

Asst. Secry., for Public and Indian Housing, HUD

§ 905.100

2. For each fiscal year, the Authority shall make available funds to the Association for its normal expenses, in such amounts as may be available to the Authority for such purposes and subject to whatever applicable HUD regulations;

3. The Association shall be entitled to the use of office space in _____ at the Development without charge by the Authority for such use;

4. The Authority and the officers of the Association shall meet at a location convenient to both parties on the _____ (day) of each month to discuss matters of interest to either party;

5. In the event the parties later agree that the Association should assume management responsibilities now held by the Authority, a contract for such purpose will be negotiated by _____ the Association; _____ terminate upon dissolution of the Association.

IN WITNESS HEREOF, the parties have executed this Agreement on _____, 19____.

Local Housing Authority
By (Official Title) _____
Homebuyers Association
By (Official Title) _____
WITNESSES: _____

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

Subpart A—General

- Sec.
- 905.100 Purpose, general description, and other requirements.
- 905.102 Applicability.
- 905.104 HUD approvals.
- 905.106 Compliance.
- 905.108 Definitions.
- 905.110 Incorporation by reference.

Subpart B—Eligible Activities

- 905.200 Eligible activities.
- 905.202 Ineligible activities and costs.
- 905.204 Emergencies and natural disasters.

Subpart C—General Program Requirements

- 905.300 Capital fund submission requirements.
- 905.302 Timely submission of the CF ACC amendment by the PHA.
- 905.304 CF ACC term and covenant to operate.
- 905.306 Obligation and expenditure of Capital Fund grants.
- 905.308 Federal requirements applicable to all Capital Fund activities.
- 905.310 Disbursements from HUD.

- 905.312 Design and construction.
- 905.314 Cost and other limitations.
- 905.316 Procurement and contract requirements.
- 905.318 Title and deed.
- 905.320 Contract administration and acceptance of work.
- 905.322 Fiscal closeout.
- 905.324 Data reporting requirements.
- 905.326 Records.

Subpart D—Capital Fund Formula

- 905.400 Capital Fund formula (CF formula).

Subpart E—Use of Capital Funds for Financing

- 905.500 Purpose and description.
- 905.505 Program requirements.
- 905.507 Streamlined application requirements for standard and high-performing PHAs.
- 905.510 Submission requirements.
- 905.515 HUD review and approval.

Subpart F—Development Requirements

- 905.600 General.
- 905.602 Program requirements.
- 905.604 Mixed-finance development.
- 905.606 Development proposal.
- 905.608 Site acquisition proposal.
- 905.610 Technical processing.
- 905.612 Disbursement of Capital Funds—predevelopment costs.

Subpart G—Other Security Interests

- 905.700 Other security interests.

Subpart H—Compliance, HUD Review, Penalties, and Sanctions

- 905.800 Compliance.
- 905.802 HUD review of PHA performance.
- 905.804 Sanctions.

AUTHORITY: 42 U.S.C. 1437g, 42 U.S.C. 1437z-2, 42 U.S.C. 1437z-7, and 3535(d).

SOURCE: 65 FR 14426, Mar. 16, 2000, unless otherwise noted.

Subpart A—General

SOURCE: 78 FR 63770, Oct. 24, 2013, unless otherwise noted.

§ 905.100 Purpose, general description, and other requirements.

(a) *Purpose.* The Public Housing Capital Fund Program (Capital Fund Program or CFP) provides financial assistance to public housing agencies (PHAs) and resident management corporations (RMC) (pursuant to 24 CFR 964.225) to

§ 905.102

24 CFR Ch. IX (4–1–16 Edition)

make improvements to existing public housing. The CFP also provides financial assistance to develop public housing, including mixed-finance developments that contain public housing units.

(b) *General description.* Congress appropriates amounts for the Capital Fund in HUD's annual appropriations. In order to receive a Capital Fund grant, the PHA must:

(1) Validate project-level information in HUD's data systems, as prescribed by HUD;

(2) Have an approved CFP 5-Year Action Plan;

(3) Enter into a Capital Fund Annual Contributions Contract (CF ACC) Amendment to the PHA's Annual Contributions Contract (as defined in 24 CFR 5.403) with HUD; and

(4) Provide a written certification and counsel's opinion that all property receiving Capital Fund assistance is under a currently effective Declaration of Trust (DOT) and is in compliance with the CF ACC and the Act.

(c) *Informational requirements.* Section 905.300 of this part describes the information to be submitted to HUD for the CFP. HUD uses the CF formula set forth in § 905.400 of this part, along with data provided by the PHA and other information, including, but not limited to, the high-performance information from the Real Estate Assessment Center (REAC) and location cost indices, to determine each PHA's annual grant amount. HUD notifies each PHA of the amount of the grant and provides a CF ACC Amendment that must be signed by the PHA and executed by HUD in order for the PHA to access the grant. After HUD executes the CF ACC Amendment, the PHA may draw down funds for eligible costs that have been described in its CFP Annual Statement/Performance and Evaluation Report or CFP 5-Year Action Plan.

(d) *Eligible activities.* Eligible Capital Fund costs and activities as further described in subpart B of this part include, but are not limited to, making physical improvements to the public housing stock and developing public housing units to be added to the existing inventory. With HUD approval, a PHA may also leverage its public housing inventory by borrowing additional

capital on the private market and pledging a portion of its annual Capital Funds for debt service, in accordance with § 905.500 of this part.

(e) *Obligation and expenditure requirements.* A PHA must obligate and expend its Capital Funds in accordance with § 905.306 of this part. The PHA will directly employ labor, either temporarily or permanently, to perform work (force account) or contract for the required work in accordance with 2 CFR part 200'. Upon completion of the work, the PHA must submit an Actual Modernization Cost Certificate (AMCC) or Actual Development Cost Certificate (ADCC) and a final Performance and Evaluation Report (in accordance with § 905.322 of this part) to HUD to close out each Capital Fund grant.

(f) *Financing and development.* Section 905.500 of this part regulates financing activities using Capital Funds and Operating Funds. Section 905.600 of this part contains the development requirements, including those related to mixed-finance development, formerly found in 24 CFR part 941. Section 905.700 of this part describes the criteria for the use of Capital Funds for other security interests. Section 905.800 of this part addresses PHA compliance with Capital Fund requirements and HUD capability for review and sanction for noncompliance.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.102 Applicability.

All PHAs that have public housing units under an Annual Contributions Contract (ACC), as described in 24 CFR 5.403, are eligible to receive Capital Funds.

§ 905.104 HUD approvals.

All HUD approvals required in this part must be in writing and from an official designated to grant such approval.

§ 905.106 Compliance.

PHAs or owner/management entities or their partners are required to comply with all applicable provisions of this part. Execution of the CF ACC Amendment, submissions required by this part, and disbursement of Capital Fund grants from HUD are individually

and collectively deemed to be the PHA's certification that it is in compliance with the provisions of this part and all other Public Housing Program Requirements. Noncompliance with any provision of this part or other applicable requirements may subject the PHA and/or its partners to sanctions contained in §905.804 of this part.

§ 905.108 Definitions.

The following definitions apply to this part:

1937 Act. The term "1937 Act" is defined in 24 CFR 5.100.

Accessible. As defined in 24 CFR 8.3.

ACC. The Annual Contributions Contract between HUD and a PHA covering a public housing project or multiple public housing projects.

ACC Amendment. An Amendment to the ACC to reflect specific changes made to a PHA's public housing inventory or funding. An ACC Amendment may be a Capital Fund ACC Amendment, a Mixed-Finance ACC Amendment, a Capital Fund Financing ACC Amendment, or other form of amendment specified by HUD.

Additional Project Costs. The sum of the following HUD-approved costs related to the development of a public housing project, which are not included in the calculation of the Total Development Cost (TDC) limit, but are included in the maximum project cost as stated in §905.314(b). Additional project costs include the following:

(1) Costs for the demolition or remediation of environmental hazards associated with public housing units that will not be rebuilt on the original site; and

(2) Extraordinary site costs that have been verified by an independent state-registered, licensed engineer (e.g., removal of underground utility systems; replacement of off-site underground utility systems; extensive rock and/or soil removal and replacement; and amelioration of unusual site conditions, such as unusual slopes, terraces, water catchments, lakes, etc.); and

(3) Cost effective energy-efficiency measures in excess of standard building codes.

Capital Fund (CF). The fund established under section 9(d) of the 1937 Act (42 U.S.C.) 1437g(d).

Capital Fund Annual Contributions Contract Amendment (CF ACC). An amendment to the Annual Contributions Contract (ACC) under the 1937 Act between HUD and the PHA containing the terms and conditions under which the Department assists the PHA in providing decent, safe, and sanitary housing for low-income families. The CF ACC must be in a form prescribed by HUD, under which HUD agrees to provide assistance in the development, modernization, and/or operation of a low-income housing project under the 1937 Act and the PHA agrees to modernize and operate the project in compliance with all Public Housing Requirements.

Capital Fund Program Fee. A fee that may be charged to a Capital Fund grant by the PHA to cover costs associated with oversight and management of the CFP by the PHA Central Office Cost Center (COCC). These costs include duties related to general capital planning, preparation of the Annual Plan, processing of the Line of Credit Control System (LOCCS), preparation of reports, drawing of funds, budgeting, accounting, and procurement of construction and other miscellaneous contracts. The CFP fee is the administrative cost for managing a Capital Fund grant for a PHA subject to asset management.

Community Renewal Costs. Community Renewal Costs consist of the sum of the following HUD-approved costs related to the development of a public housing project: planning (including proposal preparation); administration; site acquisition; relocation; demolition of—and site remediation of environmental hazards associated with—public housing units that will be replaced on the project site; interest and carrying charges; off-site facilities; community buildings and nondwelling facilities; contingency allowance; insurance premiums; any initial operating deficit; on-site streets; on site utilities; and other costs necessary to develop the project that are not covered under the Housing Construction Cost (HCC). Public housing capital assistance may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the HCC paid for

with public housing capital assistance and the TDC limit.

Cooperation agreement. An agreement, in a form prescribed by HUD, between a PHA and the applicable local governing body or bodies that assures exemption from real and personal property taxes, provides for local support and services for the development and operation of public housing, and provides for PHA payments in lieu of taxes (PILOT).

Date of Full Availability (DOFA). The last day of the month in which substantially all (95 percent or more) of the units in a public housing project are available for occupancy.

Declaration of Restrictive Covenant. The Declaration of Restrictive Covenant is a legal instrument that binds the PHA and the Owner Entity to develop mixed-finance projects in compliance with Public Housing Requirements and restricts disposition of the property, including transferring, conveying, assigning, leasing, mortgaging, pledging or otherwise encumbering the property.

Declaration of Trust (DOT). A legal instrument that grants HUD an interest in public housing property. It provides public notice that the property must be operated in accordance with all public housing federal requirements, including the requirement not to convey or otherwise encumber the property unless expressly authorized by federal law and/or HUD.

Development. Any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment in connection with a public housing project.

Emergency work. Capital Fund related physical work items that if not done pose an immediate threat to the health or safety of residents, and which must be completed within one year of funding. Management Improvements are not eligible as emergency work and therefore must be covered by the CFP 5-Year Action Plan before the PHA may carry them out.

Energy audit. A systematic review of the energy requirements and consumption for property with the intent to identify potential opportunities for energy and water savings through im-

proved operational efficiency or more efficient components.

Expenditure. Capital Funds disbursed by the PHA to pay for obligations incurred in connection with work included in a CFP 5-Year Action Plan that has been approved by the PHA Board of Commissioners and HUD. Total funds expended means cash actually disbursed and does not include retainage.

Federal Fiscal Year (FFY). The Federal Fiscal Year begins each year on October 1 and ends on September 30 of the following year.

Force account labor. Labor employed directly by the PHA on either a permanent or a temporary basis.

Fungibility. As it relates to the Capital Fund Program, fungibility allows the PHA to substitute work items between any of the years within the latest approved CFP 5-Year Action Plan, without prior HUD approval.

HCC. The sum of the following HUD-approved costs related to the development of a public housing project: dwelling unit hard costs (including construction and equipment), builder's overhead and profit, the cost of extending utilities from the street to the public housing project, finish landscaping, and the payment of Davis-Bacon wage rates.

Line of Credit Control System (LOCCS). LOCCS is a HUD grant disbursement system. LOCCS currently provides disbursement controls for over 100 HUD grant programs. LOCCS-Web is an intranet version of LOCCS for HUD personnel. eLOCCS is the Internet link to LOCCS data for HUD business partners.

Mixed-finance modernization. Use of the mixed-finance method of development to modernize public housing projects described in § 905.604.

Modernization. Modernization means the activities and items listed in § 905.200(b)(4-18).

Natural disaster. An extraordinary event, such as an earthquake, flood, or hurricane, affecting only one or few PHAs, but excluding presidentially declared emergencies and major disasters under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*).

Obligation. A binding agreement for work or financing that will result in outlays, immediately or in the future. All obligations must be incorporated within the CFP 5-Year Action Plan that has been approved by the PHA Board of Commissioners and HUD. This includes funds obligated by the PHA for work to be performed by contract labor (*i.e.*, contract award), or by force account labor (*i.e.*, work actually started by PHA employees). Capital Funds identified in the PHA's CFP 5-Year Action Plan to be transferred to operations are obligated by the PHA once the funds have been budgeted and drawn down by the PHA. Once these funds are drawn down they are subject to the requirements of 24 CFR part 990.

Open grant. Any grant for which a cost certificate has not been submitted and which has not reached fiscal close-out as described in §905.322 of this part.

Operating fund. Assistance provided under 24 CFR part 990 pursuant to section 9(e) of the 1937 Act (42 U.S.C. 1437g(e)) for the purpose of operation and management of public housing.

Owner entity. An entity that owns public housing units. In mixed-finance development, the Owner Entity may be the PHA, or may be an entity in which the PHA owns a partial interest, or may be an entity in which the PHA has no ownership interest. The Owner Entity is subject to the applicable requirements of this subpart.

Partner. A third-party entity with which the PHA has entered into a partnership or other contractual arrangement to provide for the mixed-finance development of public housing units pursuant to this subpart. The partner has primary responsibility with the PHA for the development and/or operation of the public housing units and is subject to the applicable requirements of subpart F of this part.

Physical Needs Assessment (PNA). A systematic review of all the major physical components of property to result in a long-term schedule for replacement of each component and estimated capital costs required to meet the replacement need.

PIH Information Center (PIC). PIH's current system for recording data concerning: the public housing inventory, the characteristics of public housing

and Housing Choice Voucher —assisted families, the characteristics of PHAs, and performance measurement of PHAs receiving Housing Choice Voucher funding.

Public Housing Agency (PHA). Any state, county, municipality, or other governmental entity or public body or agency or instrumentality of these entities that is authorized to engage or assist in the development or operation of public housing under this part.

Public Housing Assessment System (PHAS). The assessment system under 24 CFR part 902 for measuring the properties and PHA management performance in essential housing operations, including rewards for high performers and consequences for poor performers.

Public housing capital assistance. Assistance provided by HUD under the Act in connection with the development of public housing under this part, including Capital Fund assistance provided under section 9(d) of the Act, public housing development assistance provided under section 5 of the Act, Operating Fund assistance used for capital purposes under section 9(g)(2) or 9(e)(1)(I) (with HUD's approval of such financing of rehabilitation and development of public housing units) of the Act, and HOPE VI grant assistance.

Public housing funds. Any funds provided through the Capital Fund or Other Public Housing Development Sources, such as HOPE VI, Choice Neighborhoods, Development Funds, disposition proceeds that a PHA may realize under section 18 of the 1937 Act (42 U.S.C. 1437p), or any other funds appropriated by Congress for public housing.

Public housing project. The term "public housing" means low-income housing, and all necessary appurtenances thereto, assisted under the 1937 Act, other than assistance under 42 U.S.C. 1437f of the 1937 Act (section 8). The term "public housing" includes dwelling units in a mixed-finance project that are assisted by a public housing agency with public housing capital assistance or Operating Fund assistance. When used in reference to public housing, the term "project" means housing developed, acquired, or assisted by a PHA under the 1937 Act,

§ 905.110

and the improvement of any such housing.

Public housing requirements. All requirements applicable to public housing including, but not limited to, the 1937 Act; HUD regulations; the Consolidated Annual Contributions Contract, including amendments; HUD notices; and all applicable federal statutes, executive orders, and regulatory requirements, as these requirements may be amended from time to time.

Reasonable cost. An amount to rehabilitate or modernize an existing structure that is not greater than 90 percent of the TDC for a new development of the same structure type, number, and size of units in the same market area. Reasonable costs are also determined with consideration of HUD regulations including 2 CFR part 200.

Reconfiguration. The altering of the interior space of buildings (e.g., moving or removing interior walls to change the design, sizes, or number of units).

Uniform Federal Accessibility Standards (UFAS). As defined in 24 CFR 8.32; see also 24 CFR part 40.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.110 Incorporation by reference.

(a) Certain material is incorporated by reference into this part, with the approval of the Director of the Federal Register, under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, HUD must publish notice of change in the FEDERAL REGISTER and the material must be available to the public. Incorporated material is available from the sources listed below and is available for inspection at HUD's Office of Policy Development and Research, Affordable Housing Research and Technology Division, Department of Housing and Urban Development, telephone number 202-408-4370 (this is not a toll-free number). This material is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 (this is not a toll-free number) or go to http://www.archives.gov/federal_register/

24 CFR Ch. IX (4-1-16 Edition)

code_of_federal_regulations/ibr_locations.html.

(b) American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 1791 Tulle Circle NE., Atlanta, GA 30329 (<http://www.ashrae.org/standards-research-technology/standards-guidelines>).

(1) ASHRAE 90.1-2010, "Energy Standard for Buildings Except Low-Rise Residential Buildings," copyright 2010, IBR approved for §§ 905.200(b) and 905.312(b) of this part.

(2) [Reserved]

(c) International Code Council, 500 New Jersey Avenue NW., 6th Floor, Washington, DC 20001.

(1) International Energy Conservation Code (IECC), January 2009, IBR approved for §§ 905.200(b) and 905.312(b).

(2) [Reserved]

Subpart B—Eligible Activities

SOURCE: 78 FR 63773, Oct. 24, 2013, unless otherwise noted.

§ 905.200 Eligible activities.

(a) *General.* Activities that are eligible to be funded with Capital Funds as identified in this section include only items specified in an approved CFP 5-Year Action Plan as identified in § 905.300, or approved by HUD for emergency and natural disaster assistance, other than presidentially declared natural disasters and emergencies.

