

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

48 CFR Parts 2404, 2408, 2415, 2437, 2439, and 2452

[Docket No. FR-4705-P-01; HUD-2006-0002]

RIN 2535-AA26

Amendments to HUD Acquisition Regulations (HUDAR)

AGENCY: Office of the Chief Procurement Officer, HUD.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend HUD's Acquisition Regulations (HUDAR) to implement miscellaneous changes. The proposed revisions include improvements in clarity and uniformity in the Department's acquisition regulations.

DATES: *Comment Due Date:* March 14, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Interested persons may also submit comments electronically through the Federal electronic rulemaking portal at: www.regulations.gov. Facsimile (FAX) comments are not acceptable. All communications must refer to the docket number and title. All comments and communications submitted will be available, without revision, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Divisions at (202) 708-3055 (this is not a toll-free number). Copies of the public comments are also available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Frederick Graves, Policy and Field Operations Division, Office of the Chief Procurement Officer (Seattle Outstation), Department of Housing and Urban Development, Seattle Federal Office Building, 909 First Avenue, Seattle, WA 98104-1000, telephone (206) 220-5259, FAX (206) 220-5247 (these are not toll-free numbers). Persons with hearing or speech impairments may access that number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The uniform regulation for the procurement of supplies and services by Federal departments and agencies, the Federal Acquisition Regulation (FAR), was promulgated on September 19, 1983 (48 FR 42102). The FAR is codified in title 48, chapter 1, of the Code of Federal Regulations. HUD promulgated its regulation to implement the FAR on March 1, 1984 (49 FR 7696).

The HUDAR (title 48, chapter 24 of the Code of Federal Regulations) is prescribed under section 7(d) of the Department of HUD Act (42 U.S.C. 3535(d)); section 205(c) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 486(c)); and the general authorization in FAR 1.301. The most recent publication of the HUDAR as a final rule was on January 21, 2000 (65 FR 3571, 65 FR 3575).

II. This Proposed Rule

This proposed rule would amend the HUDAR to provide for greater uniformity in departmental contracts. The following describes HUD's proposed changes.

Section 2404.701 is added to prescribe the use of a non-disclosure clause to protect the Department from unauthorized disclosure of protected information (as the term is defined in the clause) provided by HUD to contractors under HUD contracts.

A new section 2408.404 is added to prescribe selection factors for use in placing competitive task orders for services under the General Services Administration (GSA) schedule contracts when the order is expected to exceed \$500,000.

In Section 2415.304, a new paragraph (c) is added to prescribe the use of a solicitation provision containing the Department's small business goals and a selection factor to evaluate offerors' (other than offerors that are small businesses) proposed subcontracting with small businesses. The evaluation is conducted using the offerors' proposed small business plan submitted pursuant to HUDAR 2452.219-70. Subparagraph (d)(2) is removed to reflect departmental policy eliminating the requirement that numerical scoring be used to evaluate all technical proposals. Subparagraph (d)(1) is renumbered as paragraph (d).

Section 2415.305 is revised to better define technical unacceptability of offers.

In section 2437.110, paragraph (b) is removed and redesignated as 2408.802-70 to correspond to the FAR. Redesignated paragraph (e) is revised to change the title and simplify the prescription for the use of clause

2452.237-75. Redesignated paragraph (f) is revised to change the title of clause 2452.237-77.

Section 2439.107 is revised to clarify the applicability of clause 2452.239-70.

A new section 2452.204-70 is added to implement departmental policy concerning the non-disclosure by contractors of information that HUD provides to them. HUD believes that the additional contract clause is needed to ensure that contractors do not make unauthorized disclosures without the Department's consent.

A new section 2452.208-70 is added to prescribe criteria to be used when competing task orders under GSA Federal Supply Schedule contracts. These factors include criteria related to the contractors' proposed efforts in meeting the Department's small business subcontracting goals. HUD will revise these goals annually to reflect new governmentwide goals promulgated by the U.S. Small Business Administration and any additional changes to goal amounts that HUD determines to be warranted.

Numerous revisions are made to section 2452.209-72, including: Greater clarification of activities that may result in default; referencing the definition of organizational conflict of interest at FAR subpart 9.5; and adding a prohibition against contractors evaluating their own work or that of other entities without the Contracting Officer's approval.

Section 2452.215-70 is revised to explicitly state HUD's right to contact any or all of the references provided to it by an offeror for the purposes of assessing the offeror's past performance and HUD's right to use other relevant past performance information not provided by the offeror.

A new section 2452.215-71 is added to include a small business subcontracting source selection factor in solicitations for contracts that are expected to exceed \$500,000 and contain the provision at 2452.219-70, Small Business Subcontracting Plan Compliance. The solicitation provision also notifies potential offerors of the Department's current small business subcontracting goals (see also 2452.208-70 above). [Note: The former 2452.215-72 is being consolidated into this provision to eliminate redundancies between them.]

Section 2452.216-70 is revised to correct the prescriptive reference and clarify its usage in cost-plus-award-fee contracts and to insert instructions concerning payment that were previously located in section 2452.216-71.

In section 2452.216-74, the prescriptive text citation is corrected,

and the last sentence of paragraph (b) and subparagraphs (b)(1)–(b)(3) are made into a new paragraph (c), an alternate clause to be used for cost-plus-award-fee contracts.

