



**U. S. Department of Housing and Urban Development
Office of Public and Indian Housing**

Special Attention of:

Public Housing Agencies;
HUD Directors of Public Housing;
PIH Program Center Coordinators;
Public Housing Division Directors;
Regional Directors; Regional
Environmental Officers; Field
Environmental Officers; Regional
Energy Coordinators

NOTICE: PIH-2009- 25 (HA)

Issued: July 30, 2009

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Cross Reference:

24 CFR § 85.36;

24 CFR § 965.305;

24 CFR § 965.308;

24 CFR § 990.170;

24 CFR § 990.180;

24 CFR § 990.185.

24 CFR § 965 Subpart C

PIH Notice – 2009-16(HA)

PIH Notice – 2008-25(HA)

PIH Notice – 2009-12(HA)

Subject: Energy Investment Guidance Under American Recovery and Reinvestment Act (Recovery Act) of 2009 (H.R. 1)

- 1. Purpose.** This Notice serves to provide energy investment guidance to public housing agencies (PHAs) regarding the American Recovery and Reinvestment Act of 2009 (Recovery Act). Additional information on Recovery Act Capital Fund activities can be obtained at:
<http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>
- 2. Effective Date.** This Notice is effective July 30, 2009 and expires July 31, 2010.
- 3. Background.** On February 17, 2009, the President signed the Recovery Act. This legislation includes a \$4 billion appropriation of Capital Funds to carry out capital activities for PHAs, as authorized under section 9(d) of the United States Housing Act of 1937 (“the 1937 Act”). On March 18, 2009, as directed by the Recovery Act, HUD obligated to PHAs \$2.985 billion in Capital Funds by formula. On May 7, 2009, HUD announced competitive requirements for the distribution of the remaining \$955 million. The remaining funds were transferred to the Salaries and Administrative Expenses and Working Capital Fund accounts.

Also on May 6, the Department of Energy and HUD published a Memorandum of Understanding (MOU) aimed at lowering barriers that have historically existed to the use of weatherization funds in public and assisted multifamily housing. The partnership supports the coordination of the use of \$16 billion including the \$4 billion in HUD capital funds for Public and Indian Housing appropriated by Congress through the American Recovery and Reinvestment Act.

- 4. Applicability.** This notice applies to public housing and provides guidance under the Recovery Act, Public Housing Operating Fund Program pursuant to 24 CFR § 990.185 (a), Energy Performance Contracts pursuant to 24 CFR § 965.305 (b), Subpart C, PIH Notice 2009-16(HA) and Public Housing Notice PIH 2009-12 (HA)-Information and Procedures for Processing American Recovery and Reinvestment Act Capital Fund Grants. Guidance in this Notice applies to Recovery Act Capital Funds used for energy improvements. Additional information on Recovery Act Capital Fund activities can be obtained at:
<http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>

- 5. Recovery Act Requirements.** PHAs must use these funds on Capital Fund eligible activities and comply with use of funds provisions, Five-Year Action Plan and Annual Plan requirements, restriction on use of funds provisions, obligation and expenditure of funds provisions and the obligation deadline in PIH Notice 2009-12(HA). **It is important that PHAs follow the timeline posted to the website at: <http://www.hud.gov/offices/pih/programs/ph/capfund/index.cfm> to obligate the funding.**

6. Energy Performance Contracts

Energy Performance Contracts (EPCs) are a financing technique that uses cost savings from reduced energy consumption to repay the cost of adding energy conservation measures (ECMs). HUD encourages PHAs to consider employing EPCs to attract private investment.

HUD guidance for EPCs can be found in PIH Notice 2009-16(HA) and at:

<http://www.hud.gov/offices/pih/programs/ph/phecc/eperformance.cfm>

HUD guidance for renewable energy and green construction practices in Public Housing can be found in PIH Notice 2008-25(HA).

7. The Use of Recovery Act Capital Funds for Energy Projects

Both Recovery Act and annual Capital Funds can be used for energy improvements as part of a larger modernization or development work or with PHA financing of energy improvements under the Capital Fund Financing Program. Recovery Act Capital Funds may not be used for utility payments or any operating subsidy add-ons or operating or rental assistance activities. There will be savings from the energy improvements, as there are usually operating savings from other physical

improvements, and benefit to the Operating Fund (reduced energy costs) of the PHA. However, these savings will not be considered along with savings of third party EPCs under Section 9(e)(2)(C) of the United States Housing Act and 24 CFR 990.185 and 965.308.