(b) *Eligible activities.* Eligible activities include the development, financing, and modernization of public housing projects, including the redesign, reconstruction, and reconfiguration of public housing sites and buildings (including compliance with the accessible design and construction requirements contained in 24 CFR 8.32, 24 CFR part 40, 24 CFR part 100, 28 CFR 35.151, and 28 CFR part 36, as applicable) and the development of mixed-finance projects, including the following:

(1) *Modernization.* Modernization is defined in § 905.108 of this part;

(2) *Development.* Development refers to activities and related costs to add units to a PHA's public housing inventory under § 905.600 of this part, including: construction and acquisition with or without rehabilitation; any and all undertakings necessary for planning,

design, financing, land acquisition, demolition, construction, or equipment, including development of public housing units, and buildings, facilities, and/or related appurtenances (*i.e.*, non-dwelling facilities/spaces). Development of mixed-finance projects include the provision of public housing through a regulatory and operating agreement, master contract, individual lease, condominium or cooperative agreement, or equity interest.

(3) *Financing.* Debt and financing costs (e.g., origination fees, interest) incurred by PHAs for development or modernization of PHA projects that involves the use of Capital Funds, including, but not limited to:

(i) Mixed finance as described in § 905.604 of this part;

(ii) The Capital Fund Financing Program (CFFP) as described in § 905.500 of this part; and

(iii) Any other use authorized by the Secretary under section 30 of the 1937 Act (42 U.S.C. 1437).

(4) *Vacancy reduction.* Physical improvements to reduce the number of units that are vacant. Not included are costs for routine vacant unit turn-around, such as painting, cleaning, and minor repairs. Vacancy reduction activities must be remedies to a defined vacancy problem detailed in a vacancy reduction program included in the PHA's CFP 5-Year Action Plan.

(5) *Nonroutine maintenance.* Work items that ordinarily would be performed on a regular basis in the course of maintenance of property, but have become substantial in scope because they have been postponed and involve expenditures that would otherwise materially distort the level trend of maintenance expenses. These activities also include the replacement of obsolete utility systems and dwelling equipment.

(6) *Planned code compliance.* Building code compliance includes design and physical improvement costs associated with:

(i) Correcting violations of local building code or the Uniform Physical Condition Standards (UPCS) under the Public Housing Assessment System (PHAS), and

(ii) A national building code, such as those developed by the International

Code Council or the National Fire Protection Association; and the IECC or ASHRAE 90.1-2010 (both incorporated by reference, see, § 905.110 of this part), for multifamily high-rises (four stories or higher), or a successor energy code or standard that has been adopted by HUD for new construction pursuant to section 109 of the Cranston-Gonzales National Affordable Housing Act, Public Law 101-625, codified at 42 U.S.C. 12709, or other relevant authority.

(7) *Management improvements.* Noncapital activities that are project-specific or PHA-wide improvements needed to upgrade or improve the operation or maintenance of the PHA's projects, to promote energy conservation, to sustain physical improvements at those projects, or correct management deficiencies. PHAs must be able to demonstrate the linkage between the management improvement and the correction of an identified management deficiency, including sustaining the physical improvements. HUD encourages PHAs, to the greatest extent feasible, to hire residents as trainees, apprentices, or employees to carry out activities under this part, and to contract with resident owned businesses as required by section 3 of the Housing and Community Development Act of 1968, 12 U.S.C. 1701u. Management improvement costs shall be fundable only for the implementation period of the physical improvements, unless a longer period, up to a maximum of 4 years, is clearly necessary to achieve performance targets. Eligible activities include the following costs:

(i) Training for PHA personnel in operations and procedures, including resident selection, rent collection and eviction;

(ii) Improvements to management, financial, and accounting control systems of the PHA;

(iii) Improvement of resident and project security;

(iv) Activities that assure or foster equal opportunity; and

(v) Activities needed in conjunction with capital expenditures to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents, including the costs for resident job training and resident

business development activities to enable residents and their businesses to carry out Capital Fund-assisted activities.

(vi) Resident management costs not covered by the Operating Fund include:

(A) The cost of technical assistance to a resident council or RMC to assess feasibility of carrying out management functions for a specific development or developments;

(B) The cost to train residents in skills directly related to the operation and management of the development(s) for potential employment by the RMC;

(C) The cost to train RMC board members in community organization, board development, and leadership;

(D) The cost of the formation of an RMC; and

(E) Resident participation costs that promote more effective resident participation in the operation of the PHA in its Capital Fund activities, including costs for staff support, outreach, training, meeting and office space, childcare, transportation, and access to computers that are modest and reasonable.

(8) *Economic self-sufficiency.* Capital expenditures to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents.

(9) *Demolition and reconfiguration.* (i) The costs to demolish dwelling units or nondwelling facilities subject to prior approval by HUD, where required, and other related costs for activities such as relocation, clearing, and grading the site after demolition, and subsequent site improvements to benefit the remaining portion of the existing public housing property, as applicable.

(ii) The costs to develop dwelling units or nondwelling facilities approved by HUD, where required, and other related costs for activities such as relocation, clearing and grading the site prior to development.

(iii) The costs to reconfigure existing dwelling units to units with different bedroom sizes or to a nondwelling use.

(10) *Resident relocation and mobility counseling.* Relocation and other assistance (e.g., reimbursement to affected residents of reasonable out-of-pocket expenses incurred in connection with temporary relocation, including the

cost of moving to and from temporary housing and any increase in monthly rent/utility costs) as may be required or permitted by applicable Public Housing Requirements for permanent or temporary relocation, as a direct result of modernization, development, rehabilitation, demolition, disposition, reconfiguration, acquisition, or an emergency or disaster.

(11) *Security and safety.* Capital expenditures designed to improve the security and safety of residents.

(12) *Homeownership.* Activities associated with public housing homeownership, as approved by HUD, such as:

(i) The cost of a study to assess the feasibility of converting rental units to homeownership units and the preparation of an application for the conversion to homeownership or for the sale of units;

(ii) Construction or acquisition of units;

(iii) Downpayment assistance;

(iv) Closing cost assistance;

(v) Subordinate mortgage loans;

(vi) Construction or permanent financing such as write downs for new construction, or acquisition with or without rehabilitation; and

(vii) Other activities in support of the primary homeownership activities above, including but not limited to:

(A) Demolition to make way for new construction;

(B) Abatement of environmentally hazardous materials;

(C) Relocation assistance and mobility counseling;

(D) Homeownership counseling;

(E) Site improvements; and

(F) Administrative and marketing costs.

(13) *Capital Fund-related legal costs* (e.g., legal costs related to preparing property descriptions for the DOT, zoning, permitting, environmental review, procurement, and contracting).

(14) *Energy efficiency.* Allowed costs include:

(i) Energy audit or updated energy audits to the extent Operating Funds are not available and the energy audit is included within a modernization program.

(ii) Integrated utility management and capital planning to promote energy conservation and efficiency measures.

(iii) Energy and water conservation measures identified in a PHA's most recently updated energy audit.

(iv) Improvement of energy and water-use efficiency by installing fixtures and fittings that conform to the American Society of Mechanical Engineers/American National Standards Institute standards A112.19.2-1998 and A112.18.1-2000, or any revision thereto, applicable at the time of installation, and by increasing energy efficiency and water conservation by such other means as the Secretary determines are appropriate.

(v) The installation and use of Energy Star appliances whenever energy systems, devices, and appliances are replaced, unless it is not cost-effective to do so, in accordance with Section 152 of the Energy Policy Act of 2005, 42 U.S.C. 15841.

(vi) Utility and energy management system automation, and metering activities, including changing mastermeter systems to individually metered systems if installed as a part of a modernization activity to upgrade utility systems; for example, electric, water, or gas systems of the PHA consistent with the requirements of 24 CFR part 965.

(15) *Administrative costs.* Any administrative costs, including salaries and employee benefit contributions, other than the Capital Fund Program Fee, must be related to a specific public housing development or modernization project and detailed in the CFP 5-Year Action Plan.

(16) *Audit.* Costs of the annual audit attributable to the portion of the audit covering the CFP in accordance with § 905.322(c) of this part.

(17) *Capital Fund Program Fee.* This fee covers costs associated with oversight and management of the CFP attributable to the HUD-accepted COCC as described in 24 CFR part 990 subpart H. These costs include duties related to capital planning, preparing the CFP Annual Statement/Performance and Evaluation Report, preparing the CFP 5-Year Action Plan, the monitoring of LOCCS, preparing reports, drawing funds, budgeting, accounting, and procuring construction and other miscellaneous contracts. This fee is not intended to cover costs associated with

construction supervisory and inspection functions that are considered a front-line cost of the project.

(18) *Emergency activities.* Capital Fund related activities identified as emergency work, as defined in § 905.108 of this part, whether or not the need is indicated in the CFP 5-Year Action Plan.

§ 905.202 Ineligible activities and costs.

The following are ineligible activities and costs for the CFP:

(a) Costs not associated with a public housing project or development, as defined in § 905.604(b)(1);

(b) Activities and costs not included in the PHA's CFP 5-Year Action Plan, with the exception that expenditures for emergencies and disasters, as defined in § 905.204 of this subpart, that are not identified in the 5-year Action Plan because of their emergent nature are eligible costs;

(c) Improvements or purchases that are not modest in design and cost because they include amenities, materials, and design in excess of what is customary for the locality. Air conditioning is an eligible modest amenity;

(d) Any costs not authorized as outlined in 2 CFR part 200, subpart E, including, but not limited to, indirect administrative costs and indemnification;

(e) Public housing operating assistance, except as provided in § 905.314(l) of this part;

(f) Direct provision of social services through either force account or contract labor. Examples of ineligible direct social services include, but are not limited to, salaries for social workers or GED teachers;

(g) Eligible costs that are in excess of the amount directly attributable to the public housing units when the physical or management improvements, including salaries and employee benefits and contributions, will benefit programs other than public housing, such as section 8 Housing Choice Voucher or local revitalization programs;

(h) Ineligible management improvements include:

(1) Costs for security guards or ongoing security services (Capital Funds may only be used for the initial capital (e.g., fencing, lights, and cameras) or

§ 905.204

noncapital (e.g., training of in-house security staff) management improvements but may not be used for the ongoing costs, such as security guards after the end of the implementation period of the physical improvements);

(2) General remedial education; and

(3) Job counseling, job development and placement, supportive services during training, and the hiring of a resident coordinator. No continued Capital Funds will be provided after the end of the implementation period of the management improvements. The PHA shall be responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities;

(i) Eligible cost that is funded by another source and would result in duplicate funding; and

(j) Any other activities and costs that HUD may determine on a case-by-case basis.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.204 Emergencies and natural disasters.

(a) *General.* PHAs are required by the CF ACC to carry various types of insurance to protect it from loss. In most cases, insurance coverage will be the primary source of funding to pay repair or replacement costs associated with emergencies and natural disasters. Where the Department's Annual Appropriations Act establishes a set-aside from the Capital Fund appropriation for emergencies and natural disasters, the procedures in this section apply.

(b) *Emergencies and natural disasters.* An emergency is an unforeseen or unpreventable event or occurrence that poses an immediate threat to the health and safety of the residents that must be corrected within one year of funding. A natural disaster for purposes of the Capital Fund reserve, is a non-presidentially declared disaster. In the event an emergency or natural disaster arises, HUD may require a PHA to use any other source that may legally be available, including unobligated Capital Funds, prior to providing emergency or natural disaster funds from the set-aside. The Department will review, on a case-by-case basis, re-

24 CFR Ch. IX (4-1-16 Edition)

quests for emergency and natural disaster funding from PHAs.

(c) *Procedure to request emergency or natural disaster funds.* To obtain emergency or natural disaster funds, a PHA shall submit a written request in the form and manner prescribed by HUD. In a natural disaster where the PHA requires immediate relief to preserve the property and safety of the residents, the PHA may submit a preliminary request outlined in paragraph (d) of this section. Subsequently, the PHA is required to complete and submit the remaining information outlined in paragraph (e) of this section, at a time prescribed by HUD. For emergency requests, PHAs are to follow the procedures outlined in paragraph (e) of this section.

(d) *Procedure to request preliminary natural disaster grant for immediate preservation.* A PHA may request a preliminary grant only for costs necessary for immediate preservation of the property and safety of the residents. The application should include the reasonable identification of damage and preservation costs as determined by the PHA. An independent assessment will be required when the PHA submits the final request or when the PHA reconciles the preliminary application grant with the actual amounts received from the Federal Emergency Management Agency (FEMA), insurance carriers, and other natural disaster relief sources. Regardless of whether further funding from the set-aside is requested, at a time specified by HUD, the PHA will be expected to provide a reconciliation of all funds received, to ensure that the PHA does not receive duplicate funding.

(e) *Procedure for an emergency or a final request for natural disaster funds.* In the request the PHA shall:

(1) Identify the public housing project(s) with the emergency or natural disaster condition(s).

(2) Identify and provide the date of the conditions that present an unforeseen or unpreventable threat to the health, life, or safety of residents, in the case of emergency; or Natural disaster (e.g., hurricane, tornado, etc.).

(3) Describe the activities that will be undertaken to correct the emergency or the conditions caused by the

natural disaster and the estimated cost.

(4) Provide an independent assessment of the extent of and the cost to correct the condition. The assessment must be specific as to the damage and costs associated with the emergency or natural disaster. An independent estimate of damage and repair cost is required as a part of the final natural disaster application. For natural disasters, the assessment must identify damage specifically caused by the natural disaster. The set-aside can be used only to pay costs to repair or replace a public housing project damaged as a result of the natural disaster, not for nonroutine maintenance or other improvements.

(5) Provide a copy of a currently effective DOT covering the property and an opinion of counsel that there are no preexisting liens or other encumbrances on the property.

(6) Demonstrate that without the requested funds from the set-aside, the PHA does not have adequate funds available to correct the emergency condition(s).

(7) Identify all other sources of available funds (e.g., insurance proceeds, FEMA).

(8) Any other material required by HUD.

(f) *HUD Action.* HUD shall review all requests for emergency or natural disaster funds. If HUD determines that a PHA's request meets the requirements of this section, HUD shall approve the request subject to the availability of funds in the set-aside, in the order in which requests are received and are determined approvable.

(g) *Submission of the CF ACC.* Upon being provided with a CF ACC Amendment from HUD, the PHA must sign and date the CF ACC Amendment and return it to HUD by the date established by HUD. HUD will execute the signed and dated CF ACC Amendment submitted by the PHA.

Subpart C—General Program Requirements

SOURCE: 78 FR 63773, Oct. 24, 2013, unless otherwise noted.

§ 905.300 Capital fund submission requirements.

(a) *General.* Unless otherwise stated, the requirements in this section apply to both qualified PHAs (as described in §903.3(c) of this chapter) and non-qualified PHAs. Each PHA must complete a comprehensive physical needs assessment (PNA).

(1) *Applicability.* Small PHAs (PHAs that own or operate fewer than 250 public housing units) must comply with the requirements of this section beginning 30 days after the end of the federal fiscal year quarter following HUD's publication of a notice in the FEDERAL REGISTER.

(2) [Reserved]

(b) *Capital Fund program submission requirements.* At the time that the PHA submits the ACC Amendment(s) for its Capital Fund Grants(s) to HUD, the PHA must also submit the following items:

(1) *CFP 5-Year Action Plan.* (i) *Content.* The CFP 5-Year Action Plan must describe the capital improvements necessary to ensure long-term physical and social viability of the PHA's public housing developments, including the capital improvements to be undertaken within the 5-year period, their estimated costs, status of environmental review, and any other information required for participation in the CFP, as prescribed by HUD. In order to be entitled to fungibility, PHA's must have an approved 5-year Action Plan. Except in the case of emergency/disaster work, the PHA shall not spend Capital Funds on any work that is not included in an approved CFP 5-Year Action Plan and its amendments.

(ii) *Budget.* The Capital Fund Budget for each of the 5 years shall be prepared by a PHA using the form(s) prescribed by HUD. Work items listed in the budget must include, but are not limited to, the following:

(A) Where a PHA has an approved Capital Fund Financing Program (CFFP) loan, debt service payments for the grants from which the payments are scheduled;

(B) Where a PHA has an approved CFFP loan, the PHA shall also include all work and costs, including debt service payments, in the CFP 5-Year Action Plan. Work associated with the

use of financing proceeds will be reported separately in a form and manner prescribed by HUD; or

(C) Work affecting health and safety and compliance with regulatory requirements such as section 504 of the Rehabilitation Act of 1973 and HUD's implementing regulations at 24 CFR part 8, and the lead-based paint poisoning prevention standards at 24 CFR part 35, before major systems (e.g., heating, roof, etc.) and other costs of lower priority.

(iii) PHA Criteria for Significant Amendment or Modification. The PHA must include in the basic criteria that the PHA will use for determining a significant amendment or modification to the CFP 5-Year Action Plan. In addition to the criteria established by the PHA, for the purpose of the CFP, a proposed demolition, disposition, homeownership, Capital Fund financing, development, or mixed-finance proposal are considered significant amendments to the CFP 5-Year Action Plan.

(iv) *Submission*. The PHA must submit a Board-approved CFP 5-Year Action Plan at least once every 5 years. The PHA may choose to update its CFP 5-Year Action Plan every year. The PHA shall indicate whether its CFP 5-Year Action Plan is fixed or rolling. Prior to submission to HUD, the 5-Year Action Plan must have been approved by the PHA's Board of Commissioners. In any given year that a PHA does not have a CFP 5-Year Action Plan that is approved by the PHA Board of Commissioners and HUD, the Capital Fund grant(s) for these PHAs will be reserved and obligated; however, the PHA will not have access to those funds until its CFP 5-Year Action Plan is approved by the PHA Board of Commissioners and HUD.

(v) Significant amendments or modification to the CFP 5 Year Action Plan. PHAs making significant amendments or modifications to the CFP 5-Year Action Plan, as defined in paragraph (b)(1)(iii) of this section, must follow the requirements of this section.

(A) A PHA after submitting its 5-Year Action Plan may amend or modify the plan. If the amendment or modification is a significant amendment or modification, as defined in

paragraph (b)(1)(iii) of this section, the PHA:

(1) May not adopt the amendment or modification until the PHA has duly called a meeting of its Board of Commissioners (or similar governing body) and the meeting at which the amendment or modification is adopted, is open to the public; and

(2) May not implement the amendment or modification until notification of the amendment or modifications are provided to HUD and approved by HUD in accordance with HUD's plan review procedures, as provided in paragraph (b)(6) of this section.

(B) Each significant amendment or modification to a plan submitted to HUD is subject to the requirement of paragraph (b)(3) of this section.

