



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

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Special Attention:	NOTICE	PIH-2011-4
Public Housing Agencies	Issued:	January 21, 2011
Public Housing Directors		
HUD Field Offices	Expires:	January 31, 2012
	<u>Cross References:</u>	
	Notice 2009-12,	
	24 CFR Parts 905, 941 and 968	

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Subject: Reissuance of PIH Notice 2009-12 - Information and Procedures for Processing American Recovery and Reinvestment Act Capital Fund Formula Grants

**I. Purpose:** This Notice reissues PIH Notice 2009-12, which provided processing information for PHAs regarding the allocation of the \$3 billion in formula funds. A Notice of Funding Availability (NOFA) for the award of the \$1 billion competitive grant funds was issued separately. FY 2009 Capital Fund Formula Grants were provided through a separate process.

**II. Applicability:** This guidance provides Public Housing Agencies (PHAs) and HUD Field Offices with information and procedures for processing the additional amount of Fiscal Year 2009 Public Housing Capital Fund Grants provided in accordance with the American Recovery and Reinvestment Act of 2009 (“the Recovery Act”). This Notice applies to PHAs who received either a Capital Fund Formula and/or a Replacement Housing Factor (RHF) Fund Grant in Fiscal Year 2008 under the Capital Fund Program.

**III. 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 and management activities for public housing agencies, as authorized under section 9 of the United States Housing Act of 1937 (“the 1937 Act”). The Recovery Act required that \$3 billion of these funds be distributed as formula funds and the remaining \$1 billion be distributed through a competitive process.

**IV. Use of FY 2008 Funding Allocation:** The Recovery Act specified that the additional funds be allocated by the same formula that was used to calculate Capital Fund grants in 2008. The details surrounding the 2008 award are as follows:

**Determination of Funding Amounts:** The Capital Fund formula was calculated in accordance with the regulation found at 24 CFR Section 905.10. The Capital Fund formula was computed based on data on buildings and units as reported in the

PIC system as of September 30<sup>th</sup> of the prior fiscal year which is “the reporting date” designated by HUD.

**Receipt of a Single Grant:** PHAs that received an RHF grant in FY 2008 had this factor calculated/included in their Recovery Act Capital Fund award. However, the funds will be combined in a single Recovery Act Capital Fund Grant. For this grant only, the Recovery Act provides that any restrictions on the use of RHF grants (i.e., limited to development of public housing rental) do not apply.

**Certification of Accuracy of Data in PIC:** In FY 2008, the Office of Public and Indian Housing had a process for PHAs to certify that the data contained in the Public and Indian Housing Information Center (PIC) system to be used in calculating the Capital Fund formula is accurate. The certification process was described in PIH Notice 2008-7. The Capital Fund formula is codified at 24 CFR 905.10. The Department bases its formula calculation extensively on data submitted to HUD by PHAs in the PIC system. PHAs are required to accurately report data in the PIC system in accordance with Section 15(B) of the Consolidated Annual Contributions Contract with HUD (Form HUD 53012A, 7/1995 version).

**Replacement Reserves - Account 1490.** Under section 9 of the 1937 Act, PHAs no longer have the statutory authority to accumulate ANY Capital Fund grants in a replacement reserve. In FY 2008, no Annual Statements for this fiscal year should have been approved with a budget that included replacement reserve (Account 1490).

#### **V. Recovery Act Capital Fund Grant Distribution:**

An ACC Amendment for each grant is now available electronically on the HUD PIH website at: <http://www.hud.gov/offices/pih/programs/ph/capfund/index.cfm>.

#### **Retrieval and Submission of the Annual Contributions Contract (ACC)**

**Amendments:** It is important that PHAs followed the timeline posted to obligate the funding. The timeline is also posted at:

<http://www.hud.gov/offices/pih/programs/ph/capfund/index.cfm>. PHAs were responsible for: (1) retrieving the ACC Amendment from the website, (2) signing and dating three (3) original copies of the ACC Amendment for the Capital Fund grant, and (3) ensuring that the ACC Amendments are received in the local HUD Field Office by March 9, 2009. The ACC Amendment must have original signatures and dates; therefore, a facsimile copy of the ACC Amendment is not an acceptable submission.

By signing the ACC Amendment, the PHA agreed that capital and management activities will be carried out in accordance with all HUD regulations, including 24 CFR Parts 905, 941 and 968 and other requirements applicable to the Capital Fund Program, with the PHA’s current Five Year Capital Fund Action Plan as

well as the Recovery Act requirements. This includes, but is not limited to, the Environmental Review requirements under 24 CFR Parts 50 and 58.

