

U.S. Court of Federal Claims Finds HUD Breached its ACC Obligations PHADA, et al. v. U.S., Case No. 1:13-cv-0006-EDK

On January 18, 2017, the United States Court of Federal Claims found that HUD breached its ACC obligations when HUD offset 2012 operating subsidy payments to PHAs according to a PHA's excess operating reserves, rather than the pro rata reduction prescribed by Title 24 of the Code of Federal Regulations.

Factual Background. The 2012 Consolidated and Further Continuing Appropriations Act, 2012 (the "2012 Appropriations Act") appropriated \$3,961,850,000.00 for operating subsidy payments to PHAs in 2012 and provided that "the Secretary shall take into account public housing agencies' excess operating fund reserves" in determining funding allocations. To implement the 2012 Appropriations Act, HUD issued PIH Notice 2011-055, Public Housing Operating Subsidy Calculations Calendar Year 2012 (the "PIH Notice"). The PIH Notice provided HUD would implement an "allocation adjustment" which offset each individual PHA's operating subsidy eligibility by the individual PHA's excess operating reserves, as such excess operating reserves were determined by a methodology also prescribed in the PIH Notice. Because excess operating reserves varied from PHA to PHA, the reduction in operating subsidy also varied from PHA to PHA. "In prior years, pursuant to its regulations, HUD had reduced each PHA's operating subsidy payment by a uniform percentage." The change in calculation methodology under the PIH Notice resulted in variations of operating subsidy payments across PHAs, with many PHAs experience a 100% reduction in their operating subsidy payments for 2012.

Procedural Background. Each of the PHA plaintiffs is a party to an Annual Contributions Contract ("ACC") with HUD pursuant to which each PHA plaintiff is entitled to receive operating subsidies. In 2013, the PHA plaintiffs, along with the Public Housing Authorities Directors Association ("PHADA") and the National Association of Housing and Redevelopment Officials ("NAHRO"), filed suit against HUD in the United States Court of Federal Claims alleging, among other things, that HUD breached their ACCs when HUD offset their operating subsidy payments on a non-pro rata basis in conflict with Title 24 of the Code of Federal Regulations. The plaintiffs filed a motion for partial summary judgment on their breach of contract claim on December 4, 2015. HUD filed a cross-motion for partial summary judgment as well as a motion to dismiss certain plaintiffs for lack of standing on February 12, 2016. Oral argument was held on July 20, 2016. The Court ordered supplemental briefing "concerning the proper interpretation and application of § 11(A) of the ACCs, which states that HUD's duty to pay operating subsidies is 'subject to the availability of funds.'" Supplemental briefing was completed on December 7, 2016.

Opinion and Order. On January 18, 2017, the Court issued its Opinion and Order: (1) granting in part HUD's motion to dismiss PHADA, NAHRO, and 16 PHA plaintiffs for lack of standing; (2) denying HUD's motion for partial summary judgment; and (3) granting Plaintiff's motion for partial summary judgment. The Court agreed with the plaintiffs that the ACCs incorporated by reference Title 24 of the Code of Federal Regulations but disagreed with HUD's argument that the ACCs similarly incorporated by

reference “future statutory provisions like the 2012 Appropriations Act.” Under 24 C.F.R. § 990.210(c), HUD has the “discretion to revise, on a pro rata basis, the amounts of operating subsidy to be paid to PHAs” (emphasis added). The Court further rejected HUD’s argument that 24 C.F.R. § 990.110(b)(3), which limits operating subsidy payments “to the availability of funds as described in § 990.210(c),” barred “plaintiffs’ claims because it limits the Government’s liability to the amount appropriated by Congress.” The Court reasoned that the plaintiffs were not seeking “an award in excess of the amount appropriated by Congress” but rather “their claims concern the methodology for allocating the amounts Congress has appropriated.” The Court determined that:

In 2012, HUD did not revise the amounts to be paid to each PHA...on a pro rata basis... Instead, it made an initial reduction in each Plaintiff’s subsidy by offsetting that particular PHA’s “excess operating reserves” against its formula eligibility amount. Thus, the PHAs’ formula eligibility amounts were reduced on a non-pro rata basis, contrary to the provisions of Title 24.

Thus, the Court concluded that HUD breached its obligations under the ACCs.

What is Next. The Court has ordered that the parties file a joint status report within 30 days proposing a schedule to govern further proceedings.

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