

## CHAPTER 18 – UTILITY PURCHASING, ENERGY CONSERVATION LOANS, & ENERGY PERFORMANCE CONTRACTING

*The PHA receives a subsidy add-on under 24 CFR 990.185 to cover the cost of amortizing the improvement loan during the term of the contract.*

### 18.1 GENERAL



This chapter discusses the contracting methods associated with energy conservation loans (subsidy add-on), energy performance contracting and utility purchasing. For additional information related to energy conservation opportunities, project planning, monitoring, performance contracting models, financing, and other related energy subjects, refer to the resources section cited in 18.6.

### 18.2 ENERGY CONSERVATION LOANS (OPERATING SUBSIDY ADD -ON)

Under this financing incentive, a PHA obtains a loan to finance energy improvements. The PHA receives a subsidy add-on under 24 CFR 990.185 to cover the cost of amortizing the improvement loan during the term of the contract. The add-on must not exceed the lesser of AOS project Costs or AOS Cost savings generated each year by the energy conservation measure(s) installed under this contract.

Before initiating an energy conservation loan, a PHA must procure a Comprehensive Energy Analysis (CEA) from a qualified vendor and must have the CEA, along with the list of identified improvements, reviewed and approved by HUD. HUD must also review and approve the loan document. The improvements are procured in the same manner as any other purchases addressed in this Handbook with the exception for

extensions in 24 CFR 990.185(a) to EPC contracts without the re-procurement of energy procurement contractors.

### 18.3 ENERGY PERFORMANCE CONTRACTING (FROZEN ROLLING BASE INCENTIVE)

- A. **General.** Energy performance contracting allows the PHA to qualify for the incentive to freeze the utility rolling base (see 24 CFR 990.185 and Notice PIH 2024-27). A PHA's utility expense level (UEL) will be calculated at the pre-retrofit consumption level. The PHA keeps 100 percent of the savings that result from the decreased consumption due to the energy efficiency measures installed, of which 75 percent must be used to pay off the debt and related project costs.
- B. **Third-Party Energy Performance Contracts (EPCs).** With a third-party EPC, the energy performance contractor must be procured in a manner that provides full and open competition consistent with the instructions in this handbook and 2 CFR 200.317-327 with the term and re-procurement exception in 24 CFR 990.185(a). Typically, this means procurement by competitive proposals. For third-party EPCs, HUD approval is required of:
- 1) The CEA, which the PHA must procure from a qualified vendor.
  - 2) The RFP for the energy contractor, prior to advertisement. Approval will be based upon a determination by HUD that payments under the contract can be funded from the reasonably anticipated energy cost savings.
  - 3) The final energy performance contract negotiated between the PHA and the energy performance contractor.
- C. **Self-Managed Energy Performance Contracts.** PHAs may, at their discretion, seek to self-manage an energy performance contract. The energy improvements are procured in the same manner as any other purchases addressed in this handbook. PHAs must be designated Standard Performers or High Performers under the Public Housing Assessment System (PHAS) to complete energy projects without an energy services company. HUD will consider requests on a case-by-case basis from PHAs designated as Troubled under PHAS when the PHA is able to show it has the appropriate capabilities to successfully complete the project. For self-managed EPCs, HUD approval must be secured for the following:
- 1) In lieu of the RFP commonly used with third-party EPCs, the PHA must provide a detailed energy project plan. The project plan will include an assessment of its facility needs; PHA statement of capabilities and internal project processes; an assessment of the agency's energy opportunities, including capital costs and estimated savings; financial cash flow projections; a project commissioning and preventative maintenance plan; and a Measurement and Verification (M&V) plan. PHAs must have on their team a licensed (bonded) professional engineer familiar with performance contracting, commissioning, M&V standards, State, and local codes.
  - 2) An initial plan must be submitted to the HUD field office for review and approval to proceed. After a detailed engineering study is completed, the PHA will submit its detailed project plan for field office review and approval. The detailed study will be based on actual quotes for

construction, finance, maintenance, and other costs. The PHA must also identify how it will complete design and construction and integrate the energy project with its ongoing modernization program. Included in its energy project plan the PHA will include a detailed description of its construction management practices and associated financial controls. The description should include protocols for design, construction inspections, construction draws, and requisition approvals.