**Failure to Submit ACC Amendments by the Due Date:** ACC Amendments submitted to the Field Office after the established deadline were not given a later obligation start date. Consequently, PHAs that submitted their ACC Amendment after the effective date had less than one year to obligate 100 percent of the Capital Fund grant and less than three years to expend these funds. Note that these timeframes are stricter than the standard Capital Fund obligation and expenditure deadlines (see discussion below).

**PHA Rejection of Capital Fund Grant(s):** If a PHA elected to reject this Capital Fund grant, the executive director must have sent a written statement to the local HUD Field Office that identifies the grant number of the grant to be rejected. A board resolution must have been included with the written statement.

**Capital Fund Annual Statement Parts I & II, form HUD 50075.1, and Board Resolution:** With the acceptance of this grant, the PHA must have submitted a Capital Fund Annual Statement Parts I & II, form HUD 50075.1 and a Board Resolution, if the work items are not included in a currently approved Annual or Five-Year Action Plan, to the local HUD field office no later than 21 days after the effective date of the grant. No specific Board Resolution form is required, but must have indicated that the PHA Board has accepted this grant and that the Executive Director or other designated official may sign on behalf of the PHA.

## **VI. Important Recovery Act Requirements**

### **Use of Funds :**

PHAs must use these funds on Capital Fund eligible activities currently identified in either their Annual Statement (a component of the PHA Annual Plan and/or the MTW Annual Plan) or Five-Year Action Plan (Note: Revisions to the Five-Year plan may be required if the PHA has insufficient work items for the amount of funding being provided). When contemplating use of these additional funds:

- PHAs must give priority consideration to the rehabilitation of vacant rental units;
- PHAs must prioritize capital projects, that are already underway and require additional funds, or are included in the Five-Year Capital Fund Action Plan;
- PHAs must use the funds provided in this grant to supplement expenditures, not to supplant expenditures from other Federal, State or local sources or funds independently generated; and
- PHAs are required to provide a physical needs assessment (PNA), as specified by HUD, using funds from this Recovery Act grant or other Capital Funds. (Note: PHAs are not required to complete the PNA before commencing Modernization work using the Recovery grant funds).

These funds are available to address deferred maintenance needs, including but not limited to: (1) replacement of obsolete systems and equipment with energy-efficient systems and equipment that reduce consumption; (2) work items related to code compliance, including abatement of Lead-Based Paint and implementation of accessibility standards; (3) correction of environmental issues; and (4) rehabilitation and modernization activities that have been delayed or not undertaken because of insufficient funds. Recovery Act Formula funds can be used for all Capital Fund eligible activities, including demolition and relocation, except as restricted below.

**Special Note:  
Process for Obtaining Public Comment on Five-Year Action Plan and  
Annual Plan**

According to 24 CFR 903.17, the PHA's board of directors or similar governing board must conduct a public hearing to discuss the Five-Year Action Plan and/or Annual Plan and invite the public to comment on the plan. The regulation provides a 45-day notice period informing the public that the information is available for review and inspection and announcing the public hearing. For all PHAs accepting these grant funds (including MTW agencies), the Secretary used the waiver authority in the Recovery Act to reduce this public notice period to 10 calendar days for PHAs amending their Five-Year Action Plan and/or Annual Plan due in part to these grant funds. This waiver provides for adequate notice, but does not limit the information and activities required to be performed by the PHA. This waiver also permits these PHAs to continue planning and ultimately obligate and expend these funds as intended by the Recovery Act.

**Restrictions on Use of Funds :**

- Capital Funds awarded under the Recovery Act cannot be transferred to or used for operations or rental assistance activities. (These funds cannot be transferred to Account 1406 Operations).
- PHAs are permitted to substitute any work item from the latest approved Five-Year Action Plan to any previously approved CFP Budget or CFP Annual Statement and to move work items among approved budgets without prior HUD approval. The PHA can only substitute work items in the Annual or Five-Year Plans to the Recovery grant that are not obligated to an open Capital Fund grant.
- All expenditures from Account 1410 (Administration) are limited to 10 percent of the total grant. A PHA may draw up to 10 percent of each expenditure reimbursement for administration of the Recovery Act grant. Or with Field Office approval, a PHA may draw beyond 10 percent of the expenditure if the PHA demonstrates that it has already incurred the administrative expense. Again, the total amount drawn down for

administration is capped at 10 percent of the grant. Note: The PHA must comply with the Recovery Act reporting requirements for funds drawn for administration. Any proposed information collection requirements will be submitted to OMB for review and approval.

- Management Improvements cannot exceed 20 percent of the total grant and cannot be used for operations or rental assistance activities such as staff training, resident assistance and maintenance staff salaries unless applied to force account work on a capital project.
- Funds must be used in accordance with section 1604 of the Recovery Act, which prohibits use of these funds for any casino or other gambling establishment, aquarium, zoo, golf course or swimming pool.

