

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Part 943

[Docket No. FR-4474-P-01]

RIN 2577-AC00

## Consortia of Public Housing Agencies and Joint Ventures

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement a new statutory provision specifically authorizing public housing agencies (PHAs) to administer any or all of their housing programs through a consortium of PHAs. It also authorizes PHAs to use subsidiaries, joint ventures, partnerships or other business arrangements to administer its housing programs or to provide supportive or social services. The proposed rule specifies minimum requirements relating to formation and operation of consortia and minimum contents of consortium agreements, as required by the statute.

**DATES:** *Comments Due Date:* November 15, 1999.

**ADDRESSES:** Submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** Rod Solomon, Deputy Assistant Secretary for Policy, Program, and Legislative Initiatives, Office of Public and Indian Housing, U.S. Department of Housing and Urban Development, at (202) 708-0713 or e-mail him at the following address: RodSolomon@hud.gov. The preceding telephone number is not toll-free. Persons with hearing or speech impairments may access the above telephone number via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

### SUPPLEMENTARY INFORMATION:

#### I. Statutory Basis

Section 515 of the Quality Housing and Work Responsibility Act of 1998

(Pub. L. 105-276, 112 Stat. 2549, approved October 21, 1998) (Public Housing Reform Act) repealed the existing section 13 of the United States Housing Act of 1937 (42 U.S.C. 1437k) dealing with energy conservation, replacing it with a new section 13 authorizing PHAs to operate in consortia and joint ventures. The statute requires that HUD specify minimum requirements relating to the formation and operation of consortia and minimum contents of consortium agreements.

New section 13 provides authority for PHAs to form consortia, joint ventures, affiliates, and subsidiaries for the purposes set out in the statute. Before enactment of section 13, some PHAs had established cooperative arrangements for carrying out some of their responsibilities. A principal difference between such arrangements and consortia as authorized under section 13, is that under section 13 funding may be directed to a representative of the consortium on behalf of several PHAs instead of being paid to the PHAs separately. Another major difference is that under a section 13 consortium, a joint PHA plan is submitted on behalf of participating PHAs. Enactment of section 13, however, does not restrict the ability of PHAs to continue to establish cooperative arrangements under which they receive funding separately and submit separate PHA plans.

#### II. Regulatory Interpretations

##### A. Consortia

##### 1. HUD Programs Covered

Generally, this rule covers the public housing program, PHA-administered Section 8 housing assistance programs, and related programs. Programs not covered are other housing owned by the PHA and two categories of project-based Section 8 projects:

- PHA-administered project-based section 8 under the Request for Proposals published on May 19, 1999, 64 FR 27358 (HUD invited response by specially created consortia that could qualify as PHAs.); and
- Section 8 projects that are the subject of financing restructuring under the finance restructuring "Mark to Market" program, where Participating Administrative Entities are designated to administer the program (see 42 U.S.C. 1437f note).

##### 2. General

HUD encourages PHAs to take advantage of the new authority to create consortia to operate their programs. This type of coordination may be particularly

helpful for PHAs with small programs or ones whose location is not convenient to access planning resources. Acting together, PHAs should be able to access expertise not otherwise readily available and obtain significant cost savings. In addition, joint planning by PHAs in adjacent geographic areas will permit a metropolitan or regional perspective to be set out in a single PHA Annual Plan. This may facilitate reaching deconcentration and mobility goals for very low income families. Consequently, HUD has placed very few limits on the exercise of PHA discretion in implementing this statutory provision. Nothing in this rule, however, precludes PHAs from making other contractual arrangements for administration of their programs, consistent with program regulations and provisions of their Annual Contributions Contracts (ACCs) with HUD.

This rule provides for reporting by the consortium to HUD on behalf of participating PHAs (see § 943.124). HUD invites comments on whether all reports should be combined reports.

Under the Section 8 Voucher program, program regulations (24 CFR 982.4) already provide for using a consortium of PHAs and having a separate ACC with an entity authorized to act as legal representative of the consortium.

##### 3. PHA Inclusion of Programs in a Consortium

The statute specifies that "any or all of the housing programs of [the PHAs]" may be administered by a consortium. HUD interprets the coverage to include a PHA's public housing and Section 8 programs, and related programs, such as the drug elimination program. When a PHA participates, it must decide which categories of its programs to include. For this purpose, the categories are as follows:

- Public housing;
- Section 8 voucher;
- Section 8 Moderate Rehabilitation, including Single Room Occupancy;
- All project-based Section 8 programs administered by a PHA under an ACC with HUD, except for Moderate Rehabilitation and Certificates and Vouchers;
- Grant programs associated with public housing and Section 8 housing programs (such as drug elimination)—unless use of a consortium would be inconsistent with the terms of the grant program.

