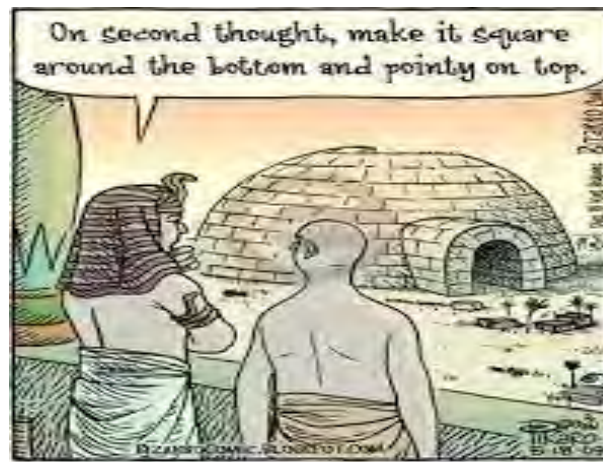


# UNDERSTANDING THE CONSTRUCTION CONTRACT

## STATUTORY ISSUES – PUBLIC CONSTRUCTION

**By: Stanley N. Wasser**  
FeldmanWasser  
Springfield, IL  
swasser@feldman-wasser.com

# UNDERSTANDING THE CONSTRUCTION CONTRACT



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

- **THE LAW IS DEEMED A PART OF EVERY CONTRACT EVEN IF NOT STATED OR REFERENCED THEREIN**
- **STATUTES MAY DICTATE WHAT TERMS NEED TO BE PLACED IN THE BID DOCUMENTS, CONSTRUCTION CONTRACTS, OR SUBCONTRACTS**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

- **ILLINOIS MECHANICS LIEN ACT**
- **BID BONDS, PERFORMANCE BONDS & PAYMENT BONDS**
- **PREVAILING WAGE ACTS**
- **ANTI-CORRUPTION LAWS**
- **BUY AMERICAN**
- **PROMPT PAYMENT ACTS**
- **CERTIFICATIONS**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **ILLINOIS MECHANICS LIEN ACT**

- **SECTION 60/1(d) – “NO LIEN” CLAUSES ARE VOID AGAINST PUBLIC POLICY**
- **SECTION 21(e) – CLAUSE CONDITIONING PAYMENT ON RECEIPT OF PAYMENT FROM ANOTHER PARTY ARE NO DEFENSE TO A LIEN CLAIM**

## UNDERSTANDING THE CONSTRUCTION CONTRACT

### ILLINOIS MECHANICS LIEN ACT



## UNDERSTANDING THE CONSTRUCTION CONTRACT

### BID BONDS

- ❑ DICTATED BY RULE FOR STATE CONTRACTS
- ❑ DICTATED BY STATUE FOR LOCAL GOVT. CONTRACTS
- ❑ FAILURE TO MEET BID SECURITY REQUIREMENT IS NON-WAIVABLE

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PERFORMANCE BONDS**

- ❑ **PUBLIC CONSTRUCTION BOND ACT  
REQUIRES PERFORMANCE BONDS  
30 ILCS 550/I**
- ❑ **OTHER STATE LAWS MAY ALSO  
MANDATE PERFORMANCE BONDS**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PAYMENT BONDS**

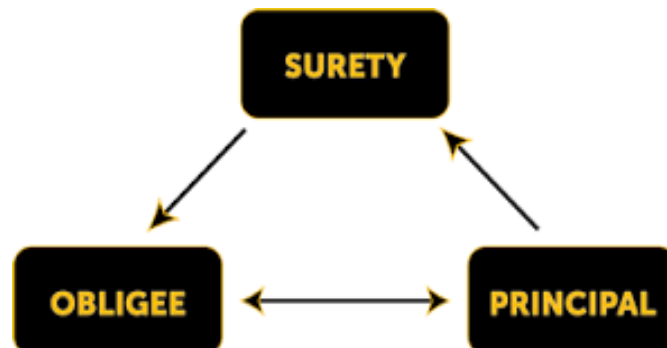
- ❑ **PUBLIC CONSTRUCTION BOND ACT  
REQUIRES PAYMENT BONDS  
30 ILCS 550/I**
- ❑ **OTHER STATE LAWS MAY ALSO  
MANDATE PAYMENT BONDS**

## UNDERSTANDING THE CONSTRUCTION CONTRACT

### PERFORMANCE & PAYMENT BONDS

- ❑ PUBLIC CONSTRUCTION BOND ACT ONLY REQUIRES A SINGLE BOND COVERING BOTH REQUIREMENTS
- ❑ BOND FORMS OFTEN INCORPORATE THE UNDERLYING CONTRACT TERMS

## UNDERSTANDING THE CONSTRUCTION CONTRACT



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PREVAILING WAGE LAWS**

- ❑ **ILLINOIS PREVAILING WAGE ACT  
APPLIES UNLESS FEDERAL FUNDS  
INVOLVED**

**820 ILCS 130/0/01 et seq.**

- ❑ **DAVIS-BACON ACT APPLIES IF  
FEDERAL FUNDS INVOLVED**

**40 U.S.C. §3141 et seq.**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PREVAILING WAGE LAWS**

- ❑ **IF BOTH FEDERAL AND STATE  
FUNDS, COMPLIANCE WITH BOTH  
ILLINOIS AND FEDERAL LAW IS  
REQUIRED IF NO CONFLICT**

***Frank Bros. Inc. v. Wisc. Dept. of Transp.***

- ❑ **IL PROCUREMENT CODE –  
RESPONSIBLE BIDDER REQUIREMENT  
– COMPLIANCE WITH IPWA [30 ILCS  
500/30-22(2)]**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PREVAILING WAGE LAWS**

- ❑ **SECTIONS 4 AND 5 OF THE ILLINOIS PREVAILING WAGE LAW DICTATES TERMS THAT MUST BE IN BID SOLICITATIONS, CONTRACTS, SUBCONTRACTS, AND BONDS**
  
- ❑ **SECTION 3142(C) OF THE DAVIS-BACON ACT DICTATES TERMS FOR CONTRACT SPECIFICATIONS**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PREVAILING WAGE LAWS**

- ❑ **PEOPLE EX REL DEPARTMENT OF LABOR v. SACKVILLE CONSTRUCTION, INC.**

**“Under a plain reading of the statute, [that one is] a private developer does not prevent it from being classified as a ‘public body’ under the Act.”**



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PREVAILING WAGE LAWS**



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **ANTI-CORRUPTION**

- ❑ ILLINOIS HAS NUMEROUS STATUTES THAT IMPOSE RESTRICTIONS AND PROHIBITIONS ON THE ABILITY TO OBTAIN A PUBLIC CONSTRUCTION CONTRACT IN ILLINOIS**
  
- ❑ SEVERAL OF THESE STATUTES ARE IN THE ILLINOIS CRIMINAL CODE**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **ANTI-CORRUPTION**



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **BUY-AMERICAN**

- ❑ **ILLINOIS AND FEDERAL LAWS REGULATE PROCUREMENT FROM DOMESTIC SOURCES**
- ❑ **THE FEDERAL LAWS APPLY IF THERE IS FEDERAL ASSISTANCE**
- ❑ **MOST COMMON RESTRICTION IS DIRECTED TO STEEL PRODUCTS**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **BUY-AMERICAN**

- ❑ **BE CAREFUL - A PRODUCT OSTENSIBLY MADE IN AMERICA DOES NOT ALWAYS SATISFY THE BUY AMERICA REQUIREMENTS, ESPECIALLY IF THERE IS FEDERAL FUNDS INVOLVED**
- ❑ **THE LAWS DO PROVIDE FOR VARIOUS EXCEPTIONS**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **BUY-AMERICAN**



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PROMPT PAYMENT ACTS**

- ❑ **STATE PROMPT PAYMENT ACT**

**30 ILCS 540/0.01 et seq.**

- ❑ **LOCAL GOVERNMENT PROMPT  
PAYMENT ACT**

**50 ILCS 505/1 et seq.**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PROMPT PAYMENT ACTS**

- ❑ **THE SCHOOL CODE APPLIES THE  
LOCAL GOVERNMENT PROMPT  
PAYMENT ACT TO SCHOOL BOARD  
PURCHASES**

**105 ILCS 5/10-20.19b**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PROMPT PAYMENT ACTS**

- ❑ **PROMPT PAYMENT ACT REQUIREMENTS VERSUS WHAT IS IN THE CONTRACT – OFTEN MATERIALLY DIFFERENT**
- ❑ **PROMPT PAYMENT ACTS PRESENT SIGNIFICANT ISSUES REGARDING PERFORMANCE AND PAYMENT BOND SURETIES**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **PROMPT PAYMENT ACTS**



## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **CERTIFICATIONS**

- ❑ **ASSURING COMPLIANCE WITH THE  
NUMEROUS LAWS BEARING UPON  
PUBLIC PROCUREMENT**
- ❑ **CIVIL/CRIMINAL  
IMPLICATIONS** **FRAUD  
FOR  
MISREPRESENTATION**

## **UNDERSTANDING THE CONSTRUCTION CONTRACT**

### **CERTIFICATIONS**



**ILLINOIS PUBLIC CONSTRUCTION  
PROCUREMENT STATUTES, RULES  
AND EXECUTIVE ORDERS**



# UNDERSTANDING THE CONSTRUCTION CONTRACT

APRIL 7, 2017 CHICAGO

## STATUTORY ISSUES – PUBLIC CONSTRUCTION

*Stanley N. Wasser, Feldman Wasser, Springfield, Illinois*

The law at the time a contract is executed is deemed part of every contract whether expressly referred to or incorporated by reference. *Schiro v. W. E. Gould & Co.*, 18 Ill.2d 538, 544-45, 165 N.E.2d 286 (1960); *Illinois Bankers' Life Ass'n v. Collins*, 341 Ill. 548, 552, 173 N.E. 465, 467 (1930) (“This principle embraces alike those which affect its validity, construction, discharge, and enforcement.”)

Many construction related statutes even dictate what terms relating to the statute need to be placed in bid documents, construction contracts and/or subcontracts. See e.g. Section of the Illinois Prevailing Wage Act which spells out exactly what must be in the contracts (820 ILCS 130/4) and Section 1 of the Public Construction Bond Act, Section 1, which spells out the conditions of payment bonds on public construction contracts that are required by that Act to be furnished (30 ILCS 550/1). These Acts are discussed in more detail below.

Thus, to fully understand the construction contract, you need to be aware of and to review various statutes that directly affect the terms and conditions of a construction contract, particularly if the project is a public construction project.

### 1. The Illinois Mechanics Lien Act

The Illinois Mechanics Lien Act is codified at 70 ILCS 60/1 *et seq.* The Act applies to both public and private construction. But only a handful of its provision apply to public construction, primarily Section 23 of that Act. The rest of the Act applies to private construction and is not applied by the courts to public construction contracts. *Alexander Lumber Co. v. Coberg*, 356 Ill. 49, 53-54, 190 N.E. 99 (1934) But where the Act is amended to bar a practice declared to be against public policy, the amendment will apply to liens on public funds. *R. W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 164, 692 N.E.2d 306 (1998).

For public construction projects, the mechanics lien remedy is only available to subcontractors and material suppliers. The lien can only be obtained against contract funds held by the project owner and not yet paid out to the contractor. In other words, there can be no lien against public property. *Gunther v. O'Brien Bros.*



*Const. Co.*, 369 Ill. 362, 367, 16 N.E.2d 890, 892 (1938); *McMillan v. Joseph P. Casey Co.*, 311 Ill. 584, 587-588, 143 N.E. 468 (1924).

Under the Act, a subcontractor is referred to as either “a mechanic, a workman, or other employee of a general contractor.” 770 ILCS 60/21. A subcontractor is one who contracts with the general contractor to do a portion of the work but who does not have privity of contract with the owner. *Dunlop v. McAtee*, 31 Ill.App.3d 56, 333 N.E.2d 76 (2<sup>nd</sup> Dist. 1975). The term “subcontractor” when used in connection with mechanics liens means subcontractors at all tiers. *Aluma Sys., Inc. v. Frederick Quinn Corp.*, 206 Ill. App. 3d 828, 850, 564 N.E.2d 1280 (1<sup>st</sup> Dist. 1990); *Koenig v. McCarthy Const. Co., Inc.*, 344 Ill.App.93, 98-100, 100 N.E.2d 338 (2<sup>nd</sup> Dist. 1951). It has also been held that since the words “contractor” and “subcontractor” appear in both Section 1 of the Act, which applies to private construction projects, and Section 23 of the Act, which applies to public construction projects, that some provisions of Section 1 can apply to Section 23 lien claims. *McMillan v. Joseph P. Casey Co.*, 231 Ill, App. 422, 430-31, 1923 Ill. App. LEXIS 1924 (3<sup>rd</sup> Dist. 1923) *aff’d* 311 Ill. 584, 143 N.E. 468 (1924).

There are two key provisions in the Mechanics Lien Act that are important to understand as regards public construction contracts.

First, Section 60/1(d) expressly provides that “no lien” clauses in contracts are void against public policy. 770 ILCS 60/1(d)

Second, Section 21(e) expressly provides that a clause in a contract of a contractor or of a subcontractor that conditions payment on “receipt of the payment from any other party” is not a defense to a mechanics lien claim. 770 ILCS 60/21(e).

The practitioner should note that the rule of construction is that the Mechanics Lien law will be strictly construed as regards the procedure for establishing the lien rights. This strict construction rule has been applied even to liens on funds for public improvements under Section 23 despite the “equitable nature of mechanics liens procedures” and despite section 39 of the Act which calls for a liberal construction to the Act. *Aluma Sys., Inc. v. Frederick Quinn Corp.*, 206 Ill. App. 3d 828, 830, 564 N.E.2d 1280, 1287 (1<sup>st</sup> Dist. 1990) ; *Bd. of Ed. of School Dist. No. 108, Tazewell Cnty. For Use of A.Y. McDonald Mfg. Co. v. Collom*, 77 Ill. App. 2d 479, 483, 222 N.E.2d 804 (3<sup>rd</sup> Dist. 1966)

## **2. Bid Bonds, Performance Bonds, & Payment Bonds**

When entering into a contract or subcontract where the project is a public construction project, the subject of bonds has to be considered in three contexts.

**Bid Bonds:** Since public entities have expended funds and time in arranging for the award of a public construction contracts, it is commonly required that a contractor bidding on a public contract post security either in the form of a bid bond or a letter of credit to secure the bidding contractor's commitment to enter into the contract the contractor is bidding upon if the bidding contractor is awarded the contract. The bid bond is often five or ten percent of the bid submitted. If a bidder defaults on its obligations to enter into the awarded contract, the public owner may have to accept a higher bid to get the work done, incur the delay and expense of a reletting, incur possible increased project costs, and otherwise lose the benefit of having the project completed within the contemplated time frame.

For State projects the bid bond requirement is usually found in an agency's procurement regulations. See e.g. Illinois Capital Development Board rules at 44 Illinois Administrative Code §8.2010(i) (state construction contracts) and 71 Illinois Administrative Code §41.120 (public construction grants).

For local projects, bid bond requirements are set by statute: for local improvements, see 65 ILCS 9-2-103; for sanitary districts see 70 ILCS 2305/11; for county board construction projects see 55 ILCS 5/5-32036.

Where the bid security is required, the bid bond is not part of the contract but a condition precedent for having the bid accepted. Therefore, the failure to meet the bid security requirement is a material variance which the public body cannot waive and which results in a finding that the bidding contractor failed to submit a responsive bid. *Bodine Electric of Champaign, Division of Rathje Enterprises, Inc. v. City of Champaign*, 305 Ill.App.3d 431, 711 N.E.2d 471 (4<sup>th</sup> Dist. 1999). Even the simple failure to execute the bid bond cannot be cured. *George W. Kennedy Const. Co., Inc. v. City of Chicago*, 135 Ill. App. 3d 306, 481 N.E.2d 913. 917 (1<sup>st</sup> Dist. 1985) *vacated* 112 Ill. 2d 70, 491 N.E.2d 1160 (1986).

