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## CHAPTER 10

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# Miscellaneous Requirements



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# Selecting Contract Type

- Factors determining type of contract used:
  - Price competition
  - Price analysis (eventually)
  - Cost analysis (eventually)
  - Type and complexity
  - Urgency
  - Period of performance
  - Contractor's technical capability and financial responsibility
  - Adequacy of contractor's accounting system
  - Concurrent contracts
  - Extent and nature of proposed subcontracting
  - Procurement history



# Type of Contract

- Type of contract used varies according to:
  - Degree and timing of responsibility assumed by contractor for costs of performance
  - Amount and nature of profit offered for meeting or exceeding specified goals
- Prohibited contracts
  - Cost-plus-percentage
  - Cost-plus-percentage-of-construction-cost



# Fixed-price Contracts

- PHA knows how much it will spend and can budget and control costs better
- Easier contract administration
- Contractor bears greater risk
- Most common and advantageous for PHA





# Elements of Fixed-price Contracts

- Is firm except when PHA awards approved contract modifications
- Contractor commits to performing requirements for fixed price
- Uncertainty in pricing or availability of supplies or services can lead to price adjustment



# Cost-reimbursement Contracts

- Payment of eligible incurred costs
- Estimate of total contract cost and a ceiling that contractor cannot exceed without approval
- When are Cost-reimbursement Contracts used?
  - When costs cannot be predicted with certainty
  - Contractor must have accounting system that can track costs accurately and impose cost controls as needed



# Cost-reimbursement Contracts, cont.

- Cost contract (no fee)
  - Contractor receives no fee
  - Typically used with nonprofits
- Cost-plus-fixed-fee
  - Used when there is risk or uncertainty in performing work
  - Does not incentivize contractor to control costs
- Two forms of cost-plus-fixed-fee
  - Completion Form
  - Term Form





# Indefinite Delivery Contracts

- Specify prices for supplies or services
- Period during which orders may be placed
- Ordering procedures
- No further competition is required for orders placed
  
- Three types:
  - Definite-quantity contracts
  - Requirements contracts
  - Indefinite-quantity contracts



# Time and Materials and Labor-Hour Contracts

- What is a time and materials contract?
  - Provides for acquiring supplies or services on an hourly basis
    - Fixed hourly rates
    - Materials at cost
- When is it used?
  - When no other contract is suitable





# Letter Contract

- Written preliminary document that allows contractor to begin work while contract terms are being negotiated
- CO must determine that no other contract is suitable
- Can result in any contract type
- Terms should be as complete as possible
- Document must include schedule for definitization
- NOT a recommended contract type!



## Letter Contract, cont.

- Letter contracts should not:
  - Commit PHA to a contract for more funding than what is available
  - Be entered into without competition unless there are exigent circumstances
- Letter contracts should only be used for emergencies, work, or supplies that require urgency





# Contractor Responsibility

- Prior to contract award, PHA must determine if the potential contractor is responsible.
  - **Responsibility factors:**
    - Adequate financial resources to perform work
    - Necessary organization, experience, accounting, and operational controls or technical skills to perform work
    - Necessary production, construction, and technical equipment and facilities
    - Ability to comply with required delivery or performance schedule
    - Satisfactory performance record
    - Satisfactory record of integrity and business ethics



# Limited Denial of Participation (LDP)

- Temporary restriction on contractor
- Reasons:
  - Failure to honor contract
  - Work deficiencies
  - False certifications
- Contractor ineligible for participation in HUD programs where violation occurred
- Effective until cause is eliminated and action is withdrawn or until sanction expires





# Suspension

- Contractor is disqualified from all federal programs
- Temporary, pending investigation
- Evidence of criminal, fraudulent, serious misconduct
- PHA must check *GSA System for Award Management (SAM)* prior to selection



# Debarment

- Contractor is disqualified from all federal programs
- For a period of time depending on violation
- Violation of contract, equal employment opportunity provisions, or labor law
- PHA must check *GSA System for Award Management (SAM)* prior to selection





# Evaluating Cost and Price

- Procurement above micro purchase threshold must always conduct and include in the file a Price Analysis and, sometimes, a Cost Analysis
- Price Analysis compares price offered with completed ICE and the Force of Competition
- If prices seem unusually high or low compared to ICE, PHA may verify offers to ensure understanding of requirements



# What is a Cost Analysis and When is it Required?

- Cost Analysis:
  - Evaluation of price elements to determine if price is reasonable, allowable, and related to requirements
- HUD requires cost analysis under the following circumstances:
  - Sole-source and noncompetitive proposals
  - Inadequate number of offers
  - Contract modifications
  - Contract termination payments
  - Construction contracts awarded using methods other than sealed bidding





