



# Federal Register

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**Monday,  
January 26, 2009**

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**Part VI**

## **Department of Housing and Urban Development**

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**24 CFR Part 990**

**Public Housing Operating Fund Program;  
Increased Terms of Energy Performance  
Contracts; Final Rule**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

**24 CFR Part 990**

[Docket Number FR-5057-F-02]

RIN 2577-AC66

**Public Housing Operating Fund  
Program; Increased Terms of Energy  
Performance Contracts**

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Final rule.

**SUMMARY:** This rule makes final the conforming amendments to the regulations of the Public Housing Operating Fund Program to reflect recent statutory amendments allowing for: (1) The maximum term of an energy performance contract (EPC) between a public housing authority (PHA) and an entity other than HUD to be up to 20 years, and (2) the extension of an existing EPC, without reprocurement, to a period of no more than 20 years, to allow additional energy conservation improvements. The increase in the maximum EPC term, which was limited to 12 years, is provided by statutory amendments and will enable longer payback periods for energy conservation measures. This final rule adopts an October 16, 2008 interim rule without change.

**DATES:** *Effective Date:* February 25, 2009.

**FOR FURTHER INFORMATION CONTACT:** David J. Reeves, Deputy Assistant Secretary, Departmental Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 2000, Washington, DC 20410-5000; telephone number 202-475-8906 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 9(e) of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act) establishes an Operating Fund for the purpose of making assistance available to PHAs to operate and manage public housing. HUD's regulations implementing section 9(e) of the 1937 Act are located at 24 CFR part 990 (entitled "The Public Housing Operating Fund Program"). The part 990 regulations contain the policies and

procedures governing the Operating Fund allocation formula used by HUD to distribute operating subsidies to PHAs.

On September 19, 2005, at 70 FR 54984, HUD published a final rule amending the regulations at 24 CFR part 990 to provide a new formula for distributing operating subsidies to PHAs and to establish requirements that PHAs convert to asset management. The September 19, 2005, final rule provides PHAs with incentives for energy conservation and utility rate reduction. The energy conservation methods may include, but are not limited to, physical improvements financed by a loan from a bank, utility, or governmental entity; management of costs under a performance contract; or a shared savings agreement with a private energy company. The final rule also provided, in § 990.185(a), that the term of the contract under which these energy conservation measures are taken cannot exceed 12 years.

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (Pub. L. 109-58, 119 Stat. 594) (Energy Policy Act). Subtitle D of the Energy Policy Act amended section 9 of the 1937 Act to promote the use in public housing of innovative approaches to achieve programmatic efficiency and reduce utility costs. Specifically, section 151 of the Energy Policy Act amended section 9(e)(2)(C) of the 1937 Act, which governs the treatment of waste and utility savings under the Operating Fund allocation formula. The amendment made by section 151 of the Energy Policy Act provides that qualifying contracts for energy conservation improvements may have terms of not more than 20 years. (See 119 Stat. 647-648.) The Energy Policy Act also amended the Operating Fund treatment of savings resulting from such contracts. It allows for longer payback periods for retrofits, including windows, heating system replacements, wall insulation, site-based generation, advanced energy saving technologies, including renewable energy generation, and other such retrofits.

The Consolidated Appropriations Act, 2008 (Pub. L. 110-161, 121 Stat. 1844, approved December 26, 2007), amended section 9(e)(2)(C) of the 1937 Act (42 U.S.C. 1437g(e)(2)(C)), by adding the following clause:

(iv) EXISTING CONTRACTS.—The term of a contract described in clause (i) that, as of the date of enactment of this clause, is in repayment and has a term of not more than 12 years, may be extended to a term of not more than 20 years to permit additional energy conservation improvements without

requiring the reprocurement of energy performance, contractors.

(See administrative provision, section 229, of title II of Division K, at 121 Stat. 2438.)

**II. The October 16, 2008, Interim Rule**

On October 16, 2008 (73 FR 6135), HUD published an interim rule that amended the regulations at 24 CFR 990.185. The interim rule provided that, consistent with the amendment to the 1937 Act by section 151 of the Energy Policy Act, the term of an EPC between a PHA and an entity other than HUD may be up to 20 years. Consistent with the amendment made to section 9(e)(C)(2) by the Consolidated Appropriations Act, 2008, the interim rule also permitted the extension of executed EPCs to a term of not more than 20 years without requiring a new competitive procurement process. The provision for entering into EPCs with terms greater than 12 years and for extending the terms of executed EPCs commenced to apply on the effective date of the interim rule, which was November 17, 2008. The interim rule clarified that, consistent with the statute, to qualify for the incentives under § 990.185, the financing of energy conservation measures by a party other than HUD must be undertaken pursuant to a contract. The interim rule also clarified that the term "energy performance contract" encompasses all contracts that qualify under § 990.185, regardless of the energy conservation measure involved or the entity that is the other party to the contract with the PHA.

**III. This Final Rule**

The October 16, 2008 interim rule provided a 60-day public comment period. HUD received one public comment by the close of the public comment period on December 15, 2008.