## 18.4 UTILITY PURCHASING

Deregulation and restructuring in the utility industry allows utility providers to operate like other open markets, with greater competition and choices. These changes offer utility consumers such as PHAs an opportunity to achieve lower utility costs by purchasing energy directly from the utility providers at lower rates based on a direct rate reduction or from new consumer rate strategies. Where deregulation has occurred and there are multiple providers, PHAs must competitively procure utilities in accordance with 2 CFR 200.317-327.

Alternately, where deregulation has not occurred (a publicly regulated rate environment where there is one utility provider for gas, electric, fuel, oil, and/or water), the PHA is not required to competitively procure utilities. Further, unlike other single source procurements, the PHA does not need to justify the reasonableness of the price charged or require HUD approval.

## 18.5 RATE REDUCTION INCENTIVE

The Rate Reduction Incentive (RRI) is a financial incentive for PHAs that pursue special and significant efforts beyond what is required by statute and/or regulations to reduce their utility rate. The PHA's action must exceed the activities required by statute and/or regulation. Pursuant to HUD regulation 24 CFR 990.185(a), a PHA will be eligible for a rate reduction if a PHA takes action beyond normal public participation in rate-making proceedings, such as wellhead purchase of natural gas, administrative appeals, or legal action to reduce the rate it pays for utilities. Generally, the RRI evenly divides the financial benefit of the lower utility rate between the PHA and HUD (i.e., 50 percent to the PHA and 50 percent to HUD). RRI financial benefits, which are provided through the Public Housing Operating Fund Grant, increase funding eligibility, and thus may be used for any eligible Operating Fund Grant activities allowable under Section 9(e) of the Housing Act.

## 18.6 POWER PURCHASE AGREEMENTS

Power Purchase Agreements (PPAs) are contracts that are procurement funding tools that allow a third-party to develop and construct a solar power facility which is a proven vehicle to accelerate the development and production of energy from renewable sources and reduce electricity generated from high-emitting fossil fuels. PHAs have used a mixture of finance methods to procure solar energy. PPAs may be executed within an EPC or as a separate agreement under regulatory conditions specified below. Some PHAs are seeking PPAs due to the benefits that intrinsically exist within a PPA: no large upfront capital cost, greenhouse gas emission reduction through using solar power, low or no operations and maintenance

costs, a fixed or known price for electricity for 10-25 years depending on the PPA term, low operational risks, and sometimes increased property value due to solar power production.

Power Purchase Agreements are funding tools that allow a third-party developer to develop and construct a solar power (or other renewable energy) facility either on-site (PPA) or off-site (Virtual PPA or VPPA) of the customer's property. The developer assumes ownership operations and maintenance responsibilities as well as risk for the project. PPAs eliminate the need for large up-front capital investment by the customer(s), permitting the owner to recover the project costs through the term of the PPA/VPPA via fixed or expected electricity rates to the customer(s). If there is excess production (solar energy not used on site) for PPAs and all the offsite production for VPPAs, the electricity is sold to the local utility provider through interconnection to the power grid, the distribution of the solar credit is included in the PPA/VPPA, and the customer receives a solar credit with their utility invoice from their utility provide.

## 18.7 CONTRACTING CONDITIONS FOR PPAS

- A. **Contracts for PPAs may be executed within an EPC.** The PIH Energy Branch will review when there is an agreement related to an energy performance contract. The energy conservation measures must be financed by an entity other than HUD (that is, a private loan); and the reasonably anticipated energy savings must be sufficient to cover all of the EPC-related debt service that will accrue within 20 years under the contract. Process is subject to EPC Approvals pursuant to Notice PIH 2024-27 or most recent notice.
- B. Contracts shall not exceed a period of five years, including options for renewal or extension.
- C. Contracts, other than energy performance contracts, with terms, plus extensions, that exceed a total of five years are viewed as restrictive of competition and in violation of 2 CFR Part 200 procurement requirements and pursuant to 2 CFR 200.319 (a): "All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and § 200.320."
- D. HUD's field office may approve contracts of more than five years if PHA provides evidence that there is no practical alternative. In such cases, supporting documentation for the evidence (e.g. comparative market options from several solar developer vendors per 2 CFR Part 200) is required showing why no practical alternative exists, how it was determined, and cost analysis to show "cost reasonableness" per 2 CFR 200.404. If a contract exceeds five years, a provision for "termination for convenience" must be included. The provision must explicitly address termination payments, if applicable. For termination payments, the provision must use reasonable cost standards described in 2 CFR 200.404. Termination payments cannot be structured in a way that makes termination uneconomical or serves as a barrier.
- E. Consistent with Section 9(e) of the Housing Act and 24 CFR 990.185, the contract period shall not exceed 20 years.

