

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Part 943**

[Docket No. FR-4474-F-02]

RIN 2577-AC00

Consortia of Public Housing Agencies and Joint Ventures**AGENCY:** Office of Public and Indian Housing, HUD.**ACTION:** Final rule.

SUMMARY: This final rule implements a 1998 law that authorizes public housing agencies (PHAs) to administer any or all of their housing programs through a consortium of PHAs. The law also authorizes PHAs to use subsidiaries, joint ventures, partnerships or other business arrangements to administer their housing programs or to provide supportive or social services. This final rule specifies minimum requirements relating to formation and operation of consortia and minimum contents of consortium agreements, as required by the statute and reflects consideration of public comments received on the proposed rule.

EFFECTIVE DATE: December 29, 2000.

FOR FURTHER INFORMATION CONTACT: Rod Solomon, Deputy Assistant Secretary for Policy, Program and Legislative Initiatives, Department of Housing and Urban Development, Office of Public and Indian Housing, 451 Seventh Street, SW, Room 4116, Washington, DC 20410; telephone (202) 708-0713 (this is not a toll-free telephone number). Persons with hearing or speech disabilities may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**I. The September 14, 1999 Proposed Rule**

On September 14, 1999 (64 FR 49940), HUD published for public comment a proposed rule implementing section 13 of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (referred to as the "1937 Act"), as amended by section 515 of the Quality Housing and Work Responsibility Act of 1998 (title V of the fiscal year 1999 HUD Appropriations Act; Pub. L. 105-276, approved October 21, 1998; 112 Stat. 2461) (referred to as the "Public Housing Reform Act").

In addition to authorizing public housing agencies (PHAs) to administer any or all of their housing programs through a consortium of PHAs, section 13 of the 1937 Act also authorizes PHAs to use subsidiaries, joint ventures,

partnerships or other business arrangements to administer their housing programs or to provide supportive or social services. The proposed rule specified minimum requirements relating to formation and operation of consortia and minimum contents of consortium agreements, as required by the statute.

Before enactment of the Public Housing Reform Act, some PHAs had established cooperative arrangements for carrying out some of their responsibilities. A principal difference is that under a section 13 consortium, a joint PHA Plan is submitted on behalf of participating PHAs. Enactment of the revised 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. Another major difference between such arrangements and consortia as authorized under section 13, is that under section 13 funding must be paid to the consortium. HUD is implementing this requirement by providing that funds shall be directed to the lead agency, as a representative of the consortium, on behalf of the participating PHAs, instead of being paid to the PHAs separately (although funding allocations are still calculated separately for each PHA).

The preamble to the September 14, 1999 proposed rule provides additional information regarding the proposed implementation of section 13 of the 1937 Act, as revised.

II. Changes Made at the Final Rule Stages

The following describes the more significant changes made to this rule at the final rule stage. In addition to the changes discussed below, certain technical and clarifying changes were made at the final rule stage. Some of the nonsubstantive changes, but not necessarily all, may be noted below. The more significant changes are as follows:

- In § 943.118 (What is a consortium?), HUD adds language at the end of this section to require that PHAs participating in a consortium adopt the same fiscal year in order that the applicable periods for submission and review of the joint PHA Plan are the same and to indicate that notwithstanding any other regulation, PHAs may request and HUD may approve changes in PHA fiscal years to make this possible.

- In § 943.120 (What programs of a PHA are included in a consortium's functions), HUD revises paragraph (a)(1) to clarify that a PHA's public housing program may include either the

operating fund or the capital fund, or both). In paragraph (a)(4) of this same section, HUD removes reference to the exception made for "Moderate Rehabilitation and Certificates and Vouchers."

- In § 943.122 (How is a consortium organized?), HUD revises paragraph to clarify that any necessary payment agreements entered into between HUD and the lead agency and other participating agencies must provide that HUD funding to the participating PHAs for program categories covered by the consortium will be paid to the lead agency. This payment arrangement is consistent with the requirements of the Public Housing Reform Act. HUD revises paragraph (b) to provide that to be the lead agency in a consortium, not only must a PHA not be designated as troubled, or determined by HUD to fail the civil rights compliance threshold for new funding, the PHA must not have had its PHAS designation withheld for civil rights or other reasons.