The participating PHAs will designate a lead agency in the consortium agreement. The consortium agreement will specify the responsibilities of the

lead PHA and other participating PHAs for administration of the consortium and for administration of the covered programs. To assure competency in the operation of the consortium, the rule requires that the lead agency for the consortium may not be one designated as troubled by HUD or one that fails the funding threshold on satisfaction of civil rights requirements.

#### 4. Relationship of PHAs in Consortium

The period of existence of a consortium and the terms under which a PHA may withdraw from it before the end of that period must be specified in the consortium agreement. To provide for orderly transition, a PHA's withdrawal from a consortium or its natural termination date must take effect at the end of the consortium's fiscal year. Nothing in this rule affects HUD's authority to intervene, as necessary, to enforce its rights under the Annual Contributions Contract, if the actions of a consortium result in a default by a PHA.

#### 5. HUD's Relationship to Consortium

The relationship between HUD and the consortium is to be specified in a payment agreement with the lead agency and the other participating PHAs. This agreement will specify the agreement for direct payment of program funds to the lead agency on behalf of the consortium and requirements for use of the funds in accordance with HUD regulations and requirements, and remedies for any breach of the obligation of the lead agency and participating PHAs to administer the combined program in accordance with HUD requirements.

### B. Joint Ventures, Partnerships, Affiliates, and Subsidiaries

#### 1. HUD Programs Covered

Although section 13 authorizes joint ventures, partnerships, affiliates, subsidiaries, and other business arrangements for all of a PHA's programs, this rule covers only the public housing program. PHAs engaged in Section 8 program administration are free to engage in such arrangements without any new regulatory restrictions. (In the Section 8 programs, the PHA is

paid a fixed fee for administration of assistance to owners and is responsible for delivering the contract administration services, without either increase or reduction of the fixed fee). In the public housing program, special protections are imposed where physical assets are at risk, as in Part 941, Subpart F, for mixed finance development. This rule does not override those protections.

Section 13 authorizes the use of joint ventures, partnerships, or other business arrangements with persons or entities "with respect to administration of the programs of the [PHA]." In this proposed rule, HUD has chosen to limit the applicability of the joint venture subpart (Subpart C) and its associated special procurement flexibility to the public housing program. PHAs do not need the flexibility granted by this subpart for their Section 8 operations because they already have it. For example, Section 8 operations are not subject to the procurement provisions of 24 CFR part 85.

#### 2. Procurement Provisions

To encourage PHAs to select the most qualified partners for joint ventures in administration of public housing, the rule clarifies the applicability of public housing procurement requirements (found in 24 CFR part 85) to these partners. For procurement of (a) supportive and social services, and (b) administrative functions, this rule provides that the standard requirements are applicable to the procurement of goods and services, but a PHA may consider factors other than price in selecting a partner under the conditions that would warrant sole source selection. (See § 943.150(b)). The rule also clarifies that a joint venture partner is not subject to standard procurement requirements in its activities unless the partner is a subsidiary, affiliate, or identity of interest party of the PHA. In that case, HUD may exempt the joint venture partner from compliance with the standard procurement requirements if the joint venture partner has an acceptable alternative procurement plan. A wholly owned subsidiary or affiliate of a PHA is not exempt in any way.

#### 3. Impact on Existing Joint Venture Authority

This statute does not attempt to regulate a PHA's use of joint ventures, as may be permitted under State law, when using non-1937 Act funds. The rule (§ 943.140(c)) makes that clear.

### Findings and Certifications

#### Public Reporting Burden

The proposed information collection requirements contained in §§ 943.124, 943.126, and 943.128 have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Submit comments on the information collections by November 15, 1999, referring to the title and docket number of the rule. Comments should be addressed to Mildred Hamman, Reports Liaison Officer, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

Comments are solicited from members of the public and affected entities concerning the proposed collection of information specifically to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The burden of information is estimated as follows:

Section of CFR	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total annual hours
943.124 Consortium Agreement .....	40	1	40	8	320
943.126 Payment Agreement .....	40	1	40	4	160
943.128(a) Consolid. Plan; .....	Already included in burden estimates for PHA Plan under Part 903				