**Performance & Payment Bonds:** The Public Construction Bond Act (30 ILCS 550/1 *et seq.*) mandates that there be performance and payment bonds provided by a contractor on contracts for public works over \$50,000.00. The Bond Act only requires "a bond", not separate payment and performance bonds. *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 30, 19 N.E.3d 615, 622

This Act applies to "all officials, boards, commissions, or agents of this State, or of any political subdivision thereof" (30 ILCS 550/1). The Illinois Procurement Act expressly makes this Public Construction Bond Act applicable to construction and construction related professional services procured by the State. (30 ILCS 500/30-45) The Act also applies to public-private agreements under the Illinois Expressway Act (30 ILCS 550/1.5) and public-private partnerships under the Transportation Act (30 ILCS 550/1.7). The Public Construction Bond Act expressly provides that various

provisions of the bonds, as required by the Act, shall be deemed to be a part of the bond whether or not included in the bond. 30 ILCS 550/1

Reference at times may also have to be made to other state laws that mandate such bonds. One example of such a statute is Section 4-103 of the Illinois Highway Code that requires the Illinois Department of Transportation to require that a successful bidder on a highway construction contract “furnish good and sufficient bonds to insure proper and prompt completion of such work in accordance with the provisions of such contracts.” [605 ILCS 5/4-103]. Another example of such a statute is Section 19 of the Public Building Commission Act. [50 ILCS 20/19], which statute expressly requires that contractors involved with construction projects under that statute must give a performance bond as required by the Board of Commissioners

The primary purpose of the performance bond is to protect the public body from spending money on unfinished projects. If the contractor fails to complete the contract according to its terms, the performance bond surety obligates itself to complete the contract either with the original contractor, with a substitute contractor or by financially guaranteeing the completion by the public body through the public body's own forces or the public body's own contractor.

The primary purpose of the payment bond is to protect subcontractors and materialmen against non-payment by contractors, provided the various notice and time requirements are met. It is an alternative remedy to a mechanics lien and is designed to avoid liens against contract funds.

The Public Construction Bond Act provides that the public body has the right of reasonable approval or disapproval of the surety chosen by the general contractor (30 ILCS 550/1).

Often times the performance bond and the payment bond are combined into a single document called a "performance and payment bond". Also, the form of the bond is usually prescribed either by statute or as part of the contract documents. Note that a bond that incorporates by reference the construction contract makes the provisions of the construction contract part of the bond. *Solai & Cameron, Inc. v. Plainfield Community Consolidated School Dist. No. 202.*, 374 Ill. App.3d 825, 835, 871 N.E.2d 944 (3<sup>rd</sup> Dist. 2007); *State Capital Development Bd ex rel P. J. Gallas Electrical Contractors, Inc. v. G. A. Rafel & Co.*, 143 Ill. App.3d 553, 493 N.E.2d 348 (2d Dist.1986).

For federally assisted projects the federal law requiring contract surety bonds on federal construction projects for contracts that exceeds \$100,000 for the construction, alteration, or repair of any building or public work is known as the Miller Act (40 U.S.C. §§ 3131-3134). The Miller Act is implemented through the Federal Acquisition Regulations (FAR) at 48 CFR Subpart 28.1. This law requires a

contractor on a federal project to post two bonds: a performance bond and a labor and material payment bond.

### **3. Prevailing Wage Acts**

Where the construction project is a public work, both Illinois and federal law prescribe both the labor rates, commonly known as the prevailing wage rates, to be paid to persons employed to perform the work and contract requirements that must be complied with to ensure the payment of these prevailing wage rates.

As regards State contracts, the Illinois Procurement Code requires that to be a responsible bidder, a bidder must, among other things, comply with Illinois Prevailing Wage Act (“IPWA”) (820 ILCS 130/0.01 *et seq*) and present satisfactory evidence of that compliance to the appropriate construction agency, unless compliance would jeopardize the receipt of federal funds for the project.

Where the project involves federally funded construction projects over \$2,000.00 for the construction, alteration or repair, including painting and decorating, of public buildings or public works, the labor rates are dictated by The Davis-Bacon Act. 40 U.S.C. §3141 *et seq*. When one speaks about The Davis-Bacon Act, it must be understood that what is being addressed is what commonly is called the “Davis Bacon and Related Acts” or “DBRA”, for since 1931, the Davis-Bacon prevailing wage requirements have been extended by statute to some 60 related federal acts which provide for federal assistance for construction, either by loans, grants, loan guarantees or insurance. Examples of such related statutes are the Federal-Aid Highway Act, the Housing and Community Development Act of 1974, and the American Recovery and Reinvestment Act of 2009. The U.S. Department of Labor has issued regulations for administering The Davis-Bacon and related acts. These regulations are codified at 20 CFR Parts 1, 3, 5, 6 and 7. Part 5 of these regulations apply to federally assisted construction contracts.

For practitioners involved with construction projects involving federal assistance through HUD’s HOME Investment Partnerships Program (“HOME”) created by the National Housing Act of 1990 (“NAHA”)(42 U.S.C. §201 *et seq.*), the practitioner should review HUD’s Federal Labor Standards to Home Projects dated August 21, 1996, and known as HUD Letter No. LR-96-02, because the application of Davis-Bacon prevailing wage requirements to HOME projects is materially different from the application of The Davis-Bacon requirements to other federally assisted construction projects, including other HUD assisted projects

Section 11 of the IPWA expressly disclaims its applicability to “Federal construction projects” that fall under The Davis-Bacon Act. 820 ILCS 130/11. IDOL Legal Opinion, March 12, 2010, provides: federally funded construction projects are

not subject to IPWA if by virtue of (i) provisions contained in federal act that funds the project; thresholds established in regulations implementing the federal act funding the project; or (iii) terms or conditions in the agreement between the public body awarding/administering the federal funds and the grantee.

It should be noted, however, that on construction projects jointly funded by federal and state funds, even if the federal Davis-Bacon Act does not require the payment of prevailing wages, the IPWA may require the payment of prevailing wages, as the federal Act is not deemed to preempt application of the Illinois Act if compliance can be had with both laws. *Frank Bros., Inc. v. Wisconsin Dept. of Transportation et al*, 409 F.3d 880, 894 (7th Cir. 2005)(contractor must comply with Wisconsin Act that specifically includes truck drivers although federal Act expressly exempts truck drivers from its coverage).

The prevailing wage laws, although appearing simple on their face, are in fact quite complex and there are material differences as between the Illinois and federal Acts. The scope and location of the work for which the prevailing wage rate is to be paid is also different as between the two Acts. *Compare e.g.* Section 3 of the Illinois Act (820 ILCS 130/3) with the requirements of the federal Davis-Bacon Act at 40 U.S.C. §3142(b) and 29 CFR §5.2.

In addition to dictating the prevailing wage rates to be paid, the two Acts impose certain requirements on public owners and upon contractors and subcontractors, which must be made a part of the bid specifications and/or construction contract at issue.

Section 4 of the IPWA provides (820 ILCS 130/4):

- The “project specifications and the contract” must contain a “stipulation to the effect that not less than the prevailing rate of wages...shall be paid to all laborers, workers and mechanics performing work under the contract.” If the work was awarded without a public bid, contract or project specification, then this stipulation must be included in the form of a written notice to the contractor on the purchase order related to the work or in a separate document. But note: *Contreras v. Control Resources Corporation*, 680 F. Sup. 289 (N.D. IL 1988)(public contract’s failure to specify what were the particular wages for particular works is not fatal to worker’s claims under IPWA)
- Effective with contracts and specifications issued or entered into on and after January 1, 2010, a public body that fails to provide notice that the project at issue is subject to the Act will be held financially responsible for any interest, penalties or fines. Similarly, contractors that fail to notify their subcontractors that a project is subject to prevailing wage requirements will be held responsible for any interest, penalties or fines.

- The contractor and each subcontractor performing the public work must have inserted into all subcontract agreements, including those with lower tier subcontractors, a “written stipulation to the effect that not less than the prevailing rate of wages...shall be paid to all laborers, workers and mechanics performing work under the contract.”
- If there is no written subcontract agreement, the contractor must provide the subcontractor written notice that the prevailing wage rates must be paid. Note *People ex rel. Dept. of Labor v. Sackville*, 402 Ill. App. 3d 195, 930 N.E.2d 1063 (3<sup>rd</sup> Dist. 2010)(Subcontractor’s lack of notice of applicability of the Act to construction project did not relieve subcontractor of its obligation to pay prevailing wages; payment obligation under statute is mandatory)
- The contract must ensure that all contractor’s bonds and subcontractor’s bonds include a provision “as will guarantee the faithful performance of such prevailing wage clause.”
- The contractor and each subcontractor must be notified of any revision to those specified prevailing wage rates.
- The contractor or construction manager performing the public work must “post, at a location on the project site of the public works that is easily accessible to the workers engaged on the project” the prevailing wage rates. Alternatively, a contractor having a business location where laborers, workers and mechanics regularly visit may post the wage rates in a conspicuous place at that location or provide the laborers, workers and mechanics written notice of the wage rates.

Section 5 of the IPWA specifies record-keeping requirements (820 ILCS 130/5):

- Contractors and subcontractors must keep and maintain for not less than three years payroll records from the date of last payment; and for payments after 1.1.14, for a period of five years. The records must contain the information required by Section 5(a)(1) of the Act.
- Contractors and subcontractors must submit monthly to the public body in charge of the project the required payroll records certified as true and accurate, certified to the wage rates paid and certifying that the contractor/subcontractor is aware that the knowing filing of a false payroll is a Class A misdemeanor.

Failure to comply with the statutory prevailing wage laws by both representatives of the public body as well as of the contractor/subcontractor can result in statutory penalties, possible criminal sanctions and possible contractor debarment. Moreover, Section 11 of the IPWA expressly provides that “[n]o public works project shall be instituted unless the provisions of this Act have been complied with” and that

“[a]ny contract for public works awarded at a time when the prevailing wage prerequisites have not been met shall be void as against public policy....” 820 ILCS 130/11. As regards State contracts, the Illinois Procurement Code requires that to be a responsible bidder, a bidder must, among other things, comply with the IPWA and present satisfactory evidence of that compliance to the appropriate construction agency, unless compliance with this provision would jeopardize the receipt of federal funds for the project. 30 ILCS 500/30-22(2). Responsible bidder laws of local government entities usually contain a similar requirement.

The IPWA is applicable to home rule units and thus, home rule units may not opt out of or modify the Act’s requirements. *People ex rel Bernardi v. City of Highland Park*, 121 Ill. 2d 1, 520 N.E.2d 316 (1988) Non-home rule units of government must also comply with the Act and have no authority to adopt ordinances or resolutions that depart from the Act or by referendum avoid compliance with the Act. IL Attorney General Opinion 15-002 (3.20.15) *citing People ex rel Bernardi*.

Note also: IPWA applicability will trigger compliance with the Illinois Substance Abuse Prevention on Public Works Project Act. 820 ILCS 265/1. "Public works" and "public body" have the meanings ascribed to those terms in the Prevailing Wage Act.

The IPWA can apply to private development. *See People ex rel Department of Labor v. Sackville Construction, Inc.*, 402 Ill. App. 3d 195, 930 N.E.2d 1063, 1067 (3rd Dist. 2010) (“[u]nder a plain reading of the statute, [that one is] a private developer does not prevent it from being classified as a ‘public body’ under the Act.”). *See also* Illinois Attorney General Opinion No. 00-018 issued December 29, 2000 (2000 WL 33152172); Illinois Attorney General Opinion No. 97-014 issued July 7, 1997 (1997 WL 398809); *Opportunity Center of Southeastern Illinois v. Bernardi*, 204 Ill. App. 3d 945, 562 N.E.2d 1053 (5th 1990)(private entity supported by public funding is subject to the Act); *Bernardi v. Illini Community Hospital*, 163 Ill. App. 3d 987, 516 N.E.2d 1320 (4th Dist. 1987)(construction project of not-for-profit hospital receiving tax funds but using only private funds for the construction project) Note, however, that whether an entity is a public body under the IPWA does not control whether it constitutes a public body under other statutes. *McKinley Foundation at University of Illinois v. Illinois Dept. of Labor*, 404 Ill.App.3d 1115, 936 N.E.2d 708, 718 (4th Dist. 2010).

For federally assisted construction projects to which the Davis-Bacon Act applies, each contract subject to the Davis-Bacon labor standards requirements must contain labor standards clauses and a Davis-Bacon wage decision. More specifically, the Davis-Bacon Act requires that all advertised specifications for every federally assisted contract in excess of \$2,000.00 for the construction, alteration or repair, including painting and decorating, of public buildings or public works must contain a

provision stating the minimum wages to be paid to laborers and mechanics employed on the project. The labor standards clauses describe the responsibilities of the contractor under the Davis-Bacon Act, obligates the contractor to comply with the labor requirements, and provides, among other things for the withholding from payments due to the contractor to ensure the payment of wages or liquidated damages which may be found due.

The Davis-Bacon Act specifically requires that every contract based upon those specification must contain the following stipulations [40 U.S.C. §3142(c)]:

- that the contractor or subcontractor shall pay all mechanics and laborers at least weekly at wage rates not less than those stated in the advertised specifications;
- that the contractor will post the prevailing wage scale in a prominent place; and
- that funds may be withheld from the contractor equal to accrued payments due laborers and mechanics employed by the contractor or any subcontractor.

In addition, the Davis-Bacon Act requires that every contract contain a provision that if laborers and mechanics are paid less than the contractually required prevailing wage rates, then upon notice to the contractor, the contractor's right to proceed with the work may be terminated for failing to pay the required wages and that the contractor's sureties shall be liable for such underpayment of wages. 40 U.S.C. §3143.

Contractors subject to the Davis-Bacon requirements must maintain payroll and basic records for all laborers and mechanics during the course of the work and for a period of three years thereafter and must, on a weekly basis, provide payrolls accompanied by a "Statement of Compliance." 29 CFR 5.5(a)(3)(ii)(B)

#### **4. Anti-Corruption**

Public construction contract is supposed to operate in a manner that prevents favoritism, improvidence, extravagance, fraud and corruption while allowing the public to secure the best work at the lowest price. *S. N. Nielsen Co. v. Pub. Bldg. Com.*, 81 Ill. 2d 290, 299-300, 410 N.E.2d 40, 44-45 (1980); *Court Street Steak House, Inc. v. County of Tazewell*, 163 Ill. 2d 159, 167, 643 N.E.2d 781 (1994); *Best Bus. Joint Venture v. Bd. of Educ. of City of Chicago*, 288 Ill. App.3d 770, 777-778, 681 N.E.2d 570 (1<sup>st</sup> Dist. 1997). Illinois has enacted several statutes that seek to ensure the integrity of its construction contracting process. As noted below under "Certifications", public bodies usually require that a prospective contractor certify



that they are not forbidden from contracting by reason of these various statutory prohibitions.

Illinois has in place several entities whose role is to prevent corruption:

1. The Executive Ethics Commission enforces the Ethics Act for all employees of the executive branch of Illinois State Government and monitors the state government procurement process.
2. The Legislative Ethics Commission, a bipartisan commission appointed by leaders of both legislative houses, conducts administrative hearings on matters brought by Office of the Legislative Inspector General which investigates misconduct by state legislative members and staff
3. Illinois has state and municipal level inspectors generals, reportedly more than any state besides Florida.
4. The State Officials and Employees Ethics Act created five offices of the Executive Inspector General, one for each constitutional office.

The following Illinois statutes seek to prevent corruption in public contracting:

- A. 30 ILCS 500/50-5, which prohibits one convicted of bribing or attempting to bribe an officer or employee of the State of Illinois or any other State, or who has made an admission of guilt of such conduct that is a matter of record, from receiving a State construction contract.
- B. 30 ILCS 500/50-10.5e, which bars one from having a contract with the State based on violating the prohibition on providing assistance to the state in identifying a need for a contract (except as part of a public request for information process) or by reviewing, drafting or preparing solicitation or similar documents for the State.
- C. 30 ILCS 500/50-25, which bars one from having a contract with the State if one has paid any money or valuable thing to induce any person to refrain from bidding on a State contract, or has accepted any money or other valuable thing, or acted upon the promise of same, for not bidding on a State contract.
- D. 30 ILCS 500/50-30, prohibits one from having a contract with the State if in violation of the “Revolving Door” section of the Illinois Procurement Code, which provides:

Chief procurement officers, State purchasing officers, procurement compliance monitors, their designees whose principal duties are directly related to State procurement, and executive officers confirmed by the Senate are expressly

prohibited for a period of 2 years after terminating an affected position from engaging in any procurement activity relating to the State agency most recently employing them in an affected position for a period of at least 6 months. The prohibition includes but is not limited to: lobbying the procurement process; specifying; bidding; proposing bid, proposal, or contract documents; on their own behalf or on behalf of any firm, partnership, association, or corporation.