Section 2452.237–75 is revised to comply with Federal Information Processing Standards 201, Homeland Security Presidential Directive (HSPD–12), and OMB Memorandum M–05–24 with regard to granting contractor employees physical access to Government facilities.

Section 2452.239–70 is revised to comply with Federal Information Processing Standards 201, Homeland Security Presidential Directive (HSPD–12), and OMB Memorandum M–05–24,

with regard to granting contractor employees access to federal government systems. It revises the definition of information technology resources covered by the clause, changes the background clearance forms required, clarifies the responsibility of contractors in identifying employees who should obtain a background clearance, and permits access by non-U.S. nationals who have been lawfully admitted to the United States for permanent residence. Reviewers are encouraged to comment on the content of the revised clause.

III. Findings and Certifications

Paperwork Reduction Act Statement

The information collection requirements proposed in this rule, as described in the table below, have been submitted to the Office of Management and Budget for review under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The information collection requirements for the HUDAR are currently approved by OMB under control number 2535–0091.

HUD’s estimate of the total reporting and recordkeeping burden that will result from the collection of information is as follows:

Reporting and Recordkeeping Burden:

| Section reference | Number of parties | Frequency of requirement | Est. average time for requirement (hrs.) | Est. annual burden (hrs.) |
|--|-------------------|--------------------------|--|---------------------------|
| HUDAR: | | | | |
| 2452.208–70 | 700 | 1/annum | 8.0 | 5,600 |
| 2452.209–70 | 250 | 1/annum | 0.5 | 125 |
| 2452.209–72 | 5 | 1/annum | 1.0 | 5 |
| 2452.215–70 | 275 | 1/annum | 80.0 | 22,000 |
| 2452.215 ALT II | 25 | 1/annum | 40.0 | 1,000 |
| 2452.216–72 | 5 | 4/annum | 2.0 | 40 |
| 2452.216–78 ALT II | 1,500 | 1/annum | 4.0 | 6,000 |
| 2452.219–70 | 150 | 1/annum | 0.5 | 75 |
| 2452.237–70 | 150 | 1/annum | 1.0 | 150 |
| 2452.237–75 | 500 | 1/annum | 1.0 | 500 |
| 2452.239–70 | 500 | 1/annum | 1.0 | 500 |
| 2452.242–71 (plan) | 40 | 1/annum | 8.0 | 320 |
| 2452.242–71 (reports) | 40 | 12/annum | 6.0 | 2,880 |
| HUD 770 | 2 | 1/annum | 0.5 | 1 |
| Total Reporting and Recordkeeping Burden (Hours). | | | | 39,196 |

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting responses to be submitted electronically.

Interested persons are invited to submit comments regarding the information collection requirements in

this proposal. Comments must be received within 30 days from the date of this proposal. Comments must refer to the proposal by name (HUDAR) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Facsimile: (202) 395–6974; and
 Lillian Deitzer, Department of Housing and Urban Development, Room 8001 PL, 451 Seventh Street, SW., Washington, DC 20410–0001, E-mail: Lillian.L.Deitzer@hud.gov, Telephone: (202) 708–2374. This is not a toll-free number.

Unfunded Mandates Reform Act

The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), that this rule does not impose a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate,

or by the private sector, of \$100 million or more in any one year.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposed rule makes technical changes to existing contracting procedures and does not make any major changes that would significantly impact businesses. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD’s determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule

that will meet HUD's objectives as described in this preamble.

Environmental Impact

This proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule would not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt state law within the meaning of the Executive Order.

List of Subjects

48 CFR Parts 2404, 2408, 2415, 2437, and 2452

Government procurement.

48 CFR Part 2439

Computer technology, Government procurement.

For the reasons discussed in the preamble, HUD proposes to amend 48 CFR chapter 24 as set forth below:

PART 2404—ADMINISTRATIVE MATTERS

1. The authority citation for part 2404 continues to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

2. Add subpart 2404.7 and section 2404.701 to read as follows:

Subpart 2404.7—Contractor Records Retention

2404.701 Contract clause.

The Contracting Officer shall insert the clause at 2452.204–70, Non-disclosure of Information, in all solicitations and contracts when it is expected or likely that the contractor

will have access to, or be provided, protected information as defined in the clause.

PART 2408—REQUIRED SOURCES OF SUPPLIES AND SERVICES

3. Add 2408.404 and subpart heading to read as follows:

Subpart 2408.4—Federal Supply Schedules

2408.404 Selection Factors for Competitive GSA Task Orders.

(b) The Contracting Officer shall use a provision substantially the same as the provision at 2452.208–70 when placing task orders for services under General Services Administration schedule contracts when the order is expected to exceed \$500,000. The Contracting Officer shall insert the percentage goals in effect at the time quotations are requested from schedule contractors. The provision may be tailored to suit the specific task order competition, but small business participation shall be evaluated in every competition.

PART 2415—CONTRACTING BY NEGOTIATION

4. The authority citation for part 2415 continues to read as follows:

Authority: 40 U.S.C. 486(c); 41 U.S.C. 253; 42 U.S.C. 3535(d).

5. Revise section 2415.304 to read as follows:

2415.304 Evaluation factors.

(c) The Contracting Officer shall insert the provision at 2452.215–71 in all solicitations exceeding \$500,000 that include the provision at 2452.219–70, Small Business Subcontracting Plan Compliance. The Contracting Officer shall insert the percentage goals in effect at the time offers are solicited.

