

9.

ACQUISITION

23 CFR 710.201(f) & (h)
49 CFR 24.102
49 CFR 24.106
49 CFR 24.203(a)(3)

REFERENCES

In order to facilitate the construction of a public improvement, it is imperative that the necessary real property interests be acquired expeditiously and consistent with governing rules and regulations. Acquisition is one of the most sensitive aspects of agency's activities since it involves direct personal contacts with the public where property valuation is

discussed.

As soon as possible, the owner shall be advised of the acquiring agency's interest in acquiring the real property and the basic entitlements, including the agency's obligation to secure an appraisal. The acquiring agency should provide the information through public meetings, hearings, notices, and correspondence in a timely manner.

The acquiring agency's primary goal during the acquisition process is to acquire the needed property interests through negotiations. The agent or negotiator plays an important role in achieving this goal. Negotiations should be conducted by a qualified member of the agency's staff. In cases where the acquiring agency has insufficient staff, fee negotiators may be used. If the use of fee negotiators is a frequent occurrence, this concept can be incorporated in the agency's approved procedures (the agency's right-of-way manual).

The negotiator shall make all reasonable efforts to personally contact each property owner or the owner's designated representative. The negotiator should attempt to make the appointment at a convenient time and place. The owner is entitled to receive an explanation of the right of way acquisition process which may be provided by an acquisition brochure. A sample brochure is contained on the

This Section deals with negotiating for real property. It covers negotiating requirements necessary to comply with Federal law as well as negotiating techniques that may be useful during this phase of project development.

SUMMARY

FHWA website. The owner must be given a written offer of the approved estimate of just compensation for the property to be acquired and a summary statement of the basis for the offer. The owner should be given a reasonable time to consider the offer and to present information which is believed to be relevant in determining the value of the property along with suggested modification in the proposed terms and conditions of the purchase. The acquiring agency must consider the owner's presentation, even though there is no obligation to accept the same.

If all reasonable efforts to make a personal contact with the owner have failed, or if the owner resides out of State and personal contact is not practical, the owner may be contacted by certified mail or other appropriate means. In addition, an alternative procedure as outlined in Section 9.3, Accelerated Negotiations (Negotiations by Mail), may be utilized under certain conditions.

The negotiator should strive to establish rapport with the property owner, inspire confidence in the correctness of the acquisition process and the fairness of the offer being made.

9.1. PROMPT OFFER TO ACQUIRE

The Uniform Act requires that the acquiring agency make a prompt offer to the property owner, one which is based on the agency's current estimate of just compensation.

Once the property valuation process has been completed, a written offer shall be made in the amount established as just compensation. Such a procedure ensures that the compensation offered is based on current values.

If delays occur between the time the estimate of just compensation is established and the time an offer can be made to the owner, the agency should reevaluate the offer amount to assure that the amount to be offered is still representative of the current market value.

It is prudent to have two people involved in establishing the amount of the offer of just compensation. In cases where the agency has waived the appraisal, the signing of an offer letter by management level personnel can be considered as an approval in lieu of an appraisal review.

ESTABLISHING JUST COMPENSATION

Occasionally, additional information may dictate a need for a revised offer. If an owner provides information, the acquiring agency must give that information appropriate consideration. Any revision should be documented providing an explanation of the reasons. A revised written offer should be made promptly to the property owner.

It is not unusual for property owners to become aware very early in the planning process that their property may be affected. By making a prompt offer, an acquiring agency can often dispel owner anxiety and dissatisfaction, thereby avoiding poor public relations. A prompt response by the acquisition agency in contacting the owner can result in settlement where it otherwise would not be attained.

9.2. WRITTEN OFFER

The acquiring agency's offer to purchase real property must be made in writing, which is in keeping with good business practices. The Uniform Act requires that the property owner be provided with a written statement of the amount established by the agency as just compensation along with a summary of the basis for the offer. (See Section 9.5)

In those instances where only a portion of the property is to be acquired, the statement must separately state the amount of compensation being offered for the property being acquired and a separate amount for damages to the remaining property, if applicable.