# Conducting Cost Analysis

- Three critical tests:
  - **Is it allowable?**
    - Cost principles issued by federal government determine if cost is allowable
  - **Is it allocable?**
    - Must be logically related to required work
    - Must pay for something that advances project
    - Listed in the HUD-approved budget
  - **Is it reasonable?**
    - Reasonable costs are what a prudent business pays in a competitive marketplace (see price analysis)



# Conducting Cost Analysis, cont.

- Other factors:
  - Projection of contractor's cost trends
    - Are contractor's costs likely to increase or decrease?
  - Assessment of costs by technical expert
    - Engineer, architect
  - Application of audited or pre-negotiated indirect cost, overhead rates, labor and fringe benefits, etc.
  - Effect of contractor's current practices on future costs
    - Track record for containing costs



# Documentation Required

- Sealed bids
  - Bid tabulation sheet
- Competitive bids
  - If adequate competition, often only need comparison of prices offered (Force of Competition) and with ICE
- No adequate competition, only one bid received, price varied significantly from ICE
  - Cost analysis required
  - CO must explain lack of competition and/or price variance





# PHA Audit of Contractor's Records

- Used infrequently when cost analysis required but usually means comparison historical cost data is not available
- Review limited to procurement action
- Offeror cannot deny access and cannot withdraw bid
- An audit:
  - Reviews cost and determines if it should be accepted, questioned, or further documented
  - Analyzes contractor's accounting system to ensure it can adequately allocate costs



# Protests

- Occur typically because a losing bidder asserts that PHA did not conduct evaluation properly
- Procedures:
  - HUD forms 5369 and 5370 contain provisions regarding bid protests and contract disputes
  - PHAs are required to have written procedures for resolving protests issued as a part of solicitation
  - Authority 2 CFR §200.318(k)



# Elements of a Protest Procedure

- Designate PHA staff to receive protests
- Designate PHA staff to render decision
- Third-party person to hear any appeal of the protest decision
- Time period in which protest must be submitted
- Remedies if protest is decided in favor of protestor
- Emergencies or unusual compelling circumstances
- Procedure for denials
- Appeal procedures





# Options

- Contractual provision that allows PHA to unilaterally extend contract term (PHAs right only to invoke, not the contractor)
- Used when PHA knows has recurring need to have fixed prices on materials to facilitate budgeting and mitigate market fluctuations
- Prior to exercising an option, PHA must document contract file with the following:
  - Indication that funds are available
  - Statement reflecting option was included in original contract
  - Overview of market to show that option price is reasonable
  - Other factors that support extension



## Options, cont.

- Can only be used if original contract language allows for extension and delineates terms
  - Contracts cannot exceed 5 total years, including all options
    - State and local laws may impose shorter terms
  - Must contain a price for agreed-upon goods or services
  - Pricing of extension must be included in proposal evaluation
  - Prior to contract expiration, typically:
    - 90 days: PHA notifies contractors if it is likely to extend
    - 30 days: PHA notifies contractor that it will extend and issues modification
  - Option cannot be exercised after contract has expired



# Labor Standards and Wage Rates

- HUD mandates PHAs pay wages in accordance with the Davis-Bacon Act and Labor Department regulations in prime construction contracts exceeding \$2,000
  - Includes contracts exceeding \$2,000 for maintenance laborers and mechanics when Maintenance Wage Rate Decision applies
- Contracts exceeding \$100,000 overtime work rates apply for laborers that work more than 40 hours in 1 week
- Davis-Bacon wage rates apply to apprentices/trainees involved in construction contracts but don't apply if workers are part of maintenance contracts





# Labor Standards and Wage Rates, cont.

- Solicitations and Contracts
  - Davis-Bacon wages must be included in solicitation and contract
- Reporting: Labor Dept. regulations
  - Payroll reports and statements of compliance to PHA each week
- Compliance
  - Contractor and subs required to pay wages as prescribed by Davis-Bacon wage rate decision
  - Wages are paid weekly
  - Contractor responsible for its own compliance and that of subs



# Labor Standards and Wage Rates, cont.

- Enforcement
  - PHA responsible for enforcement of applicable wage rates, including:
    - Posting wage rates
    - Conducting onsite interviews with laborers to ensure rates are commensurate with work performed
    - Review certified payroll reports
    - Retain all records
    - Ensure onsite worker safety