- In § 943.124 (What elements must a consortium agreement contain?), HUD revises paragraph (a)(5) to provide that the consortium agreement must not only specify the period of existence of the consortium and the terms under which a PHA may withdraw from the consortium before the end of the period of existence, but must specify when a PHA may join the consortium. This paragraph also was revised to provide that, for orderly transition, the addition or withdrawal of a PHA and termination of the consortium must take effect on the anniversary of the consortium's fiscal year.

- In § 943.126 (What is the relationship between HUD and a consortium?), HUD removes paragraph (b) which provided that HUD's payment to the consortium of funding for the covered program categories covered will be paid to the lead agency. This paragraph was duplicative of § 943.122, which addresses consortium organization. HUD revises paragraph (a) by removing the "(a)" as the designation for this paragraph and by clarifying that HUD's relationship with the consortium is through the PHA Plan process, in addition to the payment agreements entered into. HUD also revises this paragraph to clarify that HUD funds provided to the consortium must be used in accordance with the consortium agreement and the joint PHA Plan, in addition to HUD's regulations and requirements.

- In § 943.128 (How does a consortium carry out planning and reporting functions?), HUD revises paragraph (b) to clarify that the consortium must maintain records, in

addition to submitting certain reports to HUD. HUD revises paragraph (c) to require that the consortium agreement must be made available to the public as a supporting document to the joint PHA Plan.

- In § 943.130 (What are the responsibilities of participating PHAs?), HUD adds a new paragraph (b) to address the applicability of independent audit and performance assessment system requirements to consortia and to note that the manner of applicability depends upon the composition and funding of the PHA. The new paragraph provides that where the lead agency will manage substantially all program and activities of the consortium, HUD interprets financial accountability to rest with the consortium and therefore apply independent and performance assessment requirements on a consortium-wide basis. Where the lead agency will not manage substantially all programs and activities of a consortium, the consortium must identify in its PHA Plan submission which PHAs have financial accountability for the programs. The determination of financial accountability shall be made in accordance with generally accepted accounting principles, as determined in consultation with an independent public accountant. This paragraph also provides, however, that with respect to any consortium, HUD may determine (based on a request from the consortium or other circumstances) to apply independent audit and performance requirements on a different basis (than that provided in the rule) where a different basis would promote sound management.

- In § 943.140 (What programs and activities are covered by this subpart?), HUD revises paragraph (a) to clarify that subpart C applies to a PHA's management functions as well as the PHA's administrative functions.

- In § 943.146 (What impact does the use of a subsidiary affiliate, or joint venture have on financial accountability to HUD and the Federal government?), HUD replaces the term "General Accounting Office" with "Comptroller General," which is consistent with statutory terminology.

- In § 943.148 (What procurement standards apply to PHAs selecting partners for a joint venture?), HUD revises paragraph (a) to clarify that the requirements of 24 CFR part 85 (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments) are applicable to the regulations in part 943, subject to the provisions in paragraph (b) of this section. HUD revises

paragraph (b)(2) of this same section, to reference the applicability of the requirements of 24 CFR part 84 (Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Agencies).

In § 943.150 (What procurement standards apply to a PHA's joint venture partner?), HUD revises paragraph (a) to include reference to the applicability of part 84.

III. Discussion of Public Comments Received on the Proposed Rule

This final rule takes into consideration the public comments received on the September 14, 1999 proposed rule. The public comment period on the proposed rule closed on November 15, 1999. By close of business on that date, HUD had received 6 public comments. Comments were submitted by two PHAs; two of the three main organizations representing PHAs; a State PHA association; and a private individual. This section of the preamble presents a summary of the significant issues raised by the public commenters on the September 14, 1999 proposed rule and HUD's responses to these comments, and provides the basis why certain changes, as highlighted in Section II of this preamble, were made at the final rule stage. The changes benefit both from the comments received during the public comment period and from comments and questions that have arisen since the comment period closed from PHAs and others interested in forming consortia or joint ventures, as provided by this rule.

