



February 25, 2019

SUBMITTED ELECTRONICALLY

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

Re: Docket No. FR-7006-N-15:  
60-Day Notice of Proposed Information Collection: Comment Request:  
Agency Information Collection Activities: Public Housing Annual Contributions  
Contract for Capital and Operating Grant Funds

To Whom It May Concern:

The Council of Large Public Housing Authorities (“CLPHA”) and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments on the Department of Housing and Urban Development’s (“HUD”) notice of proposed information collection regarding the Public Housing Annual Contributions Contract for Capital and Operating Grant Funds (the “Notice”).

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities (“PHAs”) own and manage nearly half of the nation’s public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households.

Reno & Cavanaugh has represented hundreds of PHAs and their affiliates throughout the country and has been working with clients on fair housing issues throughout the years. Reno & Cavanaugh was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of our practice.

The mission of PHAs across the country is to serve low-income families in our communities by providing decent, safe, and affordable housing. PHAs have continued to work to foster a

cooperative and successful working relationship with HUD to serve this mission. Therefore, we are extremely concerned that HUD is proposing substantive changes to the relationship between PHAs and HUD generally and the operational capabilities of PHAs specifically through a Paperwork Reduction Act (“PRA”) notice for information and collection on revisions to the Annual Contributions Contract issued on December 27, 2018 (the “New ACC”). Below are our detailed comments on the Notice.

### ***1. Lack of Notice and Comment Rulemaking in Promulgating the New ACC***

As a preliminary matter, we believe implementation of the New ACC through the PRA process rather than through the notice and comment rulemaking process violates the Administrative Procedure Act (“APA”). The New ACC creates substantive changes to various HUD policies, procedures, and regulations that would normally trigger APA rulemaking. For example, the restrictions on the use of disposition proceeds discussed in Paragraph 3, below, conflict with 24 C.F.R. Parts 970 and Part 990 and as such present substantive regulatory changes that trigger notice and comment rulemaking. Additionally, as discussed in greater detail below regarding Section 3.d., HUD is attempting to preemptively circumvent all APA rulemaking through contract by requiring PHAs to comply with all HUD notices, forms, and agreements without the benefit of notice and comment rulemaking. Such substantive changes would benefit from an open comment period to allow PHAs and HUD to work cooperatively in understanding and evaluating the impact of such proposed changes and to minimize disruption to the mission they share with HUD of serving low-income communities throughout the country. The PRA process does not allow for such an open, interactive, and substantive comment process.

### ***2. HUD Cannot Change the Contractual Relationship it has with PHAs by Calling the ACC a Grant Agreement***

Under 24 C.F.R. § 990.115, the annual contributions contract (the “ACC”) is the contract that governs the contractual relationship between PHAs and HUD “whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of its public housing projects.” In the New ACC, HUD attempts to change the nature of the ACC by defining it as a “grant agreement” rather than a “contract.” HUD cannot change the regulatory definition of the ACC through contract. Rather, HUD must go through notice and comment rulemaking to change the regulatory definition of the ACC.

Additionally, the use of a grant agreement to govern the contractual relationship between HUD and PHAs in light of HUD’s attempts to expand its authority, control, and involvement in PHA operations is suspect at best. Under 31 U.S.C. § 6304, a “grant agreement” shall be used when “substantial involvement is **not** expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement” (emphasis added). “Substantial involvement” is not only expected between HUD and PHAs under the New ACC, but it is required (see *infra* Paragraph 7 regarding discussion of HUD’s capacity).

Lastly, we remind HUD that its past attempts to change its contractual relationships by simply calling a document by a different name, see *PHADA, et al. v. United States* (the “PHADA Case”)<sup>1</sup>

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<sup>1</sup> *Public Housing Authorities Directors Association, et al. v. United States*, 130 Fed. Cl. 522 (2017).

and *CMS Contract Management Services, et al. v. United States* (the “CMS Case”),<sup>2</sup> have failed to persuade the federal courts. While it is unclear what HUD ultimately wishes to accomplish by changing the name of the document, it is clear as a legal matter that a document being a grant agreement or a contract triggers different legal recourse and damages upon breach or default. Therefore, we are concerned about HUD’s lack of transparency regarding its intent and the timing of this change.

### **3. “Operating Receipts” and “Program Receipts” as Newly Defined Would Capture Non-Federal Funds**

Under Section 1 of the New ACC, “Operating Receipts” is defined as:

*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 received pursuant to HUD Requirements and is not limited to income from fees for services performed, the use or rental of real or personal property acquired with grant funds, the sale of commodities or items fabricated under the grant, license fees and royalties on patents and copyrights, and principal and interest on loans made with grant funds. Operating Receipts shall not include any funds received for the development or modernization of a Project, annual contributions pledged for payment of bonds or notes, or proceeds from the disposition of real property or rebates, credits, discounts and interest earned on any of them. Interest on the Operating Receipts (including the investment of Operating Receipts), constitutes Operating Receipts.*

This broad definition of what constitutes “Operating Receipts” seemingly includes fees which HUD has acknowledged previously are defederalized consistent with the Operating Fund regulations, *see* 24 C.F.R. Part 990, and HUD’s implementation of asset management. HUD cannot use a contract to implement revisions to existing regulations and program requirements in this manner.

