

U. S. Department of Housing and Urban Development
Office of Public and Indian Housing

Special Attention of:	NOTICE PIH 2006-9 (HA)
Public Housing Agencies; Regional Directors; Regional Counsel; State/Area Coordinators; Public Housing Directors; FO Counsel	Issued: February 3, 2006 Expires: February 28, 2007

Cross Reference: Notice 2003-24 (HA); FR Part 85; HUD Handbook 7460.8 REV 1, Procurement Handbook for Public Housing Agencies (new handbook pending); HUD Litigation Handbook 1530.1 REV-5, dated May 18, 2004; Notice PIH 2003-24 (HA)

Subject: Reinstatement – Notice PIH 2003-24 (HA), Procurement of Legal Services by Public Housing Agencies

1. Purpose and Applicability. This Notice reinstates Notice PIH-2003-24 (HA), same subject, sets forth procedures for the procurement of legal services by Public Housing Agencies (PHAs). This Notice supersedes similar guidance previously provided to HUD staff and PHAs including PIH 90-47, Procedures for Procuring Professional Services. This Notice 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 Notice applies to all PHA procurements of legal services that are funded in whole, or in part, with HUD grant funds subject to 24 CFR part 85 (e.g., Operating Fund subsidies and Capital Fund).
2. 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 Office of Management and Budget (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 18, 2004 (the “Litigation Handbook”).

3. Methods of Procurement. Section 85.36(d) permits PHAs to use all of the contracting methods listed below. PHAs are expected to choose the method of procurement, which is reasonable based on the facts surrounding the particular situation. The methods of procurement outlined in section 85.36(d) are:
 - a. Small purchase procedures (85.36(d)(1)). Those relatively simple and informal procurement methods for securing services, supplies or other property that do not cost more than \$100,000 (the simplified acquisition threshold fixed at 41 U.S.C. 403(11) and currently set at \$100,000) in the aggregate or a lower dollar amount as established by the PHA (e.g., to conform to State law). If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.
 - b. Sealed bids (85.36(d)(2)). 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.
 - c. Competitive proposals (85.36(d)(3)). 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 \$100,000 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 § 85.36(d)(3) must be followed.
 - d. Noncompetitive proposals (85.36(d)(4)). This method may only be used when the other methods of procurement are infeasible and the circumstances described in § 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 § 85.36 would be noncompetitive award to an attorney for legal services on a retainer basis.

4. Time and Materials Contracts (85.36(b)(10)). 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.
5. 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 3 above. The employment of house counsel is not covered by 24 CFR § 85.36. PHA house counsels are 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 3 above.
6. Contracts for Litigation Services.

- a. General Requirements and Regional Counsel Approval.

In addition to the requirements described above in paragraph 3, 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 a 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 (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 Regional Counsel shall concur on 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.

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.

- b. 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.
 - c. 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 good cause. For additional information regarding the above litigation services requirements, consult paragraphs 2-2f(3), 3-3b(3) and 5-4 of the Litigation Handbook.
7. 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. Attached to this Notice is a form of addendum to an engagement letter, which the Department urges 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 public housing agencies 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."
 8. 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.

Orlando J. Cabrera, Assistant Secretary for
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Attachment