(d) The solicitation shall state the basis for the source selection decision as either "lowest price technically acceptable" (LPTA) process or "tradeoff" process (as defined at FAR subpart 15.1).

6. Revise section 2415.305(a)(3) to read as follows:

2415.305 Proposal evaluation.

(a) * * *

(3) *Technical evaluation.* The TEP shall rate each proposal based on the evaluation factors specified in the solicitation.

(i) A proposal shall be considered unacceptable if

(A) It does not represent a reasonable initial effort to address the essential requirements of the RFP or clearly demonstrates that the offeror does not understand the requirements; or

(B) It contains major deficiencies or omissions that discussions with the offeror could not reasonably be expected to cure.

(ii) Under the tradeoff process, predetermined threshold levels of technical acceptability for proposals shall not be employed.

(iii) A technical evaluation report that complies with FAR 15.305(a)(3) shall be prepared and signed by the technical evaluator(s), furnished to the Contracting Officer, and maintained as a permanent record in the official procurement file in accordance with established departmental procedures.

PART 2437—SERVICE CONTRACTING

7. The authority citation for part 2437 continues to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

8. Amend section 2437.110 as follows:

a. Remove paragraph (b);

b. Redesignate paragraphs (c), (d), (e), and (f) as (b), (c), (d), and (e), respectively;

c. Revise newly redesignated paragraphs (d) and (e) to read as follows:

2437.110 Solicitation provisions and contract clauses.

* * * * *

(d) The Contracting Officer shall insert the clause at 2452.237–75, Access to HUD Facilities, in all solicitations and contracts where contractor employees, including subcontractors and consultants, will be required to work in or have access to any HUD facilities. If contractor employees will also be required to have access to HUD information systems, see 2439.107.

(e) The Contracting Officer shall insert the clause at 2452.237–77, Observance of Legal Holidays and Closure of HUD Facilities, in all solicitations and contracts where contractor personnel will be working on-site in any HUD office.

PART 2439—ACQUISITION OF INFORMATION TECHNOLOGY

9. The authority citation for part 2439 reads as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

10. Revise section 2439.107(a) to read as follows:

2439.107 Contract clauses.

(a) The Contracting Officer shall insert the clause at 2452.239–70, Access to HUD Systems, in solicitations and contracts when the contract will require contractor employees, including subcontractors and consultants, to have

access to any HUD information system(s) as defined in the clause. If contractor employees will also be required to have physical access to HUD facilities, see 2437.110.

* * * * *

PART 2452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. The authority citation for part 2452 continues to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

12. Add section 2452.204–70 to read as follows:

2452.204–70 Non-disclosure of Information.

As prescribed in 2404.701, insert the following clause:

NON-DISCLOSURE OF INFORMATION (* * * 2006)

(a) *Definitions.* As used in this clause—
Contractor means employees, subcontractors, consultants, affiliates, partners, joint ventures, and team members with which the contractor is associated.

Protected information means government procurement-sensitive information (e.g., acquisition planning, source selection), proprietary business information provided to the Government by other parties (e.g., other contractors), and personal information protected by the Privacy Act (e.g., Social Security Numbers).

(b) The contractor shall not release, disclose, or use in any way that would permit or result in release or disclosure to any party outside the government any information described in paragraph (a) provided to the contractor by the government, unless:

(1) The Contracting Officer has given prior written authorization for its release or disclosure; or

(2) The information is otherwise in the public domain prior to the date of release.

(c) The prohibition in paragraph (b) includes information in any medium (e.g., paper document, electronic file, audio or video tape, film, or oral communication). The prohibition also covers information provided by the government whether or not in its original form (e.g., where the information has been included in contractor-generated work or where it is discernible from materials incorporating or based upon such information).

(d) The prohibition contained in this clause has no expiration date.

(e) The contractor shall ensure that contractor personnel who are provided protected information as defined in this clause execute a non-disclosure agreement prior to obtaining such information.

(End of clause)

13. Add section 2452.208–70 to read as follows:

2452.208–70 Selection of Contractor for Task Orders Under GSA Schedule Contracts.

As prescribed in 2408.404(b), insert a provision substantially the same as the following:

SELECTION OF CONTRACTOR FOR TASK ORDERS UNDER GSA SCHEDULE CONTRACTS (* * * 2006)

(a) *General.* Any eligible contractor may compete for the proposed task order. In awarding the task order, HUD will evaluate the contractor's offer using the selection factors in paragraph (c), and select the contractor that presents the overall best value to the federal government, considering those factors. For the purposes of evaluating offers, the combined relative merit of the offer as evaluated in accordance with the non-price factors and the small business subcontracting participation factor shall be considered more important than the evaluated cost/price.

(b) *Small business subcontracting participation.*

(1) Consistent with the intent of the Small Business Act, HUD is strongly committed to ensuring that small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, small disadvantaged businesses, and women-owned small businesses have maximum opportunities to participate in subcontracting with HUD prime contractors. Therefore, contractors shall provide the maximum practicable subcontracting opportunities to those small businesses. Contractors shall address in their offer the manner in which they plan to assist the Department in achieving this goal. As part of the evaluation for award, HUD will consider the contractor's statement addressing how it proposes to meet the small business participation goal for the task order. As part of the performance requirements under the task order, the contractor will be required to submit a semi-annual report on subcontracting achievements.

