



July 12, 2022

The Honorable Patrick Leahy
Chairman, U.S. Senate Committee on
Appropriations
437 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Rosa DeLauro
Chair, U.S. House Committee on
Appropriations
2413 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Richard Shelby
Vice Chairman, U.S. Senate Committee on
Appropriations
304 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Kay Granger
Ranking Member, U.S. House Committee on
Appropriations
1026 Longworth House Office Building
Washington, DC 20515

RE: Joint Industry Request on Annual Contributions Contract (ACC) Language in FY 2023 Transportation-HUD Appropriations Legislation

Dear Chairman Leahy, Vice Chairman Shelby, Chair DeLauro, and Ranking Member Granger:

The Council of Large Public Housing Authorities (CLPHA), the MTW Collaborative, the National Association of Housing and Redevelopment Officials (NAHRO) and the Public Housing Authorities Directors Association (PHADA) **strongly urge** reinstating the following legislative language regarding the Annual Contributions Contract (ACC) in the General Provisions section of the fiscal year 2023 appropriations legislation for the U.S. Department of Housing and Urban Development (HUD).

Sec. ____. *None of the funds made available by this or any other Act may be used to implement, require, or enforce any changes to the terms and conditions of the public housing annual contributions contract between the Secretary and any public housing agency, as such contract was in effect as of January 1, 2018, unless otherwise mutually agreed upon by the Secretary and such agency, provided that such agreement by an agency may be indicated only by an amendment to the contract containing the duly authorized signature of its chief executive and provided, further, that the Secretary may not withhold funds to compel such agreement by an agency which is otherwise in compliance with its contract.*

Additionally, the industry associations **strongly urge** the inclusion of the following report language regarding the ACC to the Transportation, Housing, and Urban Development Subcommittee's report for fiscal year 2023 appropriations.

The Committee remains concerned by the Department's past attempts to unilaterally amend the Annual Contributions Contract through the Paperwork Reduction Act, and the absence of proper notice, comment, or response opportunities for public housing agencies. The Committee directs HUD to comply with all appropriate process requirements and to work and consult with public housing agencies in any future rulemaking process that amends the Annual Contributions Contract.

In past years, the industry associations have stressed the importance of including appropriations legislative language that prevents the implementation of a new ACC (see **Exhibit 1**: Joint CLPHA, PHADA, NAHRO letter to Congress dated February 28, 2019). We remain concerned that HUD's continued attempts to revise the ACC will circumvent the Administrative Procedure Act (APA), unilaterally change the contractual relationship between HUD and public housing agencies (PHAs), and strip PHAs of their ability to challenge HUD's breach of contract actions, which PHAs have recently successfully litigated. Without the inclusion of the legislative language mentioned above, the industry associations are concerned that HUD's ability to make problematic changes to the ACC has been renewed.

Collectively, while we note there is currently no proposed draft of the ACC for us to review, we resubmit the following concerns with respect to HUD's previously proposed changes to the ACC and strongly urge Congress to reinstate the legislative language necessary to protect the existing ACC.

Major Concerns with HUD's Proposed ACC -

Contract vs Grant Agreement

HUD is attempting to change the nature of the ACC by defining it as a "grant agreement" rather than a "contract." Whether a document is a grant agreement or a contract triggers different legal recourse and damages upon breach or default. Simply calling a document by a different name does not necessarily change the legal nature of the contractual relationship it governs (note HUD's earlier attempts to change the procurement requirements for Project-Based Contract Administration by calling that contractual relationship a cooperative agreement instead of a procurement contract, which the federal courts overturned). See **Exhibit 2** for additional concerns regarding the impact that the contract versus grant distinction has on the ACC.