- E. 30 ILCS 500/50-38, which prohibits one who has retained a person or entity to attempt to influence the outcome of a procurement decision for compensation contingent in whole or in part upon the decision or procurement from having a State contract.
- F. Sections 33E-3 and E-4 of the Illinois Criminal Code bars on who has been convicted of the offense of bid rigging or bid rotating or any similar offense of any state or of the United States from having a contract with the State. (720 ILCS 5/33 E-3, E-4).
- G. 30 ILCS 500/20-160 and 50-37 prohibit vendors from making certain political contributions These requirements are effective for the duration of the term of office of the incumbent Governor or for a period of 2 years after the end of the contract term, whichever is longer.
- H. 5 ILCS 430/5-30 prohibits “ [a]n officer or employee of the executive or legislative branch or a candidate for an executive or legislative branch office” from promising, among other things, “the awarding of any public contract...in consideration for a contribution to a political committee, political party, or other entity that has as one of its purposes the financial support of a candidate for elective office”
- I. 5 ILCS 283/1, known as the Public Corruption Profit Forfeiture Act, provides for forfeiture of any profits or proceeds from any person convicted of bribery, kickbacks, fraud involving DBEs where the profits or proceeds were acquired as a result of those crimes.
- J. 720 ILCS 5/33-3 makes “Official Misconduct” a criminal offense. “Official Misconduct” is defined as: “(1) intentionally or recklessly failing to perform a mandatory duty as required by law, (2) knowingly performing an act the officer knows is forbidden, (3) performing an act in excess of lawful authority with intent to gain personal advantage, or (4) soliciting or knowingly accepting for the performance of any act a fee or reward which the official knows is not authorized by law.

*See also* Illinois Executive Order No. 1 provides that vendors and subcontractors are prohibited from hiring the then-serving Governor's family members to lobby procurement activities of the State, or any other unit of government in Illinois including local governments if that procurement may result in a contract valued at over \$25,000. This prohibition also applies to hiring for that same purpose any former State employee who had procurement authority at any time during the one-year period preceding the procurement lobbying activity.

In addition, Sections 50-40, 50-45 and 50-50 of the Illinois Procurement Code requires that vendors report to the Illinois Attorney General and the Chief Procurement Officer any suspected collusion or other anti-competitive practice among any bidders, offerors, contractors, proposers or employees of the State (30 ILCS 500/50-40, 50-45, 50-50).

The Illinois Governmental Ethics Act seeks to combat corruption by requiring the public disclosure of certain economic interests by members of the legislative and executive branches of government. Special disclosure rules apply if the state official has invested in an entity that does business with the state. 5 ILCS 420/Article 4A

Public officers may not have an interest in contracts with the governmental body they serve, subject to a few, limited exceptions. The common law rules prohibiting interests in contracts by public officers were codified in statutory form and are found in the Illinois Municipal Code [65 ILCS 5/3.1-55-10(a) and 65 ILCS 5/4-8-6(a)] and the Public Officer Prohibited Activities Act [50 ILCS 105/3(a)] and Section 10-9 of the School Code (105 ILCS 5/10-9). Contracts made in violation of these laws are void.

Any member of a governing body can, however, provide services, or materials to a project he or she may be required to act or vote on if the member has "less than a 7½% share in the ownership" or the contract is for less than \$2,000 and is approved by a majority vote and the interested member abstains from the voting. 50 ILCS 105/3(b)(1) and (b)(2)

Unlike Section 3 of the Corrupt Practices Act, (50 ILCS 105/3), these prohibitions in the Municipal Code are not limited to contracts on which the official may be called upon to act or vote.

The federal anti-bribery statute (8 U.S.C §201) prohibits and punishes both the person who does the bribing and the public official who receives the bribe. This statute provides under 18 U.S.C. §201(b)(1), that bribery is committed by:

Whoever directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been

selected to be a public official to give anything of value to any other person or entity, with intent (A) to influence any official act; or (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person.

The statute further provides under 18 U.S.C. §201(b)(2), that bribery is committed by:

Whoever being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person.

## **5. Buy American**

Illinois has a "Buy-America" Act known as the Steel Products Procurement Act (30 ILCS 565/1 et seq.) Under that Act, every contract in excess of \$500.00 for the construction, reconstruction, alteration, repair, improvement or maintenance of public works made by a State agency must contain a provision that steel products used or supplied in the performance of that contract or any subcontract thereto shall be manufactured or produced in the United States. When the application of the Act's requirements is deemed by the State agency not to be in the public interest the Act does not apply. In addition, the Act does not apply if the executive head of the public agency awarding the contract can certify that the products are not available in sufficient quantity or in sufficient time or would increase the cost of the contract by more than ten percent

Similar to the federal Buy American Act [41 U.S.C. §10a], Illinois has a "Buy Illinois" Act that grants protections to Illinois businesses and products. 30 ILCS 500/45-5 et seq.

As noted below, a vendor contracting with the State is usually required to certify that steel products used or supplied in the performance of a contract for public works shall be manufactured or produced in the United States, unless the executive head of the procuring agency grants an exception (30 ILCS 565).

*See also* the federal Buy American requirements under the American Recovery and Reinvestment Act [Public Law No. 111-5, Section 1605], commonly known as the Stimulus Act. The American Recovery and Reinvestment Act of 2009 (“ARRA”) assisted stimulus projects impose a Buy-American requirement for iron, steel and manufactured goods.

Section 1605 of ARRA recognizes two exceptions to its domestic sourcing mandate. First, ARRA allows federal agency heads to waive compliance with domestic sourcing requirements if one of three circumstances are presented: (a) it is in the public interest to make the exception; (b) domestic iron, steel or manufactured goods are not available; or (c) the domestic sourcing requirement would increase the cost of the project by more than 25%. Such waivers are usually issued as project site-specific waivers. Some federal agencies have issued nationwide waivers from the Section 1605 requirements for specific goods<sup>16</sup> and also for *de minimus* incidental components. The waiver process was designed for pre-bid waivers. Post-bid waivers can be obtained, but this post-bid process may prove difficult. *See* 2 C.F.R. §176.120 (governing determinations of late requests).

ARRA also provides that the domestic sourcing mandate is to be applied in a manner consistent with United States obligations under international agreements. Under these agreements, construction materials of certain designated countries receive equal consideration with offers of domestic construction materials where the total contract amount meets or exceeds specified dollar thresholds. Local governmental entities are not usually parties to such international agreements and thus exceptions for foreign-origin materials or goods that may exist on federal or state projects do not exist for local government construction projects. Construction materials on local projects are most often, if not entirely, limited to domestic origin products unless a waiver of the ARRA domestic source requirements can be obtained

## **6. Prompt Payment Acts**

The State Prompt Payment Act [30 ILCS 540/0.01 *et seq.*] and the Local Government Prompt Payment Act [50 ILCS 505/1 *et seq.*] provide for interest in the event the public owner does not make timely payment of an approved voucher within the period of time set by statute.

But in *R.L. Vollintine Construction, Inc. v. The Illinois Capital Development Board*, 2014 IL App (4th) 130824 (October 29, 2014), the Fourth District Appellate Court held that the State Prompt Payment Act does not impose on state agencies a mandatory, nondiscretionary duty to submit invoices to State Comptroller for payment after certificate of substantial completion has been issued.

The State Prompt Payment Act (30 ILCS 540/1 *et seq.*) provides that where a State official or agency is late in payment of a vendor's bill or invoice for goods or

services furnished to the State, as defined in that act, and that bill or invoice has been properly approved in accordance with State rules, the vendor is entitled to a statutory late interest payment each month of 1.0% of any amount approved but unpaid after the end of 60 days after the date of approval. Where a State official or agency is late in payment of a properly approved vendor's bill or invoice and no other later payment terms are contained in a written contract, the State official or agency must pay interest penalties amounting to \$50 or more. For interest penalties of at least \$5.00 but less than \$50.00 the contractor must initiate a written request for the interest penalty when it is due and payable in accordance with the rules promulgated by the Illinois State Comptroller and the Illinois Department of Central Management Services. A state official or agency cannot request a vendor or contractor to waive its rights under the Act to recover a penalty for late payment as a condition of the contract.

The Act further requires that a contractor receiving any payment from the State shall pay each subcontractor and material supplier in proportion to the work completed, less any retention. Where a contractor is paid a progress payment on a public construction contract, the contractor must pay its subcontractors and material suppliers on a pro rata basis from the funds received. If, however, the State does not release the full amount of payment due under the contract because it is rejecting specific areas of work or materials or because the contractor has otherwise determined that such areas are not suitable for payment, then the specific subcontractor or suppliers whose work was rejected, are not entitled to be paid for that portion of the rejected or unsuitable work. If a contractor, without reasonable cause, fails to make payment to its subcontractors and material suppliers within 15 days after receipt of payment under the public construction project, the contractor must pay in interest penalty in the amount of 2% per month calculated from the end of the 15-day period.

The State Prompt Payment Act also applies to payments to be made by subcontractors and material suppliers to all lower tier subcontractors and material suppliers through the contracting chain.

The State rules implementing the State Prompt Payment Act, issued by the State Comptroller, can be found at 74 Ill. Adm. Code 900. Note that these regulations define a "Proper Bill" as "a bill or invoice containing sufficient and correct information necessary to process the payment for a liability of a State agency as provided in this Part, the Comptroller's Statewide Accounting Management System (SAMS) manual, or as otherwise specified by the State agency responsible for payment." 74 Ill. Adm. Code 900.20.

Local government entities are similarly liable for interest on contract payments dues under the Local Government Prompt Payment Act [50 ILCS 505/1 *et seq.*]. Local government entities are required by that Act to approve or disapprove

bills within 30 days after receipt of the bill or after receipt of goods and services, whichever is later, and to pay approved bills within 30 days thereafter. Bills not paid within the specified time limit subject the local government entity to a monthly interest penalty of 1% of any approved and unpaid amount until final payment is made. The local government entity and the contractor may agree to longer time periods for the prompt payment of bills. Local governments who are dependent upon state monies to pay for the goods and services can get reimbursement from the state if the state delays payment of the necessary funds.

Section 9 of the Local Government Prompt Payment Act [50 ILCS 505/9] requires that within 15 days of receiving payment from the public owner, contractors must pay their subcontractors and material suppliers—and subcontractors and material suppliers must pay their subcontractors and material suppliers-- in proportion to the work completed , less any retention, on a pro rata basis to the funds received by the contractor from the local government entity. If the work is rejected and funds are not released by the owner, the contractor need not pay the subcontractor and/or material supplier involved with the rejected work. A contractor failing to promptly make this payment is subject to a monthly 2% interest charge.

Section 10-20.19b of The School Code makes the Local Government Prompt Payment Act applicable to purchases by school boards. 105 ILCS 5/10-20.19b.

The practitioner needs to understand several issues that are presented by these prompt payment acts when understanding a construction contract. First and foremost, it is extremely important to understand and compare the payment terms and conditions of the construction contract--whether a prime contract or subcontractor or purchase order for materials—with the rules embodied in the prompt payment act, for invariably they will prove to be different. Since the prompt payment law is deemed a part of the contract there most likely will be inconsistent, if not conflicting provisions regarding the time triggers in the payment process.

Second, the practitioner needs to keep in mind that failure to pay in accord with a Prompt Payment Act will be considered a material breach of the contract. The consequences of such a breach are significant. A material breach by the owner or obliges of the construction contract is recognized as a defense to a performance bond claim by the owner or obligee. *See e.g. Brady Brick & Supply Co. v. Lotito*, 43 Ill. App. 3e 69, 356 N.E.2d 1126, 1130 (2<sup>nd</sup> Dist. 1976)(failure to make installment payment is substantial breach of contract allowing contractor to end the contract, cease work, and recover the value of work performed to date). A material breach by the party obligated to pay then is a defense against that party seeking to enforce other provisions of the contract.

Since the Prompt Payment Act is deemed part of the construction contract, and performance bonds often incorporate the contract terms into the bond, the result is

at times that the payment obligations on the owner/obligee as set out the Prompt Payment Act is often stricter than the obligations on the owner/obligee set forth in the terms of the bond. This expands the grounds for a surety to defend against a performance bond claim. Likewise, when the surety brings an action against the owner/obligee as subrogee of the contractor/principal to recover contract balances from the owner, the owner will likely lose the defense of contractor breach if the owner has failed to make payment in accordance with the Prompt Payment Act.

Third, where a bonded contractor fails to comply with Prompt Payment Act provisions requiring timely payment to a subcontractor, the failure to comply will likely trigger a subcontractor stopping work and filing a payment bond claim and the contractor and its surety may not then be able to assert default by the subcontractor as a defense to the payment bond claim. But the contractor and its surety may still have the right to assert a setoff to reduce the subcontractor's claim due to a subcontractor's deficient or untimely work. *See e.g. Superior Structures Company v. City of Sesser*, 292 Ill. App.3d 848, 686 N.E.2d 714 (5<sup>th</sup> Dist. 1997)(setoff which decreased claimed amount approved in case involving prompt payment act violation)

Fourth there are many unanswered questions about how the Acts are to be applied to change order requests and the consequence of an owner's failure to process such a request for work that has been performed.

Fifth, the practitioner has to consider partial and final waivers that are given in exchange for payment. Query: does a waiver release a statutory prompt payment act violation? The language of the waiver form could be determinative.

## **7. Certifications**

Various statutes of the State of Illinois provide numerous prohibitions on the eligibility of a person or business to be awarded a contract with public bodies. In order to ensure compliance with such statutory prohibitions, the public body seeking bids on a contract usually will include within its bid package, which ultimately becomes part of the awarded contract, a section in which the bidder seeking the contract certifies that the bidder is not ineligible to bid on or be awarded the contract. The certification constitutes a material representation to the public body looking to award the contract and thus a false or erroneous certification exposes the bidder to liability for fraud and exposes the performance bond surety to liability to complete the contract.

Set out in Attachment A hereto is a sample of one of the comprehensive certification forms used. The attached form is used by the Illinois Capital Development Board. Variations of this form are used by other state entities.



Under Section 50-2 of the Illinois Procurement Code (30 IOLCS 500/50-2), a contractor that has entered into a multi-year contract with the State and every subcontractor with a multi-year subcontract is required to certify by July 1 of each fiscal year that the contractor/subcontractor continues to satisfy the requirements of Article 50 of the Code pertaining to eligibility for a contract award. If a contractor or subcontractor is not able to truthfully certify that it continues to meet all requirements, it shall provide with its certification a detailed explanation of the circumstances leading to the change in certification status. A contractor or subcontractor that makes a false statement material to any given certification required under this Article is, in addition to any other penalties or consequences prescribed by law, subject to liability under the Illinois False Claims Act for submission of a false claim.

If the construction project is receiving federal assistance, federal laws and regulations will apply to the project. Various of the federal agencies have established their own standard terms and conditions which must become a part of the federally assisted construction projects. These standard terms and conditions will implement, among other things, the requirements of the federal Davis Bacon and related acts governing project payrolls.

Set out in Attachment B hereto is a sample of one such federal agency standard terms and conditions. The attached form is used by the United States Department of Housing and Development (“HUD”) for the construction of federally assisted housing projects.

Section 5.5 of the federal Labor Standards requires that for federally assisted construction contracts, the labor standard clauses set forth in Section 5.5 (or clauses modified with the approval of the Department of Labor) must be made a part of the contract. 29 CFR 5.5. Thus the owner of a project financed in part by federal funds must determine the applicability of these Part 5 Labor Standards and must ensure that these Part 5 Labor Standards are made a part of the owner’s contract with the prime contractor. In addition, Section 5.5(a)(6) of the Labor Standards provides expressly that the contractor or subcontractor “shall insert in any subcontracts” the labor standard clauses contained in Section 5.5(a)(1) through (10) and such other clauses as the federal agency may require, as well as a clause requiring subcontractors to include these clauses in any lower tier subcontract. If not expressly set forth in these subcontracts, a properly worded “incorporation by reference” or “flow-down” clause must be utilized. The importance of ensuring the inclusion of these clauses, as well as compliance therewith, is critically important, as Section 5.5(a)(6) provides that “[t]he prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.”

