

Public Housing Authorities, Secretary's Notice PIH 97-7 (HA)
Representatives; State/Area Issued: 1/28/97
Coordinators; Directors, Public Housing Expires: 1/31/98
Divisions; Accounting Divisions;
Resident Management Corporations
(RMCs); Administrators, Offices of
Native American Programs; Indian
Housing Authorities

Lead-Based Paint Liability Insurance in the Public Housing and Indian
Housing Programs

PURPOSE

This Notice is to update the assistance and guidance provided in Notice PIH 94-49 to public housing agencies (PHAs) and Indian housing authorities (IHAs), hereafter referred to as HAs, in the purchase of liability insurance to protect against claims as a result of an occurrence arising out of the abatement/removal, or the testing for the presence of lead-based paint in the PH and IH programs. The rule regarding this subject was published in the Federal Register on June 21, 1994 (59FR31927), and became effective July 21, 1994. It amended Parts 905 and 965 to specify what HUD deemed reasonable insurance coverage, with respect to the hazards associated with testing for and abatement of lead-based paint.

This rule was promulgated in accordance with The Departments of Veterans Affairs and Housing and Urban Development Appropriations Act, Pub. L. 102-139, 105 Stat. 736 (approved October 28, 1991) ("1992 Act") which states:

"Hereafter, until the Department of Housing and Urban Development has adopted regulations specifying the nature and quality of insurance covering the potential personal injury liability exposure of public housing authorities and Indian housing authorities (and their contractors, including architectural and engineering services) as a result of testing and abatement of lead-based paint in federally subsidized public and Indian housing units, said authorities shall be permitted to purchase insurance for such risk as an allowable expense against amounts available for capital improvements (modernization): Provided that such insurance

is competitively selected and that coverage provided under such policies, as certified by the authority, provides reasonable coverage for the risk of liability exposure, taking into consideration the potential liability concerns inherent in the testing and abatement of lead-based paint, and the managerial and quality assurance responsibilities associated with the conduct of such activities."

Insurance that has been purchased in accordance with the above act will be considered as meeting the requirements of HUD until expiration of the current policy. Any renewal policy must be issued in compliance with the terms set forth in the insurance rule and this Notice.

BACKGROUND

In view of the scarcity of specialized insurance to cover this hazard, in 1990 HUD assisted HAs in preparing bid specifications and obtaining a master policy that would cover HAs and their contractors for claims arising out of the lead-based paint testing and abatement process. Through the competitive bidding process, the master policy contract was awarded to the American Empire Surplus Lines Insurance Company. This policy was effective October 1, 1990 and expired on October 1, 1993. Prior to expiration, American Empire notified the Department that they would not renew the policy, nor would they offer a bid on a replacement.

Pending the expiration of the master policy, the Department decided not to pursue obtaining another master policy for a number of reasons. First, a report to Congress by the Office of Inspector General (IG) (91-TS-108-0016) questioned HUD's extensive involvement in procurement of the policy. It was the IG's opinion that this was not a Federal procurement, but rather a local HA procurement, subject to Federal 24 CFR Part 85 and State procurement statutes and regulations. The IG also felt that such extensive involvement created the appearance of undue influence with HA's competitive processes for procuring liability insurance.

Secondly, at the time the master policy was obtained, there was very little legal mandate for organizations other than HAs to abate lead-based paint if it was present. However, since that time, Congress passed The Residential Lead-Based Paint Hazard Reduction Act of 1992, which is Title X of the Housing and Community Development Act of 1992 (42 U.S.C. 4851-4856), which requires other public and private housing owners to engage in lead-based paint testing and abatement. Also, some states have passed laws that impose strict liability upon property owners for lead poisoning caused by ownership of premises containing lead-based paint. Since contractors performing these operations need insurance when working for other housing owners, the Department was of the opinion that a master policy providing coverage for the contractor only while performing work for housing authorities was no longer necessary or practical.

ALTERNATIVES TO A MASTER POLICY

Since the master policy is no longer in effect, the HAs can insure against claims arising from lead-based paint testing and abatement hazards by two methods. The first alternative would be for HAs to purchase their own insurance as they did previously under the master policy, and have the contractor included as an insured. If the work is being done by HA employees, this is the only alternative. Insurance under this method may be more difficult to secure, since some of the insurance companies that are willing to insure contractors on a direct basis do not wish to issue policies covering the HA as the principal insured, primarily because they do not wish to insure a one job operation and prefer to establish a long term relationship with the contractor. A certificate of insurance verifying this coverage must be furnished to the HUD Field Office.

The second alternative would be for the HA to require that the contractor have in effect prior to beginning work, a liability insurance policy covering this hazard and that the HA be named on the policy as an additional insured. In order to verify that this has been done, the HA and the HUD Field Office must be furnished with a certificate of insurance signed by a representative of the insurance company verifying the addition of the HA as an additional insured, as well as the policy period, coverage, and limits of liability.