Section of CFR	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total annual hours
943.128(b) Consortium Reporting .....	40	1	40	8	320
Total .....	.....	.....	.....	.....	800

### Impact on Small Entities

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that an agency analyze the impact of a rule on small entities whenever it determines that the rule is likely to have a significant impact on a substantial number of small entities. Based on HUD's experience and contacts with representatives of PHAs and HUD field offices, we expect a relatively small number of PHAs to form consortia—certainly fewer than 100. While there would be savings and efficiencies in the long run for small PHAs, forming a consortium also would require some work for these PHAs—to enter consortium agreements—and would required them to overcome resistance to giving up local control of their programs. Consequently, we conclude that the rule will not have a significant impact on a substantial number of small entities. We encourage small entities to submit comments, however, on ways that the impact of the rule on them could be made more advantageous.

### Environmental Finding

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays in the Regulations Division at the above address.

### Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule will not have substantial direct effects on states or their political subdivisions, or the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the order.

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) establishes requirements for Federal agencies to

assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This proposed rule does not impose a Federal mandate that will result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. On the contrary, it adds new options for PHA operations.

### Regulatory Review

The Office of Management and Budget (OMB) has reviewed this proposed rule under Executive Order 12866, *Regulatory Planning and Review*, issued by the President on September 30, 1993. OMB determined that this rule is a “significant regulatory action” as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made in this proposed rule after its submission to OMB are identified in the docket file, which is available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

### Catalog

The Catalog of Federal Domestic Assistance number for the programs covered by this rule are 14.850, 14.855, and 14.857.

### List of Subjects in 24 CFR 943

Low and moderate income housing. Reporting and recordkeeping requirements.

Accordingly, HUD proposes to add a new part 943 to title 24 of the Code of Federal Regulations as follows:

### PART 943— PUBLIC HOUSING AGENCY CONSORTIA AND JOINT VENTURES

Sec.

#### Subpart A—General

943.100 What is the purpose of this part?

#### Subpart B—Consortia

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### Subpart C—Subsidiaries, Affiliates, Joint Ventures in Public Housing

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943.142 In what types of operating organizations may a PHA participate?

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943.148 What procurement standards apply to PHAs selecting partners for a joint venture?

943.150 What procurement standards apply to a PHA's joint venture partner?

943.151 What procurement standards apply to a joint venture itself?

**Authority:** 42 U.S.C. 1437k and 3535(d).

### Subpart A—General

#### § 943.100 What is the purpose of this part?

This part authorizes public housing agencies (PHAs) to form consortia, joint ventures, affiliates, subsidiaries, partnerships, and other business arrangements under section 13 of the United States Housing Act of 1937 (42 U.S.C. 1437k). Under this authority, participating PHAs submit joint PHA plans to HUD and combine their funding and program administration. This part does not preclude a PHA from entering cooperative arrangements to operate its programs under other authority, as long as they are consistent with other program regulations and requirements.

### Subpart B—Consortia

#### § 943.115 What programs are covered under this subpart?

(a) Except as provided in paragraph (b) of this section, this subpart applies to the following:

(1) PHA administration of public housing or Section 8 programs under an ACC with HUD; and

(2) PHA administration of grants to the PHA in connection with its public housing or Section 8 programs.

(b) This subpart does not apply to the following:

(1) PHA administration of Section 8 projects assigned to a PHA for contract administration pursuant to an ACC entered under the Request for Proposals published May 19, 1999 (64 FR 27358);

(2) Section 8 contract administration of a restructured subsidized multifamily project by a Participating Administrative Entity in accordance with part 401 of this title; or

(3) A PHA in its capacity as owner of a Section 8 project.

#### **§ 943.118 What is a consortium?**

A consortium consists of two or more PHAs that join together to perform planning, reporting, and other administrative functions for participating PHAs, as specified in a consortium agreement. The lead agency collects the assistance funds from HUD that would be paid to the participating PHAs for the elements of their operations that are administered by the consortium and allocates them according to the consortium agreement. A consortium also submits a joint PHA plan.

#### **§ 943.120 What programs of a PHA are included in a consortium's functions?**

(a) A PHA may enter a consortium under this subpart for administration of any of the following program categories:

(1) The PHA's public housing program;

(2) The PHA's Section 8 voucher and certificate program (including the project-based certificate and voucher programs);

(3) The PHA's Section 8 Moderate Rehabilitation program, including Single Room Occupancy program;

(4) All other project-based Section 8 programs administered by the PHA under an Annual Contributions Contract (ACC) with HUD, except for Moderate Rehabilitation and Certificates and Vouchers; and

(5) Any grants to the PHA in connection with its Section 8 or public housing programs, to the extent not inconsistent with the terms of the governing documents for the grant's funding source.

