

TALKING POINTS – ACC AS A CONTRACT

- HUD itself defines the ACC as a contract.

Under 24 C.F.R. § 5.403, HUD defines the ACC as “the written contract between HUD and a PHA under which HUD agrees to provide funding for a program under the 1937 Act, and the PHA agrees to comply with HUD requirements for the program.” HUD cannot change the regulatory definition of the ACC by proposing a new form of the agreement. Such a change requires regulatory action.

- HUD has agreed in the past that the ACC is a contract.

In the PHADA Litigation,¹ plaintiffs brought a breach of contract suit against HUD in the United States Court of Federal Claims based on the ACC. HUD did not challenge the court’s jurisdiction over the breach of contract suit and in fact used the absence of an ACC between HUD and two association plaintiffs to have the association plaintiffs dismissed from the suit.

Additionally, with regards to mixed-finance projects, HUD regularly negotiates with PHAs and proposed owner entities regarding the terms and conditions of the Mixed-Finance Amendment to the Annual Contributions Contract (the “MFACC”). The MFACC serves to amend certain provisions in the PHA’s existing ACC with HUD to authorize the proposed mixed-finance project. HUD requires that the MFACC be signed by representatives of HUD and the PHA who have legal authority to bind their respective entities. If the ACC is not a contract, why does HUD entertain such contract negotiations with PHAs and require the MFACC to be signed by HUD and the PHA to be binding?

Lastly, while the New ACC proposes substantive changes to the relationship between HUD and PHAs, nothing in the law or programs has changed since the PHADA Litigation with regards to the ACC. Why is HUD now arguing that the ACC is a grant agreement?

- A “grant agreement” is not the appropriate legal instrument to govern the relationship between HUD and PHAs contemplated under the ACC.

Under the Federal Grant and Cooperative Agreement Act of 1977, grant agreements are the appropriate legal instrument to govern the relationship between the Federal Government and the recipient whenever:

- (1) *the principal purpose of the relationship is the transfer of money, property, services, or anything of value ... in order to accomplish a public purpose ...; and*
- (2) *no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the ... recipient during performance of the contemplated activity.*

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

The ACC clearly contemplates substantial involvement between HUD and PHAs. HUD's use of a grant agreement to govern such relationship is therefore contrary to law.

- Under the terms of Annual Contributions Contracts currently in effect, amendments should be in writing by mutual agreement of the parties.

The 1995 Annual Contributions Contract, the version currently in effect for most PHAs, provides under Section 23 that amendments to the contract be in writing and be “by mutual agreement of the parties to this ACC.” HUD therefore cannot amend the 1995 ACCs by simply requiring PHAs to agree to a completely different form, i.e. the New ACC.

- HUD cannot relieve itself of its obligations under the Administrative Procedures Act, regardless of whether the New ACC is a grant agreement or a contract.

HUD is required under the Administrative Procedures Act (the “APA”) to go through formal notice and comment rulemaking when it formulates, amends, or otherwise repeals “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. §§ 551 & 553. The New ACC contains substantive terms and conditions that amend or otherwise repeal HUD statements regarding the implementation, interpretation, or prescription of law or policy, thus triggering APA rulemaking. The most blatant example of this is HUD's revised definition of “HUD Requirements” under the New ACC which provides that PHAs must comply with all HUD-issued notices, forms, and agreements now in existence and as may be issued and amended from time to time. HUD cannot circumvent the APA through the New ACC, regardless of whether it is a grant agreement or a contract.

- HUD is violating the law and usurping Congressional Authority through the ACC.
 - Under 42 U.S.C. § 1437g(f), Congress mandated that HUD undertake negotiated rulemaking when issuing regulations concerning the Capital Fund and Operating Fund formulas. Contrary to this mandate, HUD unilaterally gives itself the power under the New ACC to terminate, recapture, withhold, suspend, reduce, or take any other action regarding all grant funding to PHAs, which includes Capital Funds and Operating Funds.
 - When Congress extended the current MTW agreements in 2016, Congress mandated that such agreements would be “under the same terms and conditions ... except for any changes to such terms or conditions otherwise mutually agreed upon” by HUD and MTW PHAs. (P.L. 114-113). Contrary to this mandate, the New ACC includes substantive changes which, by incorporation, necessarily change the terms and conditions of the current MTW agreements.