EPCs have a competitive advantage over the Capital Fund Financing Program and the use of traditional Capital Funds for energy improvements. The competitive advantage of an EPC is reflected in the financial leveraging through private investment and the use of HUD's energy incentives.

Under 24 CFR 990.185, a PHA may qualify for certain energy conservation incentives, e.g., the "frozen rolling base (FRB)" and the "energy add-on", if ECMs are financed by a third party. Recovery Act funds, similar to annual Capital Funds, are not considered "third party" funding sources with regard to the use of incentives. Recovery Act funds cannot be used to qualify for the special energy incentives. Recovery Act funds, however, can be used by PHAs to support energy improvements by replacing obsolete utility or building envelope systems, many of which have low paybacks.

For example, a PHA is contemplating a major upgrade at one of its projects. The total cost of the work is anticipated to be \$5 million, of which \$3 million is projected for heating and cooling system improvements (with high paybacks) and \$2 million for roofs, insulation, and windows (with low paybacks). Altogether, the work does not provide sufficient payback to attract private investment per an EPC; however, by splitting the work into high and low paybacks, the PHA can create a feasible EPC. Thus, the high payback work is done under an EPC and the low payback work is funded with Recovery Act funds.

If there are improvements funded by the Recovery Act Capital Funds, HUD incentives under an EPC will be applied only to the amount that is financed by a third party (e.g., Energy Services Company (ESCO) or bank). Utility savings generated from the measures funded by Recovery Act Capital Funds may not be included in the cash flow savings used to amortize the debt to third party financing. In addition, the PHA's energy improvements with Recovery Act Capital Funds must be reflected in their Five-Year Capital Fund Plan.

NOTE: When using an ESCO as part of an EPC, no lien or encumbrance is placed on public housing property. However, if the PHA is considering financing of an EPC with another third party, such as a bank, no liens may be placed on public housing rental property including any bank account, reserve or other personal property of the PHA. All public housing property is subject to the Declaration of Trust and use requirements of the Annual Contributions Contract and section 9 of the United States Housing Act of 1937. All public housing property is required to have a currently effective and recorded Declaration of Trust. Any secondary lien must be reviewed and approved by HUD Headquarters. Any Capital Fund finances or Operating Fund financing under section 9 or section 30 must be approved by HUD Headquarters.

8. Procurement Requirements Under the Recovery Act

PHAs shall give priority to Recovery Act Capital Fund Grant projects that can award contracts based on bids within 120 days from February 17, 2009. PHAs are required to obligate 100 percent of the formula funds made available to them under the Recovery Act within 1 year of the date on which funds become available to the PHA for obligation and this date to complete obligation would be March 17, 2010. They are required to expend 60 percent of the funds within 2 years of the date on which funds become available and 100 percent of the funds within 3 years of the date on which funds become available. The first expenditure deadline is March 17, 2011 and the final expenditure deadline is March 17, 2012. Procurement guidance using Recovery Act funds is provided in PIH Notice 2009-12(HA). In addition, the PHA must demonstrate that the energy project under consideration is viable before any Recovery Act Capital Funds are spent on a new 20-year project.

The Recovery Act states “*Provided further*, That notwithstanding any other provision of law, the Secretary shall institute measures to ensure that funds provided under this heading shall serve to supplement and not supplant expenditures from other Federal, State, or local sources or funds independently generated by the grantee.” Recovery Act Capital Funds may be used to purchase or supply additional energy improvements, e.g., to replace deteriorating energy infrastructure such as gas or water distribution lines. Recovery Act Capital Funds cannot be used to supplant or be used as a substitute for Federal, State, or local sources or funds already obtained or obligated or previously independently generated by the grantee. For example, using Recovery Act Capital Funds to pay off an existing debt would be considered supplanting.

As long as Recovery Act Capital Funds do not supplant or substitute for EPC expenditures, Recovery Act Capital Funds may be used in energy projects currently awarded or underway that are developed to promote measurable or calculable energy and water savings in public housing. The use of Recovery Act Capital Funds in cooperation with existing and pending EPCs is encouraged, when permitted. Cooperative use of the Recovery Act Capital Funds with an EPC may enable the PHA to implement measures with long paybacks that would not otherwise be possible, such as windows and renewable technologies. It also facilitates the implementation of energy-related capital measures, such as replacement of underground steam, water and gas lines. For agencies which have already procured energy performance contractors, no additional procurement is required to enable the contractor to perform the work using Recovery Act Capital Funds for a scope of work integral to the EPC, provided those energy improvement activities were in the original contract and provided that other funds were not previously obligated for that purpose and the procurement meets the Recovery Act procurement requirements (see Notice PIH 2009-12).