The Part 5 Labor Standards are implemented by various federal agencies through their own regulations and forms. Thus, the practitioner must identify the source of the federal assistance and review the applicable regulations of the federal agency providing the assistance. Two of the largest federally assisted construction programs that the practitioner may encounter are those dealing with federally assisted highway and bridge construction and federally assisted housing development construction. The following paragraphs highlight for the practitioner the required contract clauses which implement the labor standards for these two programs

If the construction project is a federally assisted highway construction project, the practitioner must be familiar with both Section 113 of the Federal-Aid Highway Act (23 U.S.C. §113) that applies the Davis-Bacon requirements to federal-aid highway projects, and with the Part 633 Required Contract Provisions established by the U.S. Department of Transportation Federal Highway Administration (“FHWA”) set forth at 23 CFR Part 633. These Part 633 regulations prescribe required contract provisions that address, among other things, equal employment opportunity, non-segregated facilities, payment of predetermined minimum wages, statements of payrolls, labor records, safety and accident prevention, and limitations on subletting or assigning contract work. The required contract provisions are set forth at Appendix A to the Part 633 regulations.

If the construction project involves a housing project assisted by one of the Department of Housing and Urban Development (“HUD”) programs, the practitioner should be aware that HUD has standard forms that specify labor standard contract clauses that are applicable to HUD’s various programs. HUD form HUD-5370, entitled “General Conditions for Construction Contracts-Public Housing Programs”, is applicable to any construction or development contracts and sets forth the contract clauses required by OMB’s common rule on grantee procurement implemented by HUD regulations 24 CFR §84.48 and Appendix A to §84 and §85.36(i). Section 46 of the HUD General Conditions sets forth Labor Standards for Davis Bacon and Related Acts. Section 40 of the General Conditions deals sets forth the Labor Standards for “Employment, training and Contracting Opportunities for Low-Income Persons.

Section 3 of the Housing and Urban Development Act of 1968, sets forth what is known as the “Section 3 clause”. The “Section 3 clause”, set out at 24 C.F.R. §135.38, is the seven paragraph clause that is required to be included in all contracts covered by Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C.§1701u). These are contracts awarded for work to be performed in connection with a housing rehabilitation (including reduction and abatement of lead-based paint hazards), housing construction, or other public construction projects, where the assistance exceeds \$200,000 and the contract or subcontract exceeds \$100,000. *See* 24 C.F.R.§135.3 for the applicability of Section 3 of said Act.

*See also* HUD form HUD-2554, Supplementary Conditions to the Contract for Construction, which is issued primarily for Federal Housing Administration multifamily housing and other construction projects administered by HUD; and HUD form HUD-4010, Federal Labor Standards Provisions, which is used for Community Development Block Grant (“CDBG”) projects pursuant to The Housing and Community Development Act of 1974 as amended [40 U.S.C. §§5301 *et seq.*] and HOME projects under Title II of the National Affordable Housing Act, as amended (42 U.S.C. §§211 *et seq.*).

**STATE OF ILLINOIS  
STANDARD CERTIFICATIONS**

---

**State of Illinois – Capital Development Board**

**July, 2016**

**Standard Business Terms and Conditions**

1. **AVAILABILITY OF APPROPRIATION; SUFFICIENCY OF FUNDS:** This contract is contingent upon and subject to the availability of sufficient funds. CDB may terminate or suspend this contract, in whole or in part, without penalty or further payment being required, if (i) sufficient funds for this contract have not been appropriated or otherwise made available to CDB by the State or the Federal funding source, (ii) the Governor or CDB reserves funds, or (iii) the Governor or CDB determines that funds will not or may not be available for payment. CDB shall provide notice, in writing, to the Vendor of any such funding failure and its election to terminate or suspend the contract as soon as practicable. Any suspension or termination pursuant to this Section will be effective upon the date of the written notice, unless otherwise indicated.
2. **AUDIT/RETENTION OF RECORDS (30 ILCS 500/20-65):** Vendor and its subcontractors shall maintain books and records relating to the performance of the contract or subcontract and necessary to support amounts charged to the State under the contract or subcontract. Books and records, including information stored in databases or other computer systems, shall be maintained by the Vendor for a period of three years from the later of the date of final payment under the contract or completion of the contract, and by the subcontractor for a period of three years from the later of final payment under the term or completion of the subcontract. If federal funds are used to pay contract costs, the Vendor and its subcontractors must retain its records for five years. Books and records required to be maintained under this section shall be available for review or audit by representatives of: the procuring Agency, the Auditor General, the Executive Inspector General, the Chief Procurement Officer, State of Illinois internal auditors or other governmental entities with monitoring authority, upon reasonable notice and during normal business hours. Vendor and its subcontractors shall cooperate fully with any such audit and with any investigation conducted by any of these entities. Failure to maintain books and records required by this section shall establish a presumption in favor of the State for the recovery of any funds paid by the State under the contract for which adequate books and records are not available to support the purported disbursement. The Vendor or subcontractors shall not impose a charge for audit or examination of the Vendor's books and records.
3. **TIME IS OF THE ESSENCE:** Time is of the essence with respect to Vendor's performance of this contract. Vendor shall continue to perform its obligations while any dispute concerning the contract is being resolved unless otherwise directed by the State.
4. **NO WAIVER OF RIGHTS:** Except as specifically waived in writing, failure by a Party to exercise or enforce a right does not waive that Party's right to exercise or enforce that or other rights in the future.
5. **FORCE MAJEURE:** Failure by either Party to perform its duties and obligations will be excused by unforeseeable circumstances beyond its reasonable control and not due to its negligence including acts of nature, acts of terrorism, riots, labor disputes, fire, flood, explosion, and governmental prohibition. The non-declaring Party may cancel the contract without penalty if performance does not resume within 30 days of the declaration.
6. **CONFIDENTIAL INFORMATION:** Each Party, including its agents and subcontractors, to this contract may have or gain access to confidential data or information owned or maintained by the other Party in the course of carrying out its responsibilities under this contract. Vendor shall presume all information received from the State or to which it gains access pursuant to this contract is confidential. Vendor information, unless clearly marked as confidential and exempt from disclosure under the Illinois Freedom of Information Act, shall

**STATE OF ILLINOIS  
STANDARD CERTIFICATIONS**

---

be considered public. No confidential data collected, maintained, or used in the course of performance of the contract shall be disseminated except as authorized by law and with the written consent of the disclosing Party, either during the period of the contract or thereafter. The receiving Party must return any and all data collected, maintained, created or used in the course of the performance of the contract, in whatever form it is maintained, promptly at the end of the contract, or earlier at the request of the disclosing Party, or notify the disclosing Party in writing of its destruction. The foregoing obligations shall not apply to confidential data or information lawfully in the receiving Party's possession prior to its acquisition from the disclosing Party; received in good faith from a third-party not subject to any confidentiality obligation to the disclosing Party; now is or later becomes publicly known through no breach of confidentiality obligation by the receiving Party; or is independently developed by the receiving Party without the use or benefit of the disclosing Party's confidential information.

7. **USE AND OWNERSHIP:** All work performed or supplies created by Vendor under this contract, whether written documents or data, goods or deliverables of any kind, shall be deemed work-for-hire under copyright law and all intellectual property and other laws, and the State of Illinois is granted sole and exclusive ownership to all such work, unless otherwise agreed in writing. Vendor hereby assigns to the State all right, title, and interest in and to such work including any related intellectual property rights, and/or waives any and all claims that Vendor may have to such work including any so-called "moral rights" in connection with the work. Vendor acknowledges the State may use the work product for any purpose. Confidential data or information contained in such work shall be subject to confidentiality provisions of this contract.

8. **INDEPENDENT CONTRACTOR:** Vendor shall act as an independent contractor and not an agent or employee of, or joint venturer with the State. All payments by the State shall be made on that basis.

9. **SOLICITATION AND EMPLOYMENT:** Vendor shall not employ any person employed by the State during the term of this contract to perform any work under this contract. Vendor shall give notice immediately to the Agency's director if Vendor solicits or intends to solicit State employees to perform any work under this contract.

10. **COMPLIANCE WITH THE LAW:** The Vendor, its employees, agents, and subcontractors shall comply with all applicable federal, state, and local laws, rules, ordinances, regulations, orders, federal circulars and all license and permit requirements in the performance of this contract. Vendor shall be in compliance with applicable tax requirements and shall be current in payment of such taxes. Vendor shall obtain at its own expense, all licenses and permissions necessary for the performance of this contract.

11. **BACKGROUND CHECK:** Whenever the State deems it reasonably necessary for security reasons, the State may conduct, at its expense, criminal and driver history background checks of Vendor's and subcontractors officers, employees or agents. Vendor or subcontractor shall reassign immediately any such individual who, in the opinion of the State, does not pass the background checks.

12. **APPLICABLE LAW:** This contract shall be construed in accordance with and is subject to the laws and rules of the State of Illinois. The Department of Human Rights' Equal Opportunity requirements (44 Ill. Adm. Code 750) are incorporated by reference. Any claim against the State arising out of this contract must be filed exclusively with the Illinois Court of Claims (705 ILCS 505/1). The State shall not enter into binding arbitration to resolve any contract dispute. The State of Illinois does not waive sovereign immunity by entering into this contract. The official text of cited statutes is incorporated by reference (An unofficial version can be viewed at <http://www.ilga.gov/legislation/ilcs/ilcs.asp>). In compliance with the Illinois and federal Constitutions, the

**STATE OF ILLINOIS  
STANDARD CERTIFICATIONS**

---

Illinois Human Rights Act, the U. S. Civil Rights Act, and Section 504 of the federal Rehabilitation Act and other applicable laws and rules the State does not unlawfully discriminate in employment, contracts, or any other activity.

13. **ANTI-TRUST ASSIGNMENT:** If Vendor does not pursue any claim or cause of action it has arising under federal or state antitrust laws relating to the subject matter of the contract, then upon request of the Illinois Attorney General, Vendor shall assign to the State rights, title and interest in and to the claim or cause of action.

14. **CONTRACTUAL AUTHORITY:** The Agency that signs for the State of Illinois shall be the only State entity responsible for performance and payment under the contract. When the Chief Procurement Officer or authorized designee signs in addition to an Agency, they do so as approving officer and shall have no liability to Vendor. When the Chief Procurement officer or authorized designee signs a master contract on behalf of State agencies, only the Agency that places an order with the Vendor shall have any liability to Vendor for that order.

15. **NOTICES:** Notices and other communications provided for herein shall be given in writing by registered or certified mail, return receipt requested, by receipted hand delivery, by courier (UPS, Federal Express or other similar and reliable carrier), by e-mail, or by fax showing the date and time of successful receipt. Notices shall be sent to the individuals who signed the contract using the contact information following the signatures. Each such notice shall be deemed to have been provided at the time it is actually received. By giving notice, either Party may change the contact information.

16. **MODIFICATIONS AND SURVIVAL:** Amendments, modifications and waivers must be in writing and signed by authorized representatives of the Parties. Any provision of this contract officially declared void, unenforceable, or against public policy, shall be ignored and the remaining provisions shall be interpreted, as far as possible, to give effect to the Parties' intent. All provisions that by their nature would be expected to survive, shall survive termination. In the event of a conflict between the State's and the Vendor's terms, conditions and attachments, the State's terms, conditions and attachments shall prevail.

17. **PERFORMANCE RECORD / SUSPENSION:** Upon request of the State, Vendor shall meet to discuss performance or provide contract performance updates to help ensure proper performance of the contract. The State may consider Vendor's performance under this contract and compliance with law and rule to determine whether to continue the contract, suspend Vendor from doing future business with the State for a specified period of time, or to determine whether Vendor can be considered responsible on specific future contract opportunities.

18. **FREEDOM OF INFORMATION ACT:** This contract and all related public records maintained by, provided to or required to be provided to the State are subject to the Illinois Freedom of Information Act notwithstanding any provision to the contrary that may be found in this contract.

## STANDARD CERTIFICATIONS

August 2015

Vendor acknowledges and agrees that compliance with this subsection in its entirety for the term of the contract and any renewals is a material requirement and condition of this contract. By executing this contract Vendor certifies compliance with this subsection in its entirety, and is under a continuing obligation to remain in compliance and report any non-compliance.

This subsection, in its entirety, applies to subcontractors used on this contract. Vendor shall include these Standard Certifications in any subcontract used in the performance of the contract using the Standard Certification form provided by the State.

If this contract extends over multiple fiscal years, including the initial term and all renewals, Vendor and its subcontractors shall confirm compliance with this section in the manner and format determined by the State by the date specified by the State and in no event later than July 1 of each year that this contract remains in effect.

If the Parties determine that any certification in this section is not applicable to this contract it may be stricken without affecting the remaining subsections.

1. As part of each certification, Vendor acknowledges and agrees that should Vendor or its subcontractors provide false information, or fail to be or remain in compliance with the Standard Certification requirements, one or more of the following sanctions will apply:
  - the contract may be void by operation of law,
  - the State may void the contract, and
  - the Vendor and its subcontractors may be subject to one or more of the following: suspension, debarment, denial of payment, civil fine, or criminal penalty.

Identifying a sanction or failing to identify a sanction in relation to any of the specific certifications does not waive imposition of other sanctions or preclude application of sanctions not specifically identified.

2. Vendor certifies it and its employees will comply with applicable provisions of the United States Civil Rights Act, Section 504 of the Federal Rehabilitation Act, the Americans with Disabilities Act, and applicable rules in performance of this contract.
3. Vendor, if an individual, sole proprietor, partner or an individual as member of a LLC, certifies he/she is not in default on an educational loan. 5 ILCS 385/3.
4. Vendor, if an individual, sole proprietor, partner or an individual as member of a LLC, certifies it he/she has not received (i) an early retirement incentive prior to 1993 under Section 14-108.3 or 16-133.3 of the Illinois Pension Code or (ii) an early retirement incentive on or after 2002 under Section 14-108.3 or 16-133.3 of the Illinois Pension Code. 30 ILCS 105/15a; 40 ILCS 5/14-108.3; 40 ILCS 5/16-133.
5. Vendor certifies that it is a legal entity authorized to do business in Illinois prior to submission of a bid, offer, or proposal. 30 ILCS 500/1-15.80, 20-43.

6. To the extent there was a current Vendor providing the services covered by this contract and the employees of that Vendor who provided those services are covered by a collective bargaining agreement, Vendor certifies (i) that it will offer to assume the collective bargaining obligations of the prior employer, including any existing collective bargaining agreement with the bargaining representative of any existing collective bargaining unit or units performing substantially similar work to the services covered by the contract subject to its bid or offer; and (ii) that it shall offer employment to all employees currently employed in any existing bargaining unit who perform substantially similar work to the work that will be performed pursuant to this contract. This does not apply to heating, air conditioning, plumbing and electrical service contracts. 30 ILCS 500/25-80.
7. Vendor certifies it has neither been convicted of bribing or attempting to bribe an officer or employee of the State of Illinois or any other State, nor made an admission of guilt of such conduct that is a matter of record. 30 ILCS 500/50-5.
8. If Vendor has been convicted of a felony, Vendor certifies at least five years have passed after the date of completion of the sentence for such felony, unless no person held responsible by a prosecutor's office for the facts upon which the conviction was based continues to have any involvement with the business. 30 ILCS 500/50-10.
9. If Vendor or any officer, director, partner, or other managerial agent of Vendor has been convicted of a felony under the Sarbanes-Oxley Act of 2002, or a Class 3 or Class 2 felony under the Illinois Securities Law of 1953, Vendor certifies at least five years have passed since the date of the conviction. Vendor further certifies that it is not barred from being awarded a contract and acknowledges that the State shall declare the contract void if this certification is false. 30 ILCS 500/50-10.5.
10. Vendor certifies it is not barred from having a contract with the State based upon violating the prohibitions related to either submitting/writing specifications or providing assistance to an employee of the State of Illinois by reviewing, drafting, directing, or preparing any invitation for bids, a request for proposal, or request of information, or similar assistance (except as part of a public request for such information). 30 ILCS 500/50-10.5(e), *amended* by Pub. Act No. 97-0895 (August 3, 2012).
11. Vendor certifies that it and its affiliates are not delinquent in the payment of any debt to the State (or if delinquent has entered into a deferred payment plan to pay the debt), and Vendor and its affiliates acknowledge the State may declare the contract void if this certification is false or if Vendor or an affiliate later becomes delinquent and has not entered into a deferred payment plan to pay off the debt. 30 ILCS 500/50-11, 50-60.
12. Vendor certifies that it and all affiliates shall collect and remit Illinois Use Tax on all sales of tangible personal property into the State of Illinois in accordance with provisions of the Illinois Use Tax Act and acknowledges that failure to comply may result in the contract being declared void. 30 ILCS 500/50-12.
13. Vendor certifies that it has not been found by a court or the Pollution Control Board to have committed a willful or knowing violation of the Environmental Protection Act within the last five years, and is therefore not barred from being awarded a contract. 30 ILCS 500/50-14.



