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FROM MIKE GIFFORD: My thoughts as to an allowable total term (or years) for contracts

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**Housing Agency Procurement Assistance**

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Dear Procurement Professionals,

I have recently received a number of inquiries from folks as to the maximum period of time (i.e., number of years) a contract is allowed to be executed for. The purpose of this mentoring correspondence is to provide regulatory references for such and to comment on such based on my extensive experience in this matter. Several thoughts thereto:

[NOTE: Unless otherwise stated, the following referenced Sections are listed within HUD Procurement Handbook 7460.8 REV 2.]

- (1) OLD ACC: A smaller number of housing agencies are still "operating under the 'old' ACC..." For those agencies, "the maximum contract term, [including options], is two years." [REFERENCE: Please see Section 12.2.F of the preceding-noted HUD Procurement Handbook.]
- (2) 5-YEAR CONTRACT LIMIT: Generally speaking, for most housing agencies (i.e., those NOT operating under the "old" ACC), HUD has allowed "a period of five years, including the options for renewal or extensions." [REFERENCE: Please see Section 12.2.I of the preceding-noted HUD Procurement Handbook.]
- (3) EXCEEDING 5-YEARS: Please remember, a housing agency cannot exceed 5 years with a contractor without prior HUD approval, and to obtain such approval the housing agency is going to have to convince HUD that there is "no practical alternative." [REFERENCE: Please see Section 12.2.I of the preceding-noted HUD Procurement Handbook.]
- (4) INITIAL CONTRACT PERIOD + OPTIONS: My strong recommendation is that housing agencies initially execute contracts for one year only, then include within the contract the option (at the housing agency's sole discretion) to award additional years based on the contractor's satisfactory performance and the housing agency's needs. Accordingly, in this method a 5-year contact would, in total, look like this: 1 + 1 + 1 + 1 + 1.

(NOTE: This does not apply to firm-fixed fee construction contracts that are typically awarded for the agreed upon period of construction only!) Why do I recommend this method?

(4a) WHY ONE YEAR AT A TIME: It is my firm opinion that it is unwise for a housing agency to make a firm long-term commitment to a contractor when there are yet so many unknowns pertaining to actual performance and agency needs. A "one year at a time" approach gives the housing agency the protection of having a well-performing contractor available with a lower risk if the contractor has problems performing.

(4a1) A contract extension only takes about 30 minutes at most, so this should not be a burdensome task for a housing agency. If you wish an example of a contract extension form that takes "about 30 minutes at most," please request such by email to me (gifford52@yahoo.com) and I will at no-charge return to you a sample.

(4b) Please remember, if you execute a long-term (i.e., longer than a year at a time) deal with a contractor, the only way you can be free of the contractor is for them to either resign, or for you to terminate. As explained in more detail immediately following, termination will typically only occur in two manners: Cause or Convenience:

(4c) If you Terminate for Cause (or Default), then such means that you have appropriately documented the contractor's repeated unsatisfactory performance by issuing to that contractor Notices to Cure; however, many housing agencies are very challenged in this area and it is very risky (very) to terminate without such Notices to Cure documentation in the agency contract files thereby justifying the Termination for Cause or Default. [REFERENCE: Please see Section 11.6.D of the preceding-noted HUD Procurement Handbook.]

(3d) If you Terminate for Convenience, then, as detailed within the HUD Procurement Handbook, such means that you no longer need a contractor to provide such services or you can no longer "fund the procurement." [REFERENCE: Please see Section 11.6.C of the preceding-noted HUD Procurement Handbook.] Two "inconvenient" issues pertaining to Terminations for Convenience are:

(3d1) You cannot then retain another contractor to provide those services in that doing so is (in my opinion) a clear indication that you were not terminating for Convenience but were actually terminating for Cause or Default, but you do not have in your files the appropriate Notices to Cure to justify a termination for Cause or Default (which is risky in the event of legal action by the terminated contractor); and,

(3d2) If you Terminate for Convenience you must settle with the terminated contractor by making a "suitable" payment" for the contractor's lost profit. [REFERENCE: Please see Section 11.6.C.2 of the preceding-noted HUD Procurement Handbook.]

I hope that this information is of a help.

Regards,

Michael S. Gifford, C.P.M., CPSD

Housing Agency Procurement Assistance

I have a consulting practice providing procurement- and contracts-related mentoring, training, and technical assistance to housing agencies. I help housing agencies conduct procurement and contracts in a HUD-compliant and "best practice" manner. [Click here](#) to see my full resume. Please do not hesitate to contact me if you have any questions or concerns pertaining to procurement and contracts (initial answering of questions is "no charge"). As I am either on-the-road or on the phone a lot, an initial contact by e-mail is best; please be sure to include your return telephone number (office/cellular) so that I can call you back.

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