The commenter supported the interim rule but expressed concern that its effectiveness could be limited due to two considerations. According to the commenter, HUD underestimates total utility costs, resulting in insufficient funding for PHAs to use to pay back EPCs, even with extended payback periods. The commenter argued that HUD should change its method for allocating utility subsidies to PHAs in order to avoid underestimating actual utility costs. In addition, the commenter expressed concern that EPC companies may overestimate the prospective savings from energy conservation measures. The commenter advocated oversight of EPC companies to prevent PHAs from paying too much in

exchange for measures that result in insufficient savings.

HUD appreciates the commenter's concerns and will take them under consideration as it develops additional guidance on the use and analysis of EPCs. HUD notes, however, that practices required under its asset management initiative result in increased accuracy in estimating utility costs, and HUD already reviews PHAs' proposed EPCs, including assumptions made about prospective utility cost savings. HUD encourages PHAs to negotiate savings guarantee provisions in their EPCs to reduce the risk to the PHA that savings from energy conservation measures will be insufficient to cover the PHA's obligations under the EPC. HUD refers PHAs to its publication, "Energy Performance Contracting for Public and Indian Housing: A Guide for Participants" (the "Green Book"), which provides extensive guidance and technical assistance on planning and negotiating successful and cost-effective EPCs. HUD anticipates that it will be issuing a revision to the Green Book to incorporate leading industry trends and best practices. If HUD determines that further regulatory action is warranted to address the issues raised by the commenter, it will undertake separate rulemaking.

This rule therefore makes final the October 16, 2008, interim rule without change.

#### **IV. Findings and Certifications**

##### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–

1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of UMRA.

##### *Executive Order 13132, Federalism*

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Order.

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule, consistent with recent statutory amendments, provides PHAs with the flexibility to enter into energy performance contracts with terms of not more than 20 years. These revisions impose no significant economic impact

on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

##### *Environmental Impact*

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

##### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance program number is 14.850.

##### **List of Subjects in 24 CFR Part 990**

Accounting, Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD makes final the October 16, 2008, interim rule (73 FR 6135) without change.

Dated: January 14, 2009.

**Paula O. Blunt,**

*General Deputy Assistant Secretary for Public and Indian Housing.*

[FR Doc. E9–1252 Filed 1–23–09; 8:45 am]

**BILLING CODE 4210–67–P**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT****24 CFR Part 990**

[Docket Number FR-5057-I-01]

RIN 2577-AC66

**Public Housing Operating Fund  
Program; Increased Terms of Energy  
Performance Contracts**

**AGENCY:** Office of the Assistant  
Secretary for Public and Indian  
Housing, HUD.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule would make conforming amendments to the regulations of the Public Housing Operating Fund Program to reflect recent statutory amendments that allow for: The maximum term of an energy performance contract (EPC) between a public housing authority (PHA) and an entity other than HUD to be up to 20 years, and the extension of an existing EPC, without reprocurement, to a period of no more than 20 years, to allow additional energy conservation improvements. The increase in the maximum EPC term, which is currently limited to 12 years, is provided by statutory amendments and will enable longer payback periods for energy conservation measures.

**DATES:** *Effective Date:* November 17, 2008. *Comment Due Date:* December 15, 2008.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. **Submission of Comments by Mail.** Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500.

2. **Electronic Submission of Comments.** Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables

HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Hanson, Deputy Assistant Secretary, Departmental Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 2000, Washington, DC 20410-5000; telephone number 202-475-7949 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

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On September 19, 2005, at 70 FR 54984, HUD published a final rule amending the regulations at 24 CFR part 990 to provide a new formula for distributing operating subsidies to PHAs and to establish requirements that PHAs convert to asset management. The September 19, 2005, final rule provides PHAs with incentives for energy conservation and utility rate reduction. The energy conservation methods may include, but are not limited to, physical improvements financed by a loan from a bank, utility, or governmental entity; management of costs under a performance contract; or a shared savings agreement with a private energy company. The final rule also provided, in § 990.185(a), that the term of the contract under which these energy

conservation measures are taken cannot exceed 12 years.

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (Pub. L. 109-58, 119 Stat. 594) (Energy Policy Act). Subtitle D of the Energy Policy Act amended section 9 of the 1937 Act to promote the use in public housing of innovative approaches to achieve programmatic efficiency and reduce utility costs. Specifically, section 151 of the Energy Policy Act amended section 9(e)(2)(C) of the 1937 Act, which governs the treatment of waste and utility savings under the Operating Fund allocation formula. The amendment made by section 151 of the Energy Policy Act provides that qualifying contracts for energy conservation improvements may have terms of not more than 20 years. (See 119 Stat. 647-648.) The Energy Policy Act also amended the Operating Fund treatment of savings resulting from such contracts. It allows for longer payback periods for retrofits, including windows, heating system replacements, wall insulation, site-based generation, advanced energy saving technologies, including renewable energy generation, and other such retrofits.