14. Vendor certifies it has neither paid any money or valuable thing to induce any person to refrain from bidding on a State contract, nor accepted any money or other valuable thing, or acted upon the promise of same, for not bidding on a State contract. 30 ILCS 500/50-25.
15. Vendor certifies it is not in violation of the "Revolving Door" provisions of the Illinois Procurement Code. 30 ILCS 500/50-30.
16. Vendor certifies that it has not retained a person or entity to attempt to influence the outcome of a procurement decision for compensation contingent in whole or in part upon the decision or procurement. 30 ILCS 500/50-38.
17. Vendor certifies that if it has hired a person required to register under the Lobbyist Registration Act to assist in obtaining any State contract, that none of the lobbyist's costs, fees, compensation, reimbursements, or other remuneration were billed to the State. 30 ILCS 500\50-38.
18. Vendor certifies it will report to the Illinois Attorney General and the Chief Procurement Officer any suspected collusion or other anti-competitive practice among any bidders, offerors, contractors, proposers, or employees of the State. 30 ILCS 500/50-40, 50-45, 50-50.
19. Vendor certifies steel products used or supplied in the performance of a contract for public works shall be manufactured or produced in the United States, unless the executive head of the procuring Agency/University grants an exception. 30 ILCS 565.
20. Drug Free Workplace
  - 20.1 If Vendor employs 25 or more employees and this contract is worth more than \$5,000, Vendor certifies it will provide a drug free workplace pursuant to the Drug Free Workplace Act.
  - 20.2 If Vendor is an individual and this contract is worth more than \$5000, Vendor certifies it shall not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance during the performance of the contract. 30 ILCS 580.
21. Vendor certifies that neither Vendor nor any substantially owned affiliate is participating or shall participate in an international boycott in violation of the U.S. Export Administration Act of 1979 or the applicable regulations of the United States. Department of Commerce. 30 ILCS 582.
22. Vendor certifies it has not been convicted of the offense of bid rigging or bid rotating or any similar offense of any state or of the United States. 720 ILCS 5/33 E-3, E-4.
23. Vendor certifies it complies with the Illinois Department of Human Rights Act and rules applicable to public contracts, which include providing equal employment opportunity, refraining from unlawful discrimination, and having written sexual harassment policies. 775 ILCS 5/2-105.
24. Vendor certifies it does not pay dues to or reimburse or subsidize payments by its employees for any dues or fees to any "discriminatory club." 775 ILCS 25/2.

25. Vendor certifies that no foreign-made equipment, materials, or supplies furnished to the State under the contract have been or will be produced in whole or in part by forced labor or indentured labor under penal sanction. 30 ILCS 583.
26. Vendor certifies that no foreign-made equipment, materials, or supplies furnished to the State under the contract have been produced in whole or in part by the labor of any child under the age of 12. 30 ILCS 584.
27. Vendor certifies that any violation of the Lead Poisoning Prevention Act, as it applies to owners of residential buildings, has been mitigated. 410 ILCS 45.
28. Vendor warrants and certifies that it and, to the best of its knowledge, its subcontractors have and will comply with Executive Order No. 1 (2007). The Order generally prohibits Vendors and subcontractors from hiring the then-serving Governor's family members to lobby procurement activities of the State, or any other unit of government in Illinois including local governments if that procurement may result in a contract valued at over \$25,000. This prohibition also applies to hiring for that same purpose any former State employee who had procurement authority at any time during the one-year period preceding the procurement lobbying activity.
29. Vendor certifies that information technology, including electronic information, software, systems and equipment, developed or provided under this contract comply with the applicable requirements of the Illinois Information Technology Accessibility Act Standards as published at ([www.dhs.state.il.us/iitaa](http://www.dhs.state.il.us/iitaa)) 30 ILCS 587.
30. Vendor certifies that it has read, understands, and is in compliance with the registration requirements of the Elections Code (10 ILCS 5/9-35) and the restrictions on making political contributions and related requirements of the Illinois Procurement Code. 30 ILCS 500/20-160 and 50-37. Vendor will not make a political contribution that will violate these requirements.

In accordance with section 20-160 of the Illinois Procurement Code, Vendor certifies as applicable:

Vendor is not required to register as a business entity with the State Board of Elections.

or

Vendor has registered with the State Board of Elections. As a registered business entity, Vendor acknowledges a continuing duty to update the registration as required by the Act.

31. Vendor certifies that if it is awarded a contract through the use of the preference required by the Procurement of Domestic Products Act, then it shall provide products pursuant to the contract or a subcontract that are manufactured in the United States. 30 ILCS 517.

32. A person (other than an individual acting as a sole proprietor) must be a duly constituted legal entity and authorized to transact business or conduct affairs in Illinois prior to submitting a bid or offer. 30 ILCS 500/20-43. If you do not meet these criteria, then your bid or offer will be disqualified.

Vendor must make one of the following two certifications by checking the appropriate box.

A.  Vendor certifies it is an individual acting as a sole proprietor and is therefore not subject to the requirements of section 20-43 of the Procurement Code.

B.  Vendor certifies that it is a legal entity, and was authorized to transact business or conduct affairs in Illinois as of the date for submitting this bid or offer. The State may require Vendor to provide evidence of compliance before award.

33. Vendor certifies that, for the duration of this contract it will:

- post its employment vacancies in Illinois and border states on the Department of Employment Security's IllinoisJobLink.com website or its successor system; or
- will provide an online link to these employment vacancies so that this link is accessible through the IllinoisJobLink.com website or its successor system; or
- is exempt from 20 ILCS 1005/1005-47 because the contract is for construction-related services as that term is defined in section 1-15.20 of the Procurement Code; or the contract is for construction and vendor is a party to a contract with a bona fide labor organization and performs construction. (20 ILCS 1005/1005-47).

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

# General Conditions for Construction Contracts - Public Housing Programs

U.S. Department of Housing and Urban Development  
Office of Public and Indian Housing  
OMB Approval No. 2577-0157 (exp. 1/31/2017)

**Applicability. This form is applicable to any construction/development contract greater than \$100,000.**

This form includes those clauses required by OMB's common rule on grantee procurement, implemented at HUD in 24 CFR 85.36, and those requirements set forth in Section 3 of the Housing and Urban Development Act of 1968 and its amendment by the Housing and Community Development Act of 1992, implemented by HUD at 24 CFR Part 135. The form is required for construction contracts awarded by Public Housing Agencies (PHAs).

The form is used by Housing Authorities in solicitations to provide necessary contract clauses. If the form were not used, HAs would be unable to enforce their contracts.

Public reporting burden for this collection of information is estimated to average 1.0 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Responses to the collection of information are required to obtain a benefit or to retain a benefit.

The information requested does not lend itself to confidentiality.

HUD may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB number.

| Clause |   | Page | Clause                             |  | Page |
|--------|---|------|------------------------------------|--|------|
| 1.     | Definitions   | 2    | <b>Administrative Requirements</b> |  |      |
| 2.     | Contractor's Responsibility for Work  | 2    | 25.                                | Contract Period  | 9    |
| 3.     | Architect's Duties, Responsibilities and Authority                                    | 2    | 26.                                | Order of Precedence  | 9    |
| 4.     | Other Contracts   | 3    | 27.                                | Payments   | 9    |
|        | <b>Construction Requirements</b>  |      | 28.                                | Contract Modifications   | 10   |
| 5.     | Preconstruction Conference and Notice to Proceed                                      | 3    | 29.                                | Changes  | 10   |
| 6.     | Construction Progress Schedule  | 3    | 30.                                | Suspension of Work   | 11   |
| 7.     | Site Investigation and Conditions Affecting the Work                                  | 3    | 31.                                | Disputes   | 11   |
| 8.     | Differing Site Conditions   | 4    | 32.                                | Default  | 11   |
| 9.     | Specifications and Drawings for Construction  | 4    | 33.                                | Liquidated   | 12   |
| 10.    | As-Built Drawings   | 5    | 34.                                | Termination of Convenience   | 12   |
| 11.    | Material and Workmanship  | 5    | 35.                                | Assignment of Contract   | 12   |
| 12.    | Permits and Codes   | 5    | 36.                                | Insurance  | 12   |
| 13.    | Health, Safety, and Accident Prevention   | 6    | 37.                                | Subcontracts   | 13   |
| 14.    | Temporary Buildings and Transportation Materials                                      | 6    | 38.                                | Subcontracting with Small and Minority Firms, Women's Business Enterprise, and Labor Surplus Area Firms                                | 13   |
| 15.    | Availability and Use of Utility Services  | 6    | 39.                                | Equal Employment Opportunity   | 13   |
| 16.    | Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements | 6    | 40.                                | Employment, Training, and Contracting Opportunities for Low-Income Persons, Section 3 of the Housing and Urban Development Act of 1968 | 14   |
| 17.    | Temporary Buildings and Transportation Materials                                      | 7    | 41.                                | Interest of Members of Congress  | 15   |
| 18.    | Clean Air and Water   | 7    | 42.                                | Interest of Members, Officers, or Employees and Former Members, Officers, or Employees   | 15   |
| 19.    | Energy Efficiency   | 7    | 43.                                | Limitations on Payments Made to Influence  | 15   |
| 20.    | Inspection and Acceptance of Construction   | 7    | 44.                                | Royalties and Patents  | 15   |
| 21.    | Use and Possession Prior to Completion  | 8    | 45.                                | Examination and Retention of Contractor's Records  | 15   |
| 22.    | Warranty of Title   | 8    | 46.                                | Labor Standards-Davis-Bacon and Related Acts   | 15   |
| 23.    | Warranty of Construction  | 8    | 47.                                | Non-Federal Prevailing Wage Rates  | 19   |
| 24.    | Prohibition Against Liens   | 9    | 48.                                | Procurement of Recovered Materials   | 19   |

---

## 1. Definitions

- (a) "Architect" means the person or other entity engaged by the PHA to perform architectural, engineering, design, and other services related to the work as provided for in the contract. When a PHA uses an engineer to act in this capacity, the terms "architect" and "engineer" shall be synonymous. The Architect shall serve as a technical representative of the Contracting Officer. The Architect's authority is as set forth elsewhere in this contract.
  - (b) "Contract" means the contract entered into between the PHA and the Contractor. It includes the forms of Bid, the Bid Bond, the Performance and Payment Bond or Bonds or other assurance of completion, the Certifications, Representations, and Other Statements of Bidders (form HUD-5370), these General Conditions of the Contract for Construction (form HUD-5370), the applicable wage rate determinations from the U.S. Department of Labor, any special conditions included elsewhere in the contract, the specifications, and drawings. It includes all formal changes to any of those documents by addendum, change order, or other modification.
  - (c) "Contracting Officer" means the person delegated the authority by the PHA to enter into, administer, and/or terminate this contract and designated as such in writing to the Contractor. The term includes any successor Contracting Officer and any duly authorized representative of the Contracting Officer also designated in writing. The Contracting Officer shall be deemed the authorized agent of the PHA in all dealings with the Contractor.
  - (d) "Contractor" means the person or other entity entering into the contract with the PHA to perform all of the work required under the contract.
  - (e) "Drawings" means the drawings enumerated in the schedule of drawings contained in the Specifications and as described in the contract clause entitled Specifications and Drawings for Construction herein.
  - (f) "HUD" means the United States of America acting through the Department of Housing and Urban Development including the Secretary, or any other person designated to act on its behalf. HUD has agreed, subject to the provisions of an Annual Contributions Contract (ACC), to provide financial assistance to the PHA, which includes assistance in financing the work to be performed under this contract. As defined elsewhere in these General Conditions or the contract documents, the determination of HUD may be required to authorize changes in the work or for release of funds to the PHA for payment to the Contractor. Notwithstanding HUD's role, nothing in this contract shall be construed to create any contractual relationship between the Contractor and HUD.
  - (g) "Project" means the entire project, whether construction or rehabilitation, the work for which is provided for in whole or in part under this contract.
  - (h) "PHA" means the Public Housing Agency organized under applicable state laws which is a party to this contract.
  - (j) "Specifications" means the written description of the technical requirements for construction and includes the criteria and tests for determining whether the requirements are met.
  - (l) "Work" means materials, workmanship, and manufacture and fabrication of components.
- (a) The Contractor shall furnish all necessary labor, materials, tools, equipment, and transportation necessary for performance of the work. The Contractor shall also furnish all necessary water, heat, light, and power not made available to the Contractor by the PHA pursuant to the clause entitled Availability and Use of Utility Services herein.
  - (b) The Contractor shall perform on the site, and with its own organization, work equivalent to at least [ ] (12 percent unless otherwise indicated) of the total amount of work to be performed under the order. This percentage may be reduced by a supplemental agreement to this order if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the PHA.
  - (c) At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the work site a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.
  - (d) The Contractor shall be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor shall hold and save the PHA, its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.
  - (e) The Contractor shall lay out the work from base lines and bench marks indicated on the drawings and be responsible for all lines, levels, and measurements of all work executed under the contract. The Contractor shall verify the figures before laying out the work and will be held responsible for any error resulting from its failure to do so.
  - (f) The Contractor shall confine all operations (including storage of materials) on PHA premises to areas authorized or approved by the Contracting Officer.
  - (g) The Contractor shall at all times keep the work area, including storage areas, free from accumulations of waste materials. After completing the work and before final inspection, the Contractor shall (1) remove from the premises all scaffolding, equipment, tools, and materials (including rejected materials) that are not the property of the PHA and all rubbish caused by its work; (2) leave the work area in a clean, neat, and orderly condition satisfactory to the Contracting Officer; (3) perform all specified tests; and, (4) deliver the installation in complete and operating condition.
  - (h) The Contractor's responsibility will terminate when all work has been completed, the final inspection made, and the work accepted by the Contracting Officer. The Contractor will then be released from further obligation except as required by the warranties specified elsewhere in the contract.

## 3. Architect's Duties, Responsibilities, and Authority

- (a) The Architect for this contract, and any successor, shall be designated in writing by the Contracting Officer.

## 2. Contractor's Responsibility for Work

- (b) The Architect shall serve as the Contracting Officer's technical representative with respect to architectural, engineering, and design matters related to the work performed under the contract. The Architect may provide direction on contract performance. Such direction shall be within the scope of the contract and may not be of a nature which: (1) institutes additional work outside the scope of the contract; (2) constitutes a change as defined in the Changes clause herein; (3) causes an increase or decrease in the cost of the contract; (4) alters the Construction Progress Schedule; or (5) changes any of the other express terms or conditions of the contract.
- (c) The Architect's duties and responsibilities may include but shall not be limited to:
- (1) Making periodic visits to the work site, and on the basis of his/her on-site inspections, issuing written reports to the PHA which shall include all observed deficiencies. The Architect shall file a copy of the report with the Contractor's designated representative at the site;
  - (2) Making modifications in drawings and technical specifications and assisting the Contracting Officer in the preparation of change orders and other contract modifications for issuance by the Contracting Officer;
  - (3) Reviewing and making recommendations with respect to - (i) the Contractor's construction progress schedules; (ii) the Contractor's shop and detailed drawings; (iii) the machinery, mechanical and other equipment and materials or other articles proposed for use by the Contractor; and, (iv) the Contractor's price breakdown and progress payment estimates; and,
  - (4) Assisting in inspections, signing Certificates of Completion, and making recommendations with respect to acceptance of work completed under the contract.