(2) *Certifications required for receipt of Capital Fund grants*. The PHA is also required to submit various certifications to HUD, in a form prescribed by HUD, including, but not limited to:

(i) Certification of PIC Data;
 (ii) Standard Form—Disclosure of Lobbying Activities;
 (iii) Civil Rights Compliance, in a form prescribed by HUD; and
 (iv) Certification of Compliance with Public Hearing Requirements.

(3) *Conduct of public hearing and Resident Advisory Board Consultation*. A PHA must annually conduct a public hearing and consult with the Resident Advisory Board (RAB) of the PHA to discuss the Capital Fund submission. The PHA may elect to conduct a separate annual public hearing in order to solicit public comments or to hold the annual public hearing at the same time as the hearing for the Annual PHA Plan, the 5-Year Plan, or the required annual hearing for qualified public housing authorities. The hearing must be conducted at a location that is convenient to the residents served by the PHA.

(i) Not later than 45 days before the public hearing is to take place, the PHA must:

(A) Make the Capital Fund submission along with the material required under this paragraph (b) available to the residents and the RAB; and

(B) Publish a notice informing the public that the information is available for review and inspection; that a

public hearing will take place on the plan; and of the date, time, and location of the hearing.

(C) PHAs shall conduct reasonable outreach activities to encourage broad public participation in the review of the Capital Fund submission.

(4) *Public and RAB comments.* The PHA must consider the comments from the residents, the public, and the RAB on the Capital Fund submission, or any significant modification thereto. In submitting the final CFP 5-Year Action Plan to HUD for approval, or any significant amendment or modification to the 5-Year Action Plan to HUD for approval, the PHA must include a copy of the recommendations made by the RAB(s) and a description of the manner in which the PHA addressed these recommendations.

(5) *Consistency with Consolidated Plan.* The Capital Fund submission must be consistent with any applicable Consolidated Plan.

(6) *HUD review and approval.* The CFP submission requirements must meet the requirements of this part as well as the Public Housing Program Requirements as defined in §905.108 of this part. A PHA is required to revise or correct information that is not in compliance, and HUD has the authority to impose administrative sanctions until the appropriate revisions are made. HUD will review the CFP submission requirements to determine whether:

(i) All of the information that is required to be submitted is included;

(ii) The information is consistent with the needs identified in the PNA and data available to HUD; and

(iii) There are any issues of compliance with applicable laws, regulations, or contract requirements that have not been addressed with the proposed use of the Capital Fund.

(7) *Time frame for submission of CFP requirements.* The requirements identified in this paragraph (b) must be submitted to HUD, in a format prescribed by HUD, at the time that the PHA submits its signed CF ACC Amendment.

(8) *Performance and Evaluation Report.*

(i) All PHAs must prepare a CFP Annual Statement/Performance and Evaluation Report at a time and in a format prescribed by HUD. These reports shall be retained on file for all grants

for which a final Actual Modernization Cost Certificate (AMCC) or an Actual Development Cost Certificate (ADCC) has not been submitted. A final Performance and Evaluation Report must be submitted in accordance with 24 CFR 905.322, at the time the PHA submits its AMCC or ADCC.

(ii) PHAs that are designated as troubled performers under PHAS (24 CFR part 902) or as troubled under the Section 8 Management Assessment Program (SEMAP) (24 CFR part 985), and/or were identified as noncompliant with section 9(j) obligation and expenditure requirements during the fiscal year, shall submit their CFP Annual Statement/Performance and Evaluation Reports to HUD for review and approval.

(iii) All other PHAs, that are not designated as troubled performers under PHAS and are not designated as troubled under SEMAP, and that were in compliance with section 9(j) obligation and expenditure requirements during the fiscal year, shall prepare a CFP Annual Statement/Performance and Evaluation report for all open grants and shall retain the report(s) on file at the PHA, to be available to HUD upon request.

(9) *Moving to Work (MTW) PHAs.* MTW PHAs are to submit the Capital Fund submissions as part of the MTW Plan annually, as required by the MTW Agreement.

(c)-(d) [Reserved]

§ 905.302 Timely submission of the CF ACC amendment by the PHA.

Upon being provided with a CF ACC Amendment from HUD, the PHA must sign and date the CF ACC Amendment and return it to HUD by the date established. HUD will execute the signed and dated CF ACC Amendment submitted by the PHA. If HUD does not receive the signed and dated Amendment by the submission deadline, the PHA will receive the Capital Fund grant for that year; however, it will have less than 24 months to obligate 90 percent of the Capital Fund grant and less than 48 months to expend these funds because the PHA's obligation start date and disbursement end date for these grants will remain as previously established by HUD.

§ 905.304

24 CFR Ch. IX (4-1-16 Edition)

§ 905.304 CF ACC term and covenant to operate.

(a) *Period of obligation to operate as public housing.* The PHA shall operate all public housing projects in accordance with the CF ACC, as amended, and applicable HUD regulations, for the statutorily prescribed period. These periods shall be evidenced by a recorded DOT on all public housing property. If the PHA uses Capital Funds to develop public housing or to modernize existing public housing, the CF ACC term and the covenant to operate those projects are as follows:

(1) *Development activities.* Each public housing project developed using Capital Funds shall establish a restricted use covenant, either in the DOT or as a Declaration of Restrictive Covenants, to operate under the terms and conditions applicable to public housing for a 40-year period that begins on the date on which the project becomes available for occupancy, as determined by HUD.

(2) *Modernization activities.* For PHAs that receive Capital Fund assistance, the execution of each new CF ACC Amendment establishes an additional 20-year period that begins on the latest date on which modernization is completed, except that the additional 20-year period does not apply to a project that receives Capital Fund assistance only for management improvements.

(3) *Operating Fund.* Any public housing project developed that receives Operating Fund assistance shall have a covenant to operate under requirements applicable to public housing for a 10-year period beginning upon the conclusion of the fiscal year for which such amounts were provided, except for such shorter period as permitted by HUD by an exception.

(b) *Mortgage or security interests.* The PHA shall not allow *any mortgage* or security interest in public housing assets, including under section 30 of the 1937 Act (42 U.S.C. 1437z-2), without prior written approval from HUD. PHAs that undertake financing unsecured by public housing assets shall include the following nonrecourse language in all financing documents as follows:

“This financing is non-recourse to any public housing property (real or personal property including all public housing assets

or income), or disposition proceeds approved pursuant to Section 18 of the United States Housing Act of 1937 (unless explicitly permitted by HUD in the Section 18 approval letter).”

(c) *Applicability of latest expiration date.* All public housing subject to this part or required by law shall be maintained and operated as public housing, as prescribed, until the latest expiration date provided in section 9(d)(3) of the 1937 Act (42 U.S.C. 1437g(d)(3)) or any other provision of law or regulation mandating the operation of the housing as public housing, or under terms and conditions applicable to public housing, for a specified period of time.

§ 905.306 Obligation and expenditure of Capital Fund grants.

(a) *Obligation.* A PHA shall obligate each Capital Fund grant, including formula grants, Replacement Housing Factor (RHF) grants, Demolition and Disposition Transitional Funding (DDTF) grants, and natural disaster grants, no later than 24 months after, and emergency grants no later than 12 months after, the date on which the funds become available to the PHA for obligation, except as provided in paragraphs (c) and (d) of this section. However, a PHA with unobligated funds from a grant shall disregard this requirement for up to not more than 10 percent of the originally allocated funds from that grant. The funds become available to the PHA when HUD executes the CF ACC Amendment. With HUD approval, and subject to the availability of appropriations, the PHA can accumulate RHF grants for up to 5 years or until it has adequate funds to undertake replacement housing. The PHA shall obligate 90 percent of the RHF grant within 24 months from the date that the PHA accumulates adequate funds, except as provided in paragraph (c) of this section.

(b) *Items and costs.* For funds to be considered obligated, all items and costs must meet the definition of “obligation” in § 905.108 of this part.

(c) *Extension to obligation requirement.* The PHA may request an extension of the obligation deadline, and HUD may grant an extension for a period of up to 12 months, based on:

(1) The size of the PHA;
 (2) The complexity of the CFP of the PHA;

(3) Any limitation on the ability of the PHA to obligate the amounts allocated for the PHA from the Capital Fund in a timely manner as a result of state or local law; or

(4) Any other factors that HUD determines to be relevant.

(d) *HUD extension for other reasons.* HUD may extend the obligation deadline for a PHA for such a period as HUD determines to be necessary, if HUD determines that the failure of the PHA to obligate assistance in a timely manner is attributable to:

(1) Litigation;
 (2) Delay in obtaining approvals from the Federal Government or a state or local government that is not the fault of the PHA;

(3) Compliance with environmental assessment and abatement requirements;

(4) Relocating residents;
 (5) An event beyond the control of the PHA; or

(6) Any other reason established by HUD by notice in the FEDERAL REGISTER.

(e) *Failure to obligate.* (1) For any month during the fiscal year, HUD shall withhold all new Capital Fund grants from any PHA that has unobligated funds in violation of paragraph (a) of this section. The penalty will be imposed once the violations of paragraph (a) are known. The PHA may cure the noncompliance by:

(i) Requesting in writing that HUD recapture the unobligated balance of the grant; or

(ii) Continuing to obligate funds for the grant in noncompliance until the noncompliance is cured.

(2) After the PHA has cured the noncompliance, HUD will release the withheld Capital Fund grant(s) minus a penalty of one-twelfth of the grant for each month of noncompliance.

(f) *Expenditure.* The PHA shall expend all grant funds within 48 months after the date on which funds become available, as described in paragraph (a) of this section. The deadline to expend funds may be extended only by the period of time of a HUD-approved extension of the obligation deadline. No

other extensions of the expenditure deadline will be granted. All funds not expended will be recaptured.

§ 905.308 Federal requirements applicable to all Capital Fund activities.

(a) The PHA shall comply with the requirements of 24 CFR part 5 (General HUD Program Requirements; Waivers), 2 CFR part 200, and this part.

(b) The PHA shall also comply with the following program requirements.

(1) *Nondiscrimination and equal opportunity.* The PHA shall comply with all applicable nondiscrimination and equal opportunity requirements, including, but not limited to, the Department's generally applicable nondiscrimination and equal opportunity requirements at 24 CFR 5.105(a) and the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*), and its implementing regulations at 24 CFR parts 40 and 41. The PHA shall affirmatively further fair housing in its use of funds under this part, which includes, but is not limited to, addressing modernization and development in the completion of requirements at 24 CFR 903.7(o).

(2) *Environmental requirements.* All activities under this part are subject to an environmental review by a responsible entity under HUD's environmental regulations at 24 CFR part 58 and must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321 *et seq.*) and the related laws and authorities listed at 24 CFR 58.5. HUD may make a finding in accordance with 24 CFR 58.11 and may perform the environmental review itself under the provisions of 24 CFR part 50. In those cases where HUD performs the environmental review under 24 CFR part 50, it will do so before approving a proposed project, and will comply with the requirements of NEPA and the related requirements at 24 CFR 50.4.

(3) *Wage rates.* (i) Davis-Bacon wage rates. For all work or contracts exceeding \$2,000 in connection with development activities or modernization activities (except for nonroutine maintenance work, as defined in §905.200(b)(5) of this part), all laborers and mechanics employed on the construction, alteration, or repair shall be paid not less than the wages prevailing in the

locality, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 3142).

(ii) HUD-determined wage rates. For all operations work and contracts, including routine and nonroutine maintenance work (as defined in § 905.200(b)(5) of this part), all laborers and mechanics employed shall be paid not less than the wages prevailing in the locality, as determined or adopted by HUD pursuant to section 12(a) of the 1937 Act, 42 U.S.C. 1437j(a).

(iii) *State wage rates.* Preemption of state prevailing wage rates as provided at 24 CFR 965.101.

(iv) *Volunteers.* The prevailing wage requirements of this section do not apply to volunteers performing development, modernization, or nonroutine maintenance work under the conditions set out in 24 CFR part 70.

(4) *Technical wage rates.* All architects, technical engineers, draftsmen, and technicians (other than volunteers under the conditions set out in 24 CFR part 70) employed in a development or modernization project shall be paid not less than the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable state or local law) by HUD.

(5) *Lead-based paint poisoning prevention.* The PHA shall comply with the Lead-Based Paint Poisoning Prevention Act (LPPPA) (42 U.S.C. 4821 *et seq.*), the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. 4851 *et seq.*), and the Lead Safe Housing Rule and the Lead Disclosure Rule at 24 CFR part 35.

(6) *Fire safety.* A PHA shall comply with the requirements of section 31 of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2227).

(7) *Flood insurance and floodplain requirements.* The PHA will not engage in the acquisition, construction, or improvement of a public housing project located in an area that has been identified by the FEMA as having special flood hazards, unless:

(i) The requirements of 24 CFR part 55, Floodplain Management, have been met, including a determination by a responsible entity under 24 CFR part 58 or by HUD under 24 CFR part 50 that there is no practicable alternative to locating in an area of special flood haz-

ards and the minimization of unavoidable adverse impacts;

(ii) Flood insurance on the building is obtained in compliance with the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 *et seq.*); and

(iii) The community in which the area is situated is participating in the National Flood Insurance Program in accordance with 44 CFR parts 59 through 79, or less than one year has passed since FEMA notification regarding flood hazards.

(8) *Coastal barriers.* In accordance with the Coastal Barriers Resources Act (16 U.S.C. 3501 *et seq.*), no financial assistance under this part may be made available within the Coastal Barrier Resources System.

(9) *Displacement, relocation, and real property acquisition.* All acquisition or rehabilitation activities carried out under the Capital Fund, including acquisition of any property for development, shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4601–4655) and with implementing regulations at 49 CFR part 24. Demolition or disposition under section 18 of the 1937 Act, 42 U.S.C. 1437p, is covered by the relocation provisions at 24 CFR 970.21.

(10) *Procurement and contract requirement.* PHAs and their contractors shall comply with section 3 of the Housing and Community Development Act of 1968 (12 U.S.C. 1701u) and HUD's implementing rules at 24 CFR part 135.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.310 Disbursements from HUD.

(a) The PHA shall initiate a fund requisition from HUD only when funds are due and payable, unless HUD approves another payment schedule as authorized by 2 CFR 200.305.

(b) The PHA shall maintain detailed disbursement records to document eligible expenditures (e.g., contracts or other applicable documents), in a form and manner prescribed by HUD.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.312 Design and construction.

The PHA shall meet the following design and construction standards, as applicable, for all development and modernization.

(a) Physical structures shall be designed, constructed, and equipped to be consistent with the neighborhoods they occupy; meet contemporary standards of modest design, comfort, and livability (see also § 905.202(c) of this part); promote security; promote energy conservation; and be attractive so as to harmonize with the community.

(b) All development projects shall be designed and constructed in compliance with:

(1) A national building code, such as those developed by the International Code Council or the National Fire Protection Association; and the IECC or ASHRAE 90.1-2010 (both incorporated by reference, see § 905.110 of this part), for multifamily high-rises (four stories or higher), or a successor energy code or standard that has been adopted by HUD pursuant to 42 U.S.C. 12709 or other relevant authority;

(2) Applicable state and local laws, codes, ordinances, and regulations;

(3) Other federal requirements, including fire protection and safety standards implemented under section 31 of the Fire Administration Authorization Act of 1992, 15 U.S.C. 2227 and HUD minimum property standards (e.g., 24 CFR part 200, subpart S);

(4) Accessibility Requirements as required by section 504 of the Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR part 8; title II of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and implementing regulations at 28 CFR part 35; and, if applicable, the Fair Housing Act (42 U.S.C. 3601-3619) and implementing regulations at 24 CFR part 100; and

(5) Occupancy of high-rise elevator structures by families with children. Pursuant to 42 U.S.C. 1437d(a), a high-rise elevator structure shall not be provided for families with children regardless of density, unless the PHA demonstrates and HUD determines that there is no practical alternative.

(c) All modernization projects shall be designed and constructed in compliance with:

(1) The modernization standards as prescribed by HUD;

(2) Accessibility requirements as required by section 504 of the Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR part 8; title II of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and implementing regulations at 28 CFR part 35; and, if applicable, the Fair Housing Act (42 U.S.C. 3601-3619) and implementing regulations at 24 CFR part 100; and

(3) Cost-effective energy conservation measures, identified in the PHA's most recently updated energy audit.

(d) Pursuant to the Energy Policy Act of 2005, in purchasing appliances, PHAs shall purchase appliances that are Energy Star products or Federal Energy Management Program designed products, unless the PHA determines that the purchase of these appliances is not cost effective.

§ 905.314 Cost and other limitations.

(a) *Eligible administrative costs.* Where the physical or management improvement costs will benefit programs other than Public Housing, such as the Housing Choice Voucher program or local revitalization programs, eligible administrative costs are limited to the amount directly attributable to the public housing program.

(b) *Maximum project cost.* The maximum project cost represents the total amount of public housing capital assistance used in connection with the development of a public housing project, and includes:

(1) Project costs that are subject to the TDC limit (*i.e.*, HCC and Community Renewal Costs); and

(2) Project costs that are not subject to the TDC limit (*i.e.*, Additional Project Costs). The total project cost to be funded with public housing capital assistance, as set forth in the proposal and as approved by HUD, becomes the maximum project cost stated in the ACC Amendment. Upon completion of the project, the actual project cost is determined based upon the amount of public housing capital assistance expended for the project, and this becomes the maximum project cost for purposes of the ACC Amendment.

(c) *TDC limit.* (1) Public housing funds, including Capital Funds, may not be used to pay for HCC and Community Renewal Costs in excess of the TDC limit, as determined under paragraph (b)(2) of this section. However, HOPE VI grantees will be eligible to request a TDC exception for public housing and HOPE VI funds awarded in FFY 1996 and prior years. PHAs may also request a TDC exception for integrated utility management, capital planning, and other capital and management activities that promote energy conservation and efficiency. HUD will examine the request for TDC exceptions to ensure that they would be cost-effective, so as to ensure that up-front expenditures subject to the exceptions would be justified by future cost savings.

(2) *Determination of TDC limit.* HUD will determine the TDC limit for a public housing project as follows:

(i) *Step 1: Unit construction cost guideline.* HUD will first determine the applicable “construction cost guideline” by averaging the current construction costs as listed in two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of “average” quality and the Marshall & Swift cost index for construction of “good” quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the FEDERAL REGISTER.

(ii) *Step 2: Bedroom size and structure types.* The construction cost guideline is then multiplied by the number of units for each bedroom size and structure type.

(iii) *Step 3: Elevator and nonelevator type structures.* HUD will then multiply the resulting amounts from step 2 by 1.6 for elevator type structures and by 1.75 for nonelevator type structures.

(iv) *Step 4: TDC limit.* The TDC limit for a project is calculated by adding the resulting amounts from step 3 for all the public housing units in the project.

(3) *Costs not subject to the TDC limit.* Additional project costs are not subject to the TDC limit.