9.3. ACCELERATED NEGOTIATIONS (NEGOTIATIONS BY MAIL)

Historically, negotiations have been conducted in person when the owner is a state resident. Negotiation by mail is an optional approach intended to provide a benefit to the owner, to reduce agency staffing and travel cost, and to accelerate the acquisition process. ***This optional approach may involve complete negotiations by mail without personal contact, or a limited use of this approach such as the first offer by mail with follow-up personal contacts.*** Under this approach, the agency may mail:

- (1) the offer letter (See Section 9.2),
- (2) summary statement (See Section 9.5),
- (3) deed or option form,
- (4) property plat or sketch showing the effect of the taking, and
- (5) a brochure which explains the agency's acquisition program.

If the acquiring agency does not receive a timely response, there should be a follow-up telephone call. Any questions can be answered or, at the property owner's election, an appointment for a personal contact can be made. If a personal contact is required, negotiations will follow the normal negotiation process. The owner, however, can still sign the option or deed and return it to the agency by mail.

Reasonable requests for personal contacts by property owners should be honored. Having the written offer beforehand, allows the discussions to focus on substantial issues when a personal contact is necessary. Experience with this approach has proven to be very successful and shown significant savings on claims where there is no substantial question concerning the acquisition.

This accelerated process may not be utilized on parcels that require relocation of the owner.

9.4. PAYMENT BEFORE POSSESSION

The Uniform Act requires that no owner shall be required to surrender possession of real property before the acquiring agency pays the agreed purchase price, or deposits with the court for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

When an amicable settlement between the property owner and the acquiring agency has been reached, the agency should present the owner the agreed purchase price, in a timely manner. When the owner and the agency cannot reach agreement over a reasonable period of time, the agency will normally institute condemnation proceedings and deposit with the court or otherwise make money available in an amount not less than the approved appraisal. This amount may be withdrawn by the owner, and such action shall not jeopardize the owner's rights in the condemnation proceedings.

The acquiring agency may retain a reasonable portion of the purchase price in order to assure that the acquired property, including fixtures, is transferred to the agency in reasonably good condition. Such funds have to be made available to the owner not later than the agency's taking physical possession of the property.

In some circumstances, with the prior approval of the owner, the acquiring agency may obtain a right-of-entry before making payment available to an owner. This procedure could be used on an emergency project such as a natural disaster, a catastrophic failure, emergency repairs, a proclamation, or in the case where a delay in possession would constitute a substantial danger to the health or safety of the public. This procedure should not be used on a routine basis. This process should not become the routine but rather limited to cases where reasonable justification for its use exists.

9.5. SUMMARY STATEMENT

A Summary Statement must be provided to the property owner along with the written offer (See Section 9.2) at the time price is first discussed. The Uniform Act requires that a summary of the basis for the amount the acquiring agency

has established as just compensation for the proposed acquisition be provided to the owner(s). A Summary Statement must also be provided the tenant owner of any buildings, structures, or other improvements affected by the acquisition. The summary statement must set forth the minimum information that must be included so that the owner can make a reasonable judgement concerning the amount of the offer.

The following is a list of the minimum information to be included:

- a. The amount established as just compensation. (In the case of a partial acquisition, the compensation for the real property to be acquired and for damages to remaining real property shall be stated separately.)
- b. A description and location identification of the real property and the interest in the real property being acquired. The description does not necessarily mean a legal description of the property, but an identification which is understandable to the owner.
- c. Identification of buildings, structures, and other improvements (including building equipment and trade fixtures) considered to be part of the real property to be acquired.
- d. Where appropriate, the statement shall identify any separately held ownership interest in the property, e.g., a tenant-owned improvement, and indicate that such interest is not covered by the offer.

The agency may include any additional information that it deems appropriate or required by state law.

An example of a written offer and summary statement incorporating the minimum information required is illustrated in Figures 9-1 and 9-2.

9.6. 90-DAY NOTICE TO VACATE

The Uniform Act provides that no person lawfully occupying real property shall be required to move from a dwelling, a business site or a farm without a written notice from the acquiring agency at least **90 days** prior to the date by which such move is required. If the property has residences which must be vacated, the 90-day notices are not valid without a prior or accompanying notice of available comparable replacement housing.

