

CHAPTER 7. COMPETITIVE PROPOSALS

7.1 General

The competitive proposal method (also commonly referred to as “negotiated procurement”) is the primary alternative to sealed bidding for contract requirements that exceed a PHA’s small purchase threshold. While the instructions in this chapter apply only to contracts above a PHA’s small purchase threshold, PHAs may adopt and adapt any of these procedures for small purchases if they choose. However, they should not overly complicate the small purchasing process with laborious and unnecessary processes.

- A. Sealed Bidding vs. Competitive Proposals.** Unlike sealed bidding, the competitive proposal method 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 the PHA, 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. (See Chapter 6, Section 6.3 for additional guidance on when to use sealed bidding.)
- B. Conditions For Use (24 CFR 85.36(d)(3)).** The conditions for using competitive proposals rather than sealed bidding should be established in the PHA’s Procurement Policy. Generally, the competitive proposals method should be used whenever any of the following conditions exist:
1. The requirement cannot be described specifically enough to permit the use of sealed bidding. In other words, the work is not definite enough to accurately estimate the total cost of the contract. Therefore, the contractor would have to build monetary contingencies into his/her price to ensure that his/her costs were covered. The PHA, in turn, would end up paying for the increase in price due to the contingency costs.
 2. The nature of the requirement is such that the PHA needs to evaluate more than just price to be sure that the prospective contractor understands the PHA’s needs and can successfully complete the contract, especially when contracting for professional services (e.g., legal, architect-engineer, accounting, etc.) where the PHA needs specific expertise and experience.
 3. The requested work lends itself to different approaches, e.g., proposals.
- C. Justification.** If not self-evident, the rationale for choosing competitive proposals rather than sealed bidding procedures should be documented in the procurement file.
- D. Bonding.** PHAs will generally need to require bid or performance bonds for competitive proposals for construction or facility improvements.
- E. Types of Competitive Proposals.** There are two types of competitive proposals: Request for Proposals (RFPs) and Requests for Qualifications (RFQs). The latter

may only be used in more limited circumstances, as described in paragraph 7.3 of this chapter.

F. Method of Solicitation. While any of the following methods can be employed, the Contracting Officer should choose the method, which, considering matters of economy, provides for full and open competition.

1. Advertising in newspapers or other print mediums of local or general circulations. A sample advertisement is provided in **Appendix 3**.
2. Advertising in various trade journals or publications.
3. E-Procurement. PHAs may conduct their public procurements through the internet using e-procurement systems. However, all e-procurements must otherwise be in compliance with **24 CFR 85.36**, State and local requirements, and the PHA's own procurement policy. Steps must be taken to meet the requirements for full and open competition to avoid potential protests.

G. Time Period for Solicitation. The solicitation must be run for a period sufficient to achieve effective competition, which, in the case of paid advertisements, should generally be run not less than once each week for two consecutive weeks. State or local law may impose additional advertising requirements.

7.2 Competitive Proposal Process (24 CFR 85.36(d)(3) (i-iv))

A. **Format.** Provided below is a suggested format for RFPs.

1. Cover Page;
2. Table of Contents;
3. Statement of Work (SOW);
4. Submission Requirements, along with pricing instructions;
5. Evaluation Factors; and
6. Attachments (including mandatory forms – see paragraph 7.2.B below).

B. **Mandatory Forms/Contract Provisions.** The PHA must include with the solicitation/bid package the following mandatory forms, which contain all mandatory contract provisions. (Note: the forms listed below assume that competitive proposals are used for procuring non-construction services. Only under limited circumstances would construction services be procured by competitive proposals.)

