



THE TOPEKA HOUSING AUTHORITY

2010 SE California Ave. ■ Topeka, KS 66607 ■ 785/357-TTHA (8842) ■ Fax: 357-2648

COMMISSIONERS

Robert Banks – Chair
Alisa Snavelly – Vice Chair
Shaye Downing
Franklin Young
Rickquette Cain-Eason

Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Annual Contributions Contract HUD-53012 (ACC)
U.S. Department of Housing and Urban Development Office of Public and Indian
Housing
OMB Approval No. 2577-0075(exp. 01/31/2021)

To whom it may concern:

Please use this communication as the Topeka Housing Authority's (THA) official public comments and concerns over the proposed changes to the ACC and CACC.

THA's Board of Commissioners, Executive Director and Management Team have reviewed the proposed changes summarized by PHADA italicized below and THA comments where relevant. We support PHADA's review and interpretation and are including their remarks as well.

Procedure for executing a new Consolidated Annual Contributions Contract (CACC)

In April, HUD tried to implement a new CACC without governing board or CEO approval and execution, violating HAS' local policies and procedures. The December 2018 Federal Register Notice failed to disclose how the department will execute a new CACC. Execution of a new CACC must include board and executive review and approval and signature by both HUD and HAS.

THA Comment – THA's internal policies and procedures indicate that only the Board Chair or Executive Director may enter into written or verbal agreements on behalf of the organization. The only exception to this is if the THA Board of Commissioners gives explicit written permission to another employee. This has not been granted in this instance. If a staff member were to draw down funds from the LOCC's system, their

action would be unauthorized and would lack the authority to affect a binding contractual agreement with THA.

Paperwork Reduction Act (PRA) Issues

The PRA standards for public comment do not satisfy Administrative Procedures Act (APA) requirements. HUD does not publish or respond to public comments. The changes proposed in this new CACC are significant and substantive, and they require compliance with the APA. They may also require changes to statute.

The PRA process is designed to oversee information collections and avoid overly burdensome reporting requirements. The revised CACC fails to collect any information and so the PRA process is inappropriate for reviewing a revised CACC.

THA Comment – HUD has a responsibility and duty to follow all Federal Rules, Regulations and Procedures and THA would request that should the Department believe there any grounds to depart from these written directives, the same be specifically identified with any applicable legal authority..

Statutory and Regulatory Authorization Issues

The new CACC includes requirements HUD is not authorized to impose. Provisions of the new CACC also conflict with existing statutes or regulations, (e.g. provisions authorizing the department to alter funding levels unilaterally).

The CACC fails to include statutory regulatory requirements. HUD would alter the relationship between the department and HAs from a contractual one to one based on a grant agreement. Law requires HUD to enter into contracts with states or their political subdivisions to operate public housing. HUD cannot change that relationship by publishing a new form such as the CACC without amendments to the underlying statute.

The proposed CACC characterizes the department's relationship with a HA as a contract and as a grant agreement depending on HUD's convenience. Both the U.S. Housing Act of 1937 and several federal courts have described that relationship as contractual, and the government has lost several lawsuits based on this relationship.

Section 1. Definitions

Grant Funding Exhibits: *HUD has changed language from, "HUD's commitment to provide grant funding," to "HUD's estimate of," funding. Existing regulations describe*

“HUD’s commitment.” HUD’s new CACC must conform to its rules that require a HUD, “commitment.”

Operating Receipts: This definition includes fees for services as operating receipts that require HUD approval for expenditure. Those fees include defederalized fees paid into a central office cost center (COCC) consistent with Operating Fund regulations and HUD’s implementation of asset management. This definition must follow HUD’s existing rules and other guidance, or HUD must amend its rules and guidance first.