(2) In support of its commitment, HUD has established the following goals, expressed as a percentage of the total value of each contract action (including task orders, modifications, and options):

(i) Total Small Business—up to [Contracting Officer insert percentage] percent.

(ii) Within the total Small Business goal in (i), the following subordinate goals apply:

(A) Small Disadvantaged Business— [Contracting Officer insert percentage] percent.

(B) Women-Owned Small Business— [Contracting Officer insert percentage] percent.

(C) Service-Disabled Veteran-Owned Small Business— [Contracting Officer insert percentage] percent.

(D) HUBZone Small Business— [Contracting Officer insert percentage] percent.

(iii) Competing contractors shall include as part of their offer a copy of their master subcontracting plan of record for the GSA schedule contract under which this task order is to be awarded.

(c) *Selection factors.*

(1) *Non-price factors.*

(i) *Technical and management capability* (applicable to all business types).

(A) The contractor's understanding of HUD's requirement as demonstrated by the extent to which the contractor's offer presents an efficient and realistic approach to meeting the proposed requirement, considering methods, scheduling of work, and management of resources.

(B) This evaluation criterion shall also apply to subcontractors that the offeror is proposing, and their contribution to demonstrating the offeror's understanding of the requirement.

(ii) *Past performance.*

(A) (Applicable to all business types.) As confirmed by references, the contractor's demonstrated record consists of successful past performance of the same or substantially similar work, including quality of services, schedule and delivery compliance, and cost control, within [Contracting Officer insert time period, e.g., the past three years]. The contractor shall identify at least five contracts, including federal, state, and local government and the private sector, for efforts similar to this requirement and provide current points of contact for each.

(B) (Applicable to other than small businesses.) Relevant is the contractor's demonstrated success in utilizing small businesses in the performance of past contracts, as confirmed by submission of required subcontracting reports, SF–294 and SF–295, and the contractor's actual achieved subcontracting percentages as contrasted with the proposed small business subcontracting goals stated under those contracts. The contractor shall identify the contracts under which it has subcontracted with small businesses, and shall provide points of contact for all federal agencies to which it has submitted subcontracting plans and reports under contracts within the past 3 years.

(iii) *Key personnel* (applicable to all business types). The qualifications, including relevant prior experience, special training, and education, of proposed key personnel (see HUDAR clause 2452.237–77, Key Personnel). The offer shall identify all key personnel and describe how each one meets the qualifications for the position for which he/she is proposed. The term "key personnel" includes employees of the contractor, any subcontractor(s), affiliates, joint venture partners, or team members, and consultants engaged by any of those entities.

(2) *Small business subcontracting participation* (applicable to other than small businesses). Small-business offerors will automatically receive the maximum possible credit for this factor. They shall not be required to submit a subcontracting plan or demonstrate subcontracting past performance (see paragraph (2)(ii)(B) above). The evaluation shall consider:

(i) The total value of the proposed small business subcontracting effort as it relates to the total value of the prospective order;

(ii) Specific goals established for the categories of small business listed in paragraph (b)(2) above;

(iii) Specific commitments from small business concerns to assist in the contractor's proposed effort as evidenced in the offer; and

(iv) The substantive nature of the work required by the task order that the contractor proposes to subcontract.

(3) *Evaluated cost/price* (applicable to all business types). HUD will evaluate the contractor's proposed costs/prices for the basic task order and all options, if any. While the cost/price will not be assigned a specific weight, it shall be considered a significant criterion in the overall evaluation of offers. HUD may award the order to other than the lowest-priced offer.
(End of provision)

14. Revise section 2452.209–72 to read as follows:

2452.209–72 Organizational Conflicts of Interest.

As prescribed in 2409.507–2, insert the following contract clause in all contracts:

ORGANIZATIONAL CONFLICTS OF INTEREST (* * * 2006)

(a) The contractor warrants that, to the best of its knowledge and belief, except as otherwise disclosed in accordance with paragraph (b), neither the contractor, nor the contractor's employees, subcontractors, team members, consultants, partners, joint ventures, affiliates, and other business relationships has an organizational conflict of interest as defined at FAR subpart 9.5, which would affect the contractor's ability to perform the work under the contract.

(b)(1) If, after award, the contractor discovers an apparent or actual organizational conflict of interest with respect to this contract, the contractor shall make an immediate written disclosure to the Contracting Officer, which shall include:

(i) A full description of the actual or potential conflict of interest, including all relevant facts; and

(ii) A plan for avoiding, neutralizing, or mitigating the conflict of interest, including a description of any effect such avoidance, neutralization, or mitigation is expected to have on the contract's cost, schedule, and performance.

(2) The contractor shall cease the performance of all affected work if directed by the Contracting Officer.

(3) When the conflict of interest can be avoided, neutralized, or mitigated, the mitigation plan accepted by the government will be incorporated into the contract by bilateral modification.

(4) If the conflict of interest cannot be avoided, neutralized, or mitigated, but the contract can be modified to remove the affected work, the Contracting Officer will modify the contract accordingly. If the conflict is extensive to the point that the removal of affected work is not practicable, the Contracting Officer may terminate the contract for convenience.

(c) The Contracting Officer may terminate the contract for default if—

(1) It is determined that the contractor was aware of an organizational conflict of interest, either before or after the award of the contract, and intentionally did not disclose the conflict to the Contracting Officer; or

(2) The contractor takes any action prohibited by this clause or fails to take action required by this clause.