(4) *Funds not subject to the TDC limit.* A PHA may use funding sources not subject to the TDC limit (e.g., Community Development Block Grant (CDBG) funds, low-income housing tax credits, private donations, private financing, etc.) to cover project costs that exceed the TDC limit or the HCC limit described in this paragraph (c). Such funds, however, may not be used for items that would result in substantially increased operating, maintenance, or replacement costs, and must meet the requirements of section 102 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (42 U.S.C. 3545). These funds must be included in the project development cost budget.

(d) *Housing Construction Costs (HCC).* (1) *General.* A PHA may not use Capital Funds to pay for HCC in excess of the amount determined under paragraph (d)(2) of this section.

(2) *Determination of HCC limit.* HUD will determine the HCC limit as listed in at least two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of “average” quality and the Marshall & Swift cost index for construction of “good” quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the FEDERAL REGISTER. The resulting construction cost guideline is then multiplied by the number of public housing units in the project, based upon bedroom size and structure type. The HCC limit for a project is calculated by adding the resulting amounts for all public housing units in the project.

(3) The HCC limit is not applicable to the acquisition of existing housing, whether or not such housing will be rehabilitated. The TDC limit is applicable to such acquisition.

(e) *Community Renewal Costs.* Capital Funds may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the HCC paid for with public housing capital assistance and the TDC limit.

(f) *Rehabilitation of existing public housing projects.* The HCC limit is not applicable to the rehabilitation of existing public housing projects. The TDC limit for modernization of existing public housing is 90 percent of the TDC limit as determined under paragraph (c) of this section. This limitation does not apply to the rehabilitation of any property acquired pursuant to § 905.600 of this part.

(g) *Modernization cost limits.* If the modernization costs are more than 90 percent of the TDC, then the project shall not be modernized. Capital Funds shall not be expended to modernize an existing public housing development that fails to meet the HUD definition of reasonable cost found in § 905.108 of this part, except for:

- (1) Emergency work;
- (2) Essential maintenance necessary to keep a public housing project habitable until the demolition or disposition application is approved; or
- (3) The costs of maintaining the safety and security of a site that is undergoing demolition.

(h) *Administrative cost limits and Capital Fund Program Fee.* (1) Administrative cost limits (for non-asset-management PHAs). The PHA shall not budget or expend more than 10 percent of its annual Capital Fund grant on administrative costs, in accordance with the CFP 5-Year Action Plan.

(2) Capital Fund Program Fee (for asset-management PHAs). For a PHA that is under asset management, the Capital Fund Program Fee and administrative cost limits are the same. For the Capital Fund Program Fee, a PHA may charge a management fee of up to 10 percent of the annual CFP formula grant(s) amount, excluding emergency and disaster grants and also excluding any costs related to lead-based paint or asbestos testing, in-house architectural and engineering work, or other special administrative costs required by state or local law.

(i) Modernization. The PHA shall not budget or expend more than 10 percent

of its annual Capital Fund grant on administrative costs, in accordance with its CFP 5-Year Action Plan. The 10 percent limit excludes any costs related to lead-based paint or asbestos testing, in-house Architectural and Engineering work, or other special administrative costs required by state or local law.

(ii) Development. For development work with Capital Fund and RHF grants, the administrative cost limit is 3 percent of the total project budget, or, with HUD's approval, up to 6 percent of the total project budget.

(i) *Management improvement cost limits.* In Fiscal Year (FY) 2014, a PHA shall not use more than 18 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. In FY 2015, a PHA shall not use more than 16 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. In FY 2016, a PHA shall not use more than 14 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. In FY 2017, a PHA shall not use more than 12 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. In FY 2018 and thereafter, a PHA shall not use more than 10 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. Management improvements are an eligible expense for PHAs participating in asset management.

(j) *Types of labor.* A PHA may use force account labor for development and modernization activities if included in a CFP 5-Year Action Plan that is approved by the PHA Board of Commissioners and HUD. HUD approval to use force account labor is not required when the PHA is designated as a high performer under PHAS.

(k) *RMC activities.* When the entire development, financing, or modernization activity, including the planning and architectural design, is administered by an RMC, the PHA shall not retain any portion of the Capital Funds for any administrative or other reason,

§ 905.316

24 CFR Ch. IX (4-1-16 Edition)

unless the PHA and the RMC provide otherwise by contract.

(1) *Capital Funds for operating costs.* A PHA may use Capital Funds for operating costs only if it is included in the CFP 5-Year Action Plan that is approved by the PHA Board of Commissioners and HUD, and limited as described in paragraphs (1)(1) and (2) of this section. Capital Funds identified in the CFP 5-Year Action Plan to be transferred to operations are obligated once the funds have been budgeted and drawn down by the PHA. Once such transfer of funds occurs, the PHA must follow the requirements of 24 CFR part 990 with respect to those funds.

(1) *Large PHAs.* A PHA with 250 or more units may use no more than 20 percent of its annual Capital Fund grant for activities that are eligible under the Operating Fund at 24 CFR part 990.

(2) *Small PHAs.* A PHA with less than 250 units, that is not designated as troubled under PHAS, may use up to 100 percent of its annual Capital Fund grant for activities that are eligible under the Operating Fund at 24 CFR part 990, except that the PHA must have determined that there are no debt service payments, significant Capital Fund needs, or emergency needs that must be met prior to transferring 100 percent of its funds to operating expenses.

§ 905.316 Procurement and contract requirements.

(a) *General.* PHAs shall comply with 24 CFR part 200, and HUD implementing instructions, for all capital activities including modernization and development, except as provided in paragraph (c) in this section.

(b) *Contracts.* The PHA shall use all contract forms prescribed by HUD. If a form is not prescribed, the PHA may use any Office of Management and Budget (OMB) approved form that contains all applicable federal requirements and contract clauses.

(c) *Mixed-finance development projects.* Mixed-finance development partners may be selected in accordance with 24 CFR 905.604(h). Contracts and other agreements with mixed-finance development partners must specify that

they comply with the requirements of §§ 905.602 and 905.604 of this part.

(d) *Assurances of completion.* Notwithstanding 24 CFR 85.36 (as revised April 1, 2013), for each construction contract over \$100,000, the contractor shall furnish the PHA with the following:

(1) A bid guarantee from each bidder, equivalent to 5 percent of the bid price; and

(2) One of the following:

(i) A performance bond and payment bond for 100 percent of the contract price;

(ii) A performance bond and a payment bond, each for 50 percent or more of the contract price;

(iii) A 20 percent cash escrow;

(iv) A 10 percent irrevocable letter of credit with terms acceptable to HUD, or

(v) Any other payment method acceptable to HUD.

(e) *Procurement of recovered materials.* PHAs that are state agencies and agencies of a political subdivision of a state that are using assistance under this part for procurement, and any person contracting with such PHAs with respect to work performed under an assisted contract, must comply with the requirements of section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. In accordance with section 6002, these agencies and persons must procure items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered material practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired in the preceding fiscal year exceeded \$10,000; must procure solid waste management services in a manner that promotes energy and resource recovery; and must have established an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.318 Title and deed.

The PHA, or, in the case of mixed-finance, the Owner Entity, shall obtain

title insurance that guarantees the title is good and marketable before taking title to any and all sites and properties acquired with public housing funds. Immediately upon taking title to a property, the PHA or Owner Entity shall record the deed and a Declaration of Trust or, in the case of mixed finance, a Declaration of Restrictive Covenants, in the form and in the manner and order prescribed by HUD. The PHA shall at all times maintain a recorded Declaration of Trust or Declaration of Restrictive Covenants in the form and in the manner and order prescribed by HUD on all public housing projects covering the term required by this part.

§ 905.320 Contract administration and acceptance of work.

(a) *Contract administration.* The PHA is responsible, in accordance with 2 CFR part 200, subpart D, for all contractual and administrative issues arising out of their procurements. The PHA shall maintain full and complete records on the history of each procurement transaction.

(b) *Inspection and acceptance.* The PHA, or, in the case of mixed finance, the Owner Entity shall carry out inspections of work in progress and goods delivered, as necessary, to ensure compliance with existing contracts. If, upon inspection, the PHA determines that the work and/or goods are complete, satisfactory and, as applicable, otherwise undamaged, except for any work that is appropriate for delayed completion, the PHA shall accept the work. The PHA shall determine any holdback for items of delayed completion and the amount due and payable for the work that has been accepted, including any conditions precedent to payment that are stated in the construction contract or contract of sale. The contractor shall be paid for items only after the PHA inspects and accepts that work.

(c) *Guarantees and warranties.* The PHA or, in the case of mixed finance, the Owner Entity, shall specify the guaranty period and amounts to be withheld, as applicable, and shall provide that all contractor, manufacturer, and supplier warranties required by the construction and modernization docu-

ments shall be assigned to the PHA. The PHA shall inspect each dwelling unit and the overall project approximately 3 months after the beginning of the project guaranty period, 3 months before its expiration, and at other times as may be necessary to exercise its rights before expiration of any warranties. The PHA shall require repair or replacement of all defective items prior to the expiration of the guaranty or warranty periods.

(d) *Notification of completion.* The PHA, or in the case of mixed finance, the Owner Entity, shall require that all contractors and developers notify the PHA in writing when the contract work, including any approved off-site work, will be completed and ready for inspection.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.322 Fiscal closeout.

(a) *General.* Each Capital Fund grant and/or development project is subject to fiscal closeout. Fiscal closeout includes the submission of a cost certificate; an audit, if applicable; a final Performance and Evaluation Report; and HUD approval of the cost certificate.

(b) *Submission of cost certificate.* (1) When an approved development or modernization activity is completed or when HUD terminates the activity, the PHA must submit to HUD the:

(i) Actual Development Cost Certificate (ADCC) within 12 months. For purposes of the CF ACC, costs incurred between the completion of the development and the date of full availability (DOFA) becomes the actual development cost; and

(ii) Actual Modernization Cost Certificate (AMCC) for each grant, no later than 12 months after the expenditure deadline but no earlier than the obligation end date. A PHA with under 250 units with an approved CFP 5-Year Action Plan for use of 100 percent of the Capital Fund grant in operations may submit the cost certificate any time after the funds have been budgeted to operations and withdrawn, as described in § 905.314(1) of this part.

§ 905.324

(2) If the PHA does not submit the cost certificate and the final CFP Annual Statement/Performance and Evaluation Report within the period prescribed in this section, HUD may impose restrictions on open Capital Fund grants; e.g., establish review thresholds, set the grant to “auto review” (HUD automatically reviews it on a periodic basis), or suspend grants, until the cost certificate for the affected grant is submitted. These restrictions may be imposed by HUD after notification of the PHA.

(c) *Audit.* The cost certificate is a financial statement subject to audit pursuant to 2 CFR part 200, subpart F. After submission of the cost certificate to HUD, the PHA shall provide the cost certificate to its independent public auditor (IPA) as part of its annual audit. After audit, the PHA will notify HUD of the grants included in the audit, any exceptions noted by the PHA auditor, and the schedule to complete corrective actions recommended by the auditor.

(d) *Review and approval.* For PHAs exempt from the audit requirements, HUD will review and approve the cost certificate based on available information regarding the Capital Fund grant. For PHAs subject to an audit, HUD will review the information from the annual audit provided by the PHA and approve the certificate after all exceptions, if any, have been resolved.

(e) *Recapture.* All Capital Funds in excess of the actual cost incurred for the grant are subject to recapture. Any funds awarded to the PHA that are returned or any funds taken back from the PHA in a fiscal year after the grant was awarded are subject to recapture.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.324 Data reporting requirements.

The PHA shall provide, at minimum, the following data reports, at a time and in a form prescribed by HUD:

(a) The Performance and Evaluation Report as described in § 905.300(b)(8) of this part;

(b) Updates on the PHA’s building and unit data as required by HUD;

(c) Reports of obligation and expenditure; and

24 CFR Ch. IX (4–1–16 Edition)

(d) Any other information required for participation in the Capital Fund Program.

§ 905.326 Records.

(a) The PHA will maintain full and complete records of the history of each Capital Fund grant, including, but not limited to, CFP 5-Year Action Plans, procurement, contracts, obligations, and expenditures.

(b) The PHA shall retain for 5 years after HUD approves either the actual development or modernization cost certificate all documents related to the activities for which the Capital Fund grant was received, unless a longer period is required by applicable law.

(c) HUD and its duly authorized representatives shall have full and free access to all PHA offices, facilities, books, documents, and records, including the right to audit and make copies.

Subpart D—Capital Fund Formula

SOURCE: 78 FR 63773, Oct. 24, 2013, unless otherwise noted.

§ 905.400 Capital Fund formula (CF formula).

(a) *General.* This section describes the formula for allocating Capital Funds to PHAs.

(b) *Formula allocation based on relative needs.* HUD shall allocate Capital Funds to the PHAs in accordance with the CF formula. The CF formula measures the existing modernization needs and accrual needs of PHAs.

(c) *Allocation for existing modernization needs under the CF formula.* HUD shall allocate one-half of the available Capital Fund amount based on the relative existing modernization needs of PHAs, determined in accordance with paragraph (d) of this section.

(d) *PHAs with 250 or more units in FFY 1999, except the New York City and Chicago Housing Authorities.* The estimates of the existing modernization needs for these PHAs shall be based on the following:

(1) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(i) The average number of bedrooms in the units in a project (Equation coefficient 4604.7);

(ii) The total number of units in a project (Equation coefficient: 10.17);

(iii) The proportion of units in a project in buildings completed in 1978 or earlier. In the case of acquired projects, HUD will use the DOFA unless the PHA provides HUD with the actual date of construction completion. When the PHA provides the actual date of construction completion, HUD will use that date (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: 4965.4);

(iv) The cost index of rehabilitating property in the area (Equation coefficient: -10608);

(v) The extent to which the units of a project were in a nonmetropolitan area as defined by the United States Bureau of the Census (Census Bureau) during FFY 1996 (Equation coefficient: 2703.9);

(vi) The PHA is located in the Southern census region, as defined by the Census Bureau (Equation coefficient: -269.4);

(vii) The PHA is located in the Western census region, as defined by the Census Bureau (Equation coefficient: -1709.5);

(viii) The PHA is located in the Midwest census region as defined by the Census Bureau (Equation coefficient: 246.2); and

(2) An equation constant of 13851.

(i) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(ii) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(3) *For New York City and Chicago Housing Authorities, based on a large sample of direct inspections.* Prior to the cost calibration in paragraph (d)(5) of this section, the number used for the existing modernization need of family projects shall be \$16,680 in New York City and \$24,286 in Chicago, and the number for elderly projects shall be \$14,622 in New York City and \$16,912 in Chicago.

(i) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(ii) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(4) *PHAs with fewer than 250 units in FFY 1999.* The estimates of the existing modernization need shall be based on the following:

(i) Objective measurable data concerning the PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 1427.1);

(B) The total number of units in a project. (Equation coefficient: 24.3);

(C) The proportion of units in a project in buildings completed in 1978 or earlier. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion, in which case HUD shall use the actual date of construction completion (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: -1389.7);

(D) The cost index of rehabilitating property in the area, as of FFY 1999. (Equation coefficient: -20163);

(E) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: 6157.7);

(F) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: 4379.2);

(G) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: 3747.7);

(H) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: -2073.5); and

(ii) An equation constant of 24762.

(A) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(B) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered by HUD to have a zero existing modernization need.

(5) *Calibration of existing modernization need for cost index of rehabilitating property in the area.* The estimated existing modernization need determined under paragraphs (d)(1), (2), or (3) of this section shall be adjusted by the values of the cost index of rehabilitating property in the area.

(6) *Freezing of the determination of existing modernization need.* FFY 2008 is the last fiscal year that HUD will calculate the existing modernization need. The existing modernization need will be frozen for all developments at the calculation as of FFY 2008 and will be adjusted for changes in the inventory and paragraph (d)(4) of this section.

(e) *Allocation for accrual needs under the CF formula.* HUD shall allocate the other half of the remaining Capital Fund amount based on the relative accrual needs of PHAs, determined in accordance with this paragraph of this section.

(1) PHAs with 250 or more units, except the New York City and Chicago Housing Authorities. The estimates of the accrual need shall be based on the following:

(i) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 324.0);

(B) The extent to which the buildings in a project average fewer than 5 units. (Equation coefficient: 93.3);

(C) The age of a project, as determined by the DOFA date. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion, in which case HUD shall use the actual date of construction (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: -7.8);

(D) Whether the development is a family project. (Equation coefficient: 184.5);

(E) The cost index of rehabilitating property in the area. (Equation coefficient: -252.8);

(F) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: -121.3);

(G) PHA size of 6,600 or more units in FFY 1999. (Equation coefficient: -150.7);

(H) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: 28.4);

(I) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: -116.9);

(J) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: 60.7); and

(ii) An equation constant of 1371.9.

(2) For the New York City and Chicago Housing Authorities, based on a large sample of direct inspections. Prior to the cost calibration in paragraph (e)(4) of this section the number used for the accrual need of family developments is \$1,395 in New York City, and \$1,251 in Chicago, and the number for elderly developments is \$734 in New York City and \$864 in Chicago.

(3) PHAs with fewer than 250 units. The estimates of the accrual need shall be based on the following:

(i) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 325.5);

(B) The extent to which the buildings in a project average fewer than 5 units. (Equation coefficient: 179.8);

(C) The age of a project, as determined by the DOFA date. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion. When provided with the actual date of construction completion, HUD shall use this date (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: -9.0);

(D) Whether the project is a family development. (Equation coefficient: 59.3);

(E) The cost index of rehabilitating property in the area. (Equation coefficient: -1570.5);

(F) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: -122.9);

(G) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: -564.0);

(H) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: -29.6);

(I) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: -418.3); and

(ii) An equation constant of 3193.6.

(4) *Calibration of accrual need for the cost index of rehabilitating property in the area.* The estimated accrual need determined under either paragraph (e)(2) or (3) of this section shall be adjusted by the values of the cost index of rehabilitation.

(f) *Calculation of number of units.* (1) *General.* For purposes of determining the number of a PHA's public housing units and the relative modernization needs of PHAs:

(i) HUD shall count as one unit:

(A) Each public housing and section 23 bond-financed CF unit, except that each existing unit under the Turnkey III program shall count as one-fourth of a unit. Units receiving operating subsidy only shall not be counted.

(B) Each existing unit under the Mutual Help program.

(ii) HUD shall add to the overall unit count any units that the PHA adds to its inventory when the units are under CF ACC amendment and have reached DOFA by the date that HUD establishes for the FFY in which the CF formula is being run (hereafter called the "reporting date"). New CF units and those reaching DOFA after the reporting date shall be counted for CF formula purposes in the following FFY.