1. **Form HUD-5369-B, Instructions to Offerors – Non-Construction.**
2. **Form HUD-5369-C, Certifications and Representations of Offerors – Non-Construction Contract.**
3. In addition, the PHA may want to include with the solicitation **Form HUD-5370-C, General Conditions for Non-Construction Contracts.**

- C. **Submission Requirements.** The PHA should make sure that the submission requirements (1) include all HUD-required forms and certifications and (2) are consistent with the factors used for evaluation. For example, if the RFP indicates that proposals will be evaluated based on similar experience in the particular activity, the PHA should make sure that it requests respondents to include information on relevant past experience.
- D. **Evaluation Factors, Non-Price (24 CFR 85.36(d)(3)(iii))**
1. The RFP must contain a clear statement of the evaluation factors to guide the offerors in structuring their proposal. Non-price factors are also called “technical factors.”
 2. The written statement of evaluation factors and their relative values clarifies each important factor to the offerors and ensures a fair selection process.
 3. The evaluation criteria should be tailored to fit each procurement.
 4. Typical evaluation criteria include the following:
 - a. Demonstrated understanding of the requirement
 - b. Appropriateness of the technical approach in the proposal (including labor categories, estimated hours, and skill mix); and
 - c. Quality of the work plan.
 - d. Technical capabilities (in terms of personnel, equipment, and materials) and management plan (including staffing of key positions, method of assigning work, and procedures for maintaining level of service, etc.);
 - e. Demonstrated experience in performing similar work; and
 - f. Demonstrated successful past performance (including meeting costs, schedules, and performance requirements) of contract work substantially similar to that required by the solicitation as verified by reference checks or other means.
- E. **Evaluation Factors, Price (24 CFR 85.36(d)(3)(iii), 24 CFR 85.36(f)).** Price must be a factor in making awards. In terms of evaluating price, a PHA has two options, which must be indicated in the RFP:
1. **Where Price is Assigned an Explicit Point(s).** Under this method, the PHA may award price a specific number of points. For example, the PHA may rank proposals on a 100-point scale. Of the total points, the PHA may award, for example, 80 points for technical merit and 20 points for price. In using this method, the PHA will need to determine the weight given to price versus technical factors and how to convert price into a point scale.
 2. **Where Price and Other Technical Factors are Considered.** Under this method, technical factors are first determined and offerors are ranked. Then, prices are evaluated. The PHA can award to the offeror whose price and technical factors are the most advantageous to the PHA. This method is also

known as the “trade-off” method in that the PHA trades-off, or weighs the importance of, price versus technical factors. All amendments must be in writing.

- F. **Amending and Canceling the RFP.** PHAs may amend or cancel RFPs when necessary or when otherwise considered to be in the best interest of the PHA.
1. **Amendments Before the Proposal Due Date.** If changes to the RFP are needed after it has been issued but before proposals are due, the Contracting Officer should issue a written amendment to all potential offerors who were furnished a copy of the original solicitation. The amendment should then be provided with the original RFP to those who request the RFP after the amendment is made.
 2. **Amendments After the Proposal Due Date.** If changes to the RFP are needed after the due date for receipt of proposals, the Contracting Officer should provide a written amendment to all offerors who submitted a proposal. If, however, the changes are significant enough that potential offerors who did not submit offers might have if the changes had been made before the proposal due date, the PHA should consider extending the proposal due date.
 3. **Amendments After Determination of the Competitive Range.** If the need for changes is discovered after the Contracting Officer has determined the competitive range (see paragraph 7.2.N), the Contracting Officer should provide the amendment to all offerors determined to be within the competitive range. If the changes may have had an impact on the acceptability of any offeror who was not included in the competitive range, the Contracting Officer should consider re-determining the range to include such offerors and provide them with the amendment.
 4. **Changes Requiring Cancellation of the RFP.** If at any time in the process any needed changes are substantial enough to constitute an essentially new requirement, the Contracting Officer should cancel the RFP, make the needed changes, and issue a new RFP with a new proposal due date. This will be a judgment call on the part of the Contracting Officer.
 5. **Canceling an RFP.** Cancellations must be done in accordance with the PHA’s written procurement policy and procedures. While it is not prohibited, the repeated cancellation of a single RFP or frequent cancellation of RFPs serves to create a lack of confidence in the PHA’s contracting process. Such actions may create the appearance that either the PHA does not really know what it wants, or the PHA may be seeking the participation of a particular contractor.
 6. **Documenting Amendments and Cancellations.** The Contracting Officer shall document the procurement file providing the rationale and supporting facts for amendments and cancellations, where necessary.
- G. **Pre-proposal conferences.** See Chapter 6, section 6.7 for instruction on pre-proposal conferences. Please note that for the purposes of this paragraph, “pre-bid” means “pre-proposal,” and “IFB” means “RFP.”

