

**Recovery Act Capital Fund Formula Grant
Frequently Asked Questions #2
As of October 5, 2009**

Notice PIH 2009-12 entitled, "Information and Procedures for Processing American Recovery and Reinvestment Act Capital Fund Formula Grants" has been posted. The Notice can be found at: <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>

The Notice provides additional guidance regarding the recent award of \$2.985 billion in Capital Fund formula grant funds pursuant to the Recovery Act, including uses (and restrictions on use) of funds.

GENERAL

Q7: Can I develop new ACC units using Recovery Act funds that exceed the October 1999 unit count?

A7: Yes. The Capital Fund section of the Recovery Act provides "That notwithstanding any other provision of law....any restriction of funding to replacement housing uses shall be inapplicable." Therefore, section 9(g)(3) of the United States Housing Act of 1937 is inapplicable with regards to this funding and PHAs can construct and/or acquire new public housing without the restrictions in section 9(g)(3) when using Recovery Act funds. If other Public Housing funds are used along with Recovery Act funds to develop the units then section 9(g)(3) would apply. PHAs should continue to follow Part 941 and submit their Development Proposal for HUD review.

Q7(a): Can you provide additional clarification on the use of Recovery Act funds to construct, acquire and rehab units that exceed the PHA's October 1999 unit count, also known as the Faircloth limit?

A7(a). The Faircloth limit is the statutory limit pursuant to Section 9(g)(3)(B) of the United States Housing Act of 1937, which states that PHAs can not receive funding for units that they construct, acquire or rehab that exceed the number of units the PHA had as of October 1, 1999 .

As stated in the FAQ on Recovery Act funds, the Recovery Act contains a provision that allows housing authorities to use ARRA Capital Funds to construct, acquire, rehab units that go above the Faircloth limit, and housing authorities can receive operating and capital funding for those units in accordance with the Operating Fund and Capital Fund formula processes. However, the Faircloth limit can only be exceeded if the PHA uses ARRA Capital Funds only. If other public housing funds (e.g., traditional Capital Funds, Replacement Housing Factor Funds, HOPE VI funds) are used in conjunction with ARRA Capital Funds then the Faircloth limit applies, which means the PHA can not receive operating and capital subsidy for those units built above the limit.

All housing authorities that want to bring non-Federal units (including state public housing units) into their Federal portfolio and receive subsidy must do so in accordance with the development process as set forth in 24 CFR 941. If the PHA wants to acquire or do conventional development, the PHA should submit a proposal to the Field Office for review and approval. If the PHA wants to do mixed finance development with tax credits, the PHA should submit its proposal to HUD Headquarters.

PHAs should be reminded that all units must meet UPCS standards and will be subject to the requirements of Section 504 of the Rehabilitation Act of 1973. In addition, PHAs are reminded that they must meet the shorter obligation and expenditure requirements associated with the ARRA Capital Funds.

Also, it is important to note that neither traditional Capital Funds nor Recovery Act funds can be used to pay off the debt on a property being brought into the Federal public housing program.

Q7(b): If a PHA is adding units exceeding the Faircloth limit, is there a minimum dollar amount required that must be expended? If so, must all the expenditures use ARRA funds?

A7(b). Yes. The minimum amount of expenditure has been determined to be \$2,000/unit within each project. This amount can only include hard development costs, such as site improvement or rehabilitation costs. All units must meet UPCS standards. A project means a public housing building or set of buildings grouped for the purpose of management (24 CFR 990.265).

If, by adding units to the ACC, the Faircloth limit is exceeded, the PHA must spend a minimum of \$2,000/unit of ARRA funds. Costs exceeding the minimum of \$2,000 per unit may come from other non-public housing sources as well as ARRA funds.

Rehabilitation may include improvements to individual units or common area improvements and other improvements that benefit all units in the project. For example, for a 50-unit senior building, a minimum of \$100,000 of rehab would have to be undertaken with ARRA funds. Eligible improvements could include common elements such as installing a new roof and completing improvements to the community room or lobby. Such common costs could be averaged by the number of affected units. Using the above example, if a new roof for the 50 unit elderly building cost \$100,000, the minimum would be met ($\$100,000 / 50 = \$2,000$).

However making substantial improvements to one or two units in a fifty-unit building and then averaging these costs by the number of units in the building would not meet the \$2,000/unit minimum. If in the same 50 unit building, 10 units were modernized at a cost of \$10,000 each, then that would NOT meet the \$2,000/unit requirement.

Q8: When do environmental reviews need to be submitted for projects using Recovery Act funding?

