

Contracts: Options, Escalations, Terminations
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What will we accomplish during this seminar?

- A renewed commitment to conduct all housing agency (HA) procurement and contract activities in an open, fair, reasonable, justifiable and HUD-compliant manner.
- An ability to locate in the Handbooks and regulations what HUD wants and requires; hence, a better understanding of the applicable law(s).
- Be more prepared for a HUD/OIG audit.
- Contract documents that better meet the needs of the HA and the contractor community (herein, contractor shall also mean supplier, vendor, consultant, etc.); contracts that contain appropriate clauses for options, escalations and terminations.
- Learn and implement "Gifford's Gospels."

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Gifford's Gospels

- No. 1: "If it ain't written, it don't exist."
No. 2: "There are no coincidences in life—everything happens for a reason."
No. 3: "Whatever we do must be open, fair, reasonable and justified."
No. 4: "Contractors are not our friends—they are our partners."
No. 5: "Nothing is free—there is a price to pay for everything."
No. 6: "Be prepared—if something can go wrong, it will happen at the worst possible moment."
No. 7: "Luck is where preparation and opportunity meet."
No. 8: "He/she who writes the contract, the contract is in favor of."

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- Important!!!! Remember, herein: [HPH: 1.2]
- "Shall" and "must" mean that an action or item is mandatory and is required by statute or regulation.
 - "Should" and "may" mean that the action or item serves to provide guidance and/or best practices but is not mandatory.
- !!!PLEASE NOTE-BEWARE!!!**
- HUD has used the term "should" a number of times in the HPH and then in another part of the HPH use the term "shall" or "must" in reference to the same issue—an auditor will most likely go with the stricter reference as the requirement.

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- HUD Contract Requirements (*)/Recommended Elements for Contracts
- *Contract number (repeated on every page of the contract—use the view area of WORD)
 - Page number on each page
 - Clauses numbered
 - *Identity of both parties (i.e. HA and contractor)
 - *An execution date, beginning date and ending date for services, with renewal option periods identified
 - Definitions

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- HUD Contract Requirements (*)/Recommended Elements for Contracts (con'd)
- *Value of the contract
 - ✓ A not-to-exceed cost, which may be amended as provided therein (e.g. escalation; increased funds; etc.)
 - ✓ If no value, then state, "This contract has no value"
 - *Specifications
 - Billing Method
 - *HA Obligations
 - *Contractor Obligations, including license and insurance and contractor warranties

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- HUD Contract Requirements (*)/Recommended Elements for Contracts (con'd)
 - Modification and Severability clauses
 - *Applicable laws
 - *Notices to each party
 - *Disputed Billings
 - *Mandatory HUD Clauses from 24 CFR 85.36(i)
 - Time of Essence
 - Limitation of Liability
 - Indemnification
 - Lobbying Certification

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- HUD Contract Requirements (*)/Recommended Elements for Contracts (con'd)
 - *Various HUD directives
 - Various potential appendices
 - Execute contract in at least two original signature copies: one for HA and one for contractor (more copies is OK, but do may be overkill).
 - ✓ Execute dated signature in pen
 - ✓ Print signer's name and title
 - ✓ Typically, contractor signs first, then HA last (HA may sign first if contractor signs last in the presence of the HA representative—meaning, DO NOT send a signed copy of the contract to the contractor, have him/her sign, then return to HA)

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- HUD Contract Requirements (*)/Recommended Elements for Contracts (con'd) [HPH: 10.5]
 - As an attachment to the contract (appendix), Mandatory HUD forms, each used as appropriate:
 - ✓ *HUD Table 5.1, *Mandatory Contract Clauses for Small Purchases other than Construction* (QSP, <\$100,000) (NF-10)
 - ✓ *form HUD-5370-EZ (10/2006), *General Contract Conditions for Small Construction/Development Contracts* (QSP, <\$100,000) (CF-14)
 - ✓ *form HUD-5370 (11/2006), *General Conditions for Construction Contracts – Public and Indian Housing Programs* (IFB, RFP, >\$100,000) (CF-13)
 - ✓ *form HUD-5370-C (10/2006), *General Conditions for Non-Construction Contracts, Section I – (With or without Maintenance Work)* (IFB, RFP, >\$100,000) (NF-4)
 - ✓ *form HUD-5370-C (10/2006), *General Conditions for Non-Construction Contracts, Section II – (With Maintenance Work)* (IFB, RFP, >\$100,000) (NF-5)
 - ✓ *form HUD-51915 (9/98), *Model Form of Agreement Between Owner & Design Professional* (RFQ/QBS, </>\$100,000) (AED-1)