**Obligations and Expenditure of Funds:** The obligation and expenditure requirements found at section 9(j) of the 1937 Act regarding the obligation and expenditure of Capital Funds do not apply. The Recovery Act provides for alternate obligation and expenditure deadlines (and penalties) as follows:

- PHAs must obligate 100 percent of the grant within one year of the ACC amendment effective date. At the one year date all unobligated funds will be unilaterally recaptured.
- PHAs must expend at least 60 percent of the grant within two years of the ACC amendment effective date. At the two year date, if less than 60 percent is expended, all unexpended funds will be unilaterally recaptured.
- PHAs must expend 100 percent of the grant within three years of the ACC amendment effective date. At the three year date, all unexpended funds will be unilaterally recaptured.

March 18, 2009, the date the funds became available, is the effective date and also the start date for these grants.

**Extensions of the Obligation Deadlines:** Extension of the obligation and expenditure deadlines are not permitted under the Recovery Act. Additionally, if a PHA fails to obligate any of its other Capital Fund grants during this time, an extension of the obligation deadline for that grant will not be granted based solely on the justification that the PHA was engaged in obligating Recovery Act funds, as it does not meet the criteria established in section 9(j) of the 1937 Act.

**Procurement:** The following procurement requirements shall be followed:

- 1) Priorities: PHAs shall have given priority to Capital Fund Stimulus Grant projects that could award contracts based on bids within 120 days from February 17, 2009.

- 2) 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.
- 3) Part 85 Compliance: PHAs shall amend their procurement standards and policies as necessary in order to expedite and facilitate the use of the funds. This amended policy can be used only for procurements related to Capital Fund Stimulus Grants. This must be done in writing and consistent with PHA policies and procedures (such as Board approval) and labeled as Capital Fund Stimulus Grant Procurement Policy. Specifically, PHAs shall remove all procurement standards that are contrary to Part 85 or the Recovery Act. Where permitted by Part 85, PHAs may insert their own procedures provided that they are not contrary to the purposes of the Recovery Act.
  - a. For example, a PHA may use their existing protest procedures, written codes of standards for employees engaged in the award and administration of the contracts and other procedures as long as they are not contrary to Part 85.
  - b. It is important to note that PHAs shall continue to follow all Part 85 requirements regarding conflicts of interest, contract cost and price.
- 4) HUD Handbook: PHAs may use the Procurement Handbook for Public Housing Agencies (7460.8 rev-2) for guidance. The Handbook can be found at:  
<http://www.hud.gov/offices/adm/hudclips/handbooks/pihh/74608/index.cfm>.
- 5) Noncompetitive Proposals: According to 24 CFR 85.36(d)(4), if solicitation of a proposal is only from one source or if the PHA finds that after solicitation of a number of sources, that competition is inadequate, the PHA may award the contract noncompetitively where small purchase procedures, sealed bids or competitive proposals are infeasible and one of the circumstances in 85.36(d)(4)(i) applies. One such circumstance is public exigency that will not permit a delay resulting from competitive solicitation (85.36(d)(4)(i)(B)). If the PHA finds that other competitive methods of procurement are infeasible, HUD will support the PHA's use of the public exigency circumstance based on the purpose and requirements of the Recovery Act. Section 3 of the Recovery Act provides that these funds shall be managed and expended to achieve the purposes specified including commencing expenditures and activities as quickly as possible consistent with prudent management. Further the Recovery Act has imposed expeditious obligation and expenditure requirements on the Capital Fund Stimulus Grants and directs HUD to assist PHAs as necessary to expedite and facilitate the use of these grants. PHAs may use the noncompetitive proposals method, but must do so on a contract-

by-contract basis and in compliance with all Part 85 requirements including the requirement for a cost analysis and the conflict of interest requirement. The PHA must ensure that the noncompetitive proposals process followed is clearly captured in their amended Capital Fund Stimulus Grant Procurement Policy. Further, the PHA must maintain records sufficient to detail the significant history of each contract's procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price (85.36(b)(9)). No HUD pre-award review is required for noncompetitive proposals as stated in Section 8.4(C), Chapter 8 of HUD Handbook No. 7460.8 Rev 2. However, all PHAs are reminded that they must make available upon HUD's request the PHA Capital Fund Stimulus Grant Procurement Policy and any documents requested related to procurement activity as stated in 24 CFR 85.36(g).