Under Section 1 of the New ACC, “Program Receipts” is defined as:

*Operating Receipts and any other funds received by the HA for the development, modernization, sale or transfer of public housing projects. Subject to HUD Requirements, as defined in Paragraph 3, interest on the program receipts (including the investment of program receipts) constitutes program receipts. Program receipts shall only be used to pay for public housing expenditures, unless otherwise allowed by HUD Requirements.*

Further, under Section 11 of the New ACC, HUD restricts the use of Program Receipts to:

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<sup>2</sup> *CMS Contract Management Services, et al. v. Massachusetts Housing Finance Agency v. United States*, 745 F.3d 1379 (2016).

*(1) The payment of the costs of development and operations of the Projects under the CACC with HUD; (2) the purchase of investment securities as approved by HUD; and (3) such other purposes as may be specifically approved by HUD.*

Taken together, these definitions appear to restrict the use of all program and operating funds to public housing expenditures. For example, while the definition of Operating Receipts excludes funds for development or modernization of a project and proceeds from disposition of real property, the definition of Program Receipts includes all funds received for development, modernization, or disposition of public housing projects. We are not aware of any authority that would allow HUD to exercise such broad control over all PHAs funds, both federal and non-federal.

#### ***4. Compliance with HUD-Issued Notices, Forms, and Agreements Without APA Rulemaking***

The New ACC in Section 3.d requires PHAs to comply with certain “HUD Requirements.” In doing so, HUD is attempting to expand these requirements from properly promulgated laws and regulations, which is the case under the existing ACC, to also include “HUD-issued notices, and HUD-required forms, or agreements” now in existence and as may be amended from time to time. Such notices, forms, and agreements are not law or regulation, but rather agency guidance and interpretation of properly promulgated laws and regulations. Any substantive changes to regulations and program requirements must be promulgated in accordance with APA notice-and-comment rulemaking, rather than by contract through the New ACC. This is a further example of HUD attempting to circumvent its obligations under the APA.

Further, the new definition of HUD Requirements unduly burdens PHAs with the internal capacity and consistency issues systemic within HUD. For example, the revised Mixed Finance ACC Amendment form released in 2014 still contained citations to regulations that were obsolete. PHAs using that revised form sought clarification from HUD regarding the citations as signing the forms would bind the PHA to regulations that no longer existed and therefore did not properly bind the PHA and the project to the appropriate regulations. In response to this clarification, HUD directed some PHAs to use the form with the obsolete language as is and allowed other PHAs to revise the form to include the correct citations. Incorrect citations is a benign example, but nevertheless highlights the variable advice HUD staff provide to PHAs on how to address inconsistencies or mistakes in HUD forms. When HUD staff vary in their advice on how to interpret or apply HUD notice and guidance materials regarding substantive program requirements, the stakes are much higher. It is unduly burdensome to require strict compliance with HUD notices, forms, or agreements without providing PHAs the benefit of a notice period to review such notices, forms, or agreements and seek clarification where terms or language may be ambiguous, confusing, or conflict with law, regulation, or previous guidance.

#### ***5. Broad Authority to Reduce, Offset, Terminate, Recapture, Withhold, Suspend, and Reduce Grant Funding***

Under Section 10.a. of the New ACC,

*Grant funding is subject to each year's annual appropriations act ... Appropriations may be reduced by HUD as directed by Congress in an appropriations act. Grant funding may be reduced by an offset of a HA's funding, pursuant to a formula prescribed by Congress in an appropriations act. Grant funding may also be reduced or offset pursuant to a formula devised by HUD if Congress has invested HUD with the discretion to devise and implement a funding formula in the appropriations act. Grant funding may also be terminated, recaptured, withheld, suspended, reduced or such other actions taken in accordance with HUD Requirements.*

It is clear that HUD is attempting to contract around the decision in PHADA Case. The court in that case held that HUD breached its obligations under the existing Annual Contributions Contracts ("ACCs") when it offset 2012 operating subsidy payments to PHAs. The court found that "the language of the ACCs reflects an intent to incorporate by reference into the contract the provisions of Title 24 of the C.F.R. [including the pro rata reductions prescribed by 24 C.F.R. § 990.210(c)], but [demonstrates] no intent to incorporate by reference future statutory provisions like the 2012 Appropriations Act, 2012." Under the New ACC, HUD is attempting to require PHAs to agree through contract that HUD has the authority to reduce or offset grant funding according to an appropriations act.