In a situation, however, in which a PHA has an approved EPC contract, but wishes to add an energy infrastructure improvement, e.g. replacing its gas piping distribution

system, the PHA must first determine pursuant to 24 CFR 85.36(d)(4) whether a contract for the additional item (gas piping) is infeasible under small purchase procedures, sealed bids or competitive proposals. Then, if infeasible under these competitive methods, the PHA must determine whether this additional item is available only from a single source or is there a public “exigency” or emergency for this work which will not permit a delay resulting from competitive solicitation. These determinations must be recorded in the PHA’s procurement files. The source of funds (if Recovery Act Capital Funds) can be the reason for the expediency determination.

If PHAs elect to use small purchase procedures under 24 CFR § 85.36 for the purchase of Energy Star products, PHAs are encouraged to use the Department of Energy’s (DOE’s) Quantity Quotes website, <http://quantityquotes.net> for procurement purchases above \$2,000 and below \$100,000. If at least three quotes are received using DOE’s Energy Star Quantity Quotes, then it satisfies both the 24 CFR § 85.36(d)(1) small purchase procedures and guidance provided in the Procurement Handbook 7460.8 REV 2, paragraph 5.2. If less than three quotes are received using DOE quotes, then the PHA must supplement the difference with other quotes which may include telephone quotes. DOE offers a ready list of energy contractors and consultants to assist participants in the Federal Energy Management Program (FEMP) at: http://www1.eere.energy.gov/femp/financing/superespcs_qualifiedescos.html. PHAs may want to consider vendors on this list to perform energy related activities. Many vendors on the list have energy background and experience in housing. PHAs electing to use the prequalified listing will still need to procure services under one of the 24 CFR § 85.36 methods and use Parts 965 and 990.

9. Maximizing the Use of Recovery Act Capital Fund Grants

Extension of an Existing EPC Projects

Under the Recovery Act, PHAs are required to prioritize capital projects already underway or included in their Five-Year Capital Fund Plan. Currently, there are approximately 168 projects that have 12-years EPCs in repayment. The 168 projects in repayment have an existing contract that can be extended without reprocurement.

If already included in the PHA’s Five-Year Capital Fund Plan, for extensions and additional improvements, PHAs should consider prioritizing the expansion of an existing EPC with new conservation measures by adding 8 years to the existing 12-year project, for a total term not to exceed 20 years.

An existing EPC, partnering with an ESCO, may be extended not to exceed 20 years without the re-procurement of energy performance contractors under current regulations. ECMs may be added or replace current ECMs in the original projects. Depending on the payback of ECM, the PHA may want to consider using Recovery Act Capital Funds for the added improvements, but improvements funded with Capital Funds cannot form the basis for extending the term to 20 years. Also, PHAs

must use the current regulation, 24 CFR 990.185 for amendments to existing EPCs unless a regulatory waiver is granted on a case by case basis for good cause.

For additional EPC improvements to the original project, the original utility baseline for each utility type as reported on form HUD-52722 (Operating Fund Calculation of Utilities Expense Level) is the basis for the extension. The baseline must be provided by site or project as described in the original contract. Savings from ECMs under the original EPC in cooperation with the savings from the new ECMs financed by a third party in the extension may be used to amortize the longer contract terms. In no situation may the original contract terms exceed 20 years.

A PHA may not extend an existing EPC contract by using Recovery Act Capital Funds. The extension is permissible only on the basis of extending the existing EPC contract and third party financing from 12 to 20 years. See PIH Notices 2009-16 and 2008-25 as amended by a final regulation published January 26, 2009 at 74 Federal Register 4637 and effective February 25, 2009, which eliminated the regulation waiver for a term change.