A8: The requirements of 24 CFR Parts 50 and 58 regarding environmental reviews, including when they are required and when they need to be submitted, continue to apply for projects using Recovery Act funding.

Q9: Will HUD take 75 days to approve an amended PHA Plan?

A9: HUD staff are working to approve amended plans in a much shorter timeframe. PHAs can help reduce the review and approval time by making sure that their submissions are complete .

Q10: Can a PHA obligate Recovery Act funds prior to submitting its amended Annual Plan?

A10: A PHA can only obligate funds for eligible activities identified in an approved five-year action and/or Annual Plan. A PHA can obligate funds to eligible activities in already approved Plans, but must wait to obligate funds to activities that are solely identified in Plans that are pending approval. Additionally, funds can only be obligated to activities that occur after the obligation start date.

Q11: Will HUD consider a waiver of Total Development Costs (TDC)?

A11: Waivers will be considered on a case-by- case basis when Recovery Act funds are used.

Q12: What Wage Rate Requirements Apply for PHAs?

A12: The Davis-Bacon wage requirements apply to the activities funded with Recovery Act Capital Fund Formula grants

ELIGIBLE USE OF FUNDS

Q11: Is it permissible to purchase maintenance vehicles with our Recovery Act formula grant?

A11: No. PHAs may not use Recovery Act Capital Fund formula grants for operating assistance activities such as the purchase of maintenance vehicles.

Q12: Is it permissible to purchase modernization vehicles and equipment with our Recovery Act formula grant?

A12: Yes. This purchase would be permissible provided that the vehicle(s) are used for the modernization program. Examples would include a bobcat or a backhoe; any equipment that is used for modernization that the PHA determines is more cost effective to purchase instead of lease.

Q13: The approved 5-year plan identified the replacement of PHA vehicles, including the vehicle used by the Executive Director and the snowplow truck and plow used by the maintenance man. Could the Recovery Act funds be used for these purposes?

A13: No. Neither of these vehicles or the plow would be eligible uses of Recovery Act formula funds because they are for maintenance/operational purposes.

Q14: Can the Recovery Act funds be used to replace office equipment, such as a copier and fax machine?

A14: No. Recovery Act funds cannot be used to cover operational expenses.

Q15: Can Recovery Act funds be used for collateralized bond financings? Bonds would provide financing for new projects and would involve leveraging of private dollars, which would allow housing authorities to do more rehab/modernization/construction work than they could do with Capital Funds alone.

A15: Yes. Recovery Act funds can be used to collateralize the construction of new project(s). These funds cannot supplant funds from an existing project or pay existing debt, such as CFFP bonds or other debt that a housing authority may have incurred. On the 50075.1, Budget line items (BLI) 1499 or 1460 should be used. It is important to remember that these funds must be obligated within one year, sixty percent of the funds expended within two years and 100 percent obligated within three years, so PHAs should keep these timeframes in mind when planning for the use of funds.

Q16: What types of management improvements are permitted?

A16: A PHA-wide management improvement may be funded where the PHA can demonstrate that by correcting the management deficiency(ies) at the development(s) being modernized other developments will benefit as well. Management Improvements must sustain physical/capital improvements. For example, job training related to modernization would be eligible.

Q17: What types of management improvements are not permitted?

A17: If a PHA cannot demonstrate the link between a PHA-wide management improvement and the correction of an identified management deficiency (including sustaining the physical improvements at the development being modernized) the management improvement is ineligible for funding. A PHA's ongoing operational expenses are ineligible management improvement costs.

Q18: May a PHA use Capital Funds provided under the Recovery Act to extend an existing energy performance contract from 12 to 20 years by adding new energy conservation measures?

A18: No. However, 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. Both Recovery Act funds and annual Capital Formula funds could be used in cooperation with third party energy performance contracts (EPCs). For example, the ESCo or privately financed EPC may be for solar panels, but the Recovery Act or annual Capital Formula funds could pay for repair or modernization of the roof or preparation of the building for solar panels. 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 energy performance contracts under Section 9(e)(2)(C) of the United States Housing Act and 24 CFR 990.185 and 965.308.

Q19: A PHA has approved RFP/Q for Energy Performance Contracting. The PHA is interested in adding an energy related infrastructure activity using its Recovery Act funds, such as replacing main water pipe. Can the PHA sole-source to the selected ESCO based on expediency?

A19: The PHA must first determine pursuant to 24 CFR 85.36(d)(4) whether a contract for the additional item (main water pipe) is feasible under small purchase procedures, sealed bids or competitive proposals. Then, if it is not feasible 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.