#### 4. Other Contracts

The PHA may undertake or award other contracts for additional work at or near the site of the work under this contract. The Contractor shall fully cooperate with the other contractors and with PHA employees and shall carefully adapt scheduling and performing the work under this contract to accommodate the additional work, heeding any direction that may be provided by the Contracting Officer. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other contractor or by PHA employees

#### Construction Requirements

##### 5. Pre-construction Conference and Notice to Proceed

- (a) Within ten calendar days of contract execution, and prior to the commencement of work, the Contractor shall attend a preconstruction conference with representatives of the PHA, its Architect, and other interested parties convened by the PHA. The conference will serve to acquaint the participants with the general plan of the construction operation and all other requirements of the contract. The PHA will provide the Contractor with the date, time, and place of the conference.
- (b) The contractor shall begin work upon receipt of a written Notice to Proceed from the Contracting Officer or designee. The Contractor shall not begin work prior to receiving such notice.

##### 6. Construction Progress Schedule

- (a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring labor, materials, and equipment). The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments or take other remedies under the contract until the Contractor submits the required schedule.
- (b) The Contractor shall enter the actual progress on the chart as required by the Contracting Officer, and immediately deliver three copies of the annotated schedule to the Contracting Officer. If the Contracting Officer determines, upon the basis of inspection conducted pursuant to the clause entitled Inspection and Acceptance of Construction, herein that the Contractor is not meeting the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the PHA. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.
- (c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the Contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the Default clause of this contract.

##### 7. Site Investigation and Conditions Affecting the Work

- (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to, (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is

---

reasonably ascertainable from an inspection of the site, including all exploratory work done by the PHA, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the PHA.

- (b) The PHA assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the PHA. Nor does the PHA assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

### 8. Differing Site Conditions

- (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site(s), of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.
- (b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. Work shall not proceed at the affected site, except at the Contractor's risk, until the Contracting Officer has provided written instructions to the Contractor. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, the Contractor shall file a claim in writing to the PHA within ten days after receipt of such instructions and, in any event, before proceeding with the work. An equitable adjustment in the contract price, the delivery schedule, or both shall be made under this clause and the contract modified in writing accordingly.
- (c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.
- (d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

### 9. Specifications and Drawings for Construction

- (a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be

promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

- (b) Wherever in the specifications or upon the drawings the words "directed", "required", "ordered", "designated", "prescribed", or words of like import are used, it shall be understood that the "direction", "requirement", "order", "designation", or "prescription", of the Contracting Officer is intended and similarly the words "approved", "acceptable", "satisfactory", or words of like import shall mean "approved by", or "acceptable to", or "satisfactory to" the Contracting Officer, unless otherwise expressly stated.
- (c) Where "shown" "indicated", "detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word "provided" as used herein shall be understood to mean "provide complete in place" that is "furnished and installed".
- (d) "Shop drawings" means drawings, submitted to the PHA by the Contractor, subcontractor, or any lower tier subcontractor, showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e., form, fit, and attachment details) of materials of equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the Contractor to explain in detail specific portions of the work required by the contract. The PHA may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.
- (e) If this contract requires shop drawings, the Contractor shall coordinate all such drawings, and review them for accuracy, completeness, and compliance with other contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Shop drawings submitted to the Contracting Officer without evidence of the Contractor's approval may be returned for resubmission. The Contracting Officer will indicate an approval or disapproval of the shop drawings and if not approved as submitted shall indicate the PHA's reasons therefore. Any work done before such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.
- (f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Architect approves any such variation and the Contracting Officer concurs, the Contracting Officer shall issue an appropriate modification to the contract, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.
- (g) It shall be the responsibility of the Contractor to make timely requests of the PHA for such large scale and full size drawings, color schemes, and other additional information, not already in his possession, which shall be

---

required in the planning and production of the work. Such requests may be submitted as the need arises, but each such request shall be filed in ample time to permit appropriate action to be taken by all parties involved so as to avoid delay.

- (h) The Contractor shall submit to the Contracting Officer for approval four copies (unless otherwise indicated) of all shop drawings as called for under the various headings of these specifications. Three sets (unless otherwise indicated) of all shop drawings, will be retained by the PHA and one set will be returned to the Contractor. As required by the Contracting Officer, the Contractor, upon completing the work under this contract, shall furnish a complete set of all shop drawings as finally approved. These drawings shall show all changes and revisions made up to the time the work is completed and accepted.
- (i) This clause shall be included in all subcontracts at any tier. It shall be the responsibility of the Contractor to ensure that all shop drawings prepared by subcontractors are submitted to the Contracting Officer.

#### 10. As-Built Drawings

- (a) "As-built drawings," as used in this clause, means drawings submitted by the Contractor or subcontractor at any tier to show the construction of a particular structure or work as actually completed under the contract. "As-built drawings" shall be synonymous with "Record drawings."
- (b) As required by the Contracting Officer, the Contractor shall provide the Contracting Officer accurate information to be used in the preparation of permanent as-built drawings. For this purpose, the Contractor shall record on one set of contract drawings all changes from the installations originally indicated, and record final locations of underground lines by depth from finish grade and by accurate horizontal offset distances to permanent surface improvements such as buildings, curbs, or edges of walks.
- (c) This clause shall be included in all subcontracts at any tier. It shall be the responsibility of the Contractor to ensure that all as-built drawings prepared by subcontractors are submitted to the Contracting Officer.

#### 11. Material and Workmanship

- (a) All equipment, material, and articles furnished under this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the contract to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of, and as approved by the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.
- (b) Approval of equipment and materials.
  - (1) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the

machinery and mechanical and other equipment. When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

- (2) When required by the specifications or the Contracting Officer, the Contractor shall submit appropriately marked samples (and certificates related to them) for approval at the Contractor's expense, with all shipping charges prepaid. The Contractor shall label, or otherwise properly mark on the container, the material or product represented, its place of origin, the name of the producer, the Contractor's name, and the identification of the construction project for which the material or product is intended to be used.
- (3) Certificates shall be submitted in triplicate, describing each sample submitted for approval and certifying that the material, equipment or accessory complies with contract requirements. The certificates shall include the name and brand of the product, name of manufacturer, and the location where produced.
- (4) Approval of a sample shall not constitute a waiver of the PHA right to demand full compliance with contract requirements. Materials, equipment and accessories may be rejected for cause even though samples have been approved.
- (5) Wherever materials are required to comply with recognized standards or specifications, such specifications shall be accepted as establishing the technical qualities and testing methods, but shall not govern the number of tests required to be made nor modify other contract requirements. The Contracting Officer may require laboratory test reports on items submitted for approval or may approve materials on the basis of data submitted in certificates with samples. Check tests will be made on materials delivered for use only as frequently as the Contracting Officer determines necessary to insure compliance of materials with the specifications. The Contractor will assume all costs of retesting materials which fail to meet contract requirements and/or testing materials offered in substitution for those found deficient.
- (6) After approval, samples will be kept in the Project office until completion of work. They may be built into the work after a substantial quantity of the materials they represent has been built in and accepted.
- (c) Requirements concerning lead-based paint. The Contractor shall comply with the requirements concerning lead-based paint contained in the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846) as implemented by 24 CFR Part 35.

#### 12. Permits and Codes

- (a) The Contractor shall give all notices and comply with all applicable laws, ordinances, codes, rules and regulations. Notwithstanding the requirement of the Contractor to comply with the drawings and specifications in the contract, all work installed shall comply with all applicable codes and regulations as amended by any



waivers. Before installing the work, the Contractor shall examine the drawings and the specifications for compliance with applicable codes and regulations bearing on the work and shall immediately report any discrepancy it may discover to the Contracting Officer. Where the requirements of the drawings and specifications fail to comply with the applicable code or regulation, the Contracting Officer shall modify the contract by change order pursuant to the clause entitled Changes herein to conform to the code or regulation.

- (b) The Contractor shall secure and pay for all permits, fees, and licenses necessary for the proper execution and completion of the work. Where the PHA can arrange for the issuance of all or part of these permits, fees and licenses, without cost to the Contractor, the contract amount shall be reduced accordingly.

### 13. Health, Safety, and Accident Prevention

(a) In performing this contract, the Contractor shall:

- (1) Ensure that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his/her health and/or safety as determined under construction safety and health standards promulgated by the Secretary of Labor by regulation;
- (2) Protect the lives, health, and safety of other persons;
- (3) Prevent damage to property, materials, supplies, and equipment; and,
- (4) Avoid work interruptions.

(b) For these purposes, the Contractor shall:

- (1) Comply with regulations and standards issued by the Secretary of Labor at 29 CFR Part 1926. Failure to comply may result in imposition of sanctions pursuant to the Contract Work Hours and Safety Standards Act (Public Law 91-54, 83 Stat. 96), 40 U.S.C. 3701 et seq.; and
- (2) Include the terms of this clause in every subcontract so that such terms will be binding on each subcontractor.

(c) The Contractor shall maintain an accurate record of exposure data on all accidents incident to work performed under this contract resulting in death, traumatic injury, occupational disease, or damage to property, materials, supplies, or equipment, and shall report this data in the manner prescribed by 29 CFR Part 1904.

(d) The Contracting Officer shall notify the Contractor of any noncompliance with these requirements and of the corrective action required. This notice, when delivered to the Contractor or the Contractor's representative at the site of the work, shall be deemed sufficient notice of the noncompliance and corrective action required. After receiving the notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to take corrective action promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Contractor shall not base any claim or request for equitable adjustment for additional time or money on any stop order issued under these circumstances.

(e) The Contractor shall be responsible for its subcontractors' compliance with the provisions of this clause. The Contractor shall take such action with respect to any subcontract as the PHA, the Secretary of Housing and Urban Development, or the Secretary of Labor shall direct as a means of enforcing such provisions.

### 14. Temporary Heating

The Contractor shall provide and pay for temporary heating, covering, and enclosures necessary to properly protect all work and materials against damage by dampness and cold, to dry out the work, and to facilitate the completion of the work. Any permanent heating equipment used shall be turned over to the PHA in the condition and at the time required by the specifications.

### 15. Availability and Use of Utility Services

- (a) The PHA shall make all reasonably required amounts of utilities available to the Contractor from existing outlets and supplies, as specified in the contract. Unless otherwise provided in the contract, the amount of each utility service consumed shall be charged to or paid for by the Contractor at prevailing rates charged to the PHA or, where the utility is produced by the PHA, at reasonable rates determined by the Contracting Officer. The Contractor shall carefully conserve any utilities furnished without charge.
- (b) The Contractor, at its expense and in a manner satisfactory to the Contracting Officer, shall install and maintain all necessary temporary connections and distribution lines, and all meters required to measure the amount of each utility used for the purpose of determining charges. Before final acceptance of the work by the PHA, the Contractor shall remove all the temporary connections, distribution lines, meters, and associated paraphernalia.

### 16. Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements

- (a) The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed under this contract, and which do not unreasonably interfere with the work required under this contract.
- (b) The Contractor shall only remove trees when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during performance of this contract, or by the careless operation of equipment, or by workmen, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.
- (c) The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site and (2) on adjacent property of a third party, the locations of which are made known to or should be known by the Contractor. Prior to disturbing the ground at the construction site, the Contractor shall ensure that all underground utility lines are clearly marked.
- (d) The Contractor shall shore up, brace, underpin, secure, and protect as necessary all foundations and other parts of existing structures adjacent to, adjoining, and in the vicinity of the site, which may be affected by the excavations or other operations connected with the construction of the project.
- (e) Any equipment temporarily removed as a result of work under this contract shall be protected, cleaned, and replaced in the same condition as at the time of award of this contract.

- (f) New work which connects to existing work shall correspond in all respects with that to which it connects and/or be similar to existing work unless otherwise required by the specifications.
- (g) No structural members shall be altered or in any way weakened without the written authorization of the Contracting Officer, unless such work is clearly specified in the plans or specifications.
- (h) If the removal of the existing work exposes discolored or unfinished surfaces, or work out of alignment, such surfaces shall be refinished, or the material replaced as necessary to make the continuous work uniform and harmonious. This, however, shall not be construed to require the refinishing or reconstruction of dissimilar finishes previously exposed, or finished surfaces in good condition, but in different planes or on different levels when brought together by the removal of intervening work, unless such refinishing or reconstruction is specified in the plans or specifications.
- (i) The Contractor shall give all required notices to any adjoining or adjacent property owner or other party before the commencement of any work.
- (j) The Contractor shall indemnify and save harmless the PHA from any damages on account of settlement or the loss of lateral support of adjoining property, any damages from changes in topography affecting drainage, and from all loss or expense and all damages for which the PHA may become liable in consequence of such injury or damage to adjoining and adjacent structures and their premises.
- (k) The Contractor shall repair any damage to vegetation, structures, equipment, utilities, or improvements, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

#### **17. Temporary Buildings and Transportation of Materials**

- (a) Temporary buildings (e.g., storage sheds, shops, offices, sanitary facilities) and utilities may be erected by the Contractor only with the approval of the Contracting Officer and shall be built with labor and materials furnished by the Contractor without expense to the PHA. The temporary buildings and utilities shall remain the property of the Contractor and shall be removed by the Contractor at its expense upon completion of the work. With the written consent of the Contracting Officer, the buildings and utilities may be abandoned and need not be removed.
- (b) The Contractor shall, as directed by the Contracting Officer, use only established roadways, or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any federal, state, or local law or regulation. When it is necessary to cross curbs or sidewalks, the Contractor shall protect them from damage. The Contractor shall repair or pay for the repair of any damaged curbs, sidewalks, or roads.

#### **18. Clean Air and Water**

The contractor shall comply with the Clean Air Act, as amended, 42 USC 7401 et seq., the Federal Water Pollution Control Water Act, as amended, 33 U.S.C. 1251 et seq., and standards issued pursuant thereto in the facilities in which this contract is to be performed.

#### **19. Energy Efficiency**

The Contractor shall comply with mandatory standards and policies relating to energy efficiency which are contained in the energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub.L. 94-163) for the State in which the work under the contract is performed.

#### **20. Inspection and Acceptance of Construction**

- (a) Definitions. As used in this clause -
  - (1) "Acceptance" means the act of an authorized representative of the PHA by which the PHA approves and assumes ownership of the work performed under this contract. Acceptance may be partial or complete.
  - (2) "Inspection" means examining and testing the work performed under the contract (including, when appropriate, raw materials, equipment, components, and intermediate assemblies) to determine whether it conforms to contract requirements.
  - (3) "Testing" means that element of inspection that determines the properties or elements, including functional operation of materials, equipment, or their components, by the application of established scientific principles and procedures.
- (b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. All work is subject to PHA inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.
- (c) PHA inspections and tests are for the sole benefit of the PHA and do not: (1) relieve the Contractor of responsibility for providing adequate quality control measures; (2) relieve the Contractor of responsibility for loss or damage of the material before acceptance; (3) constitute or imply acceptance; or, (4) affect the continuing rights of the PHA after acceptance of the completed work under paragraph (j) below.
- (d) The presence or absence of the PHA inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specifications without the Contracting Officer's written authorization. All instructions and approvals with respect to the work shall be given to the Contractor by the Contracting Officer.
- (e) The Contractor shall promptly furnish, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The PHA may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The PHA shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

- (f) The PHA may conduct routine inspections of the construction site on a daily basis.
- (g) The Contractor shall, without charge, replace or correct work found by the PHA not to conform to contract requirements, unless the PHA decides that it is in its interest to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.
- (h) If the Contractor does not promptly replace or correct rejected work, the PHA may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor, or (2) terminate for default the Contractor's right to proceed.
- (i) If any work requiring inspection is covered up without approval of the PHA, it must, if requested by the Contracting Officer, be uncovered at the expense of the Contractor. If at any time before final acceptance of the entire work, the PHA considers it necessary or advisable, to examine work already completed by removing or tearing it out, the Contractor, shall on request, promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray all the expenses of the examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the Contracting Officer shall make an equitable adjustment to cover the cost of the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.
- (j) The Contractor shall notify the Contracting Officer, in writing, as to the date when in its opinion all or a designated portion of the work will be substantially completed and ready for inspection. If the Architect determines that the state of preparedness is as represented, the PHA will promptly arrange for the inspection. Unless otherwise specified in the contract, the PHA shall accept, as soon as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines and designates can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the PHA's right under any warranty or guarantee.

## 21. Use and Possession Prior to Completion

- (a) The PHA shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the PHA intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The PHA's possession or use shall not be deemed an acceptance of any work under the contract.
- (b) While the PHA has such possession or use, the Contractor shall be relieved of the responsibility for (1) the loss of or damage to the work resulting from the PHA's possession or use, notwithstanding the terms of the clause entitled Permits and Codes herein; (2) all maintenance costs on the areas occupied; and, (3) furnishing heat, light, power, and water used in the areas

occupied without proper remuneration therefore. If prior possession or use by the PHA delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

## 22. Warranty of Title

The Contractor warrants good title to all materials, supplies, and equipment incorporated in the work and agrees to deliver the premises together with all improvements thereon free from any claims, liens or charges, and agrees further that neither it nor any other person, firm or corporation shall have any right to a lien upon the premises or anything appurtenant thereto.

