** A PHA may use any generally accepted method of development outlined in 24 CFR Part 941. The purpose of the development program is to allow the PHA to develop public housing units that serve the needs of the public housing residents over the long term. The following is a summary of the public housing requirements applicable to the development of public housing units.
1. *Mixed-finance development.* Private development firms and/or Affiliates and Instrumentalities undertaking mixed-finance development of public housing units must conform to applicable public housing requirements. Specifically, the entity must follow the requirements of 24 CFR Part 941, Subpart F – Public/Private Partnerships for Mixed-Finance Development of Public Housing Units, and the guidance and procedures established by the OPHI, including but not limited to the Mixed-Finance Guidebook (1998). The OPHI must approve the obligation of any public housing funds prior to the expenditure of these funds.
 2. *Other development methods.* Private development firms, Affiliates or Instrumentalities conducting development activities under 24 CFR Part 941, Subparts A, B, C, D, and E must conform to the requirements of the appropriate Subpart. The

PHA must ensure in its contractual arrangements that the partners will comply with all applicable public housing requirements. The Department's field offices will provide technical assistance, with respect to approvals, monitoring, and reviews. The Program Centers must approve the transaction before the obligation of any public housing funds.

3. *Environmental requirements.* Note that the references to 24 CFR Part 50 in 24 CFR 941.208 and 941.608(b)(6) are outdated. The federal environmental review will be performed by a local or state Responsible Entity pursuant to 24 CFR Part 58, unless the Department chooses to perform the review itself under Part 50. Participants in the development process, including public or private for-profit or non-profit entities and their contractors, may not commit any public or private funds to activities that would have an adverse environmental impact or limit the choice of reasonable alternatives unless one of the following conditions has been met: (1) The Department has received a certification and request for release of funds and has approved the request for release of funds; or (2) The Department has done an environmental review and approved the activity or project.

VII. Disposition and Encumbrance of Public Housing Property

Development transactions between PHAs and other parties, including Affiliates/Instrumentalities, frequently involve the disposition or the encumbrance of public housing property. The following provisions are reiterated to emphasize important restrictions and remind PHAs of their obligations associated with the receipt of public housing funds, which still apply where Instrumentalities and Affiliates are involved, and to specifically discuss the applicability of these provisions to Instrumentalities.

- A. **Consolidated Annual Contributions Contract, Part A (ACC) Form HUD-53012A (7/95).** The following are selected provisions of the ACC with particular application to transactions involving PHAs, Affiliates and Instrumentalities:
 1. Section 7 – Covenant Against Disposition and Encumbrances. This section states: “The HA shall not demolish or dispose of any project, or portion thereof, other than in accordance with the terms of this ACC and applicable HUD requirements. ... the HA shall not in any way encumber such project, or portion thereof, without the prior approval of HUD. In addition, the HA shall not pledge as collateral for a loan the assets of any project covered under this ACC.”

2. Section 8 – Declaration of Trust. This section states: “Promptly upon acquisition of the site of any project, the HA shall execute and deliver an instrument (which may be in the form of a declaration of trust, a trust indenture, or such other document as may be approved by HUD) confirming and further evidencing, among other things, the covenant of the HA not to convey or encumber the project except as expressly authorized in this ACC...”
 3. Section 9 – Depository Agreement and General Fund. This section states: “(B) All monies and investment securities received by or held for the account of the HA in connection with the development, operation and improvement of projects in accordance with an ACC with HUD shall constitute the “General Fund”...(C) The HA shall maintain records that identify the source and application of funds in such a manner as to allow HUD to determine that all funds are and have been expended in accordance with each specific program regulation and requirement. The HA may withdraw funds from the General Fund only for: (1) the payment of the costs of development and operation of the projects under the ACC with HUD; (2) the purchase of investment securities as approved by HUD; and (3) such other purposes as may be specifically approved by HUD. Program funds are not fungible; withdrawals shall not be made for a specific program in excess of the funds available on deposit for that program....These covenants apply to all public housing assets as defined in ..., including not only real estate, but also money, investment assets, future receipts from rents, operating subsidy and other sources, and any other type of tangible or intangible personal property that is a part of a public housing project” (ACC, Sec. 2, Definitions “Project”).
- B. PHAs, Affiliates, and Instrumentalities may not dispose of or encumber public housing property without the Department’s approval either under 24 CFR Part 970 or Part 941, or section 30 of the Act, as applicable.
- C. Examples. The following is a nonexclusive list of examples of general types of encumbrances that are prohibited by the ACC covenant without the prior written approval of HUD:
- a. A mortgage or other lien on project real estate;
 - b. Pledge or other encumbrance of public housing project funds, including tenant rents, and money on hand or future revenues;

- c. Use of project equipment, vehicles, or other tangible assets as collateral;
 - d. Creation of a claim against project assets, under a guaranty or indemnity agreement; and
 - e. Grant of a leasehold interest other than dwelling leases with eligible families in the project.
- D. **Exception: Disposition through mixed-finance development.** Transfer by deed or ground lease of public housing property to an Instrumentality, Affiliate or mixed-finance owner entity for the purpose of developing public housing through the mixed-finance method does not require written approval from the Department through 24 CFR Part 970. The PHA will provide a certification stating that the disposition is in compliance with the provisions of Section 18 of the Act. The Department will approve the transfer, sale or ground lease of public housing property as a component of the mixed-finance approval process.