Q20: It was stated that the PHA can draw down 10 percent for administrative costs as they drawdown each line item. Does that mean they need no backup info for this 10 percent?

A20: No. It is correct that a PHA is permitted to automatically take 10 percent for administrative costs for each drawdown. And these funds can be paid to the Central Office Cost Center (COCC) for administrative costs/as a management fee. However, OMB has not yet provided final guidance on Transparency and Reporting requirements. Since PHAs must comply with all Recovery Act requirements,

they should maintain sufficient documentation to demonstrate specifically what Recovery Act funds were used for within the Capital Fund Program.

Q21: Can you elaborate on the question above?

A21 : PHAs are required to report on the entire ARRA Capital Fund grant, including the Management Fee. PHAs that are charging a Management Fee can invoice for the Management Fee (not to exceed 10% of the drawdown) from the COCC and can report it as such. While the specific report formats will be issued shortly by the Department, to the extent that the management fee creates/retains jobs, develops/rehabs housing and/or improves energy efficiency, the PHA will be required to report this information.

PHYSICAL NEEDS ASSESSMENT

Q5: Do PHAs have to conduct a new PNA if they have done one in the past five years?

A5: At this time, all PHAs are required to complete a new PNA. However, as new PNA guidance is developed, HUD is taking into consideration whether a PNA completed within the last five years will satisfy the requirement. PHAs should not conduct a new PNA until HUD issues new guidance.

Q6: Should a PHA be contracting with a consultant to complete a PNA at this time?

A6: PHAs are advised not to contract with a firm to conduct a PNA until HUD has issued guidance on this requirement.

PROCUREMENT

Q5: On a provision of the guidance related to procurement (Notice PIH 2009-12, item 2 on page 6), specifically, “any requirements relating to the procurement of goods and services arising under state and local laws and regulations shall not apply to Capital Fund Stimulus Grants” is not referring to construction contracts, correct? Our state has mandated four-part bidding requirements for construction contracts. Please clarify.

A5: Four part bidding requirements shall not apply to Capital Fund Stimulus Grants. PHAs are to use 24 CFR 85.36 for construction contracts.

Q6: Are you aware of any Federal statutes that would restrict to the use of local preferences for Recovery Act Formula Funds, Capital Funds, or Operating Funds?

A6: As noted in 24 CFR 85.36(c)(2), in state or local geographical preferences are prohibited unless permitted by a Federal statute. In the case of Capital Funds, there are no Federal statutes which would permit or encourage State or local geographical preferences. As such, they are not permitted.

Q7: We would like to get a clarification from you regarding using the same A&E services architect for the Recovery Act Formula Grant. This A&E firm is under contract with us for the next four years to work on the CFP Programs. They were selected by the competitive bidding process and by following the procurement policies. We would like to know whether we can use the same A&E firm for the Recovery Act Grant and without going through the bidding process again, because of the shortage of time. The work items selected to be in the Recovery Act Grant Annual Statement were included in the Five-Year Action Plan.

A7: Yes. Provided that the structure of the contract is such that the PHA is issuing specific tasks against the main contract, the PHA would be able to use this firm to complete work items requested after the obligation start date of the Recovery Act grant. The PHA will need to separately report costs incurred under this contract that are funded with Recovery Act funds.

Q8: From PIH Notice 2009-12 – Please confirm “requirements” definition. *State and Local: Any requirements relating to the procurement of goods and services arising under state and local laws and regulations shall not apply to Capital Fund Stimulus Grants. PHAs shall instead follow the Part 85 requirements.* For example, is this saying that if the state law is \$50,000 for small purchase threshold, PHAs will be allowed to go up to \$100,000 as long as they proceed to amend in writing a Capital Fund Stimulus Grant Procurement Policy?

A8: Yes. State small purchase thresholds are not considered a requirement as described in PIH Notice 2009-12.

Q9: From PIH Notice 2009-12 Section VI, Procurement, item 2: This section states that any state and local procurement requirements that conflict with 24 CFR Part 85 shall not apply to the use of Recovery Act funds. What is the legal citation regarding this federal override of state and local law?

A9: The Public Housing Capital Fund section under the Public and Indian Housing section of the Department of Housing and Urban Development section of Title XII of Division A of the Recovery Act (Public Law 111-5,) enacted February 17, 2009.

Q10: From PIH Notice 2009-12, Section VI, Procurement, item 5: This section provides that a PHA may use a non-competitive proposal to obligate and award Recovery Act funds if other methods are infeasible. Typically, a PHA using non-competitive proposal would be required to obtain prior HUD approval, however, this section of the notice implies that this is not the case: “No HUD pre-award review is required for noncompetitive proposals ...”. Is this intended to be a universally-applicable change to the procurement handbook standard that will apply whenever Recovery Act funds are used for procurement by non-competitive proposal by any PHA?