A. General Comments Not Regarding a Particular Regulatory Section

Comment: Rule is unclear regarding the relationship between PHA consortia and formula funding under PHDEP. One commenter posed several questions regarding the relationship between PHA consortia and formula funding under the Public Housing Drug Elimination Program (PHDEP). The commenter referred to HUD's September 14, 1999 final rule (64 FR 49900) providing for PHDEP formula allocations. The commenter wrote that the September 14, 1999 final rule provides that certain grantees who received past funding will automatically receive PHDEP funding for Fiscal Year (FY) 1999, provided that the grantee's grant application demonstrates positive program outcomes. The commenter was concerned about those PHAs that are not eligible for automatic FY 1999 PHDEP funding.

The commenter asked the following questions:

1. Will such a PHA be able to join a consortium of other PHAs that continuously receive PHDEP assistance?

2. Will the PHA be required to become a PHDEP grantee before joining such a consortium?

3. May a PHA that was not awarded PHDEP assistance conduct drug-elimination activities subsidized by other PHAs who have received PHDEP funding?

HUD Response. Yes, a PHA not eligible for automatic PHDEP funding may join a consortium with other PHAs that do receive PHDEP assistance, without becoming a PHDEP grantee itself first. A PHA that was not awarded PHDEP assistance and is part of a consortium with PHAs that were awarded PHDEP assistance may conduct drug elimination activities using that assistance.

Comment: Rule is unclear regarding real estate transactions and development/acquisition and redevelopment. One commenter wrote that it had hoped "that these types of development activities would be highlighted in the proposed rule and encouraged by HUD."

HUD Response. HUD encourages PHAs to use the consortium and joint venture options as broadly as possible to advance their mission, including using them for capital planning and development. However, HUD also believes that any public housing development activities involving joint ventures are more appropriately addressed in HUD's Mixed-Finance Development rule or Capital Fund rule, to be issued later this year.

Comment: Further HUD guidance is required. One commenter wrote that the "statute and the proposed rule assume a level of experience or sophistication which may not be universal among the PHAs." The commenter wrote that "it would be most useful [for HUD] to prepare some form of policy guide or 'how to' that would direct the energies of potential members in a productive way." The commenter recommended that HUD provide guidance in the question and answer format, with "examples with different sizes of PHAs and different sets of consortia objectives that have successfully used the strategy."

Comment: Rule provides sufficient guidance. In contrast to the preceding comment, one commenter wrote that "sufficient regulatory guidance has been provided and that remaining planning and operational issues should be left for [P]HAs to develop through their agency planning process and partnership agreements." The commenter believes that the provisions of the proposed rule

“effectively outline the basic framework and submission process for [P]HAs that opt to form a consortium or joint venture.”

HUD Response. The rule provides the basic regulatory framework. HUD will explore issuing additional guidance to supplement the rule.

B. Comment regarding proposed § 943.115—What programs are covered under this subpart?

Comment: Final rule should cover all categories of Section 8 projects. Section 943.115 of the proposed rule provided that two types of Section 8 projects are not covered by the regulatory provisions governing consortia:

1. PHA-administered project-based Section 8 under the Request for Proposals published on May 19, 1999 (64 FR 27358); and

2. Section 8 projects that are the subject of financial restructuring under the “Mark to Market” program, where Participating Administrative Entities are designated to administer the program (see 42 U.S.C. 1437f note).

One commenter objected to these exclusions, writing that “[a]ny consortium made up of public agencies should be treated corporately as a public agency itself.”

HUD Response. Neither of these categories is covered by the PHA Plan, which is why they were excluded in the September 14, 1999 proposed rule. The PHA Plan is the vehicle for PHAs to combine their planning and reporting, and this rule addresses only those entities and activities covered by a PHA Plan. HUD, therefore, makes no change in response to this comment.