- H. Receiving Proposals.** Proposals are to be date-time stamped when they are received and held unopened in a secure place until the established date for receipt of proposals has passed. Since proposals are submitted in confidence and may contain proprietary information (such as trade secrets or other confidential business information regarding the offeror's approach to the work), they are not opened publicly. After the closing date, all proposals received are opened and evaluated in confidence. Proposals and any changes to those proposals are shown only to PHA personnel who have been authorized by the Contracting Officer as having a legitimate interest in them on the condition that information in the proposals will not be released to anyone who has not been so authorized.
- I. Late Submissions.** Any offer received at the designated place after the specified time should not be considered unless it is the only proposal received.
- J. Confidentiality.** No information regarding any of the proposals, including the names of the offerors or the number of proposals received, should be provided to anyone without the Contracting Officer's permission. Offerors submit proposals in confidence and expect their proposals to be protected from disclosure to other offerors or individuals. The PHA could be subject to liability if proprietary information is disclosed. Each member of the evaluation committee (see below) and any advisors to the evaluation committee should be required to sign a certification of nondisclosure. A sample is provided as **Appendix 9**.

K. Evaluation Process (24 CFR 85.36(d)(3))

1. The evaluation shall be based on the evaluation factors set forth in the RFP. Factors not specified in the RFP shall not be considered. Initially, proposals should be evaluated on an individual basis against the requirements stated in the RFP; at this point proposals are not analyzed in comparison with each other. Also during the initial evaluation, the committee evaluates only the content of the proposals. No personal knowledge of the offeror not based on the contractor's written submission is or should be part of the written proposals' initial evaluation; however, the contractor's prior performance with the PHA should be included as part of the standard review of offeror responsibility.
2. Unlike sealed bids, which are opened publicly, the results of proposal evaluation may or may not be disclosed; either before or after the contract is awarded. Disclosure will depend on State or local law. In the case of protests or litigation, evaluation documentation will almost certainly be made available to the protestor or litigant and their legal counsels. Therefore, evaluators should be especially careful to make the evaluations as thorough, objective, and well documented (e.g., citing the specific areas of the proposal that led to the particular portion of the evaluation) as possible. The Contracting Officer is responsible for ensuring that the evaluation results are sufficiently documented and included in the contract file. To be safe, the Contracting Officer should always assume that an award will be protested.
3. Contracting Officers must be alert to attempts by offerors to change the requirements of an RFP by inserting conditions in their offers or otherwise

altering the contract's requirements. While proposals are not required to be "responsive," as that term is used in sealed bidding (see Chapter 6), offerors may not impose conditions or change requirements to suit their own needs or desires.

Examples of conditioning offers include:

- a. Adding special terms or clauses to impose State or local laws not applicable to the PHA's contracts;
 - b. Inserting "hold harmless" clauses to avoid certain liabilities;
 - c. Making provision for attorney's fees (to attempt to make the PHA pay the contractor's legal costs if the PHA sues the contractor); or,
 - d. Taking exception to clauses, in whole or in part.
4. When possible, Contracting Officers should be willing to negotiate changes unless the changes violate Federal, State or local law or regulation, are required by HUD policy, or prejudice the other offerors (e.g., making a change that benefits a single offeror).

L. Evaluation Report (24 CFR 85.36 (b)(9)). The PHA shall prepare an evaluation report to document the ranking of the proposals by technical merit, using point scores, or similar methodology. (If price is included in the point scoring, the evaluation report will also include the price or cost analysis, as appropriate.) In addition, a narrative should accompany the scores to explain how the scores were derived, detailing the significant strengths, weaknesses, and deficiencies in the proposal. The level of detail for the evaluation report will be influenced by the complexity of the procurement, with more complex procurements likely requiring more detailed reports.

M. Evaluation of Price (24 CFR 85.36(f)). The evaluation of price is made using the cost and price analysis techniques in Chapter 10 and other evaluation processes described in the RFP.