The 90-day notice may specify the earliest date by which the property must be vacated or include a statement indicating that the occupant will be given an additional written notice at least 30 days in advance of the specific date by which the property must be vacated. In all cases, the occupant must have at least 90 days in which to vacate the property. In unusual circumstances, an

occupant may be required to vacate the property on less than 90 days' advance written notice if the person's continued occupancy of the property would constitute a substantial danger to the person's health or safety. A copy of agency's determination shall be included in the parcel file.

A 90-day notice to vacate is required in all cases, even if there is only personal property to be removed. Although project schedules sometimes are compressed, property owners and tenants must be allowed adequate time to relocate. In some instances, relocation will be completed by the occupants prior to the issuance of a 90-day notice, If this occurs, a notice is unnecessary.

LETTER PRESENTING WRITTEN OFFER

Name & Project # _____

Address: Parcel # _____

Salutation:

The State Department of Transportation is acquiring lands necessary for the construction of _____ in _____ County.

Public records indicate you are the owner of a parcel of land needed for the highway construction. We are offering \$_____ for the purchase of the property, property rights and improvements, if any * which includes the sum of \$_____ as payment for damages to your adjacent remaining lands caused by the acquisition of the portion of your land needed for the highway improvement. ** (As an alternate offer, we will acquire all of the land necessary for the project plus the uneconomic remainder for the sum of \$_____.)

This value is based on a professional appraisal made by a qualified appraiser to determine the fair market value of your property plus damages to the remainder, if any. The appraised value was reviewed by our Reviewing Appraisers to assure that you will receive just compensation for your property. The basis for the value set forth is summarized on the attached appraisal summary sheet.

*** Additionally, if you so desire you may retain the improvements located on this parcel of land for the sum of \$_____, which will be deducted from the total amount offered.

Enclosed is a brochure prepared by the Department explaining right-of-way acquisition. If you have any questions concerning the construction or acquisition details or the right-of-way plans furnished you, please contact me (phone, meeting, etc.) _____.

Very truly yours,

Right-of-Way Agent

Enc.

* Omit if no damages
** Omit if no uneconomic remainder
*** Omit if bare land
Note: Omit "if any" if not applicable

FIGURE 9-1

**OFFERING PRICE SUMMARY LETTER
LETTERHEAD OF ACQUIRING AGENCY**

Date: _____
Name: _____
Address: _____

Subject: Parcel # _____
Project I.D.: _____

Salutation:

This letter is our written offer to purchase (your property) (that portion of you property) which is needed for highway _____.

Our approved offer is \$ _____ for the needed right of way. This offer is based upon the attached appraisal(s) and is allocated as follows:

*Loss of land, including any improvements
and fixtures being acquired is: \$ _____
Damage to remaining property is: \$ _____*

A legal description of the area and interest in real estate to be acquired is attached, along with a copy of the right of way plat illustrating all property affected by the project and the names of all owners to whom offers are being made.

Our determination of just compensation: (1) Is based on the fair market value of the property; (2) Is not less than the approved, appraised value of the property; and (3) disregards any decrease or increase in fair market value prior to the date of valuation caused by the project for which the property is acquired.

Real estate taxes for the current year will be prorated as of the date of acquisition, based on the latest tax assessment.

Because of the nature of the acquisition, we do not propose to prorate taxes at the time of acquisition. If there is a reduction in next year's taxes because of the acquisition, you may wish a proration at that time. It will be necessary for you to furnish copies of tax receipts to us so correct computations can be made.

(Note: Use this clause on all minor acquisitions.)

The following structures, building equipment and fixtures have been considered as part of the real estate and are part of the property to be acquired:

(List structures, building equipment and fixtures.)

You have the right to retain any or all of these buildings or improvements for the established salvage value.

() Those items marked with an asterisk are owned by the indicated lessees or sublessees.*

(Note: Use this clause only when required.)

The following items are considered to be personal property and are not included in the acquisition:

(Note: Use this clause only where required.)

Sincerely,

FIGURE 9-2

9.7. NEGOTIATION REQUIREMENTS

The acquisition process is one of the most important parts of the agency's effort in the construction of a highway and it should be orderly and smooth. Although the process may move expeditiously or drag out over a long period of time, established requirements must be met to complete the process. These requirements are as follows:

1. Commencement of Negotiations

Negotiations can not begin until the acquiring agency determines the amount of just compensation to be offered. Just compensation is based on the estimated fair market value of the property as determined by an appraiser.