(d) A conflict of interest on the part of the prime contractor, before or after award, may be grounds for disqualifying the contractor and any partners, affiliates, principals, subcontractors, consultants, and employees from performing or competing for (e.g., under subcontract) any affected work. The government may unilaterally determine to permit individuals or entities associated with the prime contractor to perform or compete for affected work.

(e) The contractor shall not evaluate or otherwise advise the government concerning its own products or services, or those of another contractor or organization competing for a federal contract, without the written approval of the Contracting Officer. The contractor shall notify the Contracting Officer promptly, in writing, whenever the contractor has been directed to evaluate or advise the government concerning its own products or services or those of another contractor or competitor for a federal contract.

(f) If this is an indefinite-delivery type contract under which supplies or services are provided via task or delivery orders, the word "contract" shall be read to include individual orders.

(g) Nothing in this clause is intended to prohibit the contractor from marketing or selling to the government its product lines in existence on the effective date of this contract, nor shall this clause prohibit the contractor from participating in any research and development or delivering any design, development model, or prototype of any such equipment. Sales of catalog or standard commercial items by the contractor are also exempt from the requirements of this clause.

(h) The rights and remedies described herein shall not be exclusive and are in addition to other rights and remedies provided by law or included elsewhere in this contract.

(i) The contractor shall include the provisions of this clause in all subcontracts, teaming agreements, or other contractual relationships that require or provide for access to information or performance of activities covered by this clause. The contractor shall substitute "subcontractor" or other terms for "contractor" wherever appropriate.
(End of clause)

15. In section 2452.215–70, revise the undesignated introductory paragraph, the undesignated introductory heading, and paragraph (c)(2) to read as follows:

2452.215–70 Proposal Content.

As prescribed in 2415.209(a), insert a provision substantially the same as the following:

PROPOSAL CONTENT (* * * 2006)

* * * * *

(c) * * *

(2) *Past performance.* The offeror shall provide evidence of the offeror's past performance in accomplishing work—including meeting delivery dates and

schedules—the same as, or substantially similar to, that required by the solicitation. The offeror shall provide references as described below. The offeror is responsible for providing accurate and current contact information for all references provided. The government shall not be responsible for any failure to contact references resulting from inaccurate or outdated information provided by the offeror. In evaluating the offeror's past performance, the government reserves the right to contact any of the references provided, but shall not be required to contact all of them. Furthermore, the government shall not be restricted to information obtained from references provided by the offeror and may use information obtained from other sources, including references not specifically provided by the offeror but which are known or become known to the government based on its review of the contractor's performance history. [Contracting Officer insert specific instructions for reference check information required].
* * * * *

16. Add section 2452.215–71 to read as follows:

2452.215–71 Small Business Subcontracting Evaluation.

As prescribed in 2415.304(c), insert the following provision:

SMALL BUSINESS SUBCONTRACTING EVALUATION (* * * 2006)

(a) *General.* In accordance with FAR 19.702, contractors shall provide the maximum practicable subcontracting opportunities to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. HUD is strongly committed to ensuring that such small businesses have maximum opportunities to participate in subcontracting with HUD prime contractors. Contractors that are unable to meet the established goal due to practical considerations must provide the rationale for the proposed level of subcontracting.

(b) *Subcontracting Goals.* In support of its commitment, HUD has established the following goals, which are expressed as a percentage of the total value of each contract and subsequent modifications:

(1) Small Business—[Contracting Officer insert percentage] percent.

(2) Within the total Small Business goal in (1), the following subordinate goals shall apply:

(i) Small Disadvantaged Business— [Contracting Officer insert percentage] percent.

(ii) Women-Owned Small Business— [Contracting Officer insert percentage] percent.

(iii) Service-Disabled Veteran-Owned Small Business— [Contracting Officer insert percentage] percent.

(iv) HUBZone Small Business— [Contracting Officer insert percentage] percent.

(c) *Evaluation.* In addition to the technical and management evaluation factors set forth

elsewhere in this solicitation, HUD will evaluate proposals in terms of subcontracting opportunities provided to small business concerns as described in the offeror's proposed subcontracting plan submitted in accordance with the provisions at 52.219-9 and 2452.219-70 in this solicitation. The evaluation shall consider the following:

(1) The total value of the proposed small business subcontracting effort as it relates to the total value of the offer for the prospective contract;

(2) The offeror's specific goals established for each of the following categories of small business:

- (i) Small Business;
 - (ii) Veteran-owned small business;
 - (iii) Service-disabled veteran-owned small business;
 - (iv) HUBZone small business;
 - (v) Small disadvantaged business; and
 - (vi) Women-owned small business;
- (3) Specific commitments to small business concerns; and

(4) The substantive nature of the work required by the solicitation that the offeror proposes to subcontract.

(End of provision)

17. Revise section 2452.237-75 to read as follows:

2452.237-75 Access to HUD Facilities.

As prescribed in 2437.110(e), insert the following clause in solicitations and contracts:

ACCESS TO HUD FACILITIES (* * * 2006)

(a) Definitions. As used in this clause—
Access means physical entry into, and to the extent authorized, mobility within, a Government facility.

Contractor employee means an employee of the prime contractor or of any subcontractor, affiliate, partner, joint venture, or team members with which the contractor is associated. It also includes consultants engaged by any of those entities.