(2) *Replacement units.* Replacement units newly constructed on or after October 1, 1998, that replace units in a

project funded in FFY 1999 by the Comprehensive Grant formula system or the Comprehensive Improvement Assistance Program (CIAP) formula system shall be given a new CF ACC number as a separate project and shall be treated as a newly constructed development as outlined in §905.600 of this part.

(3) *Reconfiguration of units.* Reconfiguration of units may cause the need to be calculated by the new configuration based on the formula characteristics in the building and unit's PIC module (refer to the formula sections here). The unit counts will be determined by the CF units existing after the reconfiguration.

(4) *Reduction of units.* For a project losing units as a result of demolition and disposition, the number of units on which the CF formula is based shall be the number of units reported as eligible for Capital Funds as of the reporting date. Units are eligible for funding until they are removed due to demolition and disposition in accordance with a schedule approved by HUD.

(g) *Computation of formula shares under the CF formula.* (1) *Total estimated existing modernization need.* The total estimated existing modernization need of a PHA under the CF formula is the result of multiplying for each project the PHA's total number of formula units by its estimated existing modernization need per unit, as determined by paragraph (d) of this section, and calculating the sum of these estimated project needs.

(2) *Total accrual need.* The total accrual need of a PHA under the CF formula is the result of multiplying for each project the PHA's total number of formula units by its estimated accrual need per unit, as determined by paragraph (e) of this section, and calculating the sum of these estimated accrual needs.

(3) *PHA's formula share of existing modernization need.* A PHA's formula share of existing modernization need under the CF formula is the PHA's total estimated existing modernization need divided by the total existing modernization need of all PHAs.

(4) *PHA's formula share of accrual need.* A PHA's formula share of accrual need under the CF formula is the

PHA's total estimated accrual need divided by the total existing accrual need of all PHAs.

(5) *PHA's formula share of capital need.* A PHA's formula share of capital need under the CF formula is the average of the PHA's share of existing modernization need and its share of accrual need (by which method each share is weighted 50 percent).

(h) *CF formula capping.* (1) For units that are eligible for funding under the CF formula (including replacement housing units discussed below), a PHA's CF formula share shall be its share of capital need, as determined under the CF formula, subject to the condition that no PHA's CF formula share for units funded under the CF formula can be less than 94 percent of its formula share had the FFY 1999 formula system been applied to these CF formula-eligible units. The FFY 1999 formula system is based upon the FFY 1999 Comprehensive Grant formula system for PHAs with 250 or more units in FFY 1999 and upon the FFY 1999 Comprehensive Improvement Assistance Program (CIAP) formula system for PHAs with fewer than 250 units in FFY 1999.

(2) For a Moving to Work (MTW) PHA whose MTW agreement provides that its CF formula share is to be calculated in accordance with the previously existing formula, the PHA's CF formula share, during the term of the MTW agreement, may be approximately the formula share that the PHA would have received had the FFY 1999 formula funding system been applied to the CF formula eligible units.

(i) *Replacement Housing Factor to reflect formula need for developments with demolition or disposition occurring on or after October 1, 1998, and prior to September 30, 2013.* (1) *RHF generally.* PHAs that have a reduction in the number of units attributable to demolition or disposition of units during the period (reflected in data maintained by HUD) that lowers the formula unit count for the CFF calculation qualify for application of an RHF, subject to satisfaction of criteria stated in paragraph (i)(5) of this section

(2) *When applied.* The RHF will be added, where applicable:

(i) For the first 5 years after the reduction of units described in paragraph (i)(1) of this section; and

(ii) For an additional 5 years if the planning, leveraging, obligation, and expenditure requirements are met. As a prior condition of a PHA's receipt of additional funds for replacement housing provided for the second 5-year period or any portion thereof, a PHA must obtain a firm commitment of substantial additional funds, other than public housing funds, for replacement housing, as determined by HUD.

(3) *Computation of RHF.* The RHF consists of the difference between the CFF share without the CFF share reduction of units attributable to demolition or disposition and the CFF share that resulted after the reduction of units attributable to demolition or disposition.

(4) *Replacement housing funding in FFYs 1998 and 1999.* Units that received replacement housing funding in FFY 1998 will be treated as if they had received 2 years of replacement housing funding by FFY 2000. Units that received replacement housing funding in FFY 1999 will be treated as if they had received one year of replacement housing funding as of FFY 2000.

(5) *PHA Eligibility for the RHF.* A PHA is eligible for this factor only if the PHA satisfies the following criteria:

(i) The PHA will use the funding in question only for replacement housing;

(ii) The PHA will use the restored funding that results from the use of the replacement factor to provide replacement housing in accordance with the PHA's 5-Year Action Plan, as approved by HUD under part 903 of this chapter as well as the PHA's Board of Commissioners;

(iii) The PHA has not received funding for public housing units that will replace the lost units under Public Housing Development, Major Reconstruction of Obsolete Public Housing, HOPE VI, Choice Neighborhoods, Rental Assistance Payment (RAP), or programs that otherwise provide for replacement with public housing units;

(iv) The PHA, if designated as a troubled PHA by HUD, and not already under the direction of HUD or an appointed receiver, in accordance with part 902 of this chapter, uses an Alternative Management Entity, as defined

in part 902 of this chapter, for development of replacement housing and complies with any applicable provisions of its Memorandum of Agreement executed with HUD under that part; and

(v) The PHA undertakes any development of replacement housing in accordance with applicable HUD requirements and regulations.

(6) *Failure to provide replacement housing in a timely fashion.* (i) A PHA will be subject to the actions described in paragraph (i)(7)(ii) of this section if the PHA does not:

(A) Use the restored funding that results from the use of the RHF to provide replacement housing in a timely fashion, as provided in paragraph (i)(7)(i) of this section and in accordance with applicable HUD requirements and regulations, and

(B) Make reasonable progress on such use of the funding, in accordance with applicable HUD requirements and regulations.

(ii) If a PHA fails to act as described in paragraph (i)(6)(i) of this section, HUD will require appropriate corrective action under these regulations, may recapture and reallocate the funds, or may take other appropriate action.

(7) *Requirement to obligate and expend RHF funds within the specified period.* (i) In addition to the requirements otherwise applicable to obligation and expenditure of funds, PHAs are required to obligate assistance received as a result of the RHF within:

(A) 24 months from the date that funds become available to the PHA; or

(B) With specific HUD approval, 24 months from the date that the PHA accumulates adequate funds to undertake replacement housing.

(ii) To the extent the PHA has not obligated any funds provided as a result of the RHF within the time frames required by this paragraph, or has not expended such funds within a reasonable time, HUD shall recapture the unobligated amount of the grant.

(j) *Demolition and Disposition Transitional Funding (DDTF) to reflect formula need for developments with demolition or disposition on or after October 1, 2013.* (1) *DDTF generally.* In FFY 2014 and thereafter, PHAs that have a reduction in the number of units occurring in FFY

2013 and attributable to demolition or disposition are automatically eligible to receive Demolition and Disposition Transitional Funding. The DDTF will be included in their annual Capital Fund grant for a 5-year period to offset the reduction in funding a PHA would receive from removing units from inventory. DDTF is subject to the criteria stated in paragraph (j)(4) of this section.

(2) *When applied.* DDTF will be added to a PHA's annual CFP grant, where applicable, for 5 years after the reduction of units described in paragraph (j)(1) of this section.

(3) *Computation of DDTF.* The DDTF consists of the difference between the CFF share without the CFF share reduction of units attributable to demolition or disposition and the CFF share that resulted after the reduction of units attributable to demolition or disposition.

(4) *PHA eligibility for the DDTF.* A PHA is eligible for this factor only if the PHA satisfies the following criteria:

(i) The PHA will automatically receive the DDTF for reduction of units in accordance with paragraph (j)(1) of this section, unless the PHA rejects the DDTF funding for that fiscal year in writing;

(ii) The PHA will use the funding in question for eligible activities under the Capital Fund Program, found at 905.200—such as modernization and development—that are included in the PHA's HUD approved CFP 5-Year Action Plan.

(iii) The PHA has not received funding for public housing units that will replace the lost units from disposition proceeds, or under Public Housing Development, Major Reconstruction of Obsolete Public Housing, HOPE VI, Choice Neighborhoods, RAP, or programs that otherwise provide for replacement with public housing units;

(iv) The PHA, if designated as a troubled PHA by HUD, and not already under the direction of HUD or an appointed receiver, in accordance with part 902 of this chapter, uses an Alternative Management Entity, as defined in part 902 of this chapter, and complies with any applicable provisions of

§ 905.500

24 CFR Ch. IX (4–1–16 Edition)

its Memorandum of Agreement executed with HUD under that part; and

(v) The PHA undertakes any eligible activities in accordance with applicable HUD requirements and regulations.

(5) *Requirement to obligate and expend DDTF funds within the specified period.*

(i) In addition to the requirements otherwise applicable to obligation and expenditure of Capital Funds, including 42 U.S.C. 1437g(j) and the terms of the appropriation from Congress, PHAs are required to obligate funds received as a result of the DDTF within 24 months from the date that funds become available to the PHA; or

(ii) To the extent the PHA has not obligated any funds provided as a result of the DDTF within the time frames required by this paragraph, or expended such funds within a reasonable time frame, HUD shall reduce the amount of DDTF to be provided to the PHA.

(k) *RHF Transition.* (1) PHAs that would be newly eligible for RHF in FFY 2014 will receive 5 years of DDTF.

(2) PHAs that received a portion of a first increment RHF grant in FY 2013, for units removed from inventory prior to the reporting date of June 30, 2012, will receive up to 10 years of funding consisting of the remainder of first-increment RHF, subject to the requirements of § 905.400(i) of this part, and, if eligible, 5 years of DDTF, subject to the requirements of § 905.400(j) of this part.

(3) PHAs that received a portion of a second increment RHF grant in FY 2013, for units removed from inventory prior to the reporting date of June 30, 2012, will continue to receive the remaining portion of the 5-year increment as a separate second increment RHF grant, as described in § 905.400(i) of this part.

(1) *Performance reward factor.* (1) *High performer.* A PHA that is designated a high performer under the PHA's most recent final PHAS score may receive a performance bonus that is:

(i) Three (3) percent above its base formula amount in the first 5 years these awards are given (for any year in this 5-year period in which the performance reward is earned); or

(ii) Five (5) percent above its base formula amount in future years (for

any year in which the performance reward is earned);

(2) *Condition.* The performance bonus is subject only to the condition that no PHA will lose more than 5 percent of its base formula amount as a result of the redistribution of funding from nonhigh performers to high performers.

(3) *Redistribution.* The total amount of Capital Funds that HUD has recaptured or not allocated to PHAs as a sanction for violation of expenditure and obligation requirements shall be allocated to the PHAs that are designated high performers under PHAS.

Subpart E—Use of Capital Funds for Financing

SOURCE: 75 FR 65208, Oct. 21, 2010, unless otherwise noted.

§ 905.500 Purpose and description.

(a) This subpart provides the requirements necessary for a PHA to participate in the Capital Fund Financing Program (CFFP), under which the PHA may obtain HUD approval to borrow private capital and pledge a portion of its annual Capital Fund grant or public housing assets and other public housing property of the public housing agency as security.

(b) Under the CFFP, PHAs are permitted to borrow private capital to finance public housing development or modernization activities. A PHA may use a portion of its Capital Fund for debt service payments and usual and customary financing costs associated with public housing development or modernization (including public housing in mixed-finance developments). A PHA that undertakes such financing activities may, subject to HUD's written approval, grant a security interest in its future annual Capital Fund grants, which shall be subject to the appropriation of those funds by Congress. The PHA's financing activities are not obligations or liabilities of the Federal Government. The Federal Government does not assume any liability with respect to any such pledge of future appropriations, and the Federal Government neither guarantees nor provides any full faith and credit for these financing transactions.

§ 905.505 Program requirements.

(a) *Written approval.* A PHA shall obtain written HUD approval for all Capital Fund financing transactions that pledge, encumber, or otherwise provide a security interest in public housing assets or other property, including Capital Funds, and use Capital Funds for the payment of debt service or other financing costs. HUD approval shall be based on:

(1) The ability of the PHA to complete the financing transaction along with the associated improvements;

(2) The reasonableness of the provisions in the Capital Fund Financing Proposal considering the other pledges or commitments of public housing assets, the PHA's capital needs, and the pledge being proposed; and

(3) Whether the PHA meets the requirements of this subpart.

(b) *Antideficiency.* Any pledge of future year Capital Fund grants under this section is subject to the availability of appropriations by Congress for that year. All financing documents related to future year Capital Fund amounts must include a statement that the pledging of funds is subject to the availability of appropriations.

(c) *Conditions on use—(1) Development.* Any public housing that is developed using amounts under this part (including proceeds from financing authorized under this part) shall be operated under the terms and conditions applicable to public housing during the 40-year period that begins on the date on which the project becomes available for occupancy, except as otherwise provided in the 1937 Act.

(2) *Modernization.* Any public housing or portion of public housing that is modernized using amounts under this part (including proceeds from financing authorized under this part) shall be maintained and operated during the 20-year period that begins on the latest date on which the modernization is completed, except as otherwise provided in the 1937 Act.

(3) *Applicability of latest expiration date.* Public housing subject to the use conditions described in paragraph (c) of this section, or to any other provision of law mandating the operation of housing as public housing for a specific length of time, shall be maintained and

operated as required until the latest such expiration date.

(4) *Declaration of Trust.* All public housing rental projects must show evidence satisfactory to HUD of an effective Declaration of Trust being recorded in first position, meeting the requirements of paragraph (c) of this section and covering the term of the financing. If part of a mixed-finance project, this evidence will be with the mixed-finance evidentiary documents.

(d) *Public Housing Assessment System (PHAS) designation.* Generally, a PHA shall be designated a standard performer or high performer under PHAS (24 CFR part 902), and must be a standard performer or higher on the management and financial condition indicators. HUD will consider requests from a PHA designated as troubled under PHAS when the PHA is able to show that it has developed appropriate management and financial capability and controls that demonstrate its ability to successfully undertake the Capital Fund Financing Proposal. The PHA must comply with all applicable fair housing and civil rights requirements in 24 CFR 5.105(a). If a PHA has received a letter of findings, charge, or lawsuit involving ongoing systemic noncompliance under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act, or Section 109 of the Housing and Community Development Act of 1974, and the letter of findings, charge, or lawsuit has not been resolved to HUD's satisfaction, then unless the Capital Fund Financing Proposal is part of a plan to address such findings, charge, or lawsuit, the PHA will not be eligible for financing pursuant to the CFFP. HUD will determine if actions to resolve the charge, lawsuit, or letter of findings taken are sufficient to resolve the matter.

(e) *Management capacity.* A PHA shall have the capacity to undertake and administer private financing and construction or modernization of the size and type contemplated. In order to determine capacity, HUD may require the PHA to submit a management assessment conducted by an independent third party, in a form and manner prescribed by HUD.

(f) *Existing financing.* A PHA shall identify the nature and extent of any existing encumbrances, pledges, or other financing commitments of public housing funds undertaken by the PHA.

(g) *Need for financing.* (1) A PHA must complete a physical needs assessment at the project level, in the form and manner prescribed by HUD that covers the PHA's entire public housing portfolio for the term of the financing and that takes into consideration existing needs and the lifecycle repair and replacement of major building components. The activity to be financed must be identified as a need in the physical needs assessment.

(2) Based on the assessment under paragraph (g)(1) of this section, the PHA must demonstrate that the financing will not negatively impact the ability of the PHA to meet the ongoing needs of its public housing portfolio over the term of the financing. In making this demonstration, PHAs must reduce any projected future Capital Fund grants to account for planned or anticipated activities that would have the effect of reducing or otherwise limiting the availability of future Capital Fund grants. PHA projections must be detailed on the portfolio schedule form prescribed by HUD, and shall project a stabilized number of units (Stabilized Base Unit Count) to be reached in no more than 5 years after all planned or anticipated activities have been completed that would reduce future Capital Fund grants. PHAs must also take into consideration projected use of Capital Funds for other eligible activities under part 905, and may take into consideration alternative sources of financing that are available to help meet its needs.

(3) For PHAs that are proposing to borrow more than \$2 million on a cumulative basis, to the extent that:

(i) Capital and other eligible Capital Fund needs exceed projected Capital Fund program funding amounts, and the PHA is not leveraging non-public housing funds as part of its Capital Fund Financing Proposal transaction, then

(ii) The PHA must demonstrate that it has considered leveraging non-public housing funds, and state why the pro-

posed financing is appropriate in light of alternative sources available.

(iii) Notwithstanding paragraphs (g)(3)(i) and (ii) of this section, PHAs that size their financing by utilizing only replacement housing factor (RHF) funds, or PHAs that propose to use their Capital Fund Financing Proposal proceeds as part of a mixed-finance modernization transaction, are not required to comply with § 905.505(g).

(h) *CFP Plan.* (1) The use of the CFFP proceeds shall be included in a form and manner as required by HUD for CFP planning and budgeting and in a same manner as a Capital Fund grant. The CFFP proceeds shall be included as a separate Capital Fund grant to the same extent that PHAs are required to plan and budget Capital Fund grants. The use of Capital Funds for the payment of debt service and related costs shall be planned and budgeted as would other eligible uses of Capital Funds.

(2) As part of its Capital Fund Financing Proposal, the PHA shall submit a Capital Fund financing budget, in the form and manner required by HUD, detailing the proposed use of the Capital Fund Financing Proposal proceeds. There shall be no requirement for PHAs to submit a Capital Fund financing budget as part of their Capital Fund financing proceeds where the sizing of the financing is based upon the use of RHF funds for debt service, or where the Capital Fund Financing Proposal proceeds are being used as part of a mixed-finance transaction. Approval letters for mixed-finance and RHF-related Capital Fund financing transactions shall be conditioned upon the approval of the mixed-finance proposal, or, in the case of conventional development, upon the approval of the development proposal and the execution of an associated construction contract with which the Capital Fund financing proceeds would be used.

(3) The work financed with Capital Funds and described in the Capital Fund financing budget will be based on the physical needs assessment. The Capital Fund financing budget shall list the work items (e.g., roof replacement, window replacement, accessibility modifications) by development. These work items will constitute performance measures upon which the

PHA's performance will be evaluated. A general representation of the work (e.g., "rehabilitation of the development") is not sufficient.

(4) The CFP Plan (submission (as described in paragraph (h) of this section) shall include a copy of the physical needs assessment described in § 905.505(g).