(b) If a PHA elects to enter a consortium with respect to a program category specified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4) of this section, the consortium must cover the PHA's whole program under the ACC with HUD for that program category, including all dwelling units and all funding for that program under the ACC with HUD.

#### **§ 943.122 How is a consortium organized?**

(a) PHAs that elect to form a consortium enter into a consortium agreement among the participating PHAs, specifying a lead agency (see § 943.124). HUD enters into a payment agreement with the lead agency and the other participating PHAs (see § 943.126).

(b) The lead agency must not be a PHA that is designated as a "troubled PHA" by HUD or that has been determined by HUD to fail the civil rights compliance threshold for new funding. The lead agency is designated to receive HUD program payments on behalf of participating PHAs, to administer HUD requirements for administration of the funds, and to apply the funds in accordance with the consortium agreement and HUD regulations and requirements.

#### **§ 943.124 What elements must a consortium agreement contain?**

(a) The consortium agreement among the participating PHAs governs the formation and operation of the consortium. It must be consistent with the consortium's payment agreement with HUD and must specify the following:

(1) The names of the participating PHAs and the program categories each PHA is including under the consortium agreement;

(2) The name of the lead agency;

(3) The functions to be performed by the lead agency and the other participating PHAs during the term of the payment agreement;

(4) The allocation of funds among participating PHAs and responsibility for administration of funds paid to the consortium under the payment agreement; and

(5) The period of existence of the consortium and the terms under which a PHA may withdraw from it before the end of that period. To provide for orderly transition, the consortium's termination date or a PHA's withdrawal from the consortium must take effect at the end of the consortium's fiscal year.

(b) The agreement must acknowledge that the participating PHAs are subject to the requirements of the joint PHA Plan.

(c) The agreement must be signed by an authorized representative of each participating PHA.

#### **§ 943.126 What is the relationship between HUD and a consortium?**

(a) HUD has a direct relationship with the consortium through a payment agreement, executed in the form prescribed by HUD. The payment agreement specifies the conditions

under which HUD agrees to pay program funds to the lead agency on behalf of the participating PHAs. It specifies the requirements for use of the funds in accordance with HUD regulations and requirements.

(b) Under the payment agreement, the participating PHAs agree that HUD will pay the consortium all assistance payments otherwise payable to the PHAs for the program categories they have included under the consortium agreement. The combined amount is paid to the lead agency on behalf of the consortium.

#### **§ 943.128 How does a consortium carry out planning and reporting functions?**

(a) During the term of the payment agreement, the consortium must complete a joint five-year Plan and a joint Annual Plan for all participating PHAs, in accordance with part 903 of this chapter.

(b) The consortium must submit reports to HUD, in accordance with HUD regulations and requirements, for all of the participating PHAs. All PHAs will be bound by plans and reports submitted to HUD by the consortium for programs covered by the consortium.

(c) Each PHA must keep a copy of the consortium agreement on file for inspection.

#### **§ 943.130 What are the responsibilities of participating PHAs?**

Despite participation in a consortium, each participating PHA remains responsible for its own obligations under its ACC with HUD. This means that it has an obligation to assure that all program funds, including funds paid to the lead agency for administration by the consortium, are used in accordance with HUD regulations and requirements, and that the PHA program is administered in accordance with HUD regulations and requirements. Any breach of program requirements with respect to a program covered by the consortium agreement is a breach of the ACC with each of the participating PHAs, so each PHA is responsible for the performance of the consortium.

#### **Subpart C—Subsidiaries, Affiliates, Joint Ventures in Public Housing**

#### **§ 943.140 What programs and activities are covered by this subpart?**

(a) This subpart applies to the provision of a PHA's public housing administrative functions, and to the provision (or arranging for the provision) of supportive and social services in connection with public housing. It does not apply to activities of a PHA that are subject to the

requirements of part 941, subpart F, of this title.

(b) For purposes of this subpart, the term "joint venture partner" means a participant (other than a PHA) in a joint venture, partnership, or other business arrangement or contract for services with a PHA.

(c) This part does not affect a PHA's authority to use joint ventures, as may be permitted under State law, when using non-1937 Act funds.

