

Under the Public Housing Capital Fund heading of the American Recovery and Reinvestment Act of 2009 (the Recovery Act), the Secretary of HUD was given the discretion to *“direct that requirements relating to the procurement of goods and services arising under state and local laws and regulations shall not apply to amount made available under this heading.”* The Secretary decided to exercise this authority and PHAs were informed by PIH Notice 2009-12, Information and Procedures for Processing American Recovery and Reinvestment Act Capital Fund Formula Grants, issued March 18, 2009. Paragraph 7. i. of their Capital Fund Recovery Act ACC Amendment (HUD-52840-A) provides *“Requirements relating to the procurement of goods and services arising under state and local laws and regulations shall not apply to the CFP assistance provided by this agreement.”*

Please read the guidance below and refer to the Recovery Act Formula Grant Frequently Asked Questions #3 dated July 24th (<http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>) for additional information on what PHAs must do in order to comply with these procurement requirements, including establishing a separate Recovery Act Procurement Policy.

Please direct questions to PIHOI@HUD.GOV

Capital Fund Recovery Grants, Part 85 and State and Local Procurement Requirements

General Procurement Requirements for Annual Capital Fund Formula Grants (non- Recovery Act funding).

The procurement standards at 24 CFR 85.36(b)(1) permit PHAs to use their own state and local laws and regulations on procurement procedures provided their procurements conform to applicable Federal law and requirements in section 85.36. In some cases, the Federal standards may be more stringent than the state or local law. The general rule is that PHAs must comply with whichever is more stringent. It would be difficult for HUD to provide more specific guidance on every State or local requirement affecting procurement; however, Paragraph 1.5 and Chapter 13 of the HUD Handbook 7460.8 REV 2, Procurement Handbook for Public Housing Agencies (2/2007) provides a more complete discussion of the relationships between Federal, State, and local laws. Appendix 1 of the Procurement Handbook provides a sample procurement policy and notes under “Changes in Laws and Regulations” that “In the event an applicable law or regulation is modified or eliminated, or a new law or regulation is adopted, the revised law or regulation shall, to the extent inconsistent with these Policies, automatically supersede these Policies.” Many PHAs, especially small PHAs (under 250 units of public housing) use this model procurement policy.

Section 85.36 and Inclusion of State and Local Law.

There are a few instances where section 85.36 specifically mentions the treatment or inclusion of state or local law. For conflicts of interest, section 85.36(b)(3)(iv) provides that “to the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee’s and subgrantee’s officers, employees, or agents, or by contractors or their agents.” PHAs are also required to have administrative procedures for settlement of all contractual and administrative issues arising out of procurements including protest procedures and section 85.36(b)(11) –(12) notes the distinction between violations of local and State law and matters of Federal law. Section 85.36(c)(2) clarifies that State licensing law is not preempted.

Section 85.36 and Prohibition or Preemption of State and Local Law.

In some cases section 85.36 prohibits or preempts the use of State or local law. Section 85.36 (c)(2) prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Federal wage determinations (Davis-Bacon or HUD-determined wage rates) preempt any State prevailing wage rate when the state wage rate is higher than the applicable Federally-imposed wage rate (24 CFR part 965, subpart A; 85.36(i)(5); and 968.110(e)).

Section 85.36 and HUD Review of PHA's Policy and Requirements.

For construction or facility improvement contracts or subcontracts exceeding simplified acquisition threshold fixed at 41 U.S.C. 403(11)(currently set at \$100,000), HUD is given the authority to accept bonding policy and requirements of the PHA provided HUD has made a determination that HUD's interest is adequately protected. HUD has implemented an exception through rulemaking at 24 CFR 968.135(b).

Recovery Act Exception.

Under the Public Housing Capital Fund heading of the American Recovery and Reinvestment Act of 2009 (the Recovery Act), the Secretary of HUD was given the discretion to *"direct that requirements relating to the procurement of goods and services arising under state and local laws and regulations shall not apply to amount made available under this heading"*. The Secretary decided to exercise this authority and PHAs were informed by PIH Notice 2009-12, Information and Procedures for Processing American Recovery and Reinvestment Act Capital Fund Formula Grants, issued March 18, 2009. Paragraph 7. i. of their Capital Fund Recovery Act ACC Amendment (HUD-52840-A) provides *"Requirements relating to the procurement of goods and services arising under state and local laws and regulations shall not apply to the CFP assistance provided by this agreement."*

PIH Notice 2009-12, Section VI. Procurement, paragraphs 2 and 3, advised that *"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"* and to remove all procurement standards that are contrary to Part 85 or the Recovery Act, and where permitted by Part 85 (i.e., bid protest procedures, and conflicts of interest), to insert their own procedures provided that they are not contrary to the purposes of the Recovery Act (i.e., to expedite and facilitate the use of the funds).

As an example, in the PIH Notice 2009-12 (and this is in fact the only time they could include state and local law given the requirements of Part 85 and the extent of the HUD preemption), PHAs were permitted to use their existing protest procedures and standards of conduct provided their procedures were not contrary to Part 85 and the Recovery Act.

A frequent example of a HUD Recovery Act preempted area of state and local procurement law would be small purchase procedures thresholds less than \$100,000 (85.36(d)(1)). To be in compliance with the Recovery Act, Part 85 and HUD's preemption of state and local procurement laws, a PHA with a state or local small purchase procedures threshold of \$25,000, would have to raise their small purchase procedures threshold to \$100,000 for contracts using Capital Fund Recovery Act funding contracts.

However, a PHA can always choose under section 85.36, where they believe appropriate, the competitive proposals method for any size of contract (e.g., \$25,000); the sealed bid method (usually for construction contracts); or noncompetitive proposals. PHAs can continue to make this choice with

Capital Fund Recovery Act funding provided they make these choices in a manner consistent with their Recovery Act obligations.

Use of State and Local Laws for PHA Procurement with Capital Fund Recovery Act Funding.

To further clarify and summarize the HUD Recovery Act exception because some PHAs have requested permission to continue to follow State and Local Laws for their Capital Fund Stimulus Grant related procurements, additional information can be found at the Office of Capital Improvement Recovery Act web page, <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>