COMPETITIVE PROCUREMENT

If insurance is purchased by the contractor under the second alternative, the HA will not be involved in the procurement of insurance; therefore, the requirements of 24 CFR Part 85 do not apply. If the HA purchases insurance on a direct basis under the first alternative, the requirements of CFR 85.36 and 24 CFR 905 must be followed, unless coverage is purchased from a non-profit insurance entity that is owned and controlled by PHAs and approved by HUD, in accordance with 24 CFR 965.205. Currently, the Housing Authority Risk Retention Group (HARRG) is the only such entity meeting those requirements that provides lead-based paint liability insurance.

It should be noted that if the estimated cost on direct procurement does not exceed the \$100,000 small purchase limitation (or lower amount specified in the HA procurement policy, e.g., because of State law), the HA may solicit quotations by telephone or in writing from an adequate number of sources, and document their file to that effect.

INSURANCE REQUIREMENTS

Regardless of whether the insurance is purchased by the HA or the contractor, any policy insuring the operations must comply with the following minimum requirements:

1. Named Insured: See discussion under Alternatives to the master policy.
2. Policy Form: Occurrence, or if claims-made, it must contain an extended reporting period of at least five years.
3. Limits of Liability: Minimum of \$500,000 per occurrence, \$1,000,000 aggregate (if one is applicable). Although not a requirement, it is recommended that if the insurance is purchased by the contractor, the policy have an endorsement specifying that the aggregate apply on a "per project" basis.
4. Deductible: Maximum of \$5,000 if one is applicable.
5. Defense Costs: Payable in addition to, and not as a reduction of, the limit of liability. A limit on defense costs is permitted prior to becoming part of the limit of liability as long as the limit is not lower than \$250,000.
6. Cancellation: A minimum of 30 days advance Notice before cancellation is effective for any reason other than non-payment of premium.

The HA should require architects, engineers and consultants involved in any project involving lead-based paint testing and abatement, to carry professional liability (errors or omissions) insurance. However, the requirements of this Notice do not apply to that type of insurance.

In order to provide assistance to HAs in determining markets for this type of insurance, either for themselves on a direct basis or for contractors performing the work, attached to this Notice is a listing of insurance companies or brokerage firms of which the Department is aware will insure this exposure. However, this list should not be considered exclusive, since the insurance market is constantly changing. There may be some duplication involved since some of the brokerage firms may also represent some of the insurance companies on the list. We have also attempted to categorize the list according to whether the organization is an insurance market under the first alternative, the second alternative, or both.

If any additional information regarding this Notice is desired, please contact Arthur Methvin, Chief Insurance Examiner of the Office of Public and Assisted Housing Operations, Finance and Budget Division, Room 4210, 451 7th Street, S.W., Washington, D.C. 20410, telephone (202) 708-1872.

_____/s/_____
Kevin Emanuel Marchman
Acting Assistant Secretary
for Public and Indian Housing

Attachment

**INSURANCE COMPANIES AGENTS/BROKERS
OFFERING LEAD ABATEMENT GENERAL AND
PROFESSIONAL LIABILITY COVERAGE**

	<u>CODE</u>
Fidelity Environmental Insurance Company 105 Campus Drive - University Square P.O. Box 7006 Princeton, New Jersey 08543-1236 (800) 338-1236	3
United Coastal Insurance Company 233 Main Street P.O. Box 2350 New Britain, Connecticut 06050-2350 (203) 223-5000	3
Underwriters Reinsurance Company 22801 Ventura Boulevard Woodland Hills, California 91364 (Marsh & McLennan is the National Broker. Contact their local office)	3
Housing Authority Risk Retention Group (Public Housing Only) 677 South Main Street P.O. Box 189 Cheshire, Connecticut 06410 (1-800-873-0242, EXT. 256)	1
American Safety 1900 The Exchange, N.W. - #450 Marietta, Georgia 30339-2022 (800-388-3647)	3
Bonding and Insurance Specialists Agency, Inc. 717 South Wells Street Chicago, Illinois 60607 (312) 427-2951	3

Commerce & Industry Insurance Co. 2005 Market Street - #2800 Philadelphia, Pennsylvania 19103 (215) 981-7000	3
Creative Insurance Concepts 2600 Ridgewell Court Raleigh, North Carolina 27613 (919) 828-6885	2
ERIC 7257 S. Tuscon Way Englewood, Colorado 80112 (303) 792-9221 or 1-800-837-7065	2
American Empire Surplus Lines Co. P.O. Box 5370 Cincinnati, Ohio 45202 (513) 369-3000	2
L. Robert DeSanctis Insurance Agency, Inc. Ten Walnut Hill Park Woburn, Massachusetts 01801 (617) 935-8480	3
Murphy Insurance Group 400 Crown Colony Drive Quincy, Massachusetts 02169-0932 (617) 773-0087	3
National Environmental Coverage Corp. 747 Chestnut Ridge Road - #305 Chestnut Ridge, New York 10977 (800-552-0230)	3
Reliance National 77 Water Street New York, New York 10005 (212) 858-6649	3

Weakley and Company 3
P.O. Box 516065
Dallas, Texas 75251
(800-288-6099)

West Harrison Agency, Inc. 3
925 Westchester Avenue
White Plains, New York 10604
(914) 428-1500

Clark & Associates 3
9001 Crosstimber Drive
Charlotte, North Carolina 28215
(704) 599-0750

Market Codes:

1. Market for alternative #1
2. Market for alternative #2
3. Market for both