- 6) Force Account: To the extent feasible, the PHA should consider employing existing or additional force account laborers on either a permanent or a temporary basis to perform Capital Fund stimulus grant work. See 24 CFR 968.105 and 968.120. No prior HUD approval is required specifically for force account labor, but such work must be incorporated into the Capital Fund planning, budgeting and reporting documents.
- 7) Buy American: 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.
- 8) Questions: HUD's PIH Customer Service Center (CSC) can address questions related to HUD's public housing procurement policy as it relates to the Recovery Act. Energy conservation information can be obtained through the CSC as well. The toll free number is 1-800-955-2232. Emails can be sent to [PIHIRC@deval.us](mailto:PIHIRC@deval.us). HUD will reply to each inquiry. A summary of responses will be posted periodically at the Capital Fund webpage.

**Troubled PHAs:** PHAs that are troubled under the Public Housing Assessment System (PHAS) will be subject to additional monitoring and oversight by HUD as deemed necessary to ensure proper use of the Capital Funds received under the Recovery Act. Updated guidance on troubled PHAs was provided to HUD field offices in October, 2009.

**Dun and Bradstreet Data Universal Numbering System Number:** PHAs were required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number in order to receive this grant.

## **VII. Definitions**

**Obligation:** Obligations mean the cumulative amount of modernization commitments entered into by the PHA. Examples of obligations are modernization commitments entered into by the PHA, i.e., contract execution for contract labor, materials or services; start and continuation of physical work by force account labor; and start and continuation of administrative work. Contract execution means execution of the contract by both the PHA and the contractor. For force account work, all funds for a group of sequentially-related physical work items are considered obligated when the first item is started, such as kitchen cabinet replacement followed by kitchen floor replacement, but only where funds continue to be expended at a reasonable rate. Where one force account physical work items is started and is not sequentially related to other physical work items, such as site improvements and kitchen remodeling, then only the funds for the one physical work item started are considered obligated.

**Expenditure:** Where funds have been obligated, the PHA is expected to show reasonable progress through increasing fund expenditures each month at a rate that would allow completion within the timeframe established for Recovery Act Funds. Expenditures mean the cumulative amount of Capital Funds distributed by the PHA documented through written checks or electronic means. The PHA shall requisition funds only when payment is due and after inspection and acceptance of the work and shall distribute the funds within three working days of receipt of the funds.

**Force Account:** Force account is defined in the Capital Fund program as labor employed directly by the PHA either on a permanent or a temporary basis. For Recovery Act work, PHAs are permitted to use force account to accomplish capital projects, where included in the CFP Budget, Annual Plan or Five-Year Action Plan, without any additional approval from the local HUD Field Office.

**Force Account Labor:** Force account labor costs for carrying out physical improvements, including technical salaries, employee benefit contributions and, where required by State or local/tribal law, contributions to an unemployment compensation fund, shall be charged to the appropriate development account for hard costs; i.e., Site Improvements (Account 1450); Dwelling Structures (Account 1460); or Non-dwelling Structures (Account 1470). For Recovery Act work, the PHA may undertake the modernization activities using force account labor, only where included in the CFP Budget, Annual Plan or Five-Year Action Plan, without any additional HUD approval. The PHA shall use force account labor where it is cost-effective and appropriate to the scope and type of physical improvements and the PHA has the capacity to serve as its own main contractor and to maintain an adequate level of routine maintenance during force account activity.

**VIII. Moving to Work Agency Requirements:** Agencies participating in the Moving to Work Demonstration (“MTW”) are authorized to combine operating and capital assistance provided under section 9 and voucher assistance under section 8 of the United States Housing Act of 1937 as part of the regular appropriations process.

However, line item appropriations, which are supplemental to the regular appropriations process, such as the Recovery Act, may be used only for the specific purpose for which they were appropriated. Further, the Recovery Act states that “notwithstanding any other provision of law, (1) funding provided under this heading may not be used for operating or rental assistance activities.” This provision expressly overrides the authority to combine funds contained in the MTW Authorizing statute. Accordingly, the funds provided under the Recovery Act cannot be combined with an MTW agency’s operating or voucher funds, or otherwise used for purposes, notwithstanding the agency’s status as an MTW participant. Therefore, these funds cannot be assigned to Account 1492.

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. These will include mandatory reporting requirements, as PHAs will be expected to report separately on Recovery Act expenditures on a quarterly basis.

**IX. Waivers:** HUD may waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use of Capital Fund Recovery Act funds, except for requirements related to fair housing, nondiscrimination, labor standards and the environment, upon a finding that such a waiver is necessary to expedite or facilitate the use of the Capital Fund Recovery Act funds. HUD may issue further instructions on waivers and processing. However, until such time, PHAs may submit requests for regulatory or statutory waivers to their Field Office for transmittal to HUD headquarters for review and approval.

**X. Additional Guidance:** Guidance on data collection, reporting requirements and other Recovery Act provisions were issued in other Notice(s).

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