VIII. Reimbursement of Public Housing Funds

This section outlines the reimbursement provisions for PHAs that improperly use public housing funds for expenses associated with the development of projects that do not contain public housing units. Additionally, the section outlines corrective actions that PHAs must take where a PHA creates mortgages or grants a security interest in public housing property without the prior written approval of the Department.

The Department may pursue enforcement actions in the event that the PHA is found to have violated the terms of the existing public housing requirements. At its option, the Department may pursue enforcement actions for violations of ACC, statutory, or regulatory requirements and/or allow PHAs to implement the cures described below.

- A. **Reimbursement for improper use of public housing funds for development.** PHAs that have used public housing funds, itself or through a private partner or an Affiliate/Instrumentality, to develop a project that contained no public housing units must reimburse or cause the reimbursement of such funds by the private partner or Affiliate/Instrumentality, as appropriate. Any development costs paid with public housing funds for the improvement of the non-public housing units or for the improvement of a site developed with no public housing units must be reimbursed to the PHA, unless otherwise directed by the Department.
- B. **Reimbursement improper use of public housing funds for development for development of mixed-finance communities.** PHAs that have used public housing funds, without prior written from the

Department, that resulted in the development of mixed-finance projects that include some public housing units must reimburse or cause the reimbursement of such funds to the PHA under the following circumstance:

In the case where a PHA did not previously obtain the Department's approval for the mixed-finance development, the PHA must reimburse all improper costs related to the improvement of the non-public housing units (both hard and soft costs) and/or for the improvement of the site. The Department may use a pro rata share test to ensure that public housing funds were not expended in a greater ratio than the amount of public housing units in the development. For example, if 25 percent of the units in the development are public housing units, the entity must reimburse any public housing funds spent over and above 25 percent of the development costs, excluding costs such as administration, demolition, relocation and supportive services.

- C. **Failure to obtain approval from the Department for section 30.** PHAs are to scrutinize any financial guarantees, loan agreements, indemnifications or security agreements entered into by the PHA, an Affiliate or Instrumentality to ensure that mortgages or other such documents that grant a security interest in any public housing project, public housing property or other public housing asset have been previously approved in writing by the Department. At the discretion of the Department, agreements entered without prior approval from the Department that potentially give third parties a claim on PHA assets in violation of public housing regulations must be terminated or restructured. The PHA must submit documentation to the Department, including all transactional documents, evidencing that such unapproved encumbrances or security interests have been terminated or restructured in a manner to satisfactorily remedy any violations of the public housing requirements.

IX. Monitoring and Reporting in the PHA Plan

Currently, the OPHI reviews and approves mixed-finance transactions that involve PHAs and their Affiliates/Instrumentalities and owner entities. The purpose of this section is to assist with the identification of those transactions that the Department has not approved.

Because the pertinent requirements are not peculiar to transactions involving Affiliates/Instrumentalities, the general approach described should create neither a heightened nor diminished level of scrutiny merely based upon the existence of an Affiliate or Instrumentality. The purpose of this notice is not to impose new or different requirements upon PHAs or the Department, but to assist in the interpretation of existing requirements in complex situations involving the use of Affiliates or Instrumentalities.

A. Audit Findings: A-133 Compliance Supplement

1. PHAs are required to disclose activities with Affiliates/Instrumentalities in audited financial statements. The information provided should include cost allocations and financial and accounting transactions between PHAs and their Instrumentalities and Affiliates. The annual audit should include a review of the PHA's use of public housing funds in agreements with Affiliates or Instrumentalities in accordance with OMB Circular A-133 Compliance Supplement.
2. The audit may also disclose the existence of encumbrances that have not been previously approved by the Department. To assist with this part of the review, paragraph 3 below provides a non-comprehensive list of types of transactions that the Department has approved for the use of public housing funds where encumbrances may arise. The identification of any of these types of transactions, without the Department's approval, may indicate non-compliance with existing ACC and public housing requirements as outlined in this notice.
3. The types of transactions include: project syndications, limited liability corporations/partnerships and/or partnership agreements, contractual relationships, and associated accounting between PHAs, Affiliates, Instrumentalities, and other entities involved with projects utilizing public housing funds and/or assets, bank loans, pledges or guarantees of repayment.
4. Any findings from the audit that are related to the encumbrance of public housing assets or formation and cost allocation activities of Affiliates/Instrumentalities will be resolved by the field office, in conjunction with the OPHI. Such findings could trigger a joint review by OPHI and the field office. A checklist that will be used to assist with that review is attached to this Notice as Appendix 1.