## 18.8 ONSITE PRODUCTION

In situations where the solar or renewable energy production facility is built onsite, there are additional considerations:

- A. A request for solar energy producing equipment on public housing property is subject to HUD requirements of the ACC and may be subject to 24 CFR Part 970.
- B. A number of provisions in the Housing Act authorize HUD to restrict the use of real property and authorize the use of deed restrictions to ensure the low-income character of public housing and (see for example Section 6(a), 9(d), and 9(e) of the Housing Act), and to regulate the disposition of public housing property (see Section 18 of the Housing Act). HUD establishes and enforces its right to restrict the property through various means (e.g., the ACC, and the Declaration of Trust (or Restrictive Covenants) (DOT/DORC)). Under the ACC, PHAs are prohibited from disposing or encumbering public housing property without prior written approval from HUD, except for dwelling leases with eligible families for units covered by the ACC and normal uses associated with the operation of the project.
- C. Section 18 of the Housing Act governs the demolition and disposition of public housing property. Disposition means the conveyance or other transfer by the PHA, by sale or other transaction, of any interest in the real estate of a public housing project (see 24 CFR 970.5 for the definition of disposition) and subject to the exceptions stated in 24 CFR 970.3. These exceptions include but are not limited to the following:
  - 1) Leasing of dwelling or non-dwelling space incidental to the normal operation of the project for public housing purposes (see 24 CFR 970.3(b)(4)).
  - 2) Easements, rights-of-ways, and transfers of utility systems incidental to the normal operation of the public housing (see 24 CFR 970.3(b)(7)).
  - 3) Units or land leased for non-dwelling purposes for one year or less (see 24 CFR 970.3(b)(10)).
- D. **Required HUD Approvals.** PHAs are responsible for determining if a third-party agreement is subject to HUD review and, if so, whether such review must be done by HUD's Special Applications Center (SAC) under 24 CFR Part 970 or the local HUD field office under the ACC and Notice PIH 2017-24 or current PIH notice. PHAs analyze the following in making this determination:
  - 1) *PHA Disposition.* Defined by 24 CFR 970.5 as the agreement that conveys or otherwise transfers any interest in real estate of the public housing and does not fall into one of the exceptions in 970.3(b). Dispositions require SAC approval. Even when SAC approval is not required, field office approval may be required such as with third party agreements (e.g., easements) impacting the use of the public housing property (see Notice PIH 2017-24). If SAC approval is not required, the PHA needs to perform the ACC analysis below.
  - 2) *PHA ACC Analysis.* Does the agreement fall into an exception in the ACC? Specifically, is the agreement for "normal uses associated with the operation of the project(s)"? If yes, HUD approval is generally not required and the PHA may enter into the agreement. If no, field office approval is required (see Notice PIH 2017-24).