N. Competitive Range (24 CFR 85.36(f))

1. After the evaluation committee has evaluated all proposals, the Contracting Officer should determine a competitive range. The competitive range includes the proposals that have a reasonable chance of being selected for award considering their technical evaluation results and their proposed costs or prices.
2. The Contracting Officer examines the evaluation results contained in the evaluation report to decide if each offer is technically acceptable (i.e., appears to be able to perform the technical requirements of the contract). The Contracting Officer analyzes the proposed cost or pricing information (see Chapter 10, section 10.2) to decide if the offers propose a reasonable total cost or price. The Contracting Officer then considers the combination of technical and cost (the "total package") presented by each proposal to decide if it should be kept in the running for negotiations and possibly award.

Example: A high scoring, technically acceptable offeror proposes a price that far exceeds all the competition and the PHA's ICE. The Contracting Officer would be justified in not including it in the competitive range. It would be highly likely that once the costs were negotiated down to a reasonable level, the technical quality would be much lower, too. Therefore, the offer does not truly stand a reasonable chance of award.

3. Before conducting negotiations, technical proposals included in the competitive range should be classified as:
 - a. "Acceptable." This means that based upon the proposal as submitted, the PHA could contract with the offeror and expect that the work would be completed. The proposal is not perfect, but it contains no significant weaknesses.
 - b. "Potentially acceptable." This means that the technical part of the proposal contains weaknesses that keep it from being acceptable, but with relatively minor changes or additional information from the offeror, it might be made acceptable. Once additional information is obtained via initial negotiations, this type of proposal must become either acceptable or unacceptable.
 - c. "Unacceptable." This means that the proposal is seriously flawed to the point that no amount of negotiation would lead to improve it, or the offer would have to be substantially rewritten to be found acceptable. Either the offeror simply did not understand the PHA's requirement or did not elect to prepare a sufficient proposal. Technically unacceptable proposals should never be included in a competitive range.
4. The competitive range, including the Contracting Officer's rationale for it, must be documented in the contract file.
5. The Contracting Officer may redetermine the competitive range after the initial round of negotiations. For example, a potentially acceptable offer becomes unacceptable. In that case, the Contracting Officer should not ask the offeror for a Best and Final offer (see paragraph Q, below). Instead, the Contracting Officer should redetermine the range and remove that proposal. This may be done after successive rounds of negotiation, if more than one is used.

O. Pre-negotiation Objectives

1. Pre-negotiations objectives are the Contracting Officer's negotiating positions. Normally, the Contracting Officer should develop target objectives (e.g., best case, expected, highest acceptable price, etc.) for the contract price. Objectives may also be established for technical aspects of proposals. For example, the Contracting Officer may have included a "potentially acceptable" offer in the competitive range (see paragraph 7.2N). The technical pre-negotiation objectives would then include obtaining answers or clarification relative to the areas of the proposal that made it potentially acceptable.

2. The Contracting Officer should establish specific pre-negotiation objectives for each offer in the competitive range.

P. Negotiations with Offerors

1. Negotiations are exchanges (in either competitive or sole source environment) between the PHA and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining.
2. 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.
3. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.
4. Discussions are tailored to each offeror's proposal, and shall be conducted by the contracting officer with each offeror within the competitive range.
5. The primary object of discussions is to maximize the PHA'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 be considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, 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.
6. 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 the PHA 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 the PHA'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.

Q. Best and Final Offers

1. After initial negotiations are complete, the Contracting Officer shall invite the offerors in the competitive range to submit their best and final offers, making any changes they wish in their technical proposal and the price. All offerors in the competitive range should be provided an opportunity to present best and final offers.
2. The best and final offers shall be evaluated in essentially the same manner as the initial offers. At his/her discretion, the Contracting Officer may have the entire evaluation committee or only a subset of the committee evaluate the best and final offers. In either case, the Contracting Officer shall ensure that a full evaluation is conducted sufficient to support the award decision.