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- HUD Contract Requirements (*)/Recommended Elements for Contracts (con'd) [HPH: 10.5]
- The HA may choose to use the 5370 forms for purchases <\$100,000 if the HA feels it is in its best interests to do so.
 - Acceptable Methods of Incorporation: [10.5.D]
 - ✓ Attach as printed (I strongly recommend this method);
 - ✓ Incorporate text into PHA's own forms (not recommended due to potential entry errors or forms changing); and/or
 - ✓ Incorporate by reference (least desirable!); the HA must physically provide the forms if requested by the potential offerors.
 - Remember, the 5369 forms are **bidding** forms only and have NO application to a contract!

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- Prohibited Contract Pricing and Types [HPH: 10.1.A.5] (Part 85.36(f)(4))
- ✓ Cost-plus-percentage-of-cost
 - ✓ Cost-plus-percentage-of-construction-cost
 - ✓ The prohibited contract types are NOT in the best interest of the HA—these types ARE very much in favor of the contractor financially
 - Beware! These contracts types are proposed by contractors in many fields—for example, insurance brokers—the contracts do not appear to be the prohibited type, but closer analysis shows that they are.

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- Allowable Contract Pricing and Types (con'd)
(Ranked in order, lowest risk first)
- No. 1, Firm fixed-price [HPH: 10.1.C.1.a]
 - ✓ Specified price, fixed at the time of award, not subject to an adjustment, except in the case of a legitimate change order
 - ✓ Use very typical when bidding with a design specification (e.g. construction; materials; equipment; etc.)—when there are few unknowns
 - ✓ ADVANTAGE: Price is firmly set, so encourages contractor efficiency
 - ✓ DISADVANTAGE: Little flexibility

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 2, Fixed-price with an economic price adjustment or escalation** [HPH: 10.1.C.1.b]
 - ✓ Specified original price, fixed at the time of award, but is subject to an adjustment, based upon "the occurrence of specified contingencies stated in the contract" (e.g. CPI; changes in market conditions; etc.)
 - ✓ The solicitation AND the contract clause must detail how and when such adjustments or escalation will occur
 - ✓ **ADVANTAGE:** Allows greater contract flexibility, especially in length
 - ✓ **DISADVANTAGE:** Requires analysis and amendments

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 3, Cost-reimbursement—Cost Contract (no fee)** [HPH: 10.1.C.2.a]
 - ✓ Contractor is paid for costs only—no professional fee is paid.
 - ✓ Suitable for use when "uncertainties involved in contract performance" do not reasonably allow use of a fixed-price contract.
 - ✓ **ADVANTAGE:** Again, allows greater contract flexibility, especially in services received.
 - ✓ **DISADVANTAGE:** Requires HA to conduct a "significant amount of monitoring" to ensure it is receiving what it is paying for. Minimum contractor incentive to control costs.

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 4, Cost-reimbursement—Cost-plus-fixed-fee** [HPH: 10.1.C.2.b]
 - ✓ Specified unit prices (hourly fee) and allowable incurred costs, as listed in the contract, with an estimate NTE cost.
 - ✓ Suitable for use when "uncertainties involved in contract performance" do not reasonably allow use of a fixed-price contract.
 - ✓ **ADVANTAGE:** Again, allows greater contract flexibility, especially in services received.
 - ✓ **DISADVANTAGE:** Requires HA to conduct a "significant amount of monitoring" to ensure it is receiving what it is paying for. Minimum contractor incentive to control costs.

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 4, Cost-reimbursement—Cost-plus-fixed-fee (con'd)**
 - ✓ Completion Form: Contract describes a specific scope of work and a "definite goal or target specifying an end product" which the contractor must deliver.
 - ✓ Term Form: Contract describes a general scope of work and "obligates the contractor to devote a specified level of effort for a stated time period."
 - ✓ HUD states that the Completion Form is preferred over the Term Form, which means that if a HA uses the Term Form, then the HA may come under more scrutiny.

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 5, Indefinite-delivery contracts—Definite-quantity** [HPH: 10.1.C.3.i]
 - ✓ Provides "for delivery of a definite quantity of specific supplies or services for a fixed period of time."
 - ✓ Used when the HA knows exactly what it needs, the quantity of each item it needs, and when it needs it.
 - ✓ The needed specific item(s) must be available from the contractor in the quantities and time period specified (typically a short period of time—sometimes called JIT or Just In Time).