2. Separation of Functions

Negotiations must not be conducted by the person who appraised or was the reviewing appraiser for the property. The acquiring agency can establish procedures which will allow the same person to both appraise and negotiate on those acquisitions for \$2500 or less. Many state transportation departments have received waivers allowing the same person to appraise and negotiate for acquisitions valued at \$10,000 or less.

3. Reasonable Effort

Every reasonable effort shall be made to acquire, expeditiously, the real property by negotiations.

4. No Coercion

In no event shall the acquiring agency, in order to compel an agreement on the price to be paid for a property:

- (a) defer negotiations;
- (b) advance or defer condemnation; or
- (c) take any other action which may be coercive in nature.

5. Personal Contact

The acquisition agent shall make all reasonable efforts to personally contact each property owner or a designated representative. However, negotiations by mail is permissible when it would provide a benefit to the owner, reduce staffing requirements, and be more expedient than personal contact.

9.7.1. PRE-NEGOTIATION ACTIVITIES

When preparing for negotiations, the acquisition agent must assemble and prepare certain required acquisition documents and complete various administrative tasks as part of the preparation for negotiations. The agent

should complete these activities in accordance with the operational procedures.

9.7.1.1. OPTION/AGREEMENT - DEED

The acquisition agent must see to the preparation of the necessary conveyance documents. These documents must be reviewed for accuracy and completeness and should be consistent with the appraisal report with respect to the legal description and extent of the right-of-way taking. If the agency has included an uneconomic remnant in the right-of-way acquisition, two sets of documents may have to be prepared since the purchase can only be made with the consent of the property owner.

9.7.1.2. WRITTEN OFFER (See 9.2)

The agency's acquisition offer and a summary thereof must be prepared for presentation or mailing to the owner. Most agencies have developed a standard form letter or format for written offers. See Figure 9-1

9.7.1.3. NOTICES (See 9.6)

The agent prepares or coordinates the preparation of all notices which must be issued during the negotiation process. Since most notices are subject to the actual negotiation proceeding, the acquisition agent should have the responsibility for determining when they should be issued.

9.7.1.4. COORDINATION

Prior to contacting the property owner to initiate negotiations, coordination should take place with the other offices of the agency which are associated with the acquisition process. The relocation assistance and property management offices should be aware of the agent's time schedule for initiating parcel negotiations. The acquisition agent should be aware of any contacts, offers, explanations, and assistance the owner has received from the property management and relocation assistance agents. Similarly, the acquisition agent should have all pertinent information relative to property management and relocation assistance which he must convey to the property owner during the negotiation process.

In addition, the agent should be aware of any design changes in the vicinity of the property which might affect the subject parcel and/or the agency's estimate of just compensation.

9.7.1.5. APPOINTMENT SCHEDULING

When arranging meetings with property owners for negotiations, the acquisition agent must be careful not to put any undue burdens on the owners to satisfy his or her personal desires or schedule. The owner must be given as much control as possible over determining the date and time of the meeting.

The agent should maintain a courteous attitude at the onset of his or her contacts with the owner. The owner must be allowed the opportunity to ask questions which the owner feels are important. If the owner's questions focus on items or issues which the agent feels should wait until the personal visit, the agent should give a brief explanation and assure the owner that more details will be given during the scheduled meeting.

9.7.2. DOCUMENTATION REQUIREMENTS

The acquisition agent's responsibilities during the negotiation process also encompass recordkeeping activities. The agent must maintain timely and adequate records of negotiations on a parcel basis. The records are to be typed or written in ink and completed within a reasonable time after each contact with a property owner. Each record should be dated and signed by the agent.

9.7.2.1. ACTIVITY RECORDS

Activity records or logs should be maintained by the agent and kept on file. (See also Section 9.12) These records are important documentation of the activities conducted by the agent during the negotiation process. Such records should indicate the primary activities by the agent regarding the meetings with the property owner, appropriate property owner's comments and any other information on the parcel from outside sources. The agent may consider these records as a diary of all relevant activities on the parcel. Therefore, it is important to include all pertinent details in the entries made. The contents of these records could prove valuable if the case goes to court. These records can be combined with the required records of negotiation.

