

NEW ACC TALKING POINTS

- Brief Background

The December 27, 2018, 60-Day Notice of Proposed Information Collection under the Paperwork Reduction Act (“PRA”) proposes a new Public Housing Annual Contributions Contract for Capital and Grant Funds (the “New ACC”). Although HUD withdrew a prior version of the New ACC after widespread criticism, and then advised PHAs that it would reconsider issuing the document at all, the New ACC is virtually the same as the revised Annual Contributions Contract HUD published via similar PRA notice on May 1, 2018.

- Issue of Authority to Bind PHAs

In the May 2018 notice, HUD also issued a Capital Fund Processing Guidance for FFY 2018 Grant Awards notice proclaiming that, “[w]hen a PHA draws down funds from an FFY 2018 Capital Fund formula grant, it will become bound to the requirements of the New 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 the New ACC requires 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.

HUD did not address how it would bind PHAs to the New ACC in the December notice so PHAs must be on guard for similar attempts in the future.

- Administrative Procedures Act vs Paperwork Reduction Act

The New ACC creates substantive changes to various HUD policies and procedures that should be implemented via notice and comment rulemaking requirements under the Administrative Procedures Act (“APA”), not the PRA. HUD is attempting to preemptively circumvent APA rulemaking through contract vis-à-vis the New ACC, thus not giving PHAs and others the proper opportunity to be heard.

- Contract versus Grant Agreement

HUD is attempting to change the nature of the Annual Contributions Contract 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).

HUD clearly has a reason for defining the ACC as a grant agreement instead of a contract in this situation, but HUD is not sharing that reason with PHAs.

- Attempt to Control Non-Federal Funds

As defined in the New ACC, “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

The New ACC provides that a PHA must 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 requirements are not law or regulation, but 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 New ACC and renders PHAs susceptible to program violations without notice.

- Authority to Reduce or Offset Grant Funding

The New ACC requires that grant funding is subject to each year’s annual appropriations act and provides that such appropriations act may reduce a PHA’s grant funding by offset. This is clearly an attempt 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.

The New ACC further states that grant funding may be “terminated, recaptured, withheld, suspended, reduced or such other actions taken in according 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 do what it wants with a PHA’s grant funding.