3. Best and final offers are usually requested only once in a competition. However, in exceptional circumstances, the Contracting Officer may determine that it is in the PHA's best interest to conduct another round of negotiations and request a second best and final offer. (Note: The Contracting Officer may also redetermine the competitive range based upon the best and final offers. In that case, only those offerors still in the competitive range – but all of them - are asked to submit another revised best and final offer; see also paragraph N, above.) The Contracting Officer should document in the contract file his/her rationale for re-opening negotiations and requesting any additional best and final offers.
 4. The Contracting Officer shall establish a common date and time for submission of offers. Late responses should be treated the same as late initial offers. When requesting best and final offers, the Contracting Officer shall clearly inform offerors that should they fail to submit a best and final offer, or fail to submit one by the due date, their initial offer will be deemed to be their best and final offer.
- R. **Award without Negotiations.** If, after the initial evaluation of proposals, there is a clear winner, and there is no need to negotiate or obtain further clarification or information from that offeror (e.g., the price is reasonable), the Contracting Officer may proceed directly to award, provided that the RFP clearly stated that award could be made without negotiations (see paragraph 7 of form HUD-5369-B).

S. Contract Award (24 CFR 85.36(b)(8))

1. **General.** Contracts shall be awarded only in accordance with the terms of the solicitation. Contracts awarded using the competitive proposals method are based on both price and technical merit of the proposal. Awards shall be made only to offerors who have been determined to be responsible contractors. Procedures for determining contractor responsibility are included in Chapter 10, and a sample Responsibility Determination form is included in **Appendix 10**.
2. **Notice to Unsuccessful Offerors.** The Contracting Officer should notify each unsuccessful offeror and the awardee price in writing. In accordance with any applicable State or local law, the notice should identify the successful offeror and the contract price, and the basis for the offeror not being selected for contract award. The basis should clearly describe the offer's salient weaknesses and deficiencies that resulted in it not being considered for award (e.g., not simply state that the offeror's proposal did not receive a high enough score).
3. **Debriefing Unsuccessful Offerors.** The notice to unsuccessful offerors should also provide them with the opportunity to request a debriefing by the Contracting Officer. The notice should state any time frame during which the request must be made (e.g., within 10 business days after receipt of notice). The debriefing should explain how the offer was unsuccessful (e.g., by comparing it to the requirements of the RFP). The debriefing should **not** include a detailed point-by-point comparison with the successful offer or any other offer, and may not reveal any information about another offer that is protected from disclosure

(e.g., personal information, proprietary business information; see Chapter 1, section 1.7).

T. Protests. Protests against the award of contracts shall be handled as described in Chapter 10, Section 10.4.

7.3 Requests for Qualifications

A. General. The Qualifications-Based Selection (QBS) method is conducted using an RFQ. Use of the QBS is limited and is different, primarily, from the RFP method in that the PHA first selects the highest-ranked respondent on technical factors and then negotiates price. The most common use of RFQs is for Architect/Engineer (A/E) contracts. RFQs can also be used to select development partners for mixed-financed projects (Chapter 16). The discussion in this section references those special requirements/conditions in using RFQs.

B. Procedure. Unlike other methods, the QBS method does not use price as an evaluation factor. The PHA requests technical qualifications statements from prospective firms and then ranks the statements according to their qualifications as related to the project. The PHA then opens negotiations with the top-ranked firm with intentions to reach agreement on a fair and reasonable price. If agreement cannot be reached, the PHA terminates negotiations with this firm and proceeds to the next-highest rated firm until a price determined to be fair and reasonable to both parties is obtained. Once negotiations have been terminated with a firm, the PHA may not go back to that firm for additional negotiations – even if the next lower ranked respondent is higher in price.

C. Eligible Uses. The QBS method can only be used for A/E services, or Developer’s related contracts, or when specifically authorized by HUD. Further, in accordance with **24 CFR 85.36(d)(3)(v)**, the QBS method cannot be used to contract for other types of services provided by A/E firms, even though A/E firms are a potential source for performing the proposed effort.

D. Alternative Methods of Selecting A/E Firms (24 CFR 85.36(d)(3)(v)). There are several alternatives available to PHAs in contracting for the full range of services offered by A/E firms:

1. A “full-service” approach may be used if the PHA solicits offers using competitive proposal procedures or QBS for assistance in preparing modernization plans, with options for the follow-on design and construction phases for a specific contract. The evaluation criteria in the solicitation should address the qualifications and experience of prospective A/E firms for all tasks. If QBS is used, the PHA evaluates the qualification statements for technical competence, selects the best-qualified A/E, and negotiates a fair and reasonable price for the initial task. (If agreed by the A/E and the PHA, the contract may stipulate that in the event that Phase I is not approved, the A/E is not entitled to any payment.) If QBS is not used, price is considered along with technical qualifications and experience in the initial evaluation.