B. Development Activity Reporting: PHA Plan

1. In accordance with 24 CFR 903, the PHA is required to report disposition of public housing property and any public housing development activities to be entered into with Affiliates/Instrumentalities and other private development entities in the PHA Plan. The field office in the region where the PHA is located approves the PHA Plan. If the field office identifies any problematic disclosures in the PHA Plan, they will work with OPHI to review them as necessary.
2. The PHA Plan includes submission of the Annual Statement for HOPE VI, Mixed-Finance and Capital Fund Program in Part III. The PHA Plan also includes Implementation Schedules for each active grant that details the eligible activities, including development activities conducted with Affiliates

and Instrumentalities, to be funded and the budget of estimated sources and uses.

3. In accordance with the HOPE VI Notice of Funding Availability and 24 CFR 903, the PHA is required to report development activities in the PHA Plan. Additionally, the Department must separately approve all development transactions with Affiliates/Instrumentalities and private development entities that utilize public housing funds for the development. (See 24 CFR Part 941, Subparts A-F sections 941.302, 941.501, 941.612, & 941.614).
4. The approval referred to above is only for development transactions with Affiliates/Instrumentalities and private development entities that involve the use of public housing funds and assets. Non-public housing development activity is not subject to review and approval by the Department, and thus is not included in the PHA plan.

C. Procurement Review

Should a review be triggered, part of the process may include a review of procurement which should include an evaluation of compliance with the conflict-of-interest provisions that are included in the HUD Procurement Handbook, 24 CFR 85.36 and the ACC and reiterated in this notice.

D. Checklist

The Department's staff and PHAs may use the attached checklist (Appendix 1) as guidance for assessing compliance with the requirements discussed in this notice.

Signed:

/s/

Orlando J. Cabrera, Assistant Secretary for
Public and Indian Housing

Affiliate/Instrumentality Reference Sheet

Purpose:		
This reference sheet will assist in analyzing concepts covered in the PIH Notice regarding Affiliates and Instrumentalities.		
<u>Issue</u>	<u>Source Documents</u>	<u>Comments and Notice References</u>
<u>Determine Necessity of Review:</u>		
Does the PHA have any Instrumentalities (related entities that are effectively and legally controlled by the PHA), including but not limited to a Housing Development Corporation, nonprofit or for-profit entities?	<ul style="list-style-type: none"> •PHA Plan •Annual audit •Entity's organizational documents 	(See Notice Section I and II)
Does the PHA have any Affiliates (related entities that do not meet the definition of Instrumentality, but nevertheless the PHA has some measure of control over the entity in terms of organization, administration, or program activities)?	<ul style="list-style-type: none"> •Procurement records •Board resolutions •Entity's organizational documents 	(See Notice Section I and II)
<u>(If the answers to both of the above threshold questions are “no”, it is unnecessary to proceed further).</u>		
Have public housing funds been used and have public housing development activities been conducted via the Affiliate or Instrumentality?	<ul style="list-style-type: none"> •Development contract •PHA financial records •Invoices 	PHAs may work with Affiliates/Instrumentalities on non-public housing projects without public housing assistance without approval or review.
<u>(If the answer is “no”, it is unnecessary to proceed further).</u>		
Does the PHA have an approval from the Department for the public housing development activities conducted by the Affiliate/Instrumentality?	<ul style="list-style-type: none"> •Approval letter •Executed ACC Amendment •Annual PHA Plan 	The approval, ACC Amendment and PHA Plan should indicate that the PHA was working with the Affiliate/Instrumentality.
<u>(If the answer is “yes”, it is unnecessary to proceed further).</u>		