Facility and Government facility mean buildings, including areas within buildings, owned, leased, shared, occupied, or otherwise controlled by the federal government.

NACI means National Agency Check with Written Inquiries, the minimum background investigation prescribed by the U.S. Office of Personnel Management.

"PIV Card" means Personal Identity Verification (PIV) Card, the federal government-issued identification credential (identification badge).

(b) *General.* The performance of this contract requires contractor employees to have access to HUD facilities. All such employees who do not already possess a current PIV Card acceptable to HUD shall be required to provide personal background information, undergo a background investigation (NACI or other OPM-required or -approved investigation), including an FBI National Criminal History Fingerprint Check, and obtain a PIV Card prior to being permitted access to any such facility in performance of this contract. HUD may accept a PIV Card issued by another federal agency but shall not be required to do so. No

contractor employee will be permitted access to a HUD facility without a proper PIV Card.

(c) *Background information.*

(1) For each contractor employee subject to the requirements of this clause and not in possession of a current PIV Card acceptable to HUD, the contractor shall submit the following properly completed forms: Standard Form (SF) 85, "Questionnaire for Non-sensitive Positions," FD-258 (Fingerprint Chart), and a partial Optional Form (OF) 306 (Items 1, 2, 6, 8-13, 16, and 17). The SF-85 and OF-306 are available from the Office of Personnel Management's (OPM) Web site: <http://www.opm.gov>. The Government Technical Representative (GTR) will provide all other forms that are not obtainable via the Internet.

(2) The contractor shall deliver the forms and information required in subparagraph (c)(1) to the GTR.

(3) The information provided in accordance with paragraph (c)(1) will be used to perform a background investigation to determine the suitability of the contractor employees to have access to Government facilities. After completion of the investigation, the GTR will notify the contractor in writing if any contractor employee is determined to be unsuitable to be given access to a Government facility. If so notified, the contractor shall immediately remove such employees from work on this contract that requires their physical presence in a Government facility.

(4) Affected contractor employees who have had a federal background investigation without a subsequent break in federal employment or federal contract service exceeding 2 years may be exempt from the investigation requirements of this clause subject to verification of the previous investigation. For each such employee, the contractor shall submit the following information in lieu of the forms and information listed in subparagraph (c)(1): employee's full name, Social Security Number, and place and date of birth.

(d) *PIV Cards.*

(1) HUD will issue a PIV Card to each contractor employee who is to be given access to HUD facilities and does not already possess a PIV Card acceptable to HUD (see paragraph (b)). HUD will not issue the PIV Card until the contractor employee has successfully cleared the FBI National Criminal History Fingerprint Check, and until HUD has initiated the background investigation for the contractor employee. Initiation is defined to mean that all background information required in paragraph (c)(1) has been delivered to HUD. The employee may not be given access prior to those two events. HUD may issue a PIV Card and grant access pending the completion of the background investigation. HUD will revoke the PIV Card and the employee's access if the background investigation process (including adjudication of investigation results) for the employee has not been completed within 6 months after the issuance of the PIV Card.

(2) PIV Cards shall identify individuals as contractor employees. Contractor employees shall display their PIV Cards on their persons at all times while working in a HUD facility

and shall present their cards for inspection upon request by HUD officials or HUD security personnel.

(3) The contractor shall be responsible for all PIV Cards issued to the contractor's employees and shall immediately notify the GTR if any PIV Card(s) cannot be accounted for. The contractor shall notify the GTR immediately whenever any contractor employee no longer has a need for his/her HUD-issued PIV Card (e.g., employee terminates employment with the contractor, employee's duties no longer require access to HUD facilities). In such cases, the GTR will instruct the contractor on how to return the PIV Card. Upon expiration of this contract, the GTR will instruct the contractor on how to return all HUD-issued PIV Cards not previously returned. The contractor shall not return PIV Cards to any person other than the individual(s) named by the GTR.

(e) *Control of access.* HUD shall have and exercise full and complete control over granting, denying, withholding, and terminating access of contractor employees to HUD facilities. The GTR will notify the contractor immediately when HUD has determined that an employee is unsuitable or unfit to be permitted access to a HUD facility. In such cases, the contractor shall immediately notify the employee that he/she no longer has access to any HUD facility, remove the employee from any such facility that he/she may be in, and provide a suitable replacement in accordance with the requirements of this clause.

(f) *Access to HUD information systems.* If this contract requires contractor employees to have access to HUD information system(s), application(s), or information contained in such systems, the contractor shall comply with all requirements of HUDAR clause 2452.239-70, Access to HUD Systems, including providing for each affected employee any additional background investigation forms prescribed in that clause.

(g) *Subcontracts.* The contractor shall incorporate this clause in all subcontracts where the requirements specified in paragraph (b) of this section are applicable to performance of the subcontract.
(End of clause)

18. Revise section 2452.239-70 to read as follows:

2452.239-70 Access to HUD Systems.

As prescribed in 2439.107(a), insert the following clause:

ACCESS TO HUD SYSTEMS (* * * 2006)

(a) *Definitions:* As used in this clause—
Access means the ability to obtain, view, read, modify, delete, and/or otherwise make use of information resources.

Application means the use of information resources (information and information technology) to satisfy a specific set of user requirements (see OMB Circular A-130).

Contractor employee means an employee of the prime contractor or of any subcontractor, affiliate, partner, joint venture, or team members with which the contractor is associated. It also includes consultants engaged by any of those entities.