C. Comment regarding proposed § 943.120—What programs of a PHA are included in a consortium’s functions?

Comment: Final rule should authorize a PHA to enter more than one consortium for a program category. Section 943.120(b) of the proposed rule provided that “[i]f a PHA elects to enter a consortium with respect to a program category * * * the consortium must cover the PHA’s whole program under the [Annual Contributions Contract (ACC)] with HUD for that program category.” One commenter—the PHA for the State of Hawaii—objected to this provision. The commenter wrote that in addition to the administration of its state-wide program, it administers a relatively large Section 8 tenant-based program for the City and County of Honolulu. The PHA also administers separate, and smaller, Section 8 programs for neighboring counties. According to the commenter, each county also administers separate

Section 8 certificate and voucher programs. The PHA wrote that it would like to continue to administer the Section 8 program for Honolulu, while forming a separate consortium to administer the smaller programs on each of the neighbor island counties. However, under proposed § 943.120(b), the PHA stated it would be prevented from taking this course of action.

HUD Response. A joint PHA Plan covering an entire program category is an essential element of a consortium. If HUD were to allow a PHA to participate in more than one consortium for the same program category, there would be overlapping PHA Plans for the same program, and as many or more PHA Plans rather than fewer. Program administration would not be simplified. Consequently, the final rule continues to provide that a PHA may not be a member of two different consortia for the same program. However, the proposed rule and this final rule still leave room for a PHA or a consortium to contract with another PHA to administer some or all aspects of a Section 8 program. The PHA performing these functions under contract need not be a member of a consortium with the PHA whose program it is administering. In addition, HUD will work with agencies that encounter problems in determining how to combine functions where a consortium under this rule does not seem to be the proper mechanism.

D. Comment regarding proposed § 943.124—What elements must a consortium agreement contain?

Comment: Consortium agreement should provide for PHAs joining consortium after establishment. One commenter wrote that the final rule should require the inclusion of a provision in the consortium agreement providing for (or prohibiting) a new PHA joining the consortium after its establishment.

HUD Response. Section 943.124 was revised in the final rule to include the requested provision.

E. Comment regarding proposed § 943.128—How does a consortium carry out planning and reporting functions?

Comment: Final rule should provide flexibility regarding the reporting requirements. Section 943.128 of the proposed rule provided for reporting to HUD, in accordance with HUD regulations and requirements, for all of the participating PHAs. The preamble to the proposed rule solicited public comment on whether all reports should be combined reports (see 64 FR 49940, third column). One commenter wrote

that, absent an explanation of what is meant by “all reports”, the question is difficult to answer. However, the commenter recommended that “reporting requirements should be met in whatever way seems best for the consortium and its individual members, so long as [HUD] gets the data it needs.”

HUD Response. The scope of planning and reporting by the consortium must reflect the scope of consortium activities. PHAs should be aware that funding allocations for the Operating Fund and Capital Fund will continue to be calculated separately for each PHA in a consortium. In addition, as noted in Section II of this preamble, how independent audit and performance assessment requirements apply to PHAs in a consortium depends upon the composition and funding of participating PHAs. HUD’s intention, with respect to applicability of independent audit and performance assessment of PHAs in a consortium, is that a consortium composed entirely of PHAs that are not designated as troubled and for which the lead agency has assumed all public housing administration and management functions would be treated as one entity for purposes of independent and audit performance assessment requirements of the participating PHAs. However, the rule also provides HUD with the flexibility to select or approve alternative approaches to applying independent audit and performance assessment requirements where such alternative approaches would promote sound management.

F. Comment regarding proposed § 943.148—What procurement standards apply to PHAs selecting partners for a joint venture?

Comment: Final rule should not apply procurement requirements to selection of an affiliate as a joint venture partner. Section 943.148(a) of the proposed rule provided that the procurement requirements of 24 CFR part 85 are generally applicable to a PHA’s procurement of goods and services. Section 943.148(b) of the proposed rule permitted qualifications based on sole source procurement for PHA selection of a joint venture partner without making a distinction between selection of an affiliated or non-affiliated entity. Section 943.148(b) permitted such a selection of a joint venture partner if one of two conditions is met:

1. The joint venture partner will make available to the PHA 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); 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.