- E. Below is a list of some of the factors and questions that HUD must consider before approving or recommending approval of third-party agreements and the creation of encumbrances on public housing property.
- 1) *Site or Premises.* Third-party agreements should specify the type of land or structure the tenant may use and how they will access the property. For example, will there be a facility, tower, or solar panels on open land, or equipment on an existing structure? A facility, tower, or solar panels on an otherwise vacant piece of public housing property may prevent future development of the site, and the length of time in which it may be encumbered will determine if it is a disposition. Generally, a lease for a period of more than a year (unless it falls under the 970.3(b)(10) exception) is a disposition. Equipment on the roof may involve a lease for the rooftop, but there will also be an easement or some kind of right-of-way giving the third-party access to the rooftop. Specifying exactly where the tower or other equipment will be and exactly how the third-party may access the premises will prevent the third-party obtaining the right to an entire public housing parcel of land and ensure that the encumbrance is properly identified and limited in scope. The lease should also specify the purpose and type of equipment. For example, is the equipment a cell phone tower, rooftop antennae, or solar panels?
  - 2) *Rent or Proceeds.* HUD generally defers to PHAs to negotiate the rent or proceeds of a third-party agreement. Rent payments will either be Section 18 proceeds or Section 9(k) of the Housing Act nonrental program income. Section 18 proceeds must be used in accordance with 24 CFR 970.19, and non-rental program income must be used in accordance with Section 9(k) of the Housing Act. Furthermore, if the third-party agreement constitutes a Section 18 disposition, then PHAs must be cognizant that Section 18 requires disposition proceeds to be at fair-market value unless there is commensurate public benefit (see 24 CFR 970.19(a)).
  - 3) *Term.* What is the term of the third-party agreement? How are renewals or extensions structured? Typically, third-party agreements involving cell towers, cell antenna, or solar farms will have terms of 5 to 20 years (often in the form of an initial five-year term with one to three renewals at the third-party's option). Thus, most third-party agreements will not be able to fall into the Section 18 disposition exception at 24 CFR 970.3(b)(10) for "[u]nits or land leased for non-dwelling purposes for one year or less." Even a third-party agreement that initially appears to fall into 24 CFR 970.3 (b)(10) may require a Section 18 disposition review if the lease contains automatic renewals at the third-party's option (see the example in Footnote 1, Notice PIH-2017-24). Automatic renewals are particularly problematic if the third-party agreement stems from a procurement because HUD typically considers contracts for more than five years as "anti-competitive," in violation of procurement requirements.
  - 4) *Interference with the Operation of Public Housing.* PHAs are required to operate their public housing programs in compliance with the Housing Act and the public housing ACC. The public housing ACC states that PHAs "shall at all times develop and operate each [public housing] project solely for the purpose of providing decent, safe, and sanitary housing for eligible families in a manner that promotes serviceability, economy, efficiency, and stability of the projects, and the economic and social well-being of the tenants." Thus, third-party agreements cannot make the public housing use secondary to that of the third-party; public housing operations must be paramount. The agreement should not conflict with or impair the operations of the PHA's public housing program. For example, the agreement should address: (1) the temporary relocation of equipment to permit project maintenance and (2) the access a

third party will have to the site or premises (e.g., escorted, pre-approved). Although not a requirement, PHAs should consider including a provision that ensures the agreement will not adversely impact the operation of the public housing property, including the impact on residents (health and safety) and the impact on the physical property (structural integrity) (see Section 6, page 3 of Notice PIH 2017-24).

- 5) *Assignment*. Does the third-party agreement permit assignment? Generally, if the agreement involves a Section 18 disposition of vacant public housing property, HUD does not prohibit assignment because the property is being removed from the PHA's public housing inventory. However, assignment of public housing property could not be entered into unless approved under Section 30 of the Housing Act.
- 6) *Termination*. Can the PHA terminate the third-party agreement for convenience? If so, will the PHA need to pay an early termination fee to the third-party? Generally, if the agreement involves a Section 18 disposition of vacant public housing property, HUD does not dictate termination provisions because the property is being removed from the PHA's public housing inventory. However, if the agreement stems from a competitive procurement process, the agreement must address and provide for a PHA's termination for convenience (see 8B of Appendix II of 2 CFR Part 200 regarding contracts more than \$10,000). If the agreement requires the PHA to pay an early termination fee, the PHA may not use public housing funds (or public housing program income) to pay the fee. If the PHA has plans to redevelop or dispose of the public housing property, it should scrutinize its termination rights under the agreement and plan accordingly.
- 7) *Use of Public Housing Funds*. Public housing funds (Capital and Operating Funds), Section 18 proceeds, and Section 9(k) nonrental program income can only be used for eligible activities as defined in the Housing Act. Thus, no public housing funds, Section 18 proceeds, or Section 9(k) nonrental program income will be expended in connection with a third-party agreement. For example, HUD will not permit a PHA to use public housing funds, Section 18 proceeds, or Section 9(k) nonrental program income to: (1) purchase liability insurance to cover liabilities associated specifically with the agreement; (2) indemnify the third-party (including a pledge with public housing property); (3) provide utilities to the third-party's equipment (including providing equipment lighting); (4) maintain the third-party's equipment; or (5) pay for attorney's fees associated with the agreement. Although not a requirement, PHAs should consider including a conflict clause that states that the third-party agreement does not impose on the PHA any duty, obligation, or requirement which conflicts with statutes, regulations, ACC, and other HUD requirements.
- 8) *Amendments*. Third-party agreements should state when agreement amendments require HUD approval. Generally, if the agreement involves a Section 18 disposition of vacant public housing property, HUD does not require HUD approval of any amendments because the property is being removed from the PHA's public housing inventory. However, if the agreement involves an encumbrance that is less than a Section 18 disposition (e.g., rooftop lease), HUD approval of amendments is required.
- 9) *Subordination*. Third-party agreements should contain a clause that subordinates the agreement to the public housing ACC and the DOT recorded on the affected public housing property. HUD will not consent to subordinating the DOT and will not approve a non-disturbance clause or agreement. If a memorandum of lease is being recorded against the public housing property, a memorandum of termination must be recorded at the end of the