9.7.2.2. PROGRESS STATUS REPORT

In order to be fully in tune with the overall acquisition schedule, and to provide for an orderly and timely negotiation phase, the acquisition agent should maintain a progress status report. The status report enables the agent to have better control over his or her duties in administering the negotiation activities on an assigned project. The progress status report serves as an informational document for the agency in situations where the agent is suddenly unable to complete the assignment. It also could help another agent to pick up where the first left off.

The progress status report should be arranged to show the normal acquisition tasks to be performed with spaces available to record the dates the tasks were completed. Typical of the tasks which could be shown are contacts with owners, notices issued, date of offer, negotiation documents provided and other acquisition tasks where.

9.7.2.3. REVISED OFFERS

If the right-of-way acquisition is changed or the approved estimate of just compensation is revised, a revised offer and summary statement explaining the basis of the offer must be provided to the property owner. The agent must make every effort to complete all negotiation procedures and requirements when making revised offers.

9.8. UNECONOMIC REMNANTS

An uneconomic remnant is a parcel of the real property in which the owner is left with an interest after the partial acquisition of the owner's property, and which the acquiring agency has determined has little or no value or utility to the owner.

If the acquisition of only a portion of property would leave the owner with an uneconomic remnant, the acquiring agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project.

Uneconomic remnants may have utility and/or may have value. The ultimate test is whether they have utility or value to the present owner. It is up to the acquiring agency to make this determination. The acquiring agency is only obligated to make an offer to purchase the uneconomic remnant. The owner may decline the agency's purchase offer. The Uniform Act requires that the acquiring authority offer to acquire an uneconomic remnant. However, state law may provide authority to acquire such property using eminent domain if the agency wants to acquire the remnant.

The offer to acquire the uneconomic remnant may be made in the formal written offer of the acquiring agency or it may be a separate offer at the acquiring agency's discretion.

Federal funds may participate in the acquisition costs of uneconomic remnants whether or not the remnants are incorporated in the highway right-of-way. An uneconomic remnant incorporated within the right-of-way limits loses its identity and becomes part of the right-of-way. Should it no longer be needed for highway purposes, disposal of the incorporated area would be in the same manner as any other excess of highway rights-of-way (See Section 12.2).

If the acquiring agency elects to dispose of an uneconomic remnant, the amount credited to the State's property management account should be based on disposal by public sale or negotiations based upon appraised fair market value. When a credit to the state's property management account is required, the cost of disposition may be deducted from the sales price.

9.9. OWNER RETENTION OF IMPROVEMENTS

The agency determines whether any improvements in the acquisition area may be retained by owners on a project. Where the agency determines that improvements can be offered for retention, it is the agency's responsibility to determine a retention value. The agency's retention value determination should be available at the initiation of negotiations or within a reasonable period of time after the owner expresses an interest in retention. Retention value should normally be established by the acquiring agency through a comparative analysis of improvements sold at public sale.

Property owners are to be offered the full amount of just compensation and may elect to retain the improvements. When the owner is permitted to retain the improvement, the amount of the retention value should be deducted from the amount established as just compensation.

When improvements are retained, it is considered a good business practice to hold sufficient funds, i.e. performance bond, to ensure proper removal of the improvement and clean-up of the premises. The acquiring agency may establish a procedure of withholding from the just compensation, a portion of the salvage value of the retained improvement in lieu of a security deposit or bond to guarantee clean-up of the acquired site.

9.10. COERCIVE ACTION

Negotiations shall be conducted without any attempt to coerce the property owner into reaching an agreement. The negotiator should be careful not to imply that the negotiation is a "take it or leave it" situation. Condemnation as a threat shall be avoided.

Negotiations should be conducted in good faith and every attempt should be made to establish rapport with the property owners and occupants, to inspire confidence in the acquisition process, and to demonstrate the agencies willingness to work with the property owner in a positive manner.