(5) Financing proceeds under this part may be used only for the modernization or development of public housing and related costs including the modernization or development of non-dwelling space. Financing proceeds may not be used for administration or central office cost center costs (except for mixed-finance projects), management improvements, or upon non-viable projects, such as those subject to required conversion. Financing proceeds may be used to reimburse predevelopment costs, but only to the extent they were incurred in conformance with applicable regulatory requirements.

(i) *Debt Coverage Percentage.* (1) Except as stated in § 905.505(i)(2), a PHA shall not pledge more than 33 percent of its annual future Capital Fund grants for debt service payments, assuming level Capital Fund appropriations over the term of the debt obligation and any reduction attributable to activities projected by the PHA to occur during the term of the financing such as demolition, disposition, or conversion of public housing units or other occurrences that could limit the availability of Capital Funds, including a voluntary compliance agreement. This percentage of Capital Funds dedicated for debt service, taking into account adjustments for activities that would reduce the receipt of Capital Funds, is called the "Debt Coverage Percentage."

(2) A PHA may pledge up to 100 percent of any projected replacement housing factor (RHF) grants for debt service payments, provided that the pledge extends to the formula fund portion of its Capital Fund grants also, but that not more than 50 percent of its overall projected Capital Fund grants (including formula funds and RHF funds) are pledged. RHF projections shall account for any projected reductions in RHF over the term of the fi-

ancing. Unless otherwise approved by HUD, PHAs shall be limited to sizing their loans based upon increments of RHF currently being received by the PHA. CFFP transactions pledging RHF funds shall include accelerated amortization provisions, requiring all RHF funds received by the PHA to pay debt service as those RHF funds are received. A RHF grant shall be used only to develop or pay financing costs for the development of replacement public housing units in accordance with § 905.10.

(3) Subject to the reasonableness test in § 905.505(a)(2), PHAs may exceed 33 percent when pledging existing Capital Fund grants and RHF grants for the payment of debt service. Existing grants are grants that have been received by the PHA at the time of HUD's approval of the Capital Fund Financing Proposal.

(j) *Terms and conditions of financing.* The terms and conditions of all financing shall be reasonable based on current market conditions. The financing documents shall include the following, as applicable:

(1) *Term.* The term of the Capital Fund financing transaction shall not be more than 20 years. All Capital Fund financing transactions shall be fully amortizing. Bridge loans and other short-term loans are permitted; however, unless otherwise approved by HUD, the CFFP Financing transaction may not be structured in a manner that generates program income.

(2) *Acceleration.* Unless otherwise approved by HUD, the financing documents shall provide that HUD approval is required before a lender may accelerate a PHA's debt obligation, for default or otherwise.

(3) *Public housing assets.* A PHA may not pledge any public housing assets unless specifically approved in writing by HUD. PHAs seeking approval of a pledge of public housing assets must submit documentation to HUD that details the nature and priority of the pledge.

(4) *Variable interest rate.* All variable-rate transactions shall include an interest-rate cap. The financing documents must specify that the PHA shall not be liable to pay debt service with public housing funds, and that there

§ 905.505

24 CFR Ch. IX (4-1-16 Edition)

shall be no recourse to public housing assets, beyond the interest-rate cap. The limitation on the pledge of Capital Funds specified in §905.505(i) shall be calculated based on the interest-rate cap.

(5) *Other pledges or commitments.* PHAs seeking approval of a pledge of public housing assets must describe the nature and extent of existing commitments or pledges of public housing assets, providing documentation of such other commitments or pledges to the extent required by HUD.

(6) *Terms and conditions.* Financing documents must include any other terms and conditions as required by HUD.

(k) *Fairness opinion.* The PHA shall provide an opinion, in a form and manner prescribed by HUD, from a qualified, independent, third-party financial advisor attesting that the terms and conditions of the proposed financing transaction are reasonable given current market conditions with respect to such matters as interest rate, fees, costs of issuance, call provisions, and reserve fund requirements.

(1) *Financial controls and construction management.* (1) The PHA shall have a financial control and construction management plan describing how the PHA will ensure that:

(i) Adequate controls are in place regarding the use of the Capital Fund financing proceeds; and

(ii) The improvements will be developed and completed in a timely manner consistent with the contract documents.

(2) This plan shall contain protocols and financial control mechanisms that address the design of the improvements, construction inspections, construction draws, and requisition approval checks and balances. A PHA that is designated troubled under PHAS, or other PHAs as determined by HUD, may be required to institute risk mitigation measures to ensure that the funds are used properly and for the purposes intended.

(m) *Work items.* To the extent that any changes in work items financed by Capital Fund financing proceeds meet or exceed the following threshold requirements determined by HUD, PHAs must obtain written approval of

amendments to their Capital Fund financing budget from HUD:

(1) A change in the type of activity being financed (for example, if the approved Capital Fund financing budget contemplated the proceeds being used for modernization, but after the proposal is approved, the PHA decides instead to pursue development);

(2) A change in the project being modernized or developed with the proceeds;

(3) A reduction in 20 percent or more in the number of public housing units being modernized; or

(4) An increase of 20 percent or more of the cost of non-dwelling space.

(n) *Applicability of other Federal requirements.* The proceeds of the Capital Fund financing are subject to all laws, regulations, and other requirements applicable to the use of Capital Fund grants made under 24 CFR part 905, unless otherwise approved by HUD in writing. PHAs undertaking CFFP transactions shall be subject to the following requirements, which shall be further enumerated in a Capital Fund Financing Amendment to the Annual Contributions Contract (CFF ACC Amendment):

(1) Amounts payable to the PHA by HUD pursuant to the CFFP and pledged to the payment of debt service by the PHA shall be used exclusively for debt service in accordance with the debt service schedule approved by HUD and shall not be available for any other purpose;

(2) The financing does not constitute a debt or liability of HUD or the United States, the full faith and credit of the United States are not pledged to the payment of debt service, and debt service is not guaranteed by HUD or the United States;

(3) Nothing in this CFF ACC Amendment or 24 CFR part 905 is intended to diminish HUD's authority to administer, monitor, and regulate the public housing program, including HUD's authority to exercise any administrative sanction or remedy provided by law; provided, however, that except as required by law, HUD will not assert any claim or right under the ACC, including the exercise of administrative sanctions and remedies, if and to the extent that the effect of such claim or right

would be to reduce the payment of Capital Fund moneys to the PHA below the level necessary to pay debt service or delay the time for payment of such moneys such that required amounts would not be available to pay debt service when due;

(4) The financing is subject to mandatory prepayment prior to the obligation end date and expenditure end date of the Capital Fund financing proceeds to the extent necessary for the Capital Fund Financing Proposal proceeds to comply with section 9(j) of the 1937 Act (42 U.S.C. 1437g(j)). Bond and loan documents shall include appropriate provisions such that prepayment shall be made by the lender, trustee, or appropriate third-party servicer approved by HUD, without any action by HUD post-approval;

(5) HUD agrees, subject to the availability of appropriations, to approve immediately upon receipt from the PHA (subject to any legal requirements or constraints applicable at the time), a CFP Plan document (as described in 24 CFR 905.505(h)) and/or an annual CFF ACC Amendment, to the extent and in an amount sufficient to make the applicable debt service payment;

(6) Prior to cumulatively reducing its inventory of public housing units by more than 5 percent of the Stabilized Base Unit Count, if, after the removal of units from inventory, the Debt Coverage Percentage under §905.505(i)(1) would constitute more than 33 percent of future Capital Funds, the PHA shall prepay the financing such that the reduction in inventory shall not cause the Debt Coverage Percentage to increase. If the reduction in inventory is required by law or public housing requirements, the prepayment is not required to be made prior to the reduction in inventory, but instead shall be made as soon as possible after the PHA becomes aware of the requirement of law or public housing requirements, but only to the extent that Capital Funds are not otherwise needed by the PHA to address the health and safety issues or other requirements of law in the PHA's public housing portfolio, all as determined by HUD. For PHAs that size their loans based upon the projected receipt of RHF funds, prior to undertaking an activity that will re-

duce its RHF units below the number of units projected in the Capital Fund Financing Proposal as required by §905.505(i)(3), the PHA shall prepay its loan such that debt service does not exceed 100 percent of projected RHF after accounting for the reduction in RHF units, all as determined by HUD.

(o) *Performance measures.* Pursuant to 24 CFR 905.505(h) a PHA is required to identify in its CFP Plan documents specific items of work that will be accomplished using the proceeds of the proposed financing. The identified items, which shall be quantifiable, shall be the basis on which HUD evaluates a PHA's performance. HUD may also utilize the Capital Fund financing budget, and Capital Fund Financing Proposal approval documents as the basis to evaluate a PHA's performance. Failure to meet performance measures may result in:

- (1) Failure to receive HUD approval for future financing transactions;
- (2) Failure to be considered for future competitive grant programs; and
- (3) Other sanctions HUD deems appropriate and authorized by law or regulation.

(p) *Reporting requirements.* (1) The use of the CFFP proceeds shall be reported in the same manner as a Capital Fund grant. The PHA shall submit a performance and evaluation report on a quarterly basis. PHAs that utilize their Capital Fund financing proceeds as part of a mixed-finance transaction, and PHAs that size their financing based upon RHF in their Capital Fund financing transactions, are not required to submit quarterly reports.

(2) Each CFFP transaction and/or development project is subject to fiscal closeout in the same manner of a Capital Fund grant. Fiscal closeout includes the submission of an Actual Modernization Cost Certificate (AMCC) or Actual Development Cost Certificate (ADCC), an audit, if applicable, a final quarterly report, and a final Performance and Evaluation report.

§905.507 Streamlined application requirements for standard and high-performing PHAs.

(a) PHAs with cumulative CFFP borrowings of less than \$2 million and that are standard or high performers under

§ 905.510

24 CFR Ch. IX (4-1-16 Edition)

PHAS; PHAs that are high performers under PHAS with cumulative CFFP borrowings of less than \$20 million; PHAs that propose to use their CFFP proceeds in a mixed-finance transaction, or proposals where the sizing of the financing is based only upon the use of RHF funds for debt service, shall not be required to submit:

(1) A third-party management assessment under § 905.505(e);

(2) A third-party fairness opinion under § 905.505(k);

(3) An assurance of financial controls and construction management under § 905.505(l).

(b) Notwithstanding § 905.507(a), if HUD determines that interest or other costs do not appear to meet industry norms, or other aspects of the proposal present atypical risks, HUD retains the discretion to require assessments, opinions, or controls, or to return the proposal.

§ 905.510 Submission requirements.

(a) All requests for HUD approval of CFFP transactions shall be submitted to the Office of Public and Indian Housing (PIH), Attention: Office of Capital Improvements, in such form and in such number of copies as designated by PIH through direct notice.

(b) Each Capital Fund Financing Proposal shall be tabbed and presented with the following information in the order listed:

(1) *PHA transmittal letter.* The PHA must submit a letter signed by the PHA Executive Director (or Chief Executive Officer, if applicable) briefly describing the proposed financing and use of proceeds, the percentage of Capital Funds being dedicated to debt service, the percent of the PHA's public housing units benefiting from the financing, and the impact of the financing upon the public housing portfolio, and transmit to HUD a request for approval of the CFFP transaction. The transmittal letter shall provide any additional information required pursuant to this subpart including, but not limited to:

(i) Describing the transaction being proposed;

(ii) Describing in detail any existing financing or similar commitments of public housing funds;

(iii) Describing and providing justification for significant financial or legal provisions, such as variable interest or acceleration provisions;

(iv) Describing construction management and financial controls.

(2) *Term sheet, table of contents, and contact information.* The PHA must submit the HUD-prescribed term sheet that describes the basic terms of the transaction and financing structure, including the proposed amount of the financing, the term, interest rates, security, and reserve requirements. A table of contents must identify the materials submitted, as well as list the materials the PHA is not required to submit pursuant to this rule. Contact information for all of the participating parties is also required.

(3) *Financing schedules.* The PHA must submit financing schedules that include a debt service schedule, sources and uses schedule, and a portfolio schedule (including projections for RHF, as appropriate), and an adequacy-of-Capital Funds schedule, all in a format prescribed by HUD.

(4) *Other required submissions.* The following submissions must be incorporated in the proposal to the extent required to be submitted by this part: Capital fund financing budget, management assessment, fairness opinion, and physical needs assessment.

(5) *Financing documents.* The PHA must submit a complete set of the legal documents that the PHA will execute in connection with the CFFP transaction. The legal documents must identify the nature and extent of any security being provided, as well as the position of any security interest (e.g., first lien position, second lien position). The legal documents are to be submitted to HUD only after they have been negotiated and agreed upon by the parties to the transaction. HUD will not review preliminary documents that are still under negotiation.

(6) *Declaration of Trust requirements.* The PHA must submit evidence that the PHA has conformed to the Declaration of Trust requirements in accordance with this subpart.

(7) *Board resolution and counsel's opinion.* The PHA must submit evidence of a PHA Board resolution that authorizes the PHA to: Undertake the loan up

to a specified amount, provide all security interests required by the loan, and repay the loan with Capital Funds (including RHF funds, when applicable) as required by the financing documents. The Board resolution must also provide authorization for the Executive Director or other executive staff to negotiate and enter into all legal documents required as part of the transaction. The PHA must submit PHA counsel's opinion, which opines that the PHA has the authority to enter into the transaction, and affirms that the transaction complies with the requirements of the 1937 Act, as amended; Federal regulations; and the ACC, as amended.

(8) *Depository Agreement and ACC.* The PHA must submit a Depository Agreement (form HUD-51999) and a CFF ACC Amendment.

(9) Other documents as required by HUD.

§ 905.515 HUD review and approval.

(a) After receipt of a Capital Fund Financing Proposal, HUD shall review the proposal for completeness. HUD will return to the PHA all incomplete or unapprovable proposals, identifying the deficiencies, and will not take any further action. HUD will also return proposals submitted by entities other than the PHA (e.g., the PHA's consultants). HUD shall review all complete proposals for compliance with the requirements under this subpart. HUD may require the PHA to make modifications to any of the CFFP documents submitted and may require the PHA to resubmit all or any portion of the proposal. After HUD determines that a proposal complies with all applicable requirements, HUD shall notify the PHA in writing of its approval and any condition(s) of the approval.

(b) (1) A copy or copies of the CFF ACC Amendment shall accompany the approval letter.

(2) Within 60 days of the date of HUD's approval of the transaction or, if HUD sets conditions on its approval, within 60 days of the date that the PHA satisfies such conditions (as evidenced by documentation retained in the PHA's file and available to HUD upon request), but in no event longer than 120 days after the HUD approval, unless

the time has otherwise been extended by HUD in writing, the PHA must submit:

(i) Closing documents as directed by HUD; and

(ii) All documents required by HUD to take certain actions such as initiating debt service payments through HUD's automated systems.

(3) Failure to provide the required documents to HUD within the time frame required under §905.515(b)(2) may result in HUD rescinding its approval.

Subpart F—Development Requirements

SOURCE: 78 FR 63786, Oct. 24, 2013, unless otherwise noted.

§ 905.600 General.

(a) *Applicability.* This subpart F applies to the development of public housing units to be included under an ACC and which will receive funding from public housing funds. PHAs must comply, or cause the Owner Entity and its contractors to comply, as applicable, with all of the applicable requirements in this subpart. Pursuant to §905.106 of this part, when a PHA, a PHA partner, and/or an Owner Entity submits a development proposal and, if applicable, a site acquisition proposal, and executes an ACC covering the public housing units being developed, it is deemed to have certified by those executed submissions its compliance with this subpart. Noncompliance with any provision of this subpart or other applicable statutes or regulations, or the ACC Amendment, and any amendment thereto may subject the PHA, the PHA's partner and/or the Owner Entity to sanctions contained in §905.804 of this part.

(b) *Description.* A PHA may develop public housing through the construction of new units or the acquisition, with or without rehabilitation, of existing units. A PHA may use any generally accepted method of development including, but not limited to:

(1) *Conventional.* The PHA designs a project on a property it owns. The PHA then competitively selects an entity to build or rehabilitate the project.

(2) *Turnkey.* The PHA advertises for and competitively selects a developer

who will develop public housing units on a site owned or to be owned by the developer. Following HUD approval of the development proposal, the PHA and the developer execute a contract of sale and the developer builds the project. Once the project is complete, the developer sells it to the PHA.

(3) *Acquisition with or without rehabilitation.* The PHA acquires an existing property that requires substantial, moderate, or no repair. Any repair work is done by PHA staff or contracted out by the PHA. The PHA must certify that the property was not constructed with the intent of selling it to the PHA or, alternatively, the PHA must certify that HUD requirements were followed in the development of the property.

(4) *PHA use of force account labor.* The PHA uses staff to carry out new construction or rehabilitation, as provided in § 905.314(j) of this part.

(5) *Mixed finance.* Development or modernization of public housing units where the public housing units are owned in whole or in part by an entity other than a PHA, pursuant to Section 905.604.

(c) *Development process.* The general development process for public housing development, using any method and with any financing, is as follows:

(1) The PHA will identify a site to be acquired or a public housing project to be developed or redeveloped. The PHA or its Partner and/or the Owner Entity will prepare a site acquisition proposal pursuant to § 905.608 of this part and/or a development proposal pursuant to § 905.606 of this part for submission to HUD or as otherwise directed by HUD. The PHA may request predevelopment funding necessary for preparation of the acquisition proposal and/or development proposal, as stated in § 905.612(a) of this part.

(2) The PHA must consult with affected residents prior to submission of an acquisition proposal, development proposal, or both to HUD to solicit resident input into development of the public housing project.

(3) After HUD approval of the site acquisition proposal and/or development proposal, HUD and the PHA shall execute the applicable ACC Amendment for the public housing units and record

a Declaration of Trust or Declaration of Restrictive Covenants on all property acquired and/or to be developed. The PHA may then commence development of the units.

(4) Upon completion of the public housing project, the PHA will establish the DOFA. After the DOFA, the PHA will submit a cost certificate to HUD attesting to the actual cost of the project that will be subject to audit.

(d) *Funding sources.* A PHA may engage in development activities using any one or a combination of the following sources of funding:

- (1) Capital Funds;
- (2) HOPE VI funds;
- (3) Choice Neighborhoods funds;

(4) Proceeds from the sale of units under a homeownership program in accordance with 24 CFR part 906;

(5) Proceeds resulting from the disposition of PHA-owned land or improvements;

(6) Private financing used in accordance with § 905.604 of this part, Mixed-finance development;

(7) Capital Fund Financing Program (CFFP) proceeds under § 905.500 of this part;

(8) Proceeds resulting from an Operating Fund Financing Program (OFFP) approved by HUD pursuant to 24 CFR part 990; and

(9) Funds available from any other eligible sources.

§ 905.602 Program requirements.