lease. The termination of lease memorandum would, ideally, be held in escrow pending lease termination or expiration. Prior to HUD approval of a third-party agreement, the PHA must provide evidence that there is an effective DOT/DORC recorded on the affected public housing property, that any other agreements are in subordinate position to the DOT/DORC and that the PHAs right to ensure its public housing residents' right to use and quiet enjoyment of the property is preserved.

- F. **SAC Approval.** SAC will be required to approve dispositions as described in 24 CFR Part 970 and PIH notices.

## 18.9 PROCUREMENT REGULATIONS PERTAINING TO ENERGY CONSERVATION LOANS & ENERGY PERFORMANCE CONTRACTING

Conceptually, both strategies are nothing more than financing methods that result in energy savings over a period. Both operate within the guidelines of all Federal procurement regulations specified elsewhere in this Handbook.

- A. PHAs must adhere to applicable State and local procurement requirements, as well as the PHA's procurement policy. For example, the PHA must include the Form HUD-5370\*, General Conditions of Contracts for Construction, with all construction contracts for more than \$350,000 or Form HUD-5370-EZ\* for construction contracts between \$2,000 and \$350,000;
- B. PHAs must treat the energy conservation measures as any capital program and follow requirements for Federally funded construction projects;
- C. In capturing the savings, PHAs must conform to the requirements defined in the Operating Fund rule (24 CFR Part 990); and
- D. With respect to third-party EPCs, negotiating terms and conditions can be a crucial component of the procurement process.

## 18.10 RESOURCES

Additional information and expertise on energy conservation loans, energy performance contracting, and other energy conservation measures can be found at:

### A. Relevant Public Housing Notices and Guidebooks

- 1) The Public Housing Energy Branch webpage at: <https://www.hud.gov/helping-americans/public-housing-energy-branch>
- 2) Funding Information is available at:
  - a. Database of State Incentives for Renewables and Efficiency (DSIRE): <https://www.dsireusa.org>
- 3) Guidance on Energy Performance Contracts prepared by HUD 7/11. Notice PIH 2024-27 and Notice PIH 2024-31 provide supplementary guidance on financial incentives to promote energy

conservation and is available at: <https://www.hud.gov/sites/dfiles/OCHCO/documents/2024-27pihn.pdf>

- 4) Any successor or related notices, handbooks, or guidebooks available on HUDClips at: <https://www.hud.gov/hudclips>

- B. **Local HUD.** From the beginning of the planning process, view the local HUD field office as a partner in the process. Involving the HUD field office early and throughout the project should help to obtain a timely review and approval by HUD. HUD is required to approve key documents in the process and will be able to provide guidance proactively to expedite the approval process. The local HUD field office will be able to provide information on other PHAs using performance contracting and sources of technical assistance in the area.
- C. **Consultants.** If no relevant technical expertise exists within the PHA, the PHA should consider engaging the services of a qualified consultant. These fees can be paid from the savings generated or the capital budget. (Note: Such an individual or firm may not later be included, or compete, in a solicitation for the energy performance contract. Other Federal and private energy-conservation programs or local utility providers.
- D. **Energy Branch, Financial Management Division, Office of Public Housing Programs.** For questions regarding utilizing Operating Fund Incentive Programs (Energy Performance Contract (EPC); Utility Partnership Program (UPP); Rate Reduction Incentive (RRI); or Small Rural Frozen Rolling Base (SR-FRB)) contact the Energy Branch at [PHFMDEnergyBranch@Hud.gov](mailto:PHFMDEnergyBranch@Hud.gov).
- E.

E. Other PHAs, who have successfully implemented these utility conservation measures.