Authority to Reduce or Offset Grant Funding

HUD's proposed revisions to the ACC would require grant funding to be subject to each year's annual appropriations act and would provide that such appropriations act may reduce a PHA's grant funding by offset. This is clearly an attempt to circumvent via contract the decision in PHADA, et. al. v. United States, where the court found HUD breached its obligations under the ACC when it offset 2012 operating subsidy payments to PHAs. HUD's proposed revisions to the ACC further state that grant funding may be "terminated, recaptured, withheld, suspended, reduced or such other actions taken in accordance with HUD Requirements." As HUD Requirements includes any HUD notice, form, or agreement

currently in existence or issued in the future, this effectively provides HUD with unfettered authority to reduce or offset a PHA's grant funding.

Attempt to Control Non-Federal Funds

As defined in the proposed ACC revisions, "Operating Receipts" and "Program Receipts" taken together appear to restrict the use of all program and operating funds to public housing expenditures. The definition of "Operating Receipts" includes "all rents, revenues, income, and receipts accruing from, out of, generated by, or in connection with the ownership or operation of public housing, including grant funds." Additionally, "[i]nterest on the Operating Receipts (including the investment of Operating Receipts), constitutes Operating Receipts." The definition of "Program Receipts" includes "Operating Receipts and any other funds received by the HA" and specifies that "[p]rogram receipts shall only be used to pay for public housing expenditures, unless otherwise allowed by HUD Requirements." HUD does not have the authority to restrict all PHA funds to public housing.

Compliance with HUD-Issued Notices, Forms, and Agreements Without Notice and Comment Rulemaking

HUD's proposed ACC revisions would require a PHA to comply with all "HUD Requirements," which include HUD-issued notices, forms, and agreements now in existence and as may be amended from time to time. Such documents are not law or regulation, but merely non-binding HUD guidance and interpretation of regulations. This is a further example of HUD attempting to circumvent APA notice and comment rulemaking by including it in the proposed ACC revisions and would render PHAs susceptible to program violations without notice.

Administrative Procedure Act vs Paperwork Reduction Act

HUD's proposed revisions to the ACC would create substantive changes to various HUD policies and procedures that should be implemented via notice and comment rulemaking requirements under the APA, not the PRA. Through use of the PRA, HUD is attempting to circumvent APA rulemaking, thus not giving PHAs and others the proper opportunity to express their concerns.

Issue of Authority to Bind PHAs

In the May 2018 60-Day Notice of Proposed Information Collection under the Paperwork Reduction Act ("PRA") notice, HUD also issued a Capital Fund Processing Guidance for FY 2018 Grant Awards notice proclaiming that, "[w]hen a PHA draws down funds from an FY 2018 Capital Fund formula grant, it will become bound to the requirements of the [proposed ACC]." This is problematic for a number of reasons. First, it is questionable, at best, whether the PHA employee who draws down the funds electronically actually has the authority to bind the PHA to a new contract with HUD. This "contract by drawing funds" ignores the fact that PHAs are local government agencies bound by established state and local law governing, among other things, authorization to contract. Additionally, entering into contracts such as a new ACC would require review and approval by the PHA board of directors under internal

governance and policy requirements. HUD does not have authority to preempt or force PHAs to violate such requirements. We remain concerned HUD will move to reinstitute this provision should the industry-suggested legislative language be omitted from the FY 2023 appropriations legislation.

In conclusion, we are once again expressing our concerns with HUD's proposed revisions to the ACC. Absent legislative language preventing such actions, we fear that HUD will re-introduce these or other revisions to the ACC and attempt to take action to bind PHAs to a revised ACC without providing them with the ability to negotiate the same. For these reasons we earnestly urge you to include the industry recommended language in the FY 2023 HUD appropriations legislation to prevent unilateral action by HUD on an annual contributions contract.

Sincerely,

Council of Large Public Housing Authorities
MTW Collaborative
National Association of Housing and Redevelopment Officials
Public Housing Authorities Directors Association

cc: Members, U.S. Senate Committee on Appropriations
Members, U.S. House of Representatives Committee on Appropriations