The cooperative role of Recovery Act Capital Funds would be for slower or neutral payback improvements. The EPC would have to generate sufficient savings in its cash flow to amortize its debt within the extended 8-year period for the additional energy measures funded by the third party. As an example, a PHA wishes to install solar panels on the roofs of its projects under an extension to the current EPC contract. In order to install the panels, the roof will need to be replaced or reinforced. The PHA extends the existing EPC project to purchase solar panels. At the same time, the PHA may use Recovery Act Capital Funds to replace or reinforce the roof. HUD's incentives under the EPC are eligible to be used on the contract extension, for only that portion of the project that is financed by a third party (i.e., the solar panels in this example).

For an amendment to an existing EPC contract, the PHA must submit its request directly to the local HUD Field Office for approval. For additional guidance on third party energy performance contracts, see Notice PIH 2009-16(HA).

Financing New 20-Year EPCs

Currently, PHAs are having difficulties financing projects that require a 20-year payback. Investors are preferring 12-year, perhaps 15-year but not 20-year contracts. Financing EPCs for only 12 years will eliminate initiatives to include sustainable materials and green or renewable energy sources because of their slower payback. Without the use of the Recovery Act Capital Funds, the current economic environment dictates smaller projects, lower conservation opportunities at higher interest rates and higher project costs.

PHAs with an approved Request for Procurement/Qualifications (RFP/Q) or further along in the EPC process, may use Recovery Act Capital Funds cooperatively with an

EPC. The PHA in its revision to the Five-Year Capital Fund Plan must demonstrate the need for the use of HUD funds in addition to the third party financing of the EPC.

For example, a PHA has a HUD approved \$10M energy project that requires 20 year financing to include roof replacement as part of its envelope restoration. The PHA finds that 20-year financing is unavailable to address all of its energy improvements; however, 15-year financing is available. The PHA may elect to use Recovery Act Capital Funds for the roof work, essentially accomplishing within a 15 year note, the work that was in the original 20 year EPC proposal.

A second example, a PHA has a \$10M energy project for 20 years at 6.5%. A year ago, the PHA could have gotten the same loan for 4-4.5%. The PHA elects to use Recovery Act Capital Funds to purchase slower payback items, such as windows, enhancing cash flow for the financed activities. An investment of 15-25% by the PHA, reduces investor risk, enhances cash flow and puts the PHA in a better position to negotiate for a lower interest rate. A lower rate means lowers project costs and can result in additional improvements. PHAs are encouraged to negotiate project guarantees with ESCOs to include conservation measures supplemented by Recovery Act Capital Funds.

For a new EPC, the PHA must submit its request directly to the local HUD Field Office for approval. For additional guidance on third party EPCs, see Notice PIH 2009-16(HA).

- 10. Use of Energy Star Products and Appliances** - The Energy Policy Act of 2005, section 152, states that in purchasing appliances, a PHA shall purchase energy-efficient appliances which are Energy Star products or FEMP-designated products, unless the purchase of energy-efficient appliances is not cost-effective to the agency. When purchasing energy products under Recovery Act, PHAs should ensure that they purchase Energy Star products or FEMP-designated products, unless the purchase of energy-efficient appliance is not cost-effective to the agency. They should also amend their procurement policies accordingly to reflect provisions in the Energy Policy Act of 2005.
- 11. Technical Assistance Resources Available to Support PHAs** - HUD's Public and Indian Housing Customer Service Center (CSC) staffed by DEVAL LLC can address questions related to HUD's public housing procurement policy as it relates to Recovery Act, energy conservation program and specifically to information contained in this Notice. Energy conservation information can be obtained through the CSC's toll free number 1-800-955-2232 or email PIHIRC@deval.us with your procurement or energy questions.

- 12. Reporting Requirements** - Guidance on data collection, reporting requirements and other Recovery Act provisions will be issued in future Notice(s). Any proposed information collection requirements will be submitted to OMB for review and approval.
- 13. Further Information**. Direct inquiries related to this Notice to CSC's toll free number 1-800-955-2232. You may also direct requests for technical assistance related to audits, procurement, training, templates or other energy guidance to the local HUD Field Office. HUD's Energy website is: <http://www.hud.gov/offices/pih/programs/ph/phecc/eperformance.cfm>. Dina Elani, Director of Public Housing may be contacted for any additional information at 202-402-2071.
- 14. Paperwork Reduction Act**. The HUD forms referenced in this notice are approved under the Paperwork Reduction Act - OMB Control Numbers 2577-0029 and 2577-0226.

/s/

Sandra B. Henriquez, Assistant Secretary
for Public and Indian Housing

PI: Distribution: R-3-1, (PIH), R-9, 138-7, 138-8