<u>Ascertain the Basic Facts:</u>		
If one or more of the types of entities identified above exist, ascertain the basic facts about its organization, administration and activities.	<ul style="list-style-type: none"> •Entity's organizational documents •Bylaws •Board resolutions •Articles of Incorporation 	The reviewer should become familiar with the organizational structure and relationship to the PHA.
<u>Programmatic Compliance Review:</u>		
<i>Formation</i>		
Did the PHA use public housing funds for the formation of an Affiliate or Instrumentality that has not performed public housing activities?	<ul style="list-style-type: none"> •PHA financial records •Entity invoices 	The reviewer may review to determine if public housing funds were used to pay for ineligible expenses. (Section II.A)
<i>Cost Allocation</i>		
If the PHA is utilizing cost allocation for shared staff, facilities, equipment, or other resources, do the allocations generally comply with OMB Circular A-87 (2 CFR Part 225)?	<ul style="list-style-type: none"> •Financial records •Accounting records •Invoices •Contracts 	The reviewer should determine if the PHA is allocating costs appropriately in accordance with Circular A-87. (Section III.A)
If the PHA is utilizing a fee based structure, are the fees for administration charged to the development below 3% of the total project costs or otherwise approved by the Department?	<ul style="list-style-type: none"> •Approval letter •Development proposal •Development budgets •Payroll records •Accounting records 	The budgets should indicate fees within the safe harbor or approval for charging a greater fee. (Section III.B)
To the extent required, are the entities complying with Generally Accepted Accounting Principles?	<ul style="list-style-type: none"> •Annual audits •Financial reviews 	The Audit should be free from findings. Affiliates need only comply with GAAP to the extent that they are required through contracts with the PHA, they are included as a component unit, or an unrelated third party would be required. (Section III.C)

<i>Conflict of Interest</i>		**The questions in this section should apply to all transactions involving public housing funds, regardless of the participation of an Affiliate or Instrumentality**
To what extent is there common membership on the governing boards of the PHA and Affiliate/Instrumentality?	<ul style="list-style-type: none"> •Organizational documents of the Affiliate/Instrumentality •Board records 	The reviewer should identify any parties that may be prohibited individuals in the transactions. (Section IV.A.1)
Is there a personal financial benefit to any of the prohibited individuals as determined in accordance with the guidance provided in Section IV of the Notice?	<ul style="list-style-type: none"> •PHA payroll records •Other payroll records for the prohibited individuals 	The reviewer should identify any parties with a personal financial benefit other than normal and customary compensation. (Section IV.A.2, B, C, and D)
If there is a personal financial benefit to a prohibited individual, has the Department issued a waiver of the ACC provisions and 85.36(b)(3) related to conflict of interest?	<ul style="list-style-type: none"> •PHA/HUD correspondence records • Organizational documents of the Affiliate/Instrumentality 	The reviewer should ensure that the waiver and exceptions requirements have been met. (IV.B and C)
Is there reason for a Departmental review or investigation of the PHA's procurement or contracting transactions with its Affiliate/Instrumentality?		
<i>Procurement</i>		
Is the PHA in compliance with the procurement regulation? Have all Affiliates or other development partners been appropriately procured?	<ul style="list-style-type: none"> •Procurement Handbook •Procurement records 	See Section V Generally
Does the PHA have an Instrumentality as defined in the Notice?	<ul style="list-style-type: none"> •PHA Plan •Annual audit •Entity's organizational documents 	Sections I.E.2, II.B
Has the Instrumentality followed Part 85 procurement practices in the selection of members of its Development Team?	<ul style="list-style-type: none"> •Contractual agreements •Procurement protocols for the Instrumentality. 	Section V

<i>Prohibition Against Encumbrances</i>		**The questions in this section should apply to all development transactions involving public housing funds, regardless of the participation of an Affiliate or Instrumentality**
Identify all developments that contain public housing, which are or have been developed, managed or operated by an entity other than the PHA, including Affiliates/Instrumentalities and private partners.	<ul style="list-style-type: none"> •PIC •PHA Plan •Declarations of Trust or Restrictive Covenants 	This information should be included in the PHA Plan (See Sections VI and IX.B)
With respect to those developments, has the PHA or the Affiliate/Instrumentality entered into agreements or commitments that encumber, pledge, or otherwise restrict public housing property or assets?	<ul style="list-style-type: none"> •Loan agreements •Guarantees •Documents recorded upon the deed relating to the property. 	Section VI. The reviewer should look for any unapproved transactions affecting Public Housing property.
With respect to those agreements, has the department previously reviewed and approved the transaction through a Mixed Finance approval, CFFP approval, Section 30 approval or otherwise?	<ul style="list-style-type: none"> •Mixed-finance approval •CFFP approval •Section 30 approval 	Section VI.B. These transactions are allowed with the Department's approval required under Part 941.
Is there sufficient indication of an unapproved prohibited encumbrance to justify an audit or separate review?		
<i>Disposition</i>		**The questions in this section should apply to all development transactions involving public housing funds, regardless of the participation of an Affiliate or Instrumentality**
Does the PHA have an approval under the Authority under 24 CFR 970 for the disposition of property?	•HUD disposition approval	Section VII.A.
Does the disposition fall under the Mixed Finance exception and have an approval of a mixed finance development under 24 CFR 941?	•HUD mixed-finance approval	Section VII.B.