Program Receipts: This new definition of Program Receipts restricts the use of, “Operating Receipts and any other funds received by the HA for the development, modernization, sale or transfer of public housing projects,” solely for public housing expenditures, “unless otherwise allowed by HUD Requirements.” First, in HUD’s efforts to control resources over which it exercises no legitimate authority, the department is concerned that its overbroad definition of Operating Receipts is too narrow. Thus, it broadens that definition even further as Program Receipts. This is an underhanded effort to control non-federal resources earned by HAs, and to refederalize fees paid into an HA’s COCC. The new definition also adversely limits uses of disposition proceeds. Although the final catchall phrase might remedy this concern, the department’s historically spotty performance in agreeing to even the most routine requests for authorization makes the remedy questionable.

THA Comment – THA is adamantly against HUD’s attempt to have control over defederalized monies held in the COCC whether by operating receipts or program receipts. Under the Asset Management Plan, federal funds are paid at the property level (AMP) and the COCC is to charge the AMP a fee for service. This was done for many reasons. This allows THA to monitor the activities at each property to determine which property or properties are performing well or underperforming. This helps THA management to make key decisions about where funds are spent and to create priorities.

The Fee’s charged to the AMP and subsequently held by the COCC ensure THA can maintain business continuity and operations when there are funding shortages by HUD, in the case of Federal Government shutdown, emergency or disaster situations and to support other basic needs initiatives that ensure our residents and participants are successful in their housing.

Section 2. Mission of HUD and HA

HUD cannot establish HAs' missions by contract. Doing so by regulation would also be illegitimate. HAs develop missions locally with governing board approval and public input. HUD is free to suggest elements for inclusion in HAs' missions but nothing more.

The addition of a requirement to comply with all applicable HUD requirements coupled with changes in Section 3 of the new CACC illegitimately imposes any HUD non-regulatory diktat on HAs as requirements. HUD must remove this provision of Section 2.

Section 3. HUD Requirements

Paragraph d. requires HAs to, "comply with ... d. HUD-issued notices, and HUD-required forms, and agreements." Notices and guidance represent requirements only for HUD staff, unless they reiterate legitimate requirements in existing regulations or statutes. HUD has endeavored to impose guidance as requirements for decades without success. This provision would permit HUD to forgo rulemaking or public review processes in imposing new requirements. The department could simply send agencies emails or post additions to Frequently Asked Questions (FAQs) to impose novel requirements. The department cannot subvert APA requirements by publishing an unexecuted, illegitimate new CACC.

Section 4. Cooperation Agreements

This section requires prior HUD written approval of changes to cooperation agreements rather than ratification of changes negotiated between HAs and local governments. HUD has not disclosed any purposes of this change, but it unnecessarily injects HUD into Cooperation Agreement negotiations between HAs and their local governments.

Section 7. Insurance Requirements

This section eliminates an HA's ability to determine whether risks exist before it must procure insurance, and imposes all mandatory insurance requirements, even without exposure to a particular risk.

Certificates of Insurance: The CACC requires HAs' insurers to send certificates of insurance to HUD through the HA. HUD has demonstrated its lack of capacity to oversee existing paper and electronic submissions. If HAs typically have 3 insurance providers, to oversee this requirement HUD will monitor submission of over 9 thousand annual insurance certifications required by this provision.

Section 8. Employer Requirements

HUD has removed its earlier unauthorized illegitimate inclusion of the HA salary cap from the new version of the CACC. The salutary change reflects HUD's understanding that it lacked Congressional authorization to do so. Since the department understands this issue here, it should respect the issue elsewhere in the new CACC's changes.

Section 9. Accounts, Records, and Government Access

Paragraph b. adds the following: "The HA must not release, without prior HUD approval, any and all information contained in such [HUD systems of] records." Effectively, HUD would have to approve HAs' release of data owned by HAs an uploaded to HUD's system of records, some of which HUD already makes public. The provision also interferes with HAs' compliance with FOIA requests or requests based on either state or local sunshine or open records law. This provision is one of many that reflects the departments utter misunderstanding that HAs are independent entities that are political subdivisions of states and not subject to HUD's unfettered control.

