February 25, 2019

SUBMITTED ELECTRONICALLY

Colette Pollard
Reports Management Officer, QDAM
Department of Housing and Urban Development
451 7th St. SW
Room 4176
Washington, DC 20410

Re: 60-Day Notice of Proposed Information Collection: Comment Request: Moving to Work Amendment To Consolidated Annual Contributions Contract [FR-7006-N-20]

To Whom It May Concern:

On behalf of the National Association of Housing and Redevelopment Officials (NAHRO), I would like to offer the following comments to the United States Department of Housing and Urban Development (HUD or the Department) in response to the notice titled “60-Day Notice of Proposed Information Collection: Comment Request: Moving to Work Amendment To Consolidated Annual Contributions Contract” published in the Federal Register on December 27, 2018.

Formed in 1933, NAHRO represents over 20,000 housing and community development individuals and agencies. Collectively, our members manage over 970,000 public housing units, 1.7 million Housing Choice Vouchers (HCVs), and receive over $1.5 billion in Community Development Block Grant (CDBG) and HOME Investment Partnerships (HOME) Program funding to use in their communities. NAHRO has the unique ability to represent public housing agencies, local redevelopment agencies, and other HUD grantees of all sizes and geography, including Moving to Work (MTW) agencies.

The Operations Notice for the Expansion of the MTW demonstration program establishes the requirements for the implementation and continued operations of the MTW demonstration program pursuant to the 2016 MTW Expansion Statute which authorized HUD to expand the MTW demonstration program by adding an additional 100 high-performing PHAs over a period of seven years. The Act requires agencies to be added to the MTW demonstration by cohort and...
that HUD direct one specific policy change to be implemented per cohort to facilitate the evaluation of that policy. HUD released a previous draft of the MTW Operations Notice in January 2017.

An agency’s participation in the MTW Expansion will be formalized by an amendment to the PHA’s Consolidated Annual Contributions Contract (CACC) through the MTW CACC Amendment. Through the amendment, the PHA “agrees to abide by the program structure, flexibilities, and terms and conditions detailed in the Operations Notice for the term of the agency’s participation in [the] MTW demonstration.”

The Department is requesting feedback on changes to the Moving to Work Amendment to the Consolidated Annual Contributions Contract (CACC). NAHRO’s comments are in three sections. The first section focuses on NAHRO’s concerns with HUD’s process relating to current proposed revisions to the Annual Contributions Contract (ACC) and all related amendments included in the CACC. The second section focuses on NAHRO’s the Operations Notice, and the last section discusses NAHRO’s specific concerns with the amendment form itself.

1. Process Concerns

NAHRO is concerned that the agreement formalizing an agency’s participation in the MTW expansion is amended to the Annual Contributions Contract (ACC). Although the ACC is the governing document to administer the Public Housing and Section 8 programs as dictated by the U.S. Housing Act of 1937, recent actions by HUD have made it clear that HUD no longer views the ACC as a contract. In May 2018, HUD unilaterally modified the ACC without properly following the required notification and communication process with impacted agencies. As HUD unilaterally changed the existing ACC without input from PHAs while the existing ACC was still in effect, HUD failed to meet the terms of its contract with PHAs and failed to comply with Congress’s instructions in the U.S. Housing Act of 1937 that the federal government contract with local housing agencies to operate public housing.

In light of this, HUD reverted all PHAs back to their prior ACC for a brief time. However, in December 2018, HUD published another revised ACC in the Federal Register through a Notice of Proposed Information Collection via the Paperwork Reduction Act (PRA). NAHRO does not believe that revising the ACC through the PRA is appropriate. The ACC has been and continues to be a contract between a PHA and the federal government and not a unilateral grant agreement issued by HUD to a PHA. NAHRO has previously