The PHA specifies the optional task (design/construction) in the contract without a price because the full scope of the A/E services is not yet known.

If the PHA then wishes to exercise its option for the additional services, the PHA notifies the A/E accordingly and requests a design proposal. The PHA conducts a cost/price analysis, enters into negotiations, and establishes a mutually acceptable price for the design and construction phases. The PHA prepares a contract modification (supplemental agreement), executed and signed by both parties authorizing the A/E to begin the design/construction phase, or the PHA has no further obligation to the A/E and may issue a new competitive solicitation for the follow-on work.

With the exception of the full-service approach, described in paragraph 7.3.D.2 below, the PHA should determine whether or not there is an actual or potential conflict of interest resulting from the same A/E who was involved in the Phase I being subsequently involved in the related design/construction phase work.

If the PHA wishes to separate Phase I from the design/ construction phase, the PHA first solicits and contracts for Phase I. Then, after Phase I approval, the PHA solicits and contracts for the design/construction phase. The A/E who was awarded Phase I may compete for the design/construction phase, provided that the PHA makes all application-related information available to all competing A/E firms and that there is no organizational conflict of interest. (For example, award of the contract to the A/E who developed the plan would result in an unfair competitive advantage because, by virtue of doing Phase I work, an unfair advantage exists through information which might not be available to others).

The PHA is not to allow an A/E contractor, on a sole-source basis, to prepare a grant (or development application) on a “no fee” basis and then compensate that A/E by paying a contingent fee (or contracting on a sole-source basis to do the design and construction phases).

2. If the PHA wishes to procure A/E services for more than one specific project, the PHA may solicit for an indefinite-quantity of A/E services, e.g., design of various administrative or maintenance buildings, where separate orders would be placed for each building as the need arises. Because this approach may provide the successful A/E with a substantial level of business and basically confers status as the “resident A/E,” the contract should contain a clause precluding the successful A/E from competing on related A/E work solicited by the PHA during the term of the contract if the other A/E work would result in an organizational conflict of interest (such as unfair competitive advantage or impairment of contractor objectivity).

E. **A/E Evaluation Factors.** The following evaluation factors are recommended for use for modernization and development A/E contracts:

1. Evidence of the A/E’s or firm’s ability to perform the work as indicated by profiles of the principals’ and staffs’ professional and technical competence/experience, and their facilities;
2. Capability to provide professional services in a timely manner;
3. If design work is involved, evidence that the A/E is currently registered in the State of the project’s location and carries Errors and Omissions insurance (Note

that this is a yes or no criterion: if the answer is no, the firm is disqualified, not point-scored);

4. Past performance in terms of cost control, quality of work, and compliance with performance schedules;
 5. Demonstrated knowledge of local building codes and Federal building alterations requirements; and
 6. Other factors determined to be appropriate by the PHA.
- F. **Forms for A/E Contracts.** The form HUD-51915, Model Form of Agreement Between Owner and Design Professional, is required for use by PHAs for A/E contracts that exceed the Federal small purchase threshold. In preparing the solicitation, it should be noted that in States that mandate QBS, a price shall not be solicited for the initial competition, but shall be requested from the best-qualified A/E firm after the evaluation of qualifications and ranking the firms (24 CFR 85.36(d)(3)(v)).
- G. **Inadequate Response to A/E Solicitation.** If the PHA receives fewer than three proposals, the PHA should analyze and document the reasons for the inadequate response (such as if public notice advertising and outreach to potential offerors were insufficient, or if the solicitation was unduly restrictive or vague). Depending on the results of the analysis, the PHA may either reject the proposals and issue a revised solicitation, or the PHA may proceed to evaluate the proposals as deemed appropriate. If only one responsive proposal was received, the PHA should follow the procedures described in Chapter 10.