Paragraph c. requires that, "The United States Government, including HUD and the Comptroller General, and its duly authorized representatives, shall have full and free access to all HA offices and facilities, and to all books, documents, and records of the HA relevant to the administration of the Projects under this CACC, including the right to audit and make copies." This provision illegitimately opens privileged communications, records, and information, for example between an HA and its counsel, to HUD examination

Paragraph e. extends this access requirement to, "an agent or independent contractor for the HA that assists in fulfilling any obligation under this CACC." This illegitimate, overly broad provision opens all records of an agent or contractor, not just those records of work supporting the operation of public housing. HAs' contractors and partners will have to end those relationships to protect their confidential records.

THA Comment – THA is a public non-profit quasigovernmental private entity. HUD has no legal rights to do what is described above. This would be a conflict with the Kansas Open Records Act (KORA) as well as the Kansas Open Meeting Acts (KOMA). The inclusion of agent or independent contractor would greatly complicate our ability to hire contractors as they would be hesitant to work with an entity that could subject them to unnecessary inspection. It is already challenging to find contractors willing to work with a Housing Authority. This would further that burden and cause Housing Authorities to potentially have to pay a higher cost or use substandard contractors.

Section 10. Grant Funding

This new section is a transparent effort to forestall any future suits against the government similar to the successful operating reserve offset suit. With a lengthening history of federal court finding that HAs and HUD have an enforceable contract and a history of losing suits concerning HUD's failures to abide by that contract, HUD's attempt to forestall such suits and unilaterally redefine its relationship with HAs through this contract of adhesion should fail as well.

The provision concludes, "Grant funding may also be terminated, recaptured, withheld, suspended, reduced or such other actions taken in accordance with HUD Requirements." Since Section 3. d. would include as requirements all "HUD-issued notices, and HUD-required forms, and agreements," as requirements, the department is granting itself a free hand to unilaterally change, eliminate, or recapture an HA's public housing funding. The provision is arbitrary, capricious, and unconscionable. HUD lacks the authority to grant itself such sweeping capabilities.

Section 12 Depository

This section imposes federal deposit and investment requirements on "program resources," that include defederalized and non-federal fees paid to an HA's COCC. It may also include contributions from affiliates and subsidiaries. HUD lacks the authority to extend federal requirements to non-federal resources.

Section 15. Conflict of Interest

The new CACC imposes a requirement for a new written conflict of interest standards for board members. HUD lacks the authorization to impose such a requirement, and the requirement may conflict with existing state and local conflict of interest requirements involving appointed public officials. HUD lacks the authority to preempt state and local law via contract language.

HUD has attempted to apply public housing conflict of interest standards to affiliates and subsidiaries without authorization to do so.

Section 17. Civil Rights Requirements

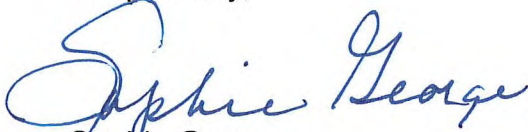
The section includes an illegitimate, irrelevant sentence authorizing work requirements consistent with law and regulation. HUD should remove this irrelevance from the new CACC.

Section 19. Waiver or Amendment

The section changes "This contract..." in the second sentence to, "This agreement..." but the first sentence refers to executing a new or amended Annual Contributions Contract (ACC) by mutual agreement. This is the final instance where HUD characterizes the CACC according to its convenience. It is a contract, and the new CACC should consistently refer to itself as such.

While the Topeka Housing Authority appreciates HUD's guidance and respects their authority, the instances cited above appear to be in direct contravention to well-established law, policies and regulations and cannot be adopted as recommended. As such, THA has no choice but to insist upon the aforementioned corrections. If you have any questions or would like to discuss we are always happy to have that conversation.

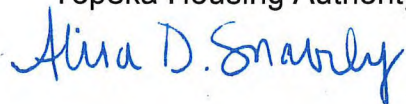
Respectfully,



Sophie George
President/CEO
Topeka Housing Authority



Robert Banks
Board Chair
Topeka Housing Authority Board of Commissioners



Alisa Snavelly
Vice Chair
Topeka Housing Authority Board of Commissioners