A10: Yes. PHAs are reminded that they must make available upon HUD’s request any documents related to procurement activity as stated in 24 CFR 85.36(g). Some PHAs may be asked to submit documentation for pre-award reviews.

Q11: If the answer to the above question is “yes”, what is the standard for documentation of the PHA determination that procurement by competitive method is not feasible?

A11: PHAs must record and document that they have attempted to procure by a competitive method first, and only then use a non-competitive proposal method. The only change to previous procedure is the elimination of HUD pre-award review and this change only applies to Recovery Act funds, unless HUD requests any documents related to procurement activity as stated in 24 CFR 85.36(g). Please refer to PIH Notice 2009-12, Section 5 Non-competitive Proposals and 24 CFR 85.36(d)(4) for process and documentation required for non-competitive proposals.

Q12: Section VI, Procurement, item 7. This section states that the “Buy America” provisions of the Recovery Act apply to ARRA Capital Funds. However, the relevant section of the Recovery Act (1605) refers to Recovery Act funds used for “public buildings and infrastructure”. How does a PHA determine whether 1) they are buying material for a “public building”, 2) whether a product or contract is likely to include iron, steel and/or manufactured goods subject to the restriction, and 3) whether such materials qualify as “produced in the US in accordance with this provision?”

A12: Product labels and descriptions shall be relied on. If in doubt, contact the manufacturer. For further information, see OMB Interim Final Guidance (2 CFR 176) published April 23, 2009 at 74 Federal Register 18449. http://www.whitehouse.gov/omb/assets/fedreg_2009/042309_recovery.pdf

Q13: Will the Buy American steel and metal provisions apply to manufactured items such as appliances, heat pumps, generators, etc. If so, what is the process to determine if they meet the standards and what documentation will be required?

A13: Yes. As stated above, and product labels and descriptions shall be relied on. If in doubt, contact the manufacturer.

Q14: What information does a PHA need to include in their contracts regarding the Buy American provision?

A14: PHAs shall follow Buy American requirements of section 1605 of the Recovery Act and use only iron, steel and manufactured goods produced in the United States in their projects. Contract language should reflect this requirement.

Q15: Does the requirements of Sec. 1605 (Buy American) apply to equipment expended from account 1410 (Administration)?

A15: Yes. The Buy American provision applies to all expenditures of the Recovery Act funds.

Q16: Does the Buy American provision extend to heating and cooling units?

A16: Yes. Manufactured goods must be manufactured in the United States, but there is no requirement with regard to the origin of components or subcomponents used in manufactured goods.

Q17: The PHA is interested in purchasing water heaters that are assembled in the U.S. and all parts are manufactured in the U.S. except for the relief valve. Does this meet the Buy American provision?

A17: Yes. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.

Q18: Where can I find additional information on the Buy American provision?

A18: HUD is working on issuing additional guidance on the Buy American provision. In the interim, please refer to OMB Interim Final Guidance "Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards published on April 23, 2009.

http://www.whitehouse.gov/omb/assets/fedreg_2009/042309_recovery.pdf

DUNS NUMBERS AND CENTRAL CONTRACTOR REGISTRATION

Q2: Do contractors awarded a contract paid for with Recovery Act funds need to have a DUNS number that is registered with the CCR?

A2: No. Only PHAs (as the grantee) must have a registered DUNS number. HUD will notify PHAs if this changes.

LOCCS

No additional questions in this section.

REPORTING

No additional questions in this section.

MOVING TO WORK AGENCY REQUIREMENTS

Q2: PIH Notice 2009-12 Under Section VIII – Moving to Work Agency Requirements, indicates that “to ensure that all Housing Authorities follow the above terms of the Recovery Act, MTW agencies will be expected to adhere to the same requirements as non-MTW agencies”. The XYZ Housing Authority has alternative site and neighborhood standards and TDC limits in its executed MTW Agreement. Since the Housing Authority expects to develop additional public housing units with Recovery Act funding, can the Authority use the modified site and neighborhood standards and TDC limits contained in its MTW Agreement or will they be required to follow the same site and neighborhood standards and TDC limits as non-MTW agencies?

A2: The PHA may take advantage of its alternate site and neighborhood standards and its alternate TDC limits in accordance with their MTW Agreement.

TROUBLED AGENCY REQUIREMENTS

No additional questions in this section.