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 6, Indefinite-delivery contracts—Requirements** [HPH: 10.1.C.3.ii]
 - ✓ Provides "for filling all of the PHA's . . . Requirements for the supplies or services during a fixed period of time."
 - ✓ Award to one contractor only! If a HA wants to award to more than one contractor—e.g. have more than one contractor available in a "pool"—the HA must use the following detailed Indefinite-quantity contract, which involves minimums and maximums.
 - ✓ Basically, at contract execution the unit costs are known and identified, but the quantity and specific delivery times are not know, though there is an ending contract date.

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 7, Indefinite-delivery contracts—Indefinite-quantity** [HPH: 10.1.C.3.iii]
 - ✓ Basically, same as a Requirements except the HA may award to more than one contractor as long as the HA sets, in the solicitation document as a part of the specifications, a “reasonable” minimum that the HA will procure pursuant to the contract and a maximum quantity that **MUST NOT** be exceeded.
 - ✓ If the minimum is **NOT** met, the HA must negotiate the lost profit and pay such to the contractor.

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 8, Time and materials and labor-hour** [HPH: 10.1.C.4.a] (Part 85.36(b)(10))
 - ✓ Contractor is paid for the hours worked.
 - ✓ Contractor is reimbursed for the materials used.
 - ✓ “Labor-hour” means that the contractor is paid for the hours worked only, that no materials were required.

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➤ **Allowable Contract Pricing and Types (con'd)**

(Ranked in order, lowest risk first)

- **No. 9, Letter contract** [HPH: 10.1.C.5]
 - ✓ Typically used for emergencies, not the result of a solicitation.
 - ✓ Authorizes the contractor to proceed with some early portions of the work while the balance is negotiated.
 - ✓ Typically, I strongly **DO NOT** recommend use—I have seen them used several times and in each case it did **NOT** work to my HA's advantage; once it resulted in a HUD OIG review and Findings.
 - ✓ Numerous restrictions and requirements (see referenced section).
- ❖ PLEASE NOTE: Various sample contract forms are included as a part of each Sample Competitive Solicitation included under the “Documents” area of procurementassistance.org.

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➤ **Prohibited Clauses—Project Labor Agreements.**

[HPH: 10.6] (24 CFR 5.108)

- Clause states that contractors/subcontractors MAY voluntarily enter into a project labor agreement, but a HA MAY NOT, if any HUD funds are in a project, except for certain “special circumstances specified in 24 CFR 5.108,” enter into a project labor agreement. PLEASE NOTE: Executive Order 13502, issued February 6, 2009, supersedes and cancels Executive Orders 13202 and 13208; accordingly, the execution of a Project Labor Agreement for construction projects involving HUD funds is no longer prohibited.

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➤ **Performance Standards.**

[HPH: 10.7]

- HA is allowed to offer a contractor “cost incentives to motivate the contractor.”
- “Performance incentives increase the efficiency of contractor performance. For example, there could be a monetary bonus for early delivery.”
- If used, strongly recommend that such potential incentives are set on the Form of Bid so that each offeror has the opportunity to propose his/her best offer. Accordingly, it is not appropriate to negotiate such with just the lowest responsive and responsible bidder—another bidder may offer the HA a better deal.

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➤ **Use of Options.**

[HPH: 10.8]

▪ **General.**

[HPH: 10.8.A]

- ✓ “The PHA may have a recurring need for specific supplies or services.
- ✓ Invoking options “gives the PHA a continued source of supply or services under contract at known prices.”

▪ **Definition.**

[HPH: 10.8.B]

- ✓ “The option to extend . . . is the unilateral right of the PHA,” NOT the contractor/supplier.

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- **Use of Options.** [HPH: 10.8]
- **Limitations.** [HPH: 10.8.C]
 - ✓ **Price.** [HPH: 10.8.C.1]
 - The option to extend . . . may only be exercised by the HA IF the solicitation and the contract contained the right and "if a price . . . was included."
 - If the option to extend was NOT in the solicitation and contract, it "is considered a new procurement."
 - ✓ **Time and Quantity.** [HPH: 10.8.C.2]
 - "Contracts shall not exceed a period of five years, including options." EXCEPTION: ESCO contracts may not exceed 20 years.
 - Contracts must be for a "finite period" (there must be a beginning and ending date on the contract and for each of the option periods).