The last sentence of Section 10.a. is also troubling. Coupled with the broadened definition of "HUD Requirements" under Section 3.d. previously discussed herein, HUD conceivably has unrestricted authority to terminate, recapture, withhold, suspend, reduce, or take any other action regarding grant funding so long as HUD issues a notice. This is clearly beyond the scope of HUD's authority.

#### ***6. Broad Authority to Request PHA Records***

Under the New ACC, HUD is attempting to give itself unrestricted access to PHA records. Section 9(b) of the New ACC provides that PHAs provide any and all "financial and program data, reports, records, statements, and documents at such times, in such form, and accompanied by such supporting data **as required by HUD.**" Section 9(e) extends such access to "any records and/or any facilities operated and maintained by an agent or independent contractor for the HA that assists in fulfilling any obligation under this CACC." This is an unreasonable expansion of HUD's access to PHA records.

Further, we are concerned that under Section 9(e) HUD attempts to make PHAs liable for the actions of independent contractors.

*Any such agent or independent contractor that denies or unduly limits HUD or its duly authorized representatives from reviewing records or denies or unduly limits HUD or its duly authorized representative entry to an office or facility, or prevents access to any office or facility, is **a denial by the HA.***

(emphasis added). PHAs do not have the same authority and control over its independent contractors as it does over its employees. As such, it is unreasonable for HUD to not only impute

actions that could be deemed as a PHA's violation of the New ACC to the PHA but to do so without the opportunity for PHAs to work with such independent contracts to correct such actions.

### ***7. HUD Lacks the Capacity to Undertake the Review and Submission Activity it Proposes Under the New ACC***

HUD proposes to involve itself in certain PHA operations despite the demonstrable lack of capacity and administrative resources to handle such operations. Under Section 7 of the New ACC, HUD is requiring PHAs' insurance providers to send certificates of insurance to HUD. As PHAs typically have more than one insurance provider, HUD is purporting to monitor thousands of insurance certificates on an annual basis. New Section 7(b)(1) requires PHAs to carry "adequate" fidelity bond coverage with no guidance as to what is "adequate" coverage. Is HUD then proposing to review such coverage on an individualized basis to determine adequacy? As currently proposed, Section 9 of the New ACC seems to create a new obligation for PHAs to obtain HUD approval prior to any release of records that the PHA is required to submit to HUD's system of records. Such records under the New ACC include "any financial and program data, reports, records, statements, and documents" and corresponding supporting data that HUD requires the PHA to furnish to HUD in the first place. PHAs receive several record requests annually. We question whether HUD has the capacity to track and approve such submissions and requests without unduly stalling or disrupting PHA operations. Further, as state agencies, PHAs are subject not only to Freedom of Information Act requests but to requests made under the corresponding state or local open records or "sunshine" laws. HUD does not have the authority to interfere with PHA compliance with state and local law via contract, as it is attempting to do through the New ACC.

### ***8. Conflict of Interest***

The New ACC requires PHAs to comply with a new conflict of interest standard for PHA board members. We are unaware of any law that authorizes HUD to impose such requirements on PHAs. Furthermore, PHAs are subject to existing state and local conflict of interest requirements. HUD's new conflict of interest standard not only requires PHAs to reconcile their existing conflict of interest policies but also potentially exposes PHAs to compliance issues if HUD's new standards conflict or otherwise cannot be reconciled with the state and local requirements. HUD cannot require PHAs to violate state and local law through contract.

### ***9. Authority to Bind PHAs***

Lastly, we note that when HUD initially proposed a revised ACC through a similar PRA notice issued on May 1, 2018, 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." As we previously communicated to HUD, 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" ignored 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 such

contracts requires review and approval by the PHA board of directors under internal governance and policy requirements. We raised our concerns with HUD, noting that HUD had no authority to preempt or force PHAs to violate such requirements. While HUD did not issue a similar notice with the New ACC issued on December 27, 2018, we are concerned that HUD may attempt a similar “contract by drawing funds” approach to implement the New ACC.

Thank you for the opportunity to comment on the Notice. We would also like to take the opportunity to adopt the comments submitted by the designated Steering Committee of the thirty-nine (39) Moving to Work PHAs (the “MTW Steering Committee”) regarding HUD’s Moving to Work Amendment to Consolidated Annual Contributions Contract Notice, Docket No. FR-7006-N-20, (the “MTW ACC Amendment Notice”). CLPHA and Reno & Cavanaugh fully endorse and adopt the MTW Steering Committee’s comments to the MTW ACC Amendment Notice and thank HUD for its consideration of both sets of comments.

If you have any questions, please do not hesitate to contact us.

Sincerely,



Sunia Zatterman  
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Member  
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