7.4 Procurement of Legal Services by PHAs (24 CFR 85.36(b)(1))

- A. **Purpose and Applicability.** The following information sets forth procedures for the procurement of legal services by PHAs. This guidance provides similar guidance to HUD staff and PHAs included in PIH Notice 2006-9, Procurement of Legal Services by PHAs or its successor guidance. The following information is not intended as the primary source of guidance in this area but is provided to remind all HUD Offices and PHAs of the proper procedures for procuring legal services and to briefly review areas of common interest and concern. This information applies to all PHA procurements of legal services that are funded with HUD grant funds subject to **24 CFR Part 85**, e.g., Operating Fund subsidies and Capital Fund.
- B. **Background.** PHAs obtain required outside legal services through procurement contracts. Such procurement is subject to the requirements set forth in **24 CFR Part 85**, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” in particular, **24 CFR 85.36**. In accordance with **24 CFR 85.22**, the costs of legal services incurred under HUD grants (including those obtained under contract) must be reasonable and necessary. Section 85.22(b) incorporates the OMB Circular A-87, which contains a set of cost principles that PHAs must use for determining the allowability of costs they incur under Federal grants and provides guidance in their use. Contracts for litigation services are also to meet the requirements of the HUD Litigation Handbook 1530.1 REV-5 dated May 2004 (the “Litigation Handbook”).

- C. **Methods of Procurement.** **24 CFR 85.36(d)** permits PHAs to use all of the contracting methods listed below. PHAs are expected to choose the method of procurement that is reasonable based on the facts surrounding the particular situation. The methods of procurement outlined in **24 CFR 85.36(d)** are:
1. **Small Purchase Procedures.** If the relatively simple and informal small purchase methods are used, price or rate quotations will be obtained from an adequate number of qualified sources.
 2. **Sealed Bids.** This method is normally not appropriate for securing legal services. Sealed bidding may only be used when it is possible to quantify the costs of the required services (e.g., number of hours) to permit the submission of firm bids and award a firm fixed-price contract to the lowest responsive and responsible bidder considering only price and price-related factors. In addition, it is often critical to consider other factors besides price (e.g., experience) when selecting a legal services contractor. Sealed bidding does not permit the use of other factors.
 3. **Competitive Proposals.** This method is generally preferred when procuring professional services because it allows for the consideration of technical quality or other factors (in addition to price) for securing services estimated to cost more than the Federal small purchase threshold or a lower threshold as established by the PHA (e.g., to conform to State law). Competitive offers are solicited, proposals are evaluated, and award is made to the offeror whose proposal is most advantageous to the PHA, with price and other factors (as specified in the solicitation) considered. Either a fixed-price or cost reimbursement type contract may be awarded. This method is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the conditions in **24 CFR 85.36(d)(3)** must be followed.
 4. **Noncompetitive Proposals.** This method may only be used when the other methods of procurement are infeasible and the circumstances described in **24 CFR 85.36(d)(4)** are applicable (e.g., legal services are available from only a single source; public exigency or emergency for the requirements will not permit a delay resulting from competitive solicitation; after solicitation of a number of sources, competition is determined inadequate; or HUD authorizes the use of noncompetitive proposals. An example of a situation considered to violate the requirements of full and open competition in **24 CFR 85.36** would be noncompetitive award to an attorney for legal services on a retainer basis.
- D. **Time and Materials Contracts.** Legal services can be procured on an hourly basis using a type of contract known as time-and-materials (or sometimes, “labor-hour”) contracts. Under these contracts, the contractor’s services are pre-priced (usually, in terms of hours) in the contract, and the PHA orders services in unit amounts (e.g., hours) as needed until the funds in the contract are exhausted. PHAs may use this type of contract only after the PHA determines that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk.
- E. **Obtaining Legal Services by Procurement or Employment Methods.** PHAs may employ an attorney directly (house counsel), or the PHA may enter into a procurement contract with an attorney or firm. The procurement of legal services

shall follow the procedures outlined in paragraph C above. The employment of house counsel is not covered by **24 CFR 85.36**. PHA house counsel is ineligible to receive procurement contracts for legal services. All services of a PHA house counsel would be part of his/her employment contract and are not to be procured separately. Where legal services are desired outside of the scope of services provided by the PHA house counsel, PHAs may use one of the procurement procedures described in paragraph C above.