(a) *Local cooperation.* Except as provided under § 905.604(i) of this part for mixed-finance projects, the PHA must enter into a Cooperation Agreement with the applicable local governing body that includes sufficient authority to cover the public housing being developed under this subpart, or provide an opinion of counsel that the existing, amended, or supplementary Cooperation Agreement between the jurisdiction and the PHA includes the project or development.

(b) *New construction limitation.* These requirements apply to the development (including new construction and acquisition) of public housing. All proposed new development projects must meet both of the following requirements:

(1) *Limitation on the number of units.* A PHA may not use Capital Funds to pay

for the development cost of public housing units if such development would result in a net increase in the number of public housing units that the PHA owned, assisted, or operated on October 1, 1999. Subject to approval by the Secretary, a PHA may develop public housing units in excess of the limitation if:

(i) The units are available and affordable to eligible low-income families and the CF formula does not provide additional funding for the specific purpose of constructing, modernizing, and operating such excess units; or

(ii) The units are part of a mixed-finance project or otherwise leverage significant additional investment, and the cost of the useful life of the projects is less than the estimated cost of providing tenant-based assistance under section 8(o) of the 1937 Act.

(2) *Limitations on cost.* A PHA may not construct public housing unless the cost of construction is less than the cost of acquisition or acquisition and rehabilitation of existing units, including the amount required to establish, as necessary, an upfront reserve for replacement accounts for major repairs. A PHA shall provide evidence of compliance with this subpart either by:

(i) Demonstrating through a cost comparison that the cost of new construction in the neighborhood where the PHA proposes to construct the housing is less than the cost of acquisition of existing housing, with or without rehabilitation, in the same neighborhood; or

(ii) Documenting that there is insufficient existing housing in the neighborhood to acquire.

(c) *Existing PHA-owned nonpublic housing properties.* Nonpublic housing properties may be used in the development of public housing units provided all requirements of the 1937 Act and the development requirements of this part are met.

(d) *Site and neighborhood standards.* Each proposed site to be newly acquired for a public housing project or for construction or rehabilitation of public housing must be reviewed and approved by the field office as meeting the following standards, as applicable:

(1) The site must be adequate in size, exposure, and contour to accommodate

the number and type of units proposed. Adequate utilities (e.g., water, sewer, gas, and electricity) and streets shall be available to service the site.

(2) The site and neighborhood shall be suitable to facilitating and furthering full compliance with the applicable provisions of title VI of the Civil Rights Act of 1964, title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued under these statutes.

(3) The site for new construction shall not be located in an area of minority concentration unless:

(i) There are already sufficient, comparable opportunities outside areas of minority concentration for housing minority families in the income range that is to be served by the proposed project; or

(ii) The project is necessary to meet overriding housing needs that cannot feasibly be met otherwise in that housing market area. "Overriding housing needs" shall not serve as the basis for determining that a site is acceptable if the only reason that these needs cannot otherwise feasibly be met is that, due to discrimination because of race, color, religion, creed, sex, disability, familial status, or national origin, sites outside areas of minority concentration are unavailable.

(4) The site for new construction shall not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

(5) Notwithstanding the foregoing, after demolition of public housing units a PHA may construct public housing units on the original public housing site or in the same neighborhood if the number of replacement public housing units is significantly fewer than the number of public housing units demolished. One of the following criteria must be satisfied:

(i) The number of public housing units being constructed is not more than 50 percent of the number of public housing units in the original development; or

(ii) In the case of replacing an occupied development, the number of public housing units being constructed is the

number needed to house current residents who want to remain at the site, so long as the number of public housing units being constructed is significantly fewer than the number being demolished; or

(iii) The public housing units being constructed constitute no more than 25 units.

(6) The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(7) The site shall be free from adverse environmental conditions, natural or manmade, such as: Toxic or contaminated soils and substances; mudslide or other unstable soil conditions; flooding; septic tank backups or other sewage hazards; harmful air pollution or excessive smoke or dust; excessive noise or vibrations from vehicular traffic; insect, rodent, or vermin infestation; or fire hazards. The neighborhood shall not be seriously detrimental to family life. It shall not be filled with substandard dwellings nor shall other undesirable elements predominate, unless there is a concerted program in progress to remedy the undesirable conditions.

(8) The site shall be accessible to social, recreational, educational, commercial, and health facilities; health services; and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing. The availability of public transportation must be considered.

(9) The site shall be accessible to a range of jobs for low-income workers and for other needs. The availability of public transportation must be considered, and travel time and cost via public transportation and private automobile must not be excessive. This requirement may be given less consideration for elderly housing.

(10) The project may not be built on a site that has occupants unless the relocation requirements at § 905.308(b)(9) of this part are met.

(11) The site shall not be in an area that HUD has identified as having special flood hazards and in which the sale of flood insurance has been made avail-

able under the National Flood Insurance Act of 1968, unless the development is covered by flood insurance required by the Flood Disaster Protection Act of 1973 and meets all applicable HUD standards and local requirements.

(e) *Relocation.* All acquisition or rehabilitation activities carried out with public housing funds must comply with the provisions of § 905.308(b)(9).

(f) *Environmental requirements.* All activities under this part are subject to an environmental review by a responsible entity under HUD's environmental regulations at 24 CFR Part 58 and must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and the related laws and authorities listed at 24 CFR 58.5. HUD may make a finding in accordance with 24 CFR 58.11 and may perform the environmental review itself under the provisions of 24 CFR Part 50. In those cases where HUD performs the environmental review under 24 CFR Part 50, it will do so before approving a proposed project, and will comply with the requirements of NEPA and the related requirements at 24 CFR 50.4.

§ 905.604 Mixed-finance development.

(a) *General.* Mixed-finance development refers to the development (through new construction or acquisition, with or without rehabilitation) or modernization of public housing, where the public housing units are owned in whole or in part by an entity other than a PHA. If the public housing units being developed are 100 percent owned by the PHA, the project is not a mixed-finance project and will be not be subject to mixed-finance development requirements. However, all other development requirements of part 905 are applicable, and, if the project includes both public housing funds and private funding for development, the project may be subject to other applicable program requirements; e.g., the Capital Fund Financing Program, Operating Fund Financing Program, Public Housing Mortgage Program, etc.

(1) *Ownership.* There are various potential scenarios for the ownership structure of a mixed-finance project, such as: public housing units may be

owned entirely by a private entity; a PHA may co-own with a private entity; or a PHA affiliate or instrumentality may own or co-own the units.

(2) *Partnerships.* PHAs may choose to enter into a partnership or other contractual arrangement with a third party entity for the mixed-finance development and/or ownership of public housing units.

(3) *Funding.* Funding for mixed-finance developments may include one or a combination of funding sources, pursuant to § 905.600(d) of this part.

(4) *Modernization.* A mixed-finance project that involves modernization, rather than new construction, shall maintain the DOFA date that existed prior to modernization and shall be subject to the provisions of § 905.304(a)(2) of this part regarding the applicable period of obligation to operate the public housing units.

(b) *Definitions applicable to this subpart.* (1) *Mixed-finance.* The development (through new construction or acquisition, with or without rehabilitation) or modernization of public housing, using public housing, nonpublic housing, or a combination of public housing and nonpublic housing funds, where the public housing units are owned in whole or in part by an entity other than the PHA. A mixed-finance development may include 100 percent public housing (if there is an Owner Entity other than the PHA) or a mixture of public housing and nonpublic housing units.

(2) *Owner Entity.* As defined in § 905.108 of this part.

(3) *PHA instrumentality.* An instrumentality is an entity related to the PHA whose assets, operations, and management are legally and effectively controlled by the PHA, and through which PHA functions or policies are implemented, and which utilizes public housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. An instrumentality assumes the role of the PHA, and is the PHA under the Public Housing Requirements, for purposes of implementing public housing development activities and programs, and must abide by the Public Housing Requirements. Instrumentalities must be authorized to act for and

to assume such responsibilities. For purposes of development, ownership of public housing units by an instrumentality would be considered mixed-finance development.

(4) *PHA affiliate.* An affiliate is an entity, other than an instrumentality, formed by a PHA and in which a PHA has a financial or ownership interest or participates in its governance. The PHA has some measure of control over the assets, operations, or management of the affiliate, but such control does not rise to the level of control to qualify the entity as an instrumentality. For the purposes of development, ownership of public housing units by an affiliate would be considered mixed-finance development.

(5) *Public housing funds.* As defined in § 905.108 of this part.

(c) *Structure of projects.* Each mixed-finance project must be structured to:

(1) Ensure the continued operation of the public housing units in accordance with all Public Housing Requirements;

(2) Ensure that public housing funds committed to a mixed-finance project are used only to pay for costs associated with the public housing units, including such costs as demolition, site work, infrastructure, and common area improvements.

(3) To ensure that the amount of public housing funds committed to a project is proportionate to the number of public housing units contained in the project. To meet this "pro rata test," the proportion of public housing funds compared to total project funds committed to a project must not exceed the proportion of public housing units compared to total number of units contained in the project. For example, if there are a total of 120 units in the project and 50 are public housing units, the public housing units are 42 percent of the total number of units in the project. Therefore the amount of public housing funds committed to the project cannot exceed 42 percent of the total project budget, unless otherwise approved by the Secretary. However, if public housing funds are to be used to pay for more than the pro rata cost of common area improvements, HUD will evaluate the proposal to ensure that

common area improvements will benefit the residents in the development in a mixed-income project; and

(4) Ensure that the project is within the Total Development Cost (TDC) and Housing Construction Cost (HCC) limits pursuant to §905.314(c) and (d) of this part.

(d) *Process.* Except as provided in this section, development of a mixed-finance project under this subpart is subject to the same requirements as development of public housing by a PHA entirely with public housing funds, as stated in §905.600 of this part. PHAs must submit an acquisition proposal under §905.608 and/or a development proposal under §905.606 or as otherwise specified by HUD.

(e) *Conflicts.* In the event of a conflict between the requirements for a mixed-finance project and other requirements of this subpart, the mixed-finance Public Housing Requirements shall apply, unless HUD determines otherwise.

(f) *HUD approval.* For purposes of this section only, any action or approval that is required by HUD pursuant to the requirements set forth in this section shall be construed to mean HUD Headquarters, unless the field office is authorized in writing by Headquarters to carry out a specific function in this section.

(g) *Comparability.* Public housing units built in a mixed-financed development must be comparable in size, location, external appearance, and distribution to nonpublic housing units within the development.

(h) *Mixed-finance procurement.* The requirements of 2 CFR part 200 and 24 CFR 905.316 are applicable to this subpart with the following exceptions:

(1) PHAs may select a development partner using competitive proposals procedures for qualifications-based procurement, subject to negotiation of fair and reasonable compensation and compliance with TDC and other applicable cost limitations;

(2) An Owner Entity (which, as a private entity, would normally not be subject to 2 CFR part 200) shall be required to comply with 2 CFR part 200 if HUD determines that the PHA or PHA instrumentality, or either of their members or employees, exercises significant decision making functions

within the Owner Entity with respect to managing the development of the proposed units. HUD may, on a case-by-case basis, exempt such an Owner Entity from the need to comply with 2 CFR part 200 if it determines that the Owner Entity has developed an acceptable alternative procurement plan.

(i) *Identity of interest.* If the Owner Entity or partner (or any other entity with an identity of interest with the Owner Entity or partner) of a mixed-finance project wants to serve as the general contractor for the mixed-finance project, it may award itself the construction contract only if:

(1) The identity of interest general contractor's bid is the lowest bid submitted in response to a request for bids; or

(2) The PHA submits a written justification to HUD that includes an independent third-party cost estimate that demonstrates that the identity of interest general contractor's costs are less than or equal to the independent third-party cost estimate; and

(3) HUD approves the identity of interest general contractor in conjunction with HUD's approval of the development proposal for the mixed-finance project.

(j) *Operating Subsidy-Only and Capital Fund-Only Assistance.* (1) *General.* This section refers to the mixed-finance development of public housing units that will be developed without public housing funds but will receive operating subsidy, or will be developed with public housing funds but will not receive operating subsidy.

(2) *Operating Subsidy-Only Development.* Operating Subsidy-Only Development refers to mixed-finance projects where public housing units are developed without the use of public housing funds, but for which HUD agrees to provide operating subsidies under Section 9(e) of the 1937 Act. These types of project are subject to the following provisions:

(i) The newly developed public housing units will be included in the calculation of the Capital Fund formula in §905.400 of this part.

(ii) An ACC Amendment will be executed to include the new public housing units. The term of the ACC Amendment will be determined based on the

assistance as provided in §905.304, unless reduced by the Secretary.

(iii) There shall be no disposition of the public housing units without the prior written approval of HUD, during, and for 10 years after the end of, the period in which the public housing units receive operating subsidy from the PHA, as required by 42 U.S.C. 1437g(3), as those requirements may be amended from time to time. However, if the PHA is no longer able to provide operating subsidies to the Owner Entity pursuant to Section 9(e) of the 1937 Act, the PHA may (on behalf of the Owner Entity) request that HUD terminate the Declaration of Trust or Declaration of Restrictive Covenants, as applicable. Termination under this section does not require disposition approval from HUD pursuant to Section 18 of the 1937 Act, 42 U.S.C. 1437p. However, the PHA must provide public housing residents with a decent, safe, sanitary, and affordable unit to which they can relocate, which may include a public housing unit in another development or a Housing Choice Voucher, and pay for the tenant's reasonable moving costs. The URA is not applicable in this situation.

(iv) Where the PHA elects in the future to use public housing funds for modernization of these units, the PHA must execute an ACC Amendment with a 20-year use restriction and record a Declaration of Trust or Declaration of Restrictive Covenants, in accordance with §905.304. There may be no disposition of the public housing units without the prior written approval of HUD during the 20-year period, and the public housing units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as those requirements may be amended from time to time.

(3) *Capital Fund-Only Development.* Capital Fund-Only projects refers to mixed-finance projects where a PHA and its partners may develop public housing units using public housing funds for development of new units, but for which HUD will not be providing operating subsidy under Section 9(e) of the Act, 42 U.S.C. 1437g(e). These types of projects are subject to the following provisions:

(i) The newly developed public housing units will not be included in the calculation of the Operating Fund formula.

(ii) The PHA must sign an ACC Amendment, with a 40-year use restriction, for development of new units and record a Declaration of Trust or Declaration of Restrictive Covenants in accordance with §905.304 of this part, unless the time period is reduced by the Secretary.

(iii) There shall be no disposition of the public housing units, without the prior written approval of HUD, during a 40-year period, and the public housing units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as required by section 9(d)(3) of the 1937 Act, 42 U.S.C. 1437g(d)(3), as those requirements may be amended from time to time.

(4) *Procedures.* PHAs must follow the development approval process identified in §905.600.

(k) *Mixed-finance operations: Deviation from HUD requirements pursuant to section 35(h) of the 1937 Act, 42 U.S.C. 1437z-7(h).* (1) *Deviation.* If a PHA enters into a contract with an entity that owns or operates a mixed-finance project, and the terms of the contract obligate the entity to operate and maintain a specified number of units in the project as public housing units, the contract may include terms that allow the Owner Entity to deviate from otherwise applicable Public Housing Requirements regarding rents, income eligibility, and other areas of public housing management with respect to all or a portion of the public housing units, subject to the following conditions:

(i) There are a significant number of units in the mixed-finance project that are not public housing units;

(ii) There is a reduction in appropriations under Section 9(e) of the 1937 Act (see 42 U.S.C. 1437g(e)) or a change in applicable law that results in the PHA being unable to fulfill its contractual obligation to the Owner Entity with respect to the public housing units;

(iii) Prior to implementation of the contractual terms related to deviation from the Public Housing Requirements,

HUD approves an Alternative Management Plan for the mixed-finance project; and

(iv) The deviation shall be to the extent necessary to preserve the viability of those units while maintaining the low-income character of the units to the maximum extent practicable.

(2) *Preparation of an Alternative Management Plan.* Should the PHA and the Owner Entity determine a need to deviate from the Public Housing Requirements, the PHA, on behalf of the Owner Entity, must submit an Alternative Management Plan to HUD for review and approval prior to implementation of any changes. The Plan must include the following:

(i) A statement describing the Owner Entity's reasons for deviating from the Public Housing Requirements;

(ii) An explanation of the Owner Entity's proposed remedies, including, but not limited to:

(A) How the Owner Entity will select the residents (including the number and income levels of the families proposed to be admitted to the public housing units) and units to be affected by the proposed change;

(B) The Owner Entity's timetable for implementing the Alternative Management Plan;

(C) The impact on existing residents. Note that for any resident who is unable to remain in the unit as a result of implementation of the Alternative Management Plan, the resident must be relocated to a public housing unit or given a Housing Choice Voucher by the PHA or by another entity as provided for in the contractual agreement between the PHA and the Owner Entity;

(iii) An amendment to the existing contractual agreement between the PHA and the Owner Entity that includes provisions which ensure that:

(A) An update on the Alternative Management Plan is submitted annually to HUD to ensure that implementation of the provisions of the Alternative Management Plan continue to be appropriate;

(B) The Owner Entity complies with the requirements of this subpart in its management and operation of the public housing units in accordance with the Alternative Management Plan;

(C) The Owner Entity provides the PHA any income that is generated by the public housing units in excess of the Owner Entity's expenses on behalf of those units, as a result of implementation of provisions in the Alternative Management Plan;

(D) The Owner Entity reinstates all Public Housing Requirements (including rent and income eligibility requirements) with respect to the original number of public housing units and number of bedrooms in the mixed-finance development, following the PHA's reinstatement of operating subsidies at the level originally agreed to in its contract with the Owner Entity; and

(iv) Additional evidence. The PHA must provide documentation that:

(A) The Owner Entity has provided copies of the Alternative Management Plan to residents of the project and provided the opportunity for review and comment prior to submission to HUD. The Owner Entity must have provided written notice to each of the public housing residents in the mixed-finance development of its intention to implement the Alternative Management Plan. Such notice must comply with all relevant federal, state, and local substantive and procedural requirements and, at a minimum, provide public housing residents 90 days advance notice of any proposal to increase rents or to relocate public housing residents to alternative housing;

(B) The revenues being generated by the public housing units (in combination with the reduced allocation of Operating Subsidy resulting primarily from a reduction in appropriations or changes in applicable law such that the PHA is unable to comply with its contractual obligations to the Owner Entity) are inadequate to cover the reasonable and necessary operating expenses of the public housing units. Documentation should include a financial statement showing actual operating expenses and revenues over the past 5 years and the projected expenses and revenues over the next 10 years;

(C) A demonstration that the PHA cannot meet its contractual obligation, and;

(D) The Owner Entity has attempted to offset with regard to the project, the

impact of reduced operating subsidies or changes in applicable law by all available means; including the use of other public and private development resources, the use of cash flow from any nonpublic housing units, and funds from other operating deficient reserves.