**§ 943.142 In what types of operating organizations may a PHA participate?**

(a) A PHA may create and operate a wholly owned or controlled subsidiary or other affiliate; may enter into joint ventures, partnerships, or other business arrangements with individuals, organizations, entities, or governmental units. A subsidiary or affiliate may be a nonprofit corporation. It may be an organization controlled by the same persons who serve on the governing board of the PHA or who are employees of the PHA.

(b) The purpose of any of these operating organizations would be to administer programs of the PHA.

**§ 943.144 What financial impact do operations of a subsidiary, affiliate, or joint venture have on a PHA?**

Income generated by subsidiaries, affiliates, or joint ventures formed under the authority of this subpart is to be used for low-income housing or to benefit the residents assisted by the PHA. This income will not cause a decrease in funding provided under the public housing program except as otherwise provided under the Operating Fund and Capital Fund formulas.

**§ 943.146 What impact does the use of a subsidiary, affiliate, or joint venture have on financial accountability to HUD and the Federal government?**

None. The subsidiary, affiliate, or joint venture is subject to the same authority of HUD, HUD's Inspector General, and the General Accounting Office to audit its conduct.

**§ 943.148 What procurement standards apply to PHAs selecting partners for a joint venture?**

(a) The requirements of part 85 of this title (generally requiring a request for

proposals or "RFP") are applicable to a PHA's procurement of goods and services under this subpart in connection with the PHA's public housing program.

(b) A PHA may use competitive proposal procedures for qualifications-based procurement (request for qualifications or "RFQ") or may solicit a proposal from only one source ("sole source") to select a joint venture partner to perform an administrative function of its public housing program or to provide or arrange to provide supportive or social services covered under this part under the following circumstances:

(1) The proposed joint venture partner has under its control and will make available to the partnership substantial, unique and tangible resources or other benefits that would not otherwise be available to the PHA on the open market (e.g., planning expertise, program experience, or financial or other resources). In this case, the PHA must maintain documentation to substantiate both the cost reasonableness of its selection of the proposed partner and the unique qualifications of the partner: or

(2) A resident group or a PHA subsidiary is willing and able to act as the PHA's partner in performing administrative functions or to provide supportive or social services. This entity must comply with the requirements of part 85 of this title with respect to its selection of the members of the team and the members must be paid on a cost-reimbursement basis only.

**§ 943.150 What procurement standards apply to a PHA's joint venture partner?**

(a) *General.* A joint venture partner is not a grantee or subgrantee and, accordingly, is not required to comply with part 85 of this title in its procurement of goods and services under this part. The partner must comply with all applicable State and local procurement and conflict of interest requirements with respect to its selection of entities to assist in PHA program administration.

(b) *Exception.* If the joint venture partner is a subsidiary, affiliate, or identity of interest party of the PHA, it is subject to the requirements of part 85 of this title. HUD may, on a case-by-case

basis, exempt such a joint venture partner from the need to comply with requirements under part 85 of this title if it determines that the joint venture has developed an acceptable alternative procurement plan.

(c) *Contracting with identity-of-interest parties.* A joint venture partner may contract with an identity-of-interest party for goods or services, or a party specified in the selected bidder's response to a RFP or RFQ (as applicable), without the need for further procurement if:

(1) The PHA can demonstrate that its original competitive selection of the partner clearly anticipated the later provision of such goods or services;

(2) Compensation of all identity-of-interest parties is structured to ensure there is no duplication of profit or expenses; and

(3) The PHA can demonstrate that its selection is reasonable based upon prevailing market costs and standards, and that the quality and timeliness of the goods or services is comparable to that available in the open market. For purposes of this paragraph (c), an "identity-of-interest party" means a party that is wholly owned or controlled by, or that is otherwise affiliated with, the partner or the PHA. The PHA may use an independent organization experienced in cost valuation to determine the cost reasonableness of the proposed contracts.

**§ 943.151 What procurement standards apply to a joint venture itself?**

(a) When the joint venture as a whole is controlled by the PHA or an identity of interest party of the PHA, the joint venture is subject to the requirements of part 85 of this title.

(b) If a joint venture is not controlled by the PHA or an identity of interest party of the PHA, then the rules that apply to the other partners apply. See § 943.150.

Dated: August 27, 1999.

**Harold Lucas,**

*Assistant Secretary for Public and Indian Housing.*

[FR Doc. 99-23701 Filed 9-13-99; 8:45 am]

BILLING CODE 4210-33-P