Mission critical system means an information technology or

telecommunications system used or operated by HUD or by a HUD contractor, or organization on behalf of HUD, that processes any information, the loss, misuse, disclosure, or unauthorized access to, or modification of which would have a debilitating impact on the mission of the agency.

NACI means National Agency Check with Written Inquiries, the minimum background investigation prescribed by the U.S. Office of Personnel Management.

PIV Card means Personal Identity Verification (PIV) Card, the federal government-issued identification credential (*i.e.*, identification badge).

Sensitive information means any information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of federal programs or the privacy to which individuals are entitled under section 552a of title 5, United States Code (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

System means an interconnected set of information resources under the same direct management control, which shares common functionality. A system normally includes hardware, software, information, data, applications, communications, and people (see OMB Circular A-130). *System* includes any system owned by HUD or owned and operated on HUD's behalf by another party.

(b) *General.*

(1) The performance of this contract requires contractor employees to have access to one or more HUD systems. All such employees who do not already possess a current PIV Card acceptable to HUD shall be required to provide personal background information, undergo a background investigation (NACI or other OPM-required or approved investigation), including an FBI National Criminal History Fingerprint Check, and obtain a PIV Card prior to being permitted access to any such system in performance of this contract. HUD may accept a PIV Card issued by another federal agency but shall not be required to do so. No contractor employee will be permitted access to any HUD system without a PIV Card.

(2) All contractor employees who require access to mission-critical systems or sensitive information contained within a HUD system or application(s) are required to undergo a more extensive background investigation. The investigation shall be commensurate with the risk and security controls involved in managing, using, or operating the system or applications(s).

(c) *Citizenship-related requirements.* Each affected contractor employee as described in paragraph (b) shall be:

(1) A United States (U.S.) citizen; or

(2) A national of the United States (see 8 U.S.C. 1408); or

(3) An alien lawfully admitted into the United States for permanent residence as evidenced by an Alien Registration Receipt Card Form I-151.

(d) *Background investigation process:*

(1) The Government Technical Representative (GTR) shall notify the

contractor of those contractor employee positions requiring background investigations.

(i) For each contractor employee requiring access to HUD information systems, the contractor shall submit the following properly completed forms: Standard Form (SF) 85, "Questionnaire for Non-sensitive Positions," FD 258 (Fingerprint Chart), and a partial Optional Form (OF) 306 (Items 1, 2, 6, 8-13, 16, and 17).

(ii) For each contractor employee requiring access to mission-critical systems or sensitive information contained within a HUD system and/or application(s), the contractor shall submit the following properly completed forms: SF-85P, "Questionnaire for Public Trust Positions," FD-258, and a Fair Credit Reporting Act form (authorization for the credit-check portion of the investigation). Contractor employees shall not complete the Medical Release behind the SF-85P.

(iii) The SF-85, 85P, and OF-306 are available from the Office of Personnel Management's Web site: <http://www.opm.gov>. The GTR will provide all other forms that are not obtainable via the Internet.

(2) The contractor shall deliver to the GTR the forms and information required in subparagraph (d)(1).

(3) Affected contractor employees who have had a federal background investigation without a subsequent break in federal employment or federal contract service exceeding 2 years may be exempt from the investigation requirements of this clause subject to verification of the previous investigation. For each such employee, the contractor shall submit the following information in lieu of the forms and information listed in subparagraph (d)(1): Employee's full name, Social Security Number, and place and date of birth.

(4) The investigation process shall consist of a range of personal background inquiries and contacts (written and personal) and verification of the information provided on the investigative forms described in subparagraph (d)(1).

(5) Upon completion of the investigation process, the GTR will notify the contractor if any contractor employee is determined to be unsuitable to have access to HUD's system(s), application(s), or information. Any employee who HUD determines to be unsuitable may not be given access to those resources. If an unsuitable employee has already been given access pending the results of the background investigation, the contractor shall ensure that the employee's access is revoked immediately upon receipt of the GTR's notification.

(6) Failure of the GTR to notify the contractor (see subparagraph (d)(1)) of any employee who should be subject to the requirements of this clause and is known, or should reasonably be known, by the contractor to be subject to the requirements of this clause, shall not excuse the contractor from making such employee(s) known to the GTR. Any such employee who is identified and is working under the contract without having had the appropriate background investigation or furnished the required forms for the investigation, shall cease to perform

such work immediately and shall not be given access to the system(s)/application(s) described in paragraph (b) until the contractor has provided the investigative forms required in subparagraph (d)(1) for the employee to the GTR.

(7) The contractor shall notify the GTR in writing whenever a contractor employee for whom a background investigation package was required and submitted to HUD, or for whom a background investigation was completed, terminates employment with the contractor or otherwise is no longer performing work under this contract that requires access to the system(s), application(s), or information. The contractor shall provide a copy of the written notice to the Contracting Officer.

(e) *PIV Cards.*

(1) HUD will issue a PIV Card to each contractor employee who is to be given access to HUD systems and does not already possess a PIV Card acceptable to HUD (see paragraph (b)). HUD will not issue the PIV Card until the contractor employee has successfully cleared an FBI National Criminal History Fingerprint Check, and HUD has initiated the background investigation for the contractor employee. Initiation is defined to mean all background information required in paragraph (d)(1) has been delivered to HUD. The employee may not be given access prior to those two events. HUD may issue a PIV Card and grant access pending the completion of the background investigation. HUD will revoke the PIV Card and the employee's access if the background investigation process (including adjudication of investigation results) for the employee has not been completed within 6 months after the issuance of the PIV Card.