(3) *HUD review.* HUD will review the Alternative Management Plan to ensure that the plan meets the requirements of this subpart and that any proposed deviation from the Public Housing Requirements will be implemented only to the extent necessary to preserve the viability of the public housing units. Upon completion of HUD's review, HUD will either approve or disapprove the Alternative Management Plan. Reasons for HUD disapproval may include, but are not limited to, the following:

(i) The justification for deviation from the Public Housing Requirements does not qualify in accordance with section 35(h) of the Act (42 U.S.C. 1437z-7(h)).

(ii) The proposed deviation(s) from the Public Housing Requirements are not limited to preserving the viability of the public housing units.

(iii) The information that HUD requires to be included in the Alternative Management Plan has not been included, is not accurate, or does not support the need for deviation from the Public Housing Requirements.

(iv) HUD has evidence that the proposed Alternative Management Plan is not in compliance with other federal requirements, including civil rights laws.

(4) *HUD reevaluation and reapproval.* The PHA, on behalf of the Owner Entity, must provide to HUD, for HUD approval, an annual update on the implementation of the Alternative Management Plan. The update must provide the status of the project and whether the circumstances originally triggering the need for the conditions contained in the Alternative Management Plan remain valid and appropriate. Any proposed changes in the Alternative Management Plan should also be identified. Once the annual update of the Alternative Management Plan is properly submitted, the existing Alternative Management Plan shall remain in ef-

fect until such time as HUD takes additional action to approve or disapprove the annual update.

[78 FR 63770, Oct. 24, 2013, as amended at 80 FR 75942, Dec. 7, 2015]

§ 905.606 Development proposal.

(a) *Development proposal.* Prior to developing public housing, either through new construction or through acquisition, with or without rehabilitation, a PHA must submit a development proposal to HUD in the form prescribed by HUD, which will allow HUD to assess the viability and financial feasibility of the proposed development. A development proposal must be submitted for all types of public housing development, including mixed-finance. Failure to submit and obtain HUD approval of a development proposal may result in the public housing funds used in conjunction with the project being deemed ineligible expenses. In determining the amount of information to be submitted by the PHA, HUD shall consider whether the documentation is required for HUD to carry out mandatory statutory, regulatory, or Executive order reviews; the quality of the PHA's past performance in implementing development projects under this subpart; the PHA's demonstrated administrative capability; and other program requirements. The development proposal shall include some or all of the following documentation, as deemed necessary by HUD.

(1) *Project description.* A description of the proposed project, including:

(i) Proposed development method (e.g., mixed-finance, new construction, acquisition with or without rehabilitation, turnkey, etc.), including the extent to which the PHA will use force account labor and use procured contractors. For new construction projects, the PHA must meet the program requirements contained in § 905.602. For projects involving acquisition of existing properties less than 2 years old, the PHA must include an attestation from the PHA and the owner of the property that the property was not constructed with the intent that it would be sold to the PHA or, if it was constructed with the intent that it be

sold to the PHA, that it was constructed in compliance with all applicable requirements (e.g., Davis Bacon wage rates, accessibility, etc.);

(ii) Type of residents to occupy the units (e.g., family, elderly, persons with disabilities, or families that include persons with disabilities);

(iii) Number and type of unit (detached, semidetached, row house, walk-up, elevator), with bedroom count, broken out by public housing vs. non-public housing, if applicable;

(iv) The type and size of nondwelling space, if applicable; and

(v) Schematic drawings of the proposed buildings, unit plans, and additional information regarding plans and specifications, as needed by HUD to review the project.

(2) *Site information.* An identification and description of the proposed site and neighborhood, a site plan, and a map of the neighborhood.

(3) *Participant description.* Identification of participating parties and a description of the activities to be undertaken by each of the participating parties and the PHA; and the legal and business relationships between the PHA and each of the participating parties, as applicable.

(4) *Development project schedule.* A schedule for the development project that includes each major stage of development, through and including the submission of an Actual Development Cost Certificate to HUD.

(5) *Accessibility.* A PHA must provide sufficient information for HUD to determine that dwelling units and other public housing facilities meet accessibility requirements specified at § 905.312 of this part, including, but not limited to, the number, location, and bedroom size distribution of accessible dwelling units (see 24 CFR 8.32 and 24 CFR part 40).

(6) *Project costs.* (i) *Budgets.* To allow HUD to assess sources of funding and projected uses of funds, the PHA shall submit a project budget, in the form prescribed by HUD, reflecting the total permanent development budget for the project, including all sources and uses of funds, including hard and soft costs. The PHA shall also submit a budget for the construction period and a construction draw schedule showing the timing

of construction financing contributions and disbursements. In addition, the PHA shall submit an independent construction cost estimate or actual construction contract that supports the permanent and construction budgets.

(ii) *TDC calculation.* The PHA must submit a calculation of the TDC and HCC, subject to § 905.314 of this part.

(iii) *Financing.* A PHA must submit a detailed description of all financing necessary for the implementation of the project, specifying the sources and uses. In addition, HUD may require documents related to the financing (e.g., loan documents, partnership or operating agreement, regulatory and operating agreement, etc.) to be submitted in final draft form as part of the development proposal. Upon financial closing, HUD may also require final, executed copies of these documents to be submitted to HUD for final approval, per § 905.612(b)(2) of this part.

(A) *Commitment of funds.* Documents submitted pursuant to this section must irrevocably commit funds to the project. Irrevocability of funds means that binding legal documents—such as loan agreements, mortgages, deeds of trust, partnership agreements or operating agreements, or similar documents committing funds—have been executed by the applicable parties; though disbursement of such funds may be subject to meeting progress milestones, the absence of default, and/or other conditions generally consistent with similar non-public housing transactions. For projects involving revolving loan funds, the irrevocability of funds means that funds in an amount identified to HUD as the maximum revolving loan have been committed pursuant to legally binding documents; though disbursement of such funds may be subject to meeting progress milestones, the absence of default, and/or other conditions generally consistent with similar affordable housing transactions. The PHA must confirm the availability of each party's financing, the amount and source of financing committed to the proposal by the parties, and the irrevocability of those funds.

(B) *Irrevocability of funds.* To ensure the irrevocable nature of the committed funds, the PHA shall review the

legal documents committing such funds to ensure that the progress milestones and conditions precedent contained in such contracts are generally consistent with similar affordable housing transactions; that the PHA and/or its Owner Entity know of no impediments that would prevent the project from moving forward consistent with the project milestones and conditions precedent; and, after conducting sufficient due diligence, that such documents are properly executed by persons or entities legally authorized to bind the entity committing such funds.

(C) *Third-party documents.* The PHA is not required to ensure the availability of funds by enforcing documents to which it is not a party.

(D) *Opinion of counsel.* As part of the proposal, the PHA may certify as to the irrevocability of funds through the submission of an opinion of the PHA's counsel attesting that counsel has examined the availability of the participating parties' financing, and the amount and source of financing committed to the project by the participating parties, and has determined that such financing has been irrevocably committed, as defined in paragraph (a)(6)(iii)(A) of this section, and that such commitments are consistent with the project budget submitted under paragraph (a)(6)(i) of this section.

(7) *Operating pro-forma/Operating Fund methodology.* To allow HUD to assess the financial feasibility of projects, PHAs shall submit a 10-year operating pro-forma, including all assumptions, to assure that operating expenses do not exceed operating income. For mixed-finance development, the PHA must describe its methodology for providing and distributing operating subsidy to the Owner Entity for the public housing units.

(8) *Local Cooperation Agreement.* A PHA may elect to exempt all public housing units in a mixed-finance project from the payment in lieu of taxes provisions under section 6(d) of the Act, 42 U.S.C. 1437d(d), and from the finding of need and cooperative agreement provisions under sections 5(e)(1)(ii) and (e)(2) of the Act, 42 U.S.C. 1437c(e)(1)(ii) and (e)(2), and instead

subject units to local real estate taxes, but only if the PHA provides documentation from an authorized official of the local jurisdiction that development of the units is consistent with the jurisdiction's comprehensive housing affordability strategy. If the PHA does not elect this exemption, the Cooperation Agreement as provided in § 905.602(a) is required and must be submitted.

(9) *Environmental requirements.* The PHA must provide an approved Request for Release of Funds and environmental certification, submitted in accordance with 24 CFR part 58, or approval in accordance with 24 CFR part 50. HUD will not approve a development proposal without the appropriate environmental approval.

(10) *Market analysis.* For a mixed-finance development that includes non-public housing units, the PHA must include an analysis of the projected market for the proposed project.

(11) *Program income and fees.* The PHA must provide information identifying fees to be paid to the PHA, the PHA's partner(s), the Owner Entity, and/or other participating parties identified by HUD and on the receipt and use of program income.

(b) *Additional HUD-requested information.* PHAs are required to provide any additional information that HUD may need to assess the development proposal.

§ 905.608 Site acquisition proposal.

(a) *Submission.* When a PHA determines that it is necessary to acquire vacant land for development of public housing through new construction, using public housing funds, prior to submission and approval of a development proposal under § 905.606 of this part, the PHA must submit an acquisition proposal to HUD for review and approval prior to acquisition. The acquisition proposal shall include the following:

(b) *Justification.* A justification for acquiring property prior to development proposal submission and approval.

(c) *Description.* A description of the property (*i.e.*, the proposed site and/or project) to be acquired.

(d) *Project description; site and neighborhood standards.* An identification and description of the proposed project, site plan, and neighborhood, together with information sufficient to enable HUD to determine that the proposed site meets the site and neighborhood standards at § 905.602(d) of this part.

(e) *Zoning.* Documentation that the proposed project is permitted by current zoning ordinances or regulations, or evidence to indicate that needed rezoning is likely and will not delay the project.

(f) *Appraisal.* Documentation attesting that an appraisal of the proposed property by an independent, state certified appraiser has been conducted and that the acquisition is in compliance with § 905.308(b)(9) of this part. The purchase price of the site/property may not exceed the appraised value without HUD approval.

(g) *Schedule.* A schedule of the activities to be carried out by the PHA.

(h) *Environmental assessment.* An environmental review or request for HUD to perform the environmental review pursuant to § 905.308(b)(2) of this part.

§ 905.610 Technical processing.

(a) *Review.* HUD shall review all development proposals and site acquisition proposals for compliance with the statutory, Executive order, and regulatory requirements applicable to the development of public housing and the project. HUD's review will evaluate whether the proposed sources and uses of funds are eligible and reasonable, and whether the financing and other documentation establish to HUD's satisfaction that the development is financially viable and structured so as to adequately protect the federal investment of funds in the development. For this purpose, HUD will consider the PHA's proposed methodology for allocating operating subsidies on behalf of the public housing units, the projected revenue to be generated by any non-public housing units in a mixed-finance development, and the 10-year operating pro forma and other information contained in the development proposal.

(b) *Subsidy layering analysis.* After the PHA submits the documentation required under paragraph (a) of this section, HUD or its designee (e.g., the

State Housing Finance Agency) shall carry out a subsidy layering analysis, pursuant to section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545) (see 24 CFR part 4), to determine that the amount of assistance being provided for the development is not more than necessary to make the assisted activity feasible after taking into account the other governmental assistance.

(c) *Safe harbor standards.* For mixed-finance projects, in order to expedite the mixed-finance review process and control costs, HUD may make available safe harbor and maximum fee ranges for a number of costs. If a project is at or below a safe harbor standard, no further review will be required by HUD. If a project is above a safe harbor standard, additional review by HUD will be necessary. In order to approve terms above the safe harbor, the PHA must demonstrate to HUD in writing that the negotiated terms are appropriate for the level of risk involved in the project, the scope of work, any specific circumstances of the development, and the local or national market for the services provided.

(d) *Approval.* If HUD determines that a site acquisition proposal or a development proposal is approvable, HUD shall notify the PHA in writing of its approval. The HUD approval of a development proposal will include the appropriate form of ACC for signature. The PHA must execute the ACC and return it to HUD for execution. Until HUD approves a development proposal, a PHA may only expend public housing funds for predevelopment costs, as provided in § 905.612 of this part.

(e) *Amendments to approved development proposals.* HUD must approve any material change to an approved development proposal. HUD defines material change as:

- (1) A change in the number of public housing units;
- (2) A change in the number of bedrooms by an increase/decrease of more than 10 percent;
- (3) A change in cost or financing by an increase/decrease of more than 10 percent; or
- (4) A change in the site.

§ 905.612 Disbursement of Capital Funds—predevelopment costs.

(a) *Predevelopment costs.* After a new development project has been included in the CFP 5-Year Action Plan that has been approved by the PHA Board of Commissioners and HUD, a PHA may use funding for predevelopment expenses. Predevelopment funds may be expended in accordance with the following requirements:

(1) Predevelopment assistance may be used to pay for materials and services related to proposal development and project soft costs. It may also be used to pay for costs related to the demolition of units on a proposed site. Absent HUD approval, predevelopment assistance may not be used to pay for site work, installation of infrastructure, construction, or other hard costs related to a development.

(2) For non-mixed-finance projects, predevelopment funding up to 5 percent of the total amount of the public housing funds committed to a project does not require HUD approval. HUD shall determine on a case-by-case basis that an amount greater than 5 percent may be drawn down by a PHA to pay for necessary and reasonable predevelopment costs, based upon a consideration of the nature and scope of activities proposed to be carried out by the PHA. Before a request for predevelopment assistance in excess of 5 percent may be approved, the PHA must provide to HUD information and documentation specified in §§ 905.606 and 905.608 of this part, as HUD deems appropriate.

(3) For mixed-finance projects, all funding for predevelopment costs must be reviewed and approved by HUD prior to expenditure.

(4) The requirements in paragraph (b) of this section to disburse funds for mixed-financed projects in an approved ratio to other public and private funding do not apply to disbursement of predevelopment funds.

(b) *Standard drawdown requirements.*
 (1) *General.* If HUD determines that the proposed development is approvable, it may execute with the PHA the applicable ACC Amendment to provide funds for the purposes and in the amounts approved by HUD. Upon approval of the development proposal and all necessary

documentation evidencing and implementing the development plan, the PHA may disburse amounts as are necessary and consistent with the approved development proposal without further HUD approval, unless HUD determines that such approval is necessary. Once HUD approves the site acquisition proposal, the PHA may request funds for acquisition activities. Each Capital Fund disbursement from HUD is deemed to be an attestation of compliance by the PHA with the requirements of this part, as prescribed in § 905.106 of this part. If HUD determines that the PHA is in noncompliance with any provision of this part, the PHA may be subject to the sanctions in § 905.800, subpart H, of this part.

(2) *Mixed-finance projects.* For mixed-finance projects, prior to PHA disbursement of public housing funds, except predevelopment funds identified in paragraph (a) of this section, HUD may require a PHA to submit to HUD, for review and approval, copies of final, fully executed, and, where appropriate, recorded documents, submitted as part of the development proposal process. Upon completion of the project, the ratio of public housing funds to non-public housing funds for the overall project must remain as reflected in the executed documents. The ratio does not apply during the construction period.

Subpart G—Other Security Interests

SOURCE: 78 FR 63786, Oct. 24, 2013, unless otherwise noted.

§ 905.700 Other security interests.

(a) The PHA may not pledge, mortgage, enter into a transaction that provides recourse to public housing assets, or otherwise grant a security interest in any public housing project, portion thereof, or other property of the PHA without the written approval of HUD.

(b) The PHA shall submit the request in the form and manner prescribed by HUD.

(c) HUD shall consider:

(1) The ability of the PHA to complete the financing, the improvements, and repay the financing;

§ 905.800

(2) The reasonableness of the provisions in the proposal; or

(3) Any other factors HUD deems appropriate.

Subpart H—Compliance, HUD Review, Penalties, and Sanctions

SOURCE: 78 FR 63786, Oct. 24, 2013, unless otherwise noted.

§ 905.800 Compliance.

As provided in § 905.106 of this part, PHAs or other owner/management entities and their partners are required to comply with all applicable provisions of this part. Execution of the CF ACC Amendment received from the PHA, submissions required by this part, and disbursement of Capital Fund grants from HUD are individually and collectively deemed to be the PHA's certification that it is in compliance with the provisions of this part and all other Public Housing Program Requirements. Noncompliance with any provision of this part or other applicable requirements may subject the PHA and/or its partners to sanctions contained in § 905.804 of this part.

§ 905.802 HUD review of PHA performance.

(a) *HUD determination.* HUD shall review the PHA's performance in completing work in accordance with this part. HUD may make such other reviews when and as it determines necessary. When conducting such a review, HUD shall, at minimum, make the following determinations:

(1) HUD shall determine whether the PHA has carried out its activities under this part in a timely manner and in accordance with its CFP 5-Year Action Plan and other applicable requirements.

(2) HUD shall determine whether the PHA has a continuing capacity to carry out its Capital Fund activities in a timely manner.

(3) HUD shall determine whether the PHA has accurately reported its obligation and expenditures in a timely manner.

(4) HUD shall determine whether the PHA has accurately reported required building and unit data for the calculation of the formula.

24 CFR Ch. IX (4–1–16 Edition)

(5) HUD shall determine whether the PHA has obtained approval for any CFFP or OFFP proposal and any PHA development proposal.

(b) [Reserved]

§ 905.804 Sanctions.

(a) If at any time, HUD finds that a PHA has failed to comply substantially with any provision this part, HUD may impose one or a combination of sanctions, as it determines is necessary. Sanctions associated with failure to obligate or expend in a timely manner are specified at § 905.306 of this part. Other possible sanctions that HUD may impose for noncompliance by the PHA include, but are not limited to, the following:

(1) Issue a corrective action order, at any time, by notifying the PHA of the specific program requirements that the PHA has violated, and specifying that any of the corrective actions listed in this section must be taken. Any corrective action ordered by HUD shall become a condition of the CF ACC Amendment.

(2) Require reimbursement from non-HUD sources.

(3) Limit, withhold, reduce, or terminate Capital Fund or Operating Fund assistance.

(4) Issue a Limited Denial of Participation or Debar responsible PHA officials, pursuant to 2 CFR parts 180 and 2424.

(5) Withhold assistance to the PHA under section 8 of the Act, 42 U.S.C. 1437f.

(6) Declare a breach of the CF ACC with respect to some or all of the PHA's functions.

(7) Take any other available corrective action or sanction as HUD deems necessary.

(b) *Right to appeal.* Before taking any action described in paragraph (a) of this section, HUD shall notify the PHA of its finding and proposed action and provide to the PHA an opportunity, within a prescribed period of time, to present any arguments or additional facts and data concerning the finding and proposed action to HUD's Assistant Secretary for Public and Indian Housing.