9.11. PARCEL CLOSINGS

The final step to the acquisition stage of the project is the closing for the acquired parcel. This step includes obtaining releases, preparation of closing statement and deed, and payment of just compensation.

9.11.1. OBTAINING PROPERTY ENCUMBRANCE RELEASES

Obtaining property encumbrance releases on acquired property may be necessary in order to clear the title before closing the file. This process can be a simple or a complicated procedure depending on the interest acquired and the type of title information obtained by the agency. (See Section 5.2 - Title Documents) As a cost saving method, some States have established procedures to close on acquired properties without getting releases of encumbrances such as a partial mortgage release. In order to use such an

approach to parcel closing, the acquiring agency needs to evaluate the risk involved.

The following procedures have been useful to some States in parcel closings "subject to" encumbrances:

For normal, uncomplicated acquisitions with a value of \$2500 or less, the acquiring agency will clear no interest other than the possessory interest (fee owner, contract purchaser, utility easements, and when impacted, the lessee). In such cases, only minor clearing is necessary. In the event bankruptcy, delinquent taxes, judgments, mortgage or trust deed payment, etc. are discovered during negotiations, the acquiring agency should decide whether the interest will adversely affect the title and should be cleared.

The same criteria may apply to condemnations, except that the acquiring agency may pay off or clear the interest created by mortgages or trust deeds.

For acquisitions of fee ownership over \$2500, the acquiring agency may establish criteria for releases based on the type of title information obtained during the title search. (See Section 5.2.4 - Recommended Techniques) Except for minor or tenuous interests, all interests in the property determined to be detrimental to the State's interest should be cleared or releases obtained.

For acquisitions of easements, a policy of taking "subject to" encumbrance may be extended beyond the \$2500 limit if, in the judgment of the agency, the interest do not compromise the easement rights acquired.

9.11.2. PREPARATION OF SETTLEMENT STATEMENT AND DEED

The transfer of the title to the acquiring agency may require the payment of some incidental expenses by the owner. These incidental expenses are

IRS regulations require that the acquiring agencies follow IRS procedures for reporting on real estate transactions. The acquiring agencies should contact the IRS office regarding questions of interpretations.

REPORTING TRANSACTIONS

reimbursable under federal regulations. The federal regulations governing the incidental expenses are found in 49 CFR 24.106. The regulation also states that "whenever feasible, the agency shall pay these costs directly so that the owner will not have to pay such costs and then seek reimbursement from the agency."

The preparation of the settlement statement and the deed will generally follow the form prescribed by the State law.

9.11.3. PAYMENT OF JUST COMPENSATION

The Uniform Act requires that no owner shall be required to surrender possession of real property before the acquiring agency pays the agreed purchase price, or deposits with the court for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property. (See Section 9.4, Payment Before Possession)

9.12. NEGOTIATOR'S LOG

Negotiators must maintain adequate records of negotiations on a parcel basis in sufficient detail to demonstrate compliance with the federal laws. These records shall be retained for at least 3 years from the date of acceptance of the final voucher for the project but the requirements of the State, municipal, or private entities may be followed if a longer retention period is chosen or required.

The records are to be typed or written in ink and completed within a reasonable time after each contact with the property owner. The information for each contact should include, but is not limited to, the date and place of contact, parties of interest contacted, offers made (dollar amounts), counteroffers, reasons settlement could not be reached, and any other pertinent data. The records shall be signed and dated by the negotiator.

A negotiator's log is a necessary historical document relating the course of events leading to the acquisition. It may occur that the initial negotiator may not be able to continue the negotiations and without a complete record of the case a subsequent negotiator could be in a difficult position. Additionally, a review of the negotiating proceedings may indicate the possibility for an administrative or legal settlement. The Uniform Act requires certain acquisition practices that encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public improvement program, and to promote public confidence in public land acquisition practices.

When negotiations are unsuccessful and the negotiator considers further attempts to negotiate to be futile, the records should be documented with the negotiator's recommendations for appropriate future actions. (See Section 11, Settlements)

Upon completion of negotiations, the above records shall become a part of the project parcel file.

Under State law, negotiation records are usually confidential regarding their availability as public information. Unless applicable law provides otherwise, the confidentiality of the records is to be maintained by the acquiring agency.