One commenter wrote that, by treating a PHA's decision to operate through an affiliate as a procurement action, the proposed rule "detracts from the benefit to the PHA of utilizing the associated entity." The commenter wrote that new section 13 of the 1937 Act "appears to evidence Congress' opinion that PHAs need the ability to operate through whatever organizational structure is most suitable in light of the specific objectives sought to be accomplished, without fear that such operation will be clouded by intimations that such relationships are somehow improper or inappropriate vehicles."

The commenter stated that it does not believe that the "sole source exception" provided in proposed § 943.148(b) adequately addresses this problem. According to the commenter, the first standard "provides little help in the PHA/affiliate context" because the "PHA affiliate will usually offer to the PHA only another form with which to accomplish its objectives, with perhaps the same staff and resources the PHA already has." The commenter also objected to the second standard because "there are many functions" (such as real estate acquisition) that cannot be categorized as administrative functions or supportive/social services.

HUD Response. The commenter interprets the rule to require a PHA to follow part 85 in its transactions with a subsidiary or affiliate, while that is not its intent. Rather, the rule creates an exception to part 85 procurement procedures in selection of its joint venture partner. The rule creates an ability to make this selection under streamlined procedures—either through a Request for Qualifications or a sole source procurement.

With respect to the functions that are covered by subpart C, the rule has been revised at this final rule stage to clarify that the functions covered include management functions. It does not apply to activities of a PHA that are subject to the requirements of subpart F of Part 941. This section also has been revised at the final rule stage to clarify that the requirements of 24 CFR part 84 also may be applicable.

IV. Findings and Certifications

Public Reporting Burden

The information collection requirements contained in §§ 943.124, 943.126, and 943.128 have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2577–0235. 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.

Impact on Small Entities

The Secretary has reviewed this final rule before publication and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities. Based on HUD's experience and contacts with representatives of PHAs and HUD field offices, HUD expects 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 require them to overcome resistance to giving up local control of their programs. Consequently, HUD concludes that this final rule will not have a significant impact on a substantial number of small entities.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made at the proposed rule stage, in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). Since the changes to the proposed rule are minor, that Finding remains applicable to this final rule and is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays 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.

Federalism Impact

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not

required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule does not impose a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

Regulatory Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, entitled "Regulatory Planning and Review." 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 to this rule as a result of that review are clearly identified in the docket file, which is available for public inspection in the Regulations Division of the Office of General Counsel, Room 10276, 451 Seventh Street, SW, Washington, DC 20410–0500.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the program affected by this rule are 14.850, 14.855, and 14.857.

List of Subjects in 24 CFR Part 943

Low and moderate income housing, Reporting and recordkeeping requirements.

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

PART 943—PUBLIC HOUSING AGENCY CONSORTIA AND JOINT VENTURES

Subpart A—General

Sec.

943.100 What is the purpose of this part?

Subpart B—Consortia

943.115 What programs are covered under this subpart?

943.118 What is a consortium?

- 943.120 What programs of a PHA are included in a consortium's functions?
- 943.122 How is a consortium organized?
- 943.124 What elements must a consortium agreement contain?
- 943.126 What is the relationship between HUD and a consortium?
- 943.128 How does a consortium carry out planning and reporting functions?
- 943.130 What are the responsibilities of participating PHAs?

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

- 943.140 What programs and activities are covered by this subpart?
- 943.142 In what types of operating organizations may a PHA participate?
- 943.144 What financial impact do operations of a subsidiary, affiliate, or joint venture have on a PHA?
- 943.146 What impact does the use of a subsidiary, affiliate, or joint venture have on financial accountability to HUD and the Federal government?
- 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, PHAs participating in a consortium enter into a consortium agreement, submit joint PHA Plans to HUD, and may combine all or part of 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 Annual Contributions Contract (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 (RFP) 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 or management functions for participating PHAs, as specified in a consortium agreement. A consortium also submits a joint PHA Plan. 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. The participating PHAs must adopt the same fiscal year so that the applicable periods for submission and review of the joint PHA Plan are the same. Notwithstanding any other regulation, PHAs proposing to form consortia may request and HUD may approve changes in PHA fiscal years to make this possible.