## 23. Warranty of Construction

- (a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (j) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or workmanship performed by the Contractor or any subcontractor or supplier at any tier. This warranty shall continue for a period of \_\_\_\_\_ (one year unless otherwise indicated) from the date of final acceptance of the work. If the PHA takes possession of any part of the work before final acceptance, this warranty shall continue for a period of (one year unless otherwise indicated) from the date that the PHA takes possession.
- (b) The Contractor shall remedy, at the Contractor's expense, any failure to conform, or any defect. In addition, the Contractor shall remedy, at the Contractor's expense, any damage to PHA-owned or controlled real or personal property when the damage is the result of—
  - (1) The Contractor's failure to conform to contract requirements; or
  - (2) Any defects of equipment, material, workmanship or design furnished by the Contractor.
- (c) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for (one year unless otherwise indicated) from the date of repair or replacement.
- (d) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect or damage.
- (e) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the PHA shall have the right to replace, repair or otherwise remedy the failure, defect, or damage at the Contractor's expense.
- (f) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall:
  - (1) Obtain all warranties that would be given in normal commercial practice;
  - (2) Require all warranties to be executed in writing, for the benefit of the PHA; and,
  - (3) Enforce all warranties for the benefit of the PHA.
- (g) In the event the Contractor's warranty under paragraph (a) of this clause has expired, the PHA may bring suit at its own expense to enforce a subcontractor's, manufacturer's or supplier's warranty.

- (h) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defect of material or design furnished by the PHA nor for the repair of any damage that results from any defect in PHA furnished material or design.
- (i) Notwithstanding any provisions herein to the contrary, the establishment of the time periods in paragraphs (a) and (c) above relate only to the specific obligation of the Contractor to correct the work, and have no relationship to the time within which its obligation to comply with the contract may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to its obligation other than specifically to correct the work.
- (j) This warranty shall not limit the PHA's rights under the Inspection and Acceptance of Construction clause of this contract with respect to latent defects, gross mistakes or fraud.

**24. Prohibition Against Liens**

The Contractor is prohibited from placing a lien on the PHA's property. This prohibition shall apply to all subcontractors at any tier and all materials suppliers.

**Administrative Requirements**

**25. Contract Period**

The Contractor shall complete all work required on this contract within \_\_\_\_\_ calendar days of the effective date of the contract, or within the time schedule established in the notice to proceed issued by the Contracting Officer.

**26. Order of Provisions**

In the event of a conflict between these General Conditions and the Specifications, the General Conditions shall prevail. In the event of a conflict between the contract and any applicable state or local law or regulation, the state or local law or regulation shall prevail; provided that such state or local law or regulation does not conflict with, or is less restrictive than applicable federal law, regulation, or Executive Order. In the event of such a conflict, applicable federal law, regulation, and Executive Order shall prevail.

**27. Payments**

- (a) The PHA shall pay the Contractor the price as provided in this contract.
- (b) The PHA shall make progress payments approximately every 30 days as the work proceeds, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer. The PHA may, subject to written determination and approval of the Contracting Officer, make more frequent payments to contractors which are qualified small businesses.
- (c) Before the first progress payment under this contract, the Contractor shall furnish, in such detail as requested by the Contracting Officer, a breakdown of the total contract price showing the amount included therein for each principal category of the work, which shall substantiate the payment amount requested in order to provide a

- basis for determining progress payments. The breakdown shall be approved by the Contracting Officer and must be acceptable to HUD. If the contract covers more than one project, the Contractor shall furnish a separate breakdown for each. The values and quantities employed in making up this breakdown are for determining the amount of progress payments and shall not be construed as a basis for additions to or deductions from the contract price. The Contractor shall prorate its overhead and profit over the construction period of the contract.
  - (d) The Contractor shall submit, on forms provided by the PHA, periodic estimates showing the value of the work performed during each period based upon the approved breakdown of the contract price. Such estimates shall be submitted not later than \_\_\_\_\_ days in advance of the date set for payment and are subject to correction and revision as required. The estimates must be approved by the Contracting Officer with the concurrence of the Architect prior to payment. If the contract covers more than one project, the Contractor shall furnish a separate progress payment estimate for each.
  - (e) Along with each request for progress payments and the required estimates, the Contractor shall furnish the following certification, or payment shall not be made: I hereby certify, to the best of my knowledge and belief, that:
    - (1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
    - (2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements; and,
    - (3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.
- \_\_\_\_\_  
Name:
- \_\_\_\_\_  
Title:
- \_\_\_\_\_  
Date:
- (f) Except as otherwise provided in State law, the PHA shall retain ten (10) percent of the amount of progress payments until completion and acceptance of all work under the contract; except, that if upon completion of 50 percent of the work, the Contracting Officer, after consulting with the Architect, determines that the Contractor's performance and progress are satisfactory, the PHA may make the remaining payments in full for the work subsequently completed. If the Contracting Officer subsequently determines that the Contractor's performance and progress are unsatisfactory, the PHA shall reinstate the ten (10) percent (or other percentage as provided in State law) retainage until such time as the Contracting Officer determines that performance and progress are satisfactory.
  - (g) The Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration when computing progress payments.

Material delivered to the Contractor at locations other than the site may also be taken into consideration if the Contractor furnishes satisfactory evidence that (1) it has acquired title to such material; (2) the material is properly stored in a bonded warehouse, storage yard, or similar suitable place as may be approved by the Contracting Officer; (3) the material is insured to cover its full value; and (4) the material will be used to perform this contract. Before any progress payment which includes delivered material is made, the Contractor shall furnish such documentation as the Contracting Officer may require to assure the protection of the PHA's interest in such materials. The Contractor shall remain responsible for such stored material notwithstanding the transfer of title to the PHA.

- (h) All material and work covered by progress payments made shall, at the time of payment become the sole property of the PHA, but this shall not be construed as (1) relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or, (2) waiving the right of the PHA to require the fulfillment of all of the terms of the contract. In the event the work of the Contractor has been damaged by other contractors or persons other than employees of the PHA in the course of their employment, the Contractor shall restore such damaged work without cost to the PHA and to seek redress for its damage only from those who directly caused it.
- (i) The PHA shall make the final payment due the Contractor under this contract after (1) completion and final acceptance of all work; and (2) presentation of release of all claims against the PHA arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release. Each such exception shall embrace no more than one claim, the basis and scope of which shall be clearly defined. The amounts for such excepted claims shall not be included in the request for final payment. A release may also be required of the assignee if the Contractor's claim to amounts payable under this contract has been assigned.
- (j) Prior to making any payment, the Contracting Officer may require the Contractor to furnish receipts or other evidence of payment from all persons performing work and supplying material to the Contractor, if the Contracting Officer determines such evidence is necessary to substantiate claimed costs.
- (k) The PHA shall not; (1) determine or adjust any claims for payment or disputes arising there under between the Contractor and its subcontractors or material suppliers; or, (2) withhold any moneys for the protection of the subcontractors or material suppliers. The failure or refusal of the PHA to withhold moneys from the Contractor shall in no wise impair the obligations of any surety or sureties under any bonds furnished under this contract.

## 28. Contract Modifications

- (a) Only the Contracting Officer has authority to modify any term or condition of this contract. Any contract modification shall be authorized in writing.
- (b) The Contracting Officer may modify the contract unilaterally (1) pursuant to a specific authorization stated in a contract clause (e.g., Changes); or (2) for administrative matters which do not change the rights or

responsibilities of the parties (e.g., change in the PHA address). All other contract modifications shall be in the form of supplemental agreements signed by the Contractor and the Contracting Officer.

- (c) When a proposed modification requires the approval of HUD prior to its issuance (e.g., a change order that exceeds the PHA's approved threshold), such modification shall not be effective until the required approval is received by the PHA.

## 29. Changes

- (a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract including changes:
  - (1) In the specifications (including drawings and designs);
  - (2) In the method or manner of performance of the work;
  - (3) PHA-furnished facilities, equipment, materials, services, or site; or,
  - (4) Directing the acceleration in the performance of the work.
- (b) Any other written order or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances and source of the order and (2) that the Contractor regards the order as a change order.
- (c) Except as provided in this clause, no order, statement or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
- (d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a adjustment based on defective specifications, no proposal for any change under paragraph (b) above shall be allowed for any costs incurred more than 20 days (5 days for oral orders) before the Contractor gives written notice as required. In the case of defective specifications for which the PHA is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.
- (e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause, or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting a written statement describing the general nature and the amount of the proposal. If the facts justify it, the Contracting Officer may extend the period for submission. The proposal may be included in the notice required under paragraph (b) above. No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.
- (f) The Contractor's written proposal for equitable adjustment shall be submitted in the form of a lump sum proposal supported with an itemized breakdown of all increases and decreases in the contract in at least the following details:

- (1) Direct Costs. Materials (list individual items, the quantity and unit cost of each, and the aggregate cost); Transportation and delivery costs associated with materials; Labor breakdowns by hours or unit costs (identified with specific work to be performed); Construction equipment exclusively necessary for the change; Costs of preparation and/ or revision to shop drawings resulting from the change; Worker's Compensation and Public Liability Insurance; Employment taxes under FICA and FUTA; and, Bond Costs when size of change warrants revision.
- (2) Indirect Costs. Indirect costs may include overhead, general and administrative expenses, and fringe benefits not normally treated as direct costs.
- (3) Profit. The amount of profit shall be negotiated and may vary according to the nature, extent, and complexity of the work required by the change. The allowability of the direct and indirect costs shall be determined in accordance with the Contract Cost Principles and Procedures for Commercial Firms in Part 31 of the Federal Acquisition Regulation (48 CFR 1-31), as implemented by HUD Handbook 2210.18, in effect on the date of this contract. The Contractor shall not be allowed a profit on the profit received by any subcontractor. Equitable adjustments for deleted work shall include a credit for profit and may include a credit for indirect costs. On proposals covering both increases and decreases in the amount of the contract, the application of indirect costs and profit shall be on the net-change in direct costs for the Contractor or subcontractor performing the work.
- (g) The Contractor shall include in the proposal its request for time extension (if any), and shall include sufficient information and dates to demonstrate whether and to what extent the change will delay the completion of the contract in its entirety.
- (h) The Contracting Officer shall act on proposals within 30 days after their receipt, or notify the Contractor of the date when such action will be taken.
- (i) Failure to reach an agreement on any proposal shall be a dispute under the clause entitled Disputes herein. Nothing in this clause, however, shall excuse the Contractor from proceeding with the contract as changed.
- (j) Except in an emergency endangering life or property, no change shall be made by the Contractor without a prior order from the Contracting Officer.

### 30. Suspension of Work

- (a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the PHA.
- (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified (or within a reasonable time if not specified) in this contract an adjustment shall be made for any increase in the cost of performance of the contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have

been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or for which any equitable adjustment is provided for or excluded under any other provision of this contract.

- (c) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and, (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

### 31. Disputes

- (a) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under the contract, unlike a claim relating to the contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by complying with the requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.
- (b) Except for disputes arising under the clauses entitled Labor Standards - Davis Bacon and Related Acts, herein, all disputes arising under or relating to this contract, including any claims for damages for the alleged breach thereof which are not disposed of by agreement, shall be resolved under this clause.
- (c) All claims by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the PHA against the Contractor shall be subject to a written decision by the Contracting Officer.
- (d) The Contracting Officer shall, within 60 (unless otherwise indicated) days after receipt of the request, decide the claim or notify the Contractor of the date by which the decision will be made.
- (e) The Contracting Officer's decision shall be final unless the Contractor (1) appeals in writing to a higher level in the PHA in accordance with the PHA's policy and procedures, (2) refers the appeal to an independent mediator or arbitrator, or (3) files suit in a court of competent jurisdiction. Such appeal must be made within (30 unless otherwise indicated) days after receipt of the Contracting Officer's decision.
- (f) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

### 32. Default

- (a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with the diligence that will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within this time, the Contracting Officer may, by written notice to the Contractor, terminate the right to

proceed with the work (or separable part of the work) that has been delayed. In this event, the PHA may take over the work and complete it, by contract or otherwise, and may take possession of and use any materials, equipment, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the PHA resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the PHA in completing the work.

- (b) The Contractor's right to proceed shall not be terminated or the Contractor charged with damages under this clause if—
- (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God, or of the public enemy, (ii) acts of the PHA or other governmental entity in either its sovereign or contractual capacity, (iii) acts of another contractor in the performance of a contract with the PHA, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and
  - (2) The Contractor, within days (10 days unless otherwise indicated) from the beginning of such delay (unless extended by the Contracting Officer) notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, time for completing the work shall be extended by written modification to the contract. The findings of the Contracting Officer shall be reduced to a written decision which shall be subject to the provisions of the Disputes clause of this contract.
- (c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been for convenience of the PHA.

### 33. Liquidated Damages

- (a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, as specified in the clause entitled Default of this contract, the Contractor shall pay to the PHA as liquidated damages, the sum of \$ \_\_\_\_\_ [Contracting Officer insert amount] for each day of delay. If different completion dates are specified in the contract for separate parts or stages of the work, the amount of liquidated damages shall be assessed on those parts or stages which are delayed. To the extent that the Contractor's delay or nonperformance is excused under another clause in this contract, liquidated damages shall not be due the PHA. The Contractor remains liable for damages caused other than by delay.
- (b) If the PHA terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final

completion of the work together with any increased costs occasioned the PHA in completing the work.

- (c) If the PHA does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

### 34. Termination for Convenience

- (a) The Contracting Officer may terminate this contract in whole, or in part, whenever the Contracting Officer determines that such termination is in the best interest of the PHA. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which the performance of the work under the contract is terminated, and the date upon which such termination becomes effective.
- (b) If the performance of the work is terminated, either in whole or in part, the PHA shall be liable to the Contractor for reasonable and proper costs resulting from such termination upon the receipt by the PHA of a properly presented claim setting out in detail: (1) the total cost of the work performed to date of termination less the total amount of contract payments made to the Contractor; (2) the cost (including reasonable profit) of settling and paying claims under subcontracts and material orders for work performed and materials and supplies delivered to the site, payment for which has not been made by the PHA to the Contractor or by the Contractor to the subcontractor or supplier; (3) the cost of preserving and protecting the work already performed until the PHA or assignee takes possession thereof or assumes responsibility therefore; (4) the actual or estimated cost of legal and accounting services reasonably necessary to prepare and present the termination claim to the PHA; and (5) an amount constituting a reasonable profit on the value of the work performed by the Contractor.
- (c) The Contracting Officer will act on the Contractor's claim within days (60 days unless otherwise indicated) of receipt of the Contractor's claim.
- (d) Any disputes with regard to this clause are expressly made subject to the provisions of the Disputes clause of this contract.

### 35. Assignment of Contract

The Contractor shall not assign or transfer any interest in this contract; except that claims for monies due or to become due from the PHA under the contract may be assigned to a bank, trust company, or other financial institution. Such assignments of claims shall only be made with the written concurrence of the Contracting Officer. If the Contractor is a partnership, this contract shall inure to the benefit of the surviving or remaining member(s) of such partnership as approved by the Contracting Officer.

### 36. Insurance

- (a) Before commencing work, the Contractor and each subcontractor shall furnish the PHA with certificates of insurance showing the following insurance is in force and will insure all operations under the Contract:
- (1) Workers' Compensation, in accordance with state or Territorial Workers' Compensation laws.
  - (2) Commercial General Liability with a combined single limit for bodily injury and property damage of not less than \$ \_\_\_\_\_ [Contracting Officer insert amount]

per occurrence to protect the Contractor and each subcontractor against claims for bodily injury or death and damage to the property of others. This shall cover the use of all equipment, hoists, and vehicles on the site(s) not covered by Automobile Liability under (3) below. If the Contractor has a made" policy, then the following additional requirements apply: the policy must provide a "retroactive date" which must be on or before the execution date of the Contract; and the extended reporting period may not be less than five years following the completion date of the Contract.