The Consolidated Appropriations Act, 2008 (Pub. L. 110-161, 121 Stat. 1844, approved December 26, 2007), amended section 9(e)(2)(C) of the 1937 Act (42 U.S.C. 1437g(e)(2)(C)), by adding the following clause:

"(iv) EXISTING CONTRACTS.—The term of a contract described in clause (i) that, as of the date of enactment of this clause, is in repayment and has a term of not more than 12 years, may be extended to a term of not more than 20 years to permit additional energy conservation improvements without requiring the procurement of energy performance, contractors." (See administrative provision, section 229, of title II of Division K, at 121 Stat. 2438.)

##### II. This Interim Rule

This interim rule amends the regulations at 24 CFR 990.185 to provide that, consistent with the amendment to the 1937 Act by section 151 of the Energy Policy Act, the term of an EPC between a PHA and an entity other than HUD may be up to 20 years. Consistent with the amendment made to section 9(e)(2)(C) by the Consolidated Appropriations Act, 2008, this rule also permits the extension of executed EPCs to a term of not more than 20 years without requiring a new competitive procurement process.

The increased maximum contract terms provided by these statutory amendments permit longer payback periods for energy conservation

measures. HUD encourages PHAs to utilize the extended contract terms to achieve additional reductions in utility consumption and costs. These statutory changes to EPC terms, as are being codified by this rule, provide PHAs with the ability to fund additional energy measures with a longer payback period, and also provide additional flexibility by allowing a PHA to extend an existing contract without needing to go through procurement.

The provision for entering into EPCs with terms greater than 12 years and for extending the terms of executed EPCs would commence to apply on the effective date of this rule.

The 20-year contract term, consistent with statutory authority, is the maximum term. If state or local laws or regulations restrict terms of EPCs to a shorter period of time, PHAs would still have to comply with the state or local government requirement.

Consistent with the statute, this rule clarifies that to qualify for the incentives under § 990.185, the financing of energy conservation measures by a party other than HUD must be undertaken pursuant to a contract. This rule also clarifies that the term "energy performance contract" encompasses all contracts that qualify under § 990.185, regardless of the energy conservation measure involved or the entity that is the other party to the contract with the PHA.

##### III. Justification for Interim Rulemaking

In accordance with its regulations on rulemaking at 24 CFR part 10, HUD ordinarily publishes its rules for advance public comment. Notice and public procedure are omitted, however, if HUD determines that, in a particular case or class of cases, notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." (See 24 CFR 10.1.) In this case, HUD is simply conforming its existing regulations to statutory provisions that are already legally effective. In doing so, HUD is not exercising agency discretion, but rather simply following the statutory mandate. Because this is a conforming regulation, advance public notice and comment is unnecessary. However, while HUD found the statutory language to be clear as to meaning and intent and has incorporated the language without change, PHAs may seek further clarification. HUD specifically welcomes comments on the clarity of the conforming amendments, as well as on any other aspect of the rule. HUD will consider all comments submitted by the public in the final rule that follows this interim rule.

#### IV. Findings and Certifications

##### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of UMRA.

##### *Executive Order 13132, Federalism*

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##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule, consistent with recent statutory amendments, provides PHAs with the flexibility to enter into energy performance contracts with terms of not more than 20 years. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD’s view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD’s objectives as described in this preamble.

##### *Environmental Impact*

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or

new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

##### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance program number is 14.850.

##### **List of Subjects in 24 CFR Part 990**

Accounting, Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 990 as follows:

##### **PART 990—THE PUBLIC HOUSING OPERATING FUND PROGRAM**

■ 1. The authority citation for part 990 continues to read as follows:

**Authority:** 42 U.S.C. 1437g; 42 U.S.C. 3535(d).

■ 2. In § 990.185, revise paragraph (a) introductory text and paragraph (a)(3)(iv), to read as follows:

##### **§ 990.185 Utilities expense level: Incentives for energy conservation/rate reduction.**

(a) *General/consumption reduction.* If a PHA undertakes energy conservation measures that are financed by an entity other than HUD, the PHA may qualify for the incentives available under this section. For a PHA to qualify for these incentives, the PHA must enter into a contract to finance the energy conservation measures, and must obtain HUD approval. Such approval shall be based on a determination that payments under a contract can be funded from reasonably anticipated energy cost savings. The contract period shall not exceed 20 years. The energy conservation measures may include, but are not limited to: Physical improvements financed by a loan from a bank, utility, or governmental entity; management of costs under the performance contract; or a shared savings agreement with a private energy service company. All such contracts shall be known as energy performance contracts. PHAs may extend an executed energy performance contract with a term of less than 20 years to a term of not more than 20 years, to permit additional energy conservation improvements without the procurement of energy performance contractors. The PHA must obtain HUD

approval to extend the term of an executed energy performance contract.

\* \* \* \* \*

(3) \* \* \*

(iv) If energy cost savings are less than the amount necessary to meet amortization payments specified in a contract, the contract term may be extended (up to the 20-year limit) if HUD determines that the shortfall is the result of changed circumstances, rather than a miscalculation or misrepresentation of projected energy savings by the contractor or PHA. The contract term may be extended only to accommodate payment to the contractor and associated direct costs.

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Dated: September 11, 2008.

**Paula O. Blunt,**

*General Deputy Assistant Secretary for Public and Indian Housing.*

[FR Doc. E8–24573 Filed 10–15–08; 8:45 am]

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