§ 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 (which may include either the operating fund or the capital fund, or both);

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

(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 ACC with HUD; and

(5) Any grant programs of the PHA in connection with its Section 8 or public housing programs, such as the Drug Elimination program or the Resident Opportunities and Self-Sufficiency program, to the extent not inconsistent with the terms of the governing documents for the grant program's funding source.

(b) If a PHA elects to enter a consortium with respect to a category specified in paragraph (a) of this section, the consortium must cover the PHA's whole program under the ACC

with HUD for that 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), and submit a joint PHA Plan (§ 943.118). HUD enters into any necessary payment agreements with the lead agency and the other participating PHAs (see § 943.126) to provide that HUD funding to the participating PHAs for program categories covered by the consortium will be paid to the lead agency.

(b) The lead agency must not be a PHA that is designated as a "troubled PHA" by HUD, that has been determined by HUD to fail the civil rights compliance threshold for new funding, or that has had a PHAS designation withheld for civil rights or other reasons. 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. The consortium agreement must be consistent with any payment agreements between the participating PHAs and 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 consortium;

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

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

(b) The agreement must acknowledge that the participating PHAs are subject to the joint PHA Plan submitted by the lead agency.

(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?

HUD has a direct relationship with the consortium through the PHA Plan process and through one or more payment agreements, executed in a form prescribed by HUD, under which HUD and the participating PHAs agree that program funds will be paid to the lead agency on behalf of the participating PHAs. Such funds must be used in accordance with the consortium agreement, the joint PHA Plan and HUD regulations and requirements.

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

(a) During the term of the consortium agreement, the consortium must submit joint five-year Plans and joint Annual Plans for all participating PHAs, in accordance with part 903 of this chapter. HUD may prescribe methods of submission for consortia generally and where the consortium does not cover all program categories.

(b) The consortium must maintain records and 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. The consortium agreement must also be a supporting document to the joint PHA Plan.

§ 943.130 What are the responsibilities of participating PHAs?

(a) *Responsibilities, generally.* Despite participation in a consortium, each participating PHA remains responsible for its own obligations under its ACC with HUD. This means that the PHA 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.

(b) *Applicability of independent audit and performance assessment system requirements to consortia.* Where the lead agency will manage substantially all program and activities of the

consortium, HUD interprets financial accountability to rest with the consortium and thus HUD will apply independent audit and performance assessment requirements on a consortium-wide basis. Where the lead agency will not manage substantially all programs and activities of a consortium, the consortium shall indicate in its PHA Plan submission which PHAs have financial accountability for the programs. The determination of financial accountability shall be made in accordance with generally accepted accounting principles, as determined in consultation with an independent public accountant. In such situations, HUD will apply independent audit and performance assessment requirements consistent with that determination. With respect to any consortium, however, HUD may determine (based on a request from the consortium or other circumstances) to apply independent audit and performance requirements on a different basis where this would promote sound management.

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 and management functions, and to the provision (or arranging for the provision) of supportive and social services in connection with public housing. This subpart 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. A subsidiary or affiliate 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 Comptroller General 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 are applicable to this part, subject to paragraph (b) of this section, 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 or management 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 and management functions or to provide supportive or social services. This entity must comply with the requirements of part 84 of this title (if the entity is a nonprofit) or part

85 of this title (if the entity is a State or local government) with respect to its selection of the members of the team and the members must be paid on a cost-reimbursement basis only. The PHA must maintain documentation that indicates both the cost reasonableness of its selection of a resident group or PHA subsidiary and the ability of that group or subsidiary to act as the PHA's partner under this provision.

§ 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 84 or 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 HUD 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.

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