

Chapter 16

public and private partnerships. Contents, talk about the application of this section. Selection of the developer and developer partner. Oh yeah, this is done a lot. Procurement requirements of the selected developer. Procurement by parties other than the PHA or the developer. Resident involvement. Procurement by the PHA when acting as a developer, or with an ownership interest. Issues arising in CSS procurement activities, community service groups. Contracting with sub-contractees. Introduction. Special provisions associated with selecting a developer, and apply to different partners. We're gonna talk about that. OMB requirements founded 2 CFR 200 317 through 326 applied to the developer whenever HUD or other federal funds are used. So remember, any time you have federal funds in a project, the procurements are gonna apply to 2 CFR 200, 317 through 326. Do any of you have developers? -

Well only if they're going to retain the developer, are they likely to retain the developer. If private funds, public and private funds are commingled, 2 CFR 200 applies, 317 through 326 applies. Now be careful of something, because any time you commingle funds, federal funds into another project, HUD has to give specific approval. Your field office has to give you specific approval to do that. I have a developer who told one of my clients that he could commingle capital funds into a project, and I told him he could not commingle without HUD approval. The developer told him he was wrong, I was wrong, don't listen to me. And I didn't know much about the issue, other than I knew that whenever you have HUD funds go into a project, they have to approve it, and especially capital funds, because capital funds are to be used in a certain way to improve the developments. But if it was gonna go into a new development project, it had to be approved. he thanked me for my opinion, I left, and he believed the developer, and it opened up a massive audit on his whole thing, and they tried to save millions, not HUD, the OIG. What a mess that became. What you have to remember about developers is they are not the end all of everything. When people utilize developers, I have several folks who act as conciliaries to housing authorities, to keep them on the right path. Developers are not your friends. The conciliary is your friend. The advisor, the consultant that helps keep you on the right path is your friend. Mixed financial refers to development, new construction, or acquisition, with or without rehabilitation. When you're modernizing units, you're gonna get private money, you're gonna get public money involved in it.

And remember, HUD has to approve all that public money every step of the way, what it's being used for, okay? A developer partner will sometimes act as the agent to get all of this done, but again, you've gotta be very careful, because developers sometimes are a little more loose and free with the rules, because they're private, than what the public portion of the money requires you to do. Any entity with whom a PHA has entered to in a partnership with a developer partner as an entity, who you enter into this agreement with them, and they are many times gonna do a lot of the work. But you are responsible to ensure that the things that they do incur are in compliance with all the laws. Many times a developer has that primary responsibility for the development or use of the funds, but any developer must be, other than a PHA instrumentality, must be procured in accordance to 2 CFR 200, and we retain a developer which pursuant to what kind of process? A request for qualifications. We then, after that, negotiate the pricing with them, but again, I tell my people that if you are going to negotiate with a developer, you need an attorney who knows what they're doing. Not your local attorney, necessarily, but somebody who has negotiated those contracts. HUD permits the QBS or RFQ method for selecting a developer partner, but it is not permitted for procurement of HOPE VI, mixed financial property manage, or legal services, you have to do an RFP, okay? 24 CFR 905.604 has the mixed finance in term rule, has a lot of rules pertaining to this, but be very careful, and let me tell you why.

There's some language in that rule that indicates that the requirements of 2 CFR 200 317 through 326 do not have to be followed, yet in other places, it says they do. So be very careful, there's gray language there. You can never go wrong if you follow HUD procurement rules. (laughing) If you follow them righteously, completely. I'm just telling ya, when in doubt, just follow the HUD procurement rules, and you're gonna be a lot better off when the audits start occurring. Any procurements done must provide for full and open competition. Let me give you an example. Sometimes developers have construction companies. They conduct a bid, and they give themselves a bid, absolutely not. In that case, I'd like you to conduct the construction bid, and then they can respond to the bid. That's what I did at my agency, and that's what my clients do, is my client conducts the construction bid, then the sister agency that's a construction firm can respond to that bid. However, construction management is gonna have to be by a party other than the developer, because they can't oversee themselves, are you with me? And I usually have the architect do that, as long as the architect is not affiliated with the developer.

When you do an RFQ for the developer, you're going to negotiate all the terms and conditions, including the cost, how much of a fee they get, everything like that. Again, you need an attorney to help you with that, and I advise a conciliary. You must conduct a cost and price analysis after you have determined, and an independent cost estimate, after the price analysis happens, after you negotiate the fee. It has to be in conformance with all the rules, in your best interest. Once a developer has been selected, the developer partner is not subject to 2 CFR 200. I know that's what the rule says, Procurement requirements of the developer continued. Activities by a PHA, or instrumentality are not considered significant functions. Again, if you just follow, right into the whole requirements that they have to follow, the CFR, this is all not necessary. However, those are monitoring regulatory compliance, coordinating communications. If the PHA does these things, it's not considered a significant function. Providing community supportive services, attending construction meetings and reviewing the draws, maintaining the wait list, reviewing, approving, operating budgets. Here's a chart you've got here, procurement by parties other than PHA or the developer, does the CFR apply for each one of these entity of interests here? Here's the answers for it.

Again, I recommend you just put it in that everybody has to do complete procurement, pursuant to the CFR, even if it's technically not required. Resident involvement, RMCs may be awarded still a sole source contract, if they are a resident management corporate approved by the resident council. HUD encourages inclusion of residence on selection panels, that would mean residents off of the Resident Council. I wouldn't just pick up others, because everything for residents is coordinated through the Resident Council. You don't want to jump over them. Whenever the PHA or its instrumentality acts as a development entity, or performs a significant role of the auction, the requirements of the 2 CFR do apply. I believe some of those resident functions that are listed are a little bit loose. I believe you should do the 2 CFR 200 for everything that you do with HUD money, with your money, with the investors involved. PHA instrumentality is not subject to the CFR. When it is not subjective, they must procure other members and development team subject to the same procurement rules of the PHA. Again, 2 CFR 200 does apply. With community support, or services, consortium services, you must comply with 2 CFR 200 when you are selecting administrative of that program, and when you retain those services. I do RFPs for everything, it's the only fair way to protect yourself, and I do it pursuant to the CFR, so that folks, so that I have a standard, even though HUD does give you some exceptions, my clients do not take advantage of it, 'kay? You may use sub-grantees to complete elements of the project, including development and the community supportive services, but you are responsible to ensure that they are all procured properly.