F. Contracts for Litigation Services

1. **General Requirements and Regional Counsel Approval.** In addition to the requirements described above in paragraph C, the Litigation Handbook sets thresholds for Regional Counsel and Headquarters Program Associate General Counsel approval of litigation service contracts. With the exception of litigation involving a PHA acting as a section 8 private developer, a PHA must submit to HUD Regional Counsel for prior written concurrence any litigation service contract where the fee is expected to exceed \$100,000 with a private attorney involving PHA program, project, or activity receiving loan, grant, or other subsidy assistance from HUD. Such contracts shall make provision for reasonable fees and reimbursement of necessary expenses. If additional funding or budget revision will be required to cover the cost of litigation services, the PHA shall consult appropriate Field and Regional Offices staff.

Upon receiving a request for concurrence, if Regional Counsel is satisfied that the PHA has not violated HUD requirements or is otherwise not at fault, the Regional Counsel shall concur in a request received from the PHA for approval of a contract for litigation services if he/she is also satisfied that: the contract contains adequate protection against fraud and abuse; the contract contains all mandatory provisions for professional service contracts for the program or activity giving rise to the litigation; and the contract amount is reasonable. (Note: In cases where the PHA is at fault, the Regional Counsel may authorize the limited use of program funds for the PHA's defense to facilitate settlement or obtain judicial definition of the required relief.) The contract amount will be considered reasonable if it does not exceed the rates prevailing in the same or similar localities for the same or similar services, or the PHA can demonstrate special circumstances that require payment of a higher amount. Regional Counsel's concurrence signifies that the attorney's fee (proposed contract price) under the contract is an allowable project expense, but is not a certification that there are sufficient project funds available to cover the contract amount.

2. **Headquarters Program Associate General Counsel Approval.** No contract for attorney's fees for litigation services entered into by any PHA, which calls for an estimated maximum price in excess of \$300,000 may be approved by the Regional Counsel without the prior concurrence of the Headquarters Program Associate General Counsel.
3. **Use of Fixed-Price Contracts.** Fixed-price proposals will be approved only where the issues are uncomplicated, extensive preparation probably is not required, and any trial that may ensue probably will not be lengthy. Ordinarily, a fixed-price proposal in excess of \$100,000 shall not be approved but Regional

Counsel may approve a higher amount for a good cause. For additional information regarding the above litigation services requirements, consult paragraphs 2-3g(3), 3-3b(3) and 5-4 of the Litigation Handbook.

- G. **Contract Addendum – Legal Services Protocol.** As indicated above, recent attention to the key role that attorneys play in PHA activities prompt the following guidance to promote and improve the Department’s partnership with PHAs. See **Appendix 11** for a form of addendum to an engagement letter, which the Department urges PHAs to follow in procuring and utilizing legal services. The form of engagement letter is intended to set a course that will be helpful to both PHA and HUD partners, clarifying a method of operation for HUD’s statutory oversight responsibilities while optimizing the statutory directive in section 2(a)(1)(C) of the United States Housing Act of 1937 “to vest in PHAs that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public.”
- H. **Legal Fee Management Service Contracts.** PHAs may also find it helpful to engage a legal fee management firm when heavy demand or high local priorities or other conditions merit secure oversight of legal services.

7.5 Employment Contracts

- A. **Employment vs. Independent Contracts.** There is a distinction between employing an individual (employment contracts), such as an employment contract for an executive director, and contracting for independent services (independent service contract). The former is part of the personnel process and is subject to those rules and regulations. The latter is considered to be a procurement action, subject to the standards in **24 CFR 85.36(d)(3)**. In an independent services contract there is no employer-employee relationship. Employment contracts are not subject to **24 CFR 85.36** and need not be competitively procured.
- B. **Executive Directors.** Executive Directors may be hired as PHA employees or may be retained under an independent services contract. A contract with a term in excess of two years requires prior written approval by the local HUD office if the PHA operates under the old ACC form HUD-53011 (11/69). The new ACC form HUD-53012A (7/95), does not specify a term; however, as with other contracts of this length, it is recommended that the PHA issue the contract for two base years with three one-year option periods. HUD can question and disallow fees or salaries paid by PHAs that are determined to be in violation of the ACC’s provisions for economy and efficiency.