U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-7000

ASSISTANT SECRETARY FOR
COMMUNITY PLANNING AND DEVELOPMENT

AUG 2 6 2011

MEMORANDUM FOR: Regional Environmental Officers
Field Environmental Officers
Environmental Clearance Officers

FROM: Mercedes Márquez, Assistant Secretary, Community Planning and Development, D

SUBJECT: Guidance on Options and Conditional Contracts for Purchase of Real Property for Environmental Reviews Conducted by a Responsible Entity under 24 CFR 58

The purpose of this memorandum is to provide guidance on when it is appropriate for grantees to use conditional and option contracts for purchase of real property. Both conditional and option contracts are useful tools for grantees to obtain site control while allowing time to complete the environmental review. Option contracts have a broader use than conditional contracts. Conditional contracts are restricted to the acquisition of existing single family and multifamily residential properties. The use of conditional contracts is restricted to the purchase of existing structures that will be retained for the same use, with or without minor rehabilitation of the structure (or purchase and demolition of single family properties under limited circumstances). Conditional and option contracts differ in their obligations upon the buyer and seller. In addition, HUD has different restrictions imposed upon the use of conditional purchase contracts and option contracts.

Option Contract or Agreement:

A real estate option contract or agreement is a legal agreement between the potential buyer of real property and the owner of that property. The real estate option agreement gives the potential buyer the exclusive right to buy the property at a specific price within a specific time period. The option agreement does not impose any obligation upon the potential buyer to purchase the property. The option agreement does obligate the seller to sell at the specified price if the potential buyer exercises the option to buy in the manner described in the contract.

HUD's regulations at 24 CFR 58.22(d) allow for an option agreement for any project prior to the completion of the environmental review when the following requirements are met:

(1) the option agreement is subject to a determination by the recipient on the desirability of the property for the project as a result of the completion of the environmental review in accordance with 24 CFR Part 58; and

(2) the cost of the option is a nominal portion of the purchase price.

The provision allows flexibility regarding the term "nominal" and any reasonable interpretation is acceptable. For instance, it is reasonable to conclude that the nominal amount for option contracts will vary depending upon the local real estate market and the purchase price.

Conditional Contract:

A conditional contract is a legal agreement between the potential buyer of a real estate property and the owner of that property. The conditional contract includes condition(s) that must be met for the obligation to purchase to become binding. Specifically a conditional contract binds the buyer to purchase the property if and when the condition(s) contained in the sales contract are met.

HUD has set very specific restrictions for the use of conditional contracts. Conditional contracts can be used in more limited circumstances than option contracts. In the past, HUD only allowed conditional contracts for single family properties (1-4 units); this guidance expands the use to multifamily residential properties. The use of conditional contracts is limited to the acquisition of existing single family and multifamily residential units as described below.

The Responsible Entity (RE) must complete the environmental review of the property pursuant to HUD regulations at 24 CFR Part 58 and receive approval of a Request for Release of Funds before the RE provides its written determination that the purchase of the property may proceed. For conditional contracts, HUD does not allow for flexibility for a non-refundable deposit – if a deposit is nonrefundable, it must be $1000 or less for single family property and 3% of the purchase price for multifamily projects. If the environmental review requires conditions to mitigate any environmental impacts, then the RE (if it is not the Purchaser) should enter into an agreement with the Purchaser to ensure that the conditions will be undertaken.

Single Family (1-4 units)

This memorandum clarifies that a Responsible Entity may allow a recipient, subrecipient, or third party to enter into a conditional purchase contract for an existing single family home (one to four units) before the HUD environmental review of the property is complete when the action is limited to acquisition and/or rehabilitation[1] or demolition[2] of the home, provided that:

(1) the purchase contract includes the appropriate language for a conditional contract (see below);

(2) no transfer of title to the purchaser or removal of the environmental conditions in the purchase contract occurs unless and until the RE determines, on the basis of the environmental review, that the transfer to the homebuyer should go forward, and the RE (or recipient) has obtained approval of a Request for Release of Funds and environmental certification, where applicable; and

(3) deposit using HUD funds or other funds is a reasonable amount and refundable if the conditions are not met, or if non-refundable, is nominal ($1000 or less).

Multifamily Residential

A Responsible Entity (RE) may allow a recipient, sub-recipient, or third party to enter into a conditional purchase contract for an existing multifamily residential property before the HUD

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[1] Rehabilitation that meets the requirements of 24 CFR 58.35(a)(3)(i)

[2] Demolition of existing single family home, provided that the end use of the property is limited to vacancy, reconstruction of single family house or is unknown at the time of acquisition.

environmental review of the property is complete when HUD or non-HUD funds will be used for acquisition[3] and/or rehabilitation[4] of the multifamily structure, provided that:

(1) the structure is not located within a Special Flood Hazard Area;

(2) the purchase contract includes the appropriate language for a conditional contract (see below);

(3) no transfer of title to the purchaser or removal of the environmental conditions in the purchase contract occurs unless and until the RE determines, on the basis of the environmental review, that the transfer to the buyer should go forward, and the RE (or recipient) has obtained approval of a Request for Release of Funds and environmental certification, where applicable; and

(4) deposit using HUD funds or other funds is a reasonable amount and is refundable if the conditions are not met, or if non-refundable, is nominal (3% of purchase price or less).

If the conditions described above are met, then the following language, or similar language, must be included in the purchase contract:

> Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until [Responsible Entity] has provided Purchaser and/or Seller with a written notification that: (1) it has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract, (a) the purchase may proceed, or (b) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or (2) it has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required. [Responsible Entity] shall use its best efforts to conclude the environmental review of the property expeditiously.

If you have any questions, please contact Danielle Schopp at Danielle.L.Schopp@hud.gov/202-402-4442.

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[3] Acquisition of existing multifamily residential structure provided that the structure will be retained for multifamily residential use

[4] Rehabilitation that meets the requirements of 24 CFR 58.35(a)(3)(ii)

Below is a table that compares and contrasts Conditional and Option Contracts:

	Types of projects/activities	Amount
Option Contract: Obligates seller only	Any – • New construction, rehabilitation and/or demolition of single family or multifamily residential or non-residential structure	• Cost of option must be reasonable – may vary depending upon local real estate market • Usually non-refundable
Conditional Contract: Obligates both buyer and seller *after* conditions are met	*Purchase of existing* single family (1-4 units) with or without • Demolition of existing single family home, provided that the end use of the property is limited to vacancy, reconstruction of single family house or is unknown at the time of acquisition; or • Rehabilitation when density is not increased beyond 4 units, the land use is not changed and the footprint of the building is not increased in a floodplain or in a wetland	• $1000 or less for non-refundable deposit • Reasonable amount for refundable deposit
	Purchase of existing multifamily residential if the structure is not located in a Special Flood Hazard Area with or without • Rehabilitation when the unit density is not changed more than 20%, the project does not involve changes in land use from residential to non-residential, and the estimated cost of rehabilitation is less than 75% of the total estimated cost of replacement after rehabilitation.	• 3% or less of purchase price for non-refundable deposit • Reasonable amount for refundable deposit