- (3) Automobile Liability on owned and non-owned motor vehicles used on the site(s) or in connection therewith for a combined single limit for bodily injury and property damage of not less than \$ \_\_\_\_\_ [Contracting Officer insert amount] per occurrence.
- (b) Before commencing work, the Contractor shall furnish the PHA with a certificate of insurance evidencing that Builder's Risk (fire and extended coverage) Insurance on all work in place and/or materials stored at the building site(s), including foundations and building equipment, is in force. The Builder's Risk Insurance shall be for the benefit of the Contractor and the PHA as their interests may appear and each shall be named in the policy or policies as an insured. The Contractor in installing equipment supplied by the PHA shall carry insurance on such equipment from the time the Contractor takes possession thereof until the Contract work is accepted by the PHA. The Builder's Risk Insurance need not be carried on excavations, piers, footings, or foundations until such time as work on the superstructure is started. It need not be carried on landscape work. Policies shall furnish coverage at all times for the full cash value of all completed construction, as well as materials in place and/or stored at the site(s), whether or not partial payment has been made by the PHA. The Contractor may terminate this insurance on buildings as of the date taken over for occupancy by the PHA. The Contractor is not required to carry Builder's Risk Insurance for modernization work which does not involve structural alterations or additions and where the PHA's existing fire and extended coverage policy can be endorsed to include such work.
- (c) All insurance shall be carried with companies which are financially responsible and admitted to do business in the State in which the project is located. If any such insurance is due to expire during the construction period, the Contractor (including subcontractors, as applicable) shall not permit the coverage to lapse and shall furnish evidence of coverage to the Contracting Officer. All certificates of insurance, as evidence of coverage, shall provide that no coverage may be canceled or non-renewed by the insurance company until at least 30 days prior written notice has been given to the Contracting Officer.

### 37. Subcontracts

- (a) Definitions. As used in this contract -
- (1) "Subcontract" means any contract, purchase order, or other purchase agreement, including modifications and change orders to the foregoing, entered into by a subcontractor to furnish supplies, materials, equipment, and services for the performance of the prime contract or a subcontract.

- (2) "Subcontractor" means any supplier, vendor, or firm that furnishes supplies, materials, equipment, or services to or for the Contractor or another subcontractor.
- (b) The Contractor shall not enter into any subcontract with any subcontractor who has been temporarily denied participation in a HUD program or who has been suspended or debarred from participating in contracting programs by any agency of the United States Government or of the state in which the work under this contract is to be performed.
- (c) The Contractor shall be as fully responsible for the acts or omissions of its subcontractors, and of persons either directly or indirectly employed by them as for the acts or omissions of persons directly employed by the Contractor.
- (d) The Contractor shall insert appropriate clauses in all subcontracts to bind subcontractors to the terms and conditions of this contract insofar as they are applicable to the work of subcontractors.
- (e) Nothing contained in this contract shall create any contractual relationship between any subcontractor and the PHA or between the subcontractor and HUD.

### 38. Subcontracting with Small and Minority Firms, Women's Business Enterprise, and Labor Surplus Area Firms

The Contractor shall take the following steps to ensure that, whenever possible, subcontracts are awarded to small business firms, minority firms, women's business enterprises, and labor surplus area firms:

- (a) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- (b) Ensuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources;
- (c) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises;
- (d) Establishing delivery schedules, where the requirements of the contract permit, which encourage participation by small and minority businesses and women's business enterprises; and
- (e) Using the services and assistance of the U.S. Small Business Administration, the Minority Business Development Agency of the U.S. Department of Commerce, and State and local governmental small business agencies.

### 39. Equal Employment Opportunity

During the performance of this contract, the Contractor agrees as follows:

- (a) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, or handicap.
- (b) The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, national origin, or handicap. Such action shall include, but not be limited to, (1) employment, (2) upgrading, (3) demotion, (4) transfer, (5) recruitment or recruitment advertising, (6) layoff or termination, (7) rates of pay or other forms of compensation, and (8) selection for training, including apprenticeship.



- (c) The Contractor shall post in conspicuous places available to employees and applicants for employment the notices to be provided by the Contracting Officer that explain this clause.
- (d) The Contractor shall, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, or handicap.
- (e) The Contractor shall send, to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice to be provided by the Contracting Officer advising the labor union or workers' representative of the Contractor's commitments under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.
- (f) The Contractor shall comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.
- (g) The Contractor shall furnish all information and reports required by Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto. The Contractor shall permit access to its books, records, and accounts by the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (h) In the event of a determination that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part, and the Contractor may be declared ineligible for further Government contracts, or Federally assisted construction contracts under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended, the rules, regulations, and orders of the Secretary of Labor, or as otherwise provided by law.
- (i) The Contractor shall include the terms and conditions of this clause in every subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order 11246, as amended, so that these terms and conditions will be binding upon each subcontractor or vendor. The Contractor shall take such action with respect to any subcontract or purchase order as the Secretary of Housing and Urban Development or the Secretary of Labor may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided that if the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.
- (j) Compliance with the requirements of this clause shall be to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act and the Indian Preference clause of this contract.

**40. Employment, Training, and Contracting Opportunities for Low-Income Persons, Section 3 of the Housing and Urban Development Act of 1968.**

- (a) The work to be performed under this contract is subject to the requirements of section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u (section 3). The purpose of section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted projects covered by section 3, shall, to the greatest extent feasible, be directed to low- and very low-income persons, particularly persons who are recipients of HUD assistance for housing.
- (b) The parties to this contract agree to comply with HUD's regulations in 24 CFR Part 135, which implement section 3. As evidenced by their execution of this contract, the parties to this contract certify that they are under no contractual or other impediment that would prevent them from complying with the Part 135 regulations.
- (c) The contractor agrees to send to each labor organization or representative of workers with which the contractor has a collective bargaining agreement or other understanding, if any, a notice advising the labor organization or workers' representative of the contractor's commitments under this section 3 clause, and will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the section 3 preference, shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions, the qualifications for each; and the name and location of the person(s) taking applications for each of the positions; and the anticipated date the work shall begin.
- (d) The contractor agrees to include this section 3 clause in every subcontract subject to compliance with regulations in 24 CFR Part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR Part 135. The contractor will not subcontract with any subcontractor where the contractor has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR Part 135.
- (e) The contractor will certify that any vacant employment positions, including training positions, that are filled (1) after the contractor is selected but before the contract is executed, and (2) with persons other than those to whom the regulations of 24 CFR Part 135 require employment opportunities to be directed, were not filled to circumvent the contractor's obligations under 24 CFR Part 135.
- (f) Noncompliance with HUD's regulations in 24 CFR Part 135 may result in sanctions, termination of this contract for default, and debarment or suspension from future HUD assisted contracts.
- (g) With respect to work performed in connection with section 3 covered Indian housing assistance, section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e) also applies to the work to be performed under this contract. Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises. Parties to this contract that are subject to the provisions of section 3 and section 7(b) agree to comply with section 3 to the maximum extent feasible, but not in derogation of compliance with section 7(b).

---

#### 41. Interest of Members of Congress

No member of or delegate to the Congress of the United States of America shall be admitted to any share or part of this contract or to any benefit that may arise therefrom.

#### 42. Interest of Members, Officers, or Employees and Former Members, Officers, or Employees

No member, officer, or employee of the PHA, no member of the governing body of the locality in which the project is situated, no member of the governing body of the locality in which the PHA was activated, and no other public official of such locality or localities who exercises any functions or responsibilities with respect to the project, shall, during his or her tenure, or for one year thereafter, have any interest, direct or indirect, in this contract or the proceeds thereof.

#### 43. Limitations on Payments made to Influence Certain Federal Financial Transactions

- (a) The Contractor agrees to comply with Section 1352 of Title 31, United States Code which prohibits the use of Federal appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, and officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract; the making of any Federal grant; the making of any Federal loan; the entering into of any cooperative agreement; or the modification of any Federal contract, grant, loan, or cooperative agreement.
- (b) The Contractor further agrees to comply with the requirement of the Act to furnish a disclosure (OMB Standard Form LLL, Disclosure of Lobbying Activities) if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative agreement.

#### 44. Royalties and Patents

The Contractor shall pay all royalties and license fees. It shall defend all suits or claims for infringement of any patent rights and shall save the PHA harmless from loss on account thereof; except that the PHA shall be responsible for all such loss when a particular design, process or the product of a particular manufacturer or manufacturers is specified and the Contractor has no reason to believe that the specified design, process, or product is an infringement. If, however, the Contractor has reason to believe that any design, process or product specified is an infringement of a patent, the Contractor shall promptly notify the Contracting Officer. Failure to give such notice shall make the Contractor responsible for resultant loss.

#### 45. Examination and Retention of Contractor's Records

- (a) The PHA, HUD, or Comptroller General of the United States, or any of their duly authorized representatives shall, until 3 years after final payment under this contract, have access to and the right to examine any of the Contractor's directly pertinent books, documents, papers, or other records involving transactions related to this contract for the purpose of making audit, examination, excerpts, and transcriptions.
- (b) The Contractor agrees to include in first-tier subcontracts under this contract a clause substantially the same as paragraph (a) above. "Subcontract," as used in this clause, excludes purchase orders not exceeding \$10,000.
- (c) The periods of access and examination in paragraphs (a) and (b) above for records relating to (1) appeals under the Disputes clause of this contract, (2) litigation or settlement of claims arising from the performance of this contract, or (3) costs and expenses of this contract to which the PHA, HUD, or Comptroller General or any of their duly authorized representatives has taken exception shall continue until disposition of such appeals, litigation, claims, or exceptions.

#### 46. Labor Standards - Davis-Bacon and Related Acts

If the total amount of this contract exceeds \$2,000, the Federal labor standards set forth in the clause below shall apply to the development or construction work to be performed under the contract.

- (a) Minimum Wages.
  - (1) All laborers and mechanics employed under this contract in the development or construction of the project(s) involved will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a)(1)(iv); also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the regular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under 29 CFR 5.5(a)(1)(ii) and the Davis-Bacon poster (WH-1321) shall

---

be posted at all times by the Contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

- (2) (i) Any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. HUD shall approve an additional classification and wage rate and fringe benefits therefor only when all the following criteria have been met: (A) The work to be performed by the classification requested is not performed by a classification in the wage determination; and (B) The classification is utilized in the area by the construction industry; and (C) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
- (ii) If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and HUD or its designee agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by HUD or its designee to the Administrator of the Wage and Hour Division, Employee Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise HUD or its designee or will notify HUD or its designee within the 30-day period that additional time is necessary.
- (iii) In the event the Contractor, the laborers or mechanics to be employed in the classification or their representatives, and HUD or its designee do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), HUD or its designee shall refer the questions, including the views of all interested parties and the recommendation of HUD or its designee, to the Administrator of the Wage and Hour Division for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise HUD or its designee or will notify HUD or its designee within the 30-day period that additional time is necessary.
- (iv) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (a)(2)(ii) or (iii) of this clause shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in classification.
- (3) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.
- (4) If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the

amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program; provided, that the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

- (b) Withholding of funds. HUD or its designee shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Contractor under this contract or any other Federal contract with the same prime Contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime Contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working in the construction or development of the project, all or part of the wages required by the contract, HUD or its designee may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased. HUD or its designee may, after written notice to the Contractor, disburse such amounts withheld for and on account of the Contractor or subcontractor to the respective employees to whom they are due.
- (c) Payrolls and basic records.
- (1) Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working in the construction or development of the project. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Secretary of Labor has found, under 29 CFR 5.5(a)(1)(iv), that the wages of any laborer or mechanic include the amount of costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

- (2) (i) The Contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the Contracting Officer for transmission to HUD or its designee. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under subparagraph (c)(1) of this clause. This information may be submitted in any form desired. Optional Form WH-347 (Federal Stock Number 029-005-00014-1) is available for this purpose and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The Contractor is responsible for the submission of copies of payrolls by all subcontractors. (Approved by the Office of Management and Budget under OMB Control Number 1214-0149.)
- (ii) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
- (A) That the payroll for the payroll period contains the information required to be maintained under paragraph (c) (1) of this clause and that such information is correct and complete;
- (B) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR Part 3; and
- (C) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
- (iii) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirements for submission of the "Statement of Compliance" required by subparagraph (c)(2)(ii) of this clause.
- (iv) The falsification of any of the above certifications may subject the Contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.
- (3) The Contractor or subcontractor shall make the records required under subparagraph (c)(1) available for inspection, copying, or transcription by authorized representatives of HUD or its designee, the Contracting Officer, or the Department of Labor and shall permit such representatives to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit the required records or to make them available, HUD or its designee may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to

make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

- (d) (1) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship and Training, Employer and Labor Services (OATELS), or with a State Apprenticeship Agency recognized by OATELS, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by OATELS or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in this paragraph, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event OATELS, or a State Apprenticeship Agency recognized by OATELS, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- (2) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under

the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed in the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate in the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate in the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate in the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

- (3) Equal employment opportunity. The utilization of apprentices, trainees, and journeymen under this clause shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.
- (e) Compliance with Copeland Act requirements. The Contractor shall comply with the requirements of 29 CFR Part 3, which are hereby incorporated by reference in this contract.
- (f) Contract termination; debarment. A breach of this contract clause may be grounds for termination of the contract and for debarment as a Contractor and a subcontractor as provided in 29 CFR 5.12.
- (g) Compliance with Davis-Bacon and related Act requirements. All rulings and interpretations of the Davis-Bacon and related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.
- (h) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this clause shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the PHA, HUD, the U.S. Department of Labor, or the employees or their representatives.
- (i) Certification of eligibility.
  - (1) By entering into this contract, the Contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the Contractor's firm is a person or firm ineligible to be awarded contracts by the United States Government by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

- (2) No part of this contract shall be subcontracted to any person or firm ineligible for award of a United States Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
  - (3) The penalty for making false statements is prescribed in the U. S. Criminal Code, 18 U.S.C. 1001.
- (j) Contract Work Hours and Safety Standards Act. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.
- (1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics, including watchmen and guards, shall require or permit any such laborer or mechanic in any workweek in which the individual is employed on such work to work in excess of 40 hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of 40 hours in such workweek.
  - (2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the provisions set forth in subparagraph (j)(1) of this clause, the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic (including watchmen and guards) employed in violation of the provisions set forth in subparagraph (j)(1) of this clause, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by provisions set forth in subparagraph (j)(1) of this clause.
  - (3) Withholding for unpaid wages and liquidated damages. HUD or its designee shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any Federal contract with the same prime Contractor, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions set forth in subparagraph (j)(2) of this clause.
- (k) Subcontracts. The Contractor or subcontractor shall insert in any subcontracts all the provisions contained in this clause, and such other clauses as HUD or its designee may by appropriate instructions require, and also a clause requiring the subcontractors to include these provisions in any lower tier subcontracts. The prime Contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all these provisions.

---

47. Non-Federal Prevailing Wage Rates

- (a) Any prevailing wage rate (including basic hourly rate and any fringe benefits), determined under State or tribal law to be prevailing, with respect to any employee in any trade or position employed under the contract, is inapplicable to the contract and shall not be enforced against the Contractor or any subcontractor, with respect to employees engaged under the contract whenever such non-Federal prevailing wage rate exceeds:
  - (1) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 3141 et seq.) to be prevailing in the locality with respect to such trade;
- (b) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the U.S. Department of Labor (DOL) or a DOL-recognized State Apprenticeship Agency; or
- (c) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program.

48. Procurement of Recovered Materials.

- (a) In accordance with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, the Contractor shall procure items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition. The Contractor shall procure items designated in the EPA guidelines that contain the highest percentage of recovered materials practicable unless the Contractor determines that such items: (1) are not reasonably available in a reasonable period of time; (2) fail to meet reasonable performance standards, which shall be determined on the basis of the guidelines of the National Institute of Standards and Technology, if applicable to the item; or (3) are only available at an unreasonable price.
- (b) Paragraph (a) of this clause shall apply to items purchased under this contract where: (1) the Contractor purchases in excess of \$10,000 of the item under this contract; or (2) during the preceding Federal fiscal year, the Contractor: (i) purchased any amount of the items for use under a contract that was funded with Federal appropriations and was with a Federal agency or a State agency or agency of a political subdivision of a State; and (ii) purchased a total of in excess of \$10,000 of the item both under and outside that contract.