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- **Use of Options (con'd)**
- **Limitations (con'd)**
 - ✓ **Options to Extend.** [HPH: 10.8.C.3]
 - It must be declared in the contract within what time frame an option may be extended.
 - The pricing of the option must be evaluated as part of the overall contract award.
 - Typical to notify the contractor of intent at least 90 days prior to exercising an option; and
 - Typical to notify the contractor at least 30 days prior when the decision is made to exercise an option.
 - Options may not be exercised after the term of the contract has expired (technically, there is no longer a valid contract to extend).

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- **Use of Options (con'd)**
- **Exercising Options.** [HPH: 10.8.D]
 - ✓ Before an option is exercised, document to the file a written determination or justification, including:
 - Funding availability.
 - Certification "that the option was included in and evaluated as a part of the basic contract."
 - Determination of price reasonableness.
 - An other factors that support the decision to extend.
 - ❖ <See HAPA Sample Form SF-16: *Justification to Exercise a Contract Option*>
 - ❖ <See HAPA Sample Form SF-9: *Contract Option Extension*>

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- **Administering Non-Construction Contracts**
 - **Control of Payments.** [HPH: 11.3.G]
 - ✓ The HA MUST NOT pay for items or services unless they were actually received.
- **Contract Modifications.** [HPH: 11.4]
 - **General.** [HPH: 11.4.A]
 - ✓ Also called contract change orders.
 - ✓ Two types:
 - Unilateral. Signed only by the HA. NOT the preferable method, but may be necessary if the contractor is not cooperating.
 - Bilateral. Signed by both parties. Preferred method.

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- **Contract Modifications (con'd)**
 - **Process.** [HPH: 11.4.B]
 - ✓ For unforeseen conditions within the general scope of the project (e.g. hidden conditions on a roof job that were not known (and would not have been known under normal inspection) prior to the award.
 - ✓ The Changes clause is included in forms HUD-5370 (for construction); form HUD-5370-C-1/11 (for non-construction); and form HUD-5370-EZ (for small construction)—all HUD-mandatory forms.
 - ✓ Again addresses unilateral and bilateral forms.
 - ✓ Must be detailed (see Section 11.4.B.4).

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- **Contract Modifications (con'd)**
 - **Limitation on Change Orders.** [HPH: 11.4.C]
 - ✓ For unforeseen conditions, within the original general scope.
 - **Modification Register.** [HPH: 11.4.D]
Such a register must be in each contract file, fully detailed as described herein.
 - ❖ <See HAPA Sample Form SF-8: *Contract Modification Register*>
 - **HUD Approval of Modifications.** [HPH: 11.4.E]
 - ✓ HUD must give prior approval for any modifications that are not in complete conformance with the Changes clause described herein and within the noted HUD forms; and any contract modifications greater than \$100,000, either singularly or in total.

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➤ **Contract Terminations.**

[HPH: 11.6]

▪ **General.**

[HPH: 11.6.A]

- ✓ As detailed on the HUD-5370 forms, two types of termination only:
 - Convenience [HPH: 11.6.C], meaning the HA no longer has the money to pay for the services or the HA no longer needs the services.
 - Accordingly, if you terminate for convenience you cannot immediately retain another contractor to provide the same services.
 - Cause or Default [HPH: 11.6.D], meaning, because of poor performance, the HA no longer wishes the contractor to provide the services.
 - If you terminate for cause you must ensure that the contractor receives written notice that they are ineligible to offer such services to the HA again—no bidding.

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➤ **Contract Terminations (con'd)**

▪ **Termination Notice.**

[HPH: 11.6.B]

- ✓ Shall only be delivered to the contractor in writing, "by certified mail, return receipt requested."
- ✓ Shall state at a minimum:
 - Terminated for convenience or default, citing the appropriate contract clause;
 - Whether termination is in whole or in part;
 - If for cause or default, detail the acts or omissions that justify such;
 - Effective date of the termination;
 - Contractor's right to proceed under the non-terminated portion of the contract (if applicable);
 - Any special instructions; and
 - If bonded, copies of termination notice sent to the surety.

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- ❖ <See HAPA Sample Forms SF-23a: *Notice of Contract Termination for Convenience*; SF-23b: *Notice of Contract Termination for Default (Cause)*>

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I hope this information is of a
help!

Thank you!