(2) PIV Cards shall identify individuals as contractor employees. Contractor employees shall display their PIV Cards on their persons at all times while working in a HUD facility and shall present cards for inspection upon request by HUD officials or HUD security personnel.

(3) The contractor shall be responsible for all PIV Cards issued to the contractor's employees and shall immediately notify the GTR if any PIV Card(s) cannot be accounted for. The contractor shall notify the GTR immediately whenever any contractor employee no longer has a need for his/her HUD-issued PIV Card (*e.g.*, the employee terminates employment with the contractor, or employee's duties no longer require access to HUD systems). The GTR will instruct the contractor on how to return the PIV Card. Upon expiration of this contract, the GTR will instruct the contractor on how to return all HUD-issued PIV Cards not previously returned. The contractor shall not return PIV Cards to any person other than the individual(s) named by the GTR.

(f) *Control of access.* HUD shall have and exercise full and complete control over granting, denying, withholding, and terminating access of contractor employees to HUD systems. The GTR will notify the contractor immediately when HUD has determined that an employee is unsuitable or unfit to be permitted access to a HUD system. The contractor shall immediately notify such an employee that he/she no longer has access

to any HUD system, shall retrieve the employee's PIV Card from the employee, and shall provide a suitable replacement employee in accordance with the requirements of this clause.

(g) *Incident response notification.* An incident is defined as an event, either accidental or deliberate, that results in unauthorized access, loss, disclosure, modification, or destruction of information technology systems, applications, or data. The contractor shall immediately notify the GTR and the Contracting Officer of any known or suspected incident, or any unauthorized disclosure of the information contained in the system(s) to which the contractor has access.

(h) *Non-disclosure of information.*

(1) Neither the contractor nor any of its employees shall divulge or release data or information developed or obtained during performance of this contract, except to authorized government personnel with an established need to know or upon written approval of the Contracting Officer. Information contained in all source documents and other media provided by HUD is the sole property of HUD.

(2) The contractor shall require that all employees who may have access to the system(s)/applications(s) identified in paragraph (b) sign a pledge of non-disclosure of information. The employees shall sign these pledges before they are permitted to perform work under this contract. The contractor shall maintain the signed pledges for a period of 3 years after final payment under this contract. The contractor shall provide a copy of these pledges to the GTR.

(i) *Security procedures.*

(1) The contractor shall comply with applicable federal and HUD statutes, regulations, policies, and procedures governing the security of the system(s) to

which the contractor's employees have access including, but not limited to:

- (i) Federal Information Security Management Act (FISMA) of 2002;
- (ii) OMB Circular A-130, Management of Federal Information Resources, Appendix III, Security of Federal Automated Information Resources;
- (iii) HUD Handbook 2400.25, Information Security Policy;
- (iv) HUD Handbook 732.3, Personnel Security/Suitability;
- (v) Federal Information Processing Standards 201 (FIPS 201), Sections 2.1 and 2.2;
- (vi) Homeland Security Presidential Directive 12 (HSPD-12); and
- (vii) OMB Memorandum M-05-24, Implementing Guidance for HSPD-12.

The HUD Handbooks are available online at: <http://www.hudclips.org/> or from the GTR.

(2) The contractor shall develop and maintain a compliance matrix that lists each requirement set forth in paragraphs (b), (c), (d), (e), (f), (g), (h), (i)(1), and (m) of this clause with specific actions taken, and/or procedures implemented, to satisfy each requirement. The contractor shall identify an accountable person for each requirement, the date actions/procedures were initiated/completed, and certify that information contained in this compliance matrix is correct. The contractor shall ensure that information in this compliance matrix is complete, accurate, and up-to-date at all times for the duration of this contract. Upon request, the contractor shall provide copies of the current matrix to HUD.

(3) The contractor shall ensure that its employees, in performance of the contract, receive annual training (or a single time if the contract is for less than one year) in HUD information technology security policies, procedures, computer ethics, and best

practices in accordance with HUD Handbook 2400.25.

(j) *Access to contractor's systems.* The contractor shall afford HUD, including the Office of Inspector General, access to the contractor's facilities, installations, operations, documentation (including the compliance matrix required under paragraph (i)(2)), databases, and personnel used in performance of the contract. Access shall be provided to the extent required to carry out, but not limited to, any information security program activities, investigation and audit to safeguard against threats and hazards to the integrity, availability, and confidentiality of HUD data and systems, or to the function of information systems operated on behalf of HUD, and to preserve evidence of computer crime.

(k) *Contractor compliance with this clause.* Failure on the part of the contractor to comply with the terms of this clause may result in termination of this contract for default.

(l) *Physical access to federal government facilities.* The contractor and any subcontractor(s) shall also comply with the requirements of HUDAR clause 2452.237-75 when the contractor's or subcontractor's employees will perform any work under this contract on-site in a HUD or other federal government facility.

(m) *Subcontracts.* The contractor shall incorporate this clause in all subcontracts where the requirements specified in paragraph (b) of this section are applicable to performance of the subcontract. (End of clause)

Dated: December 21, 2005.

Joseph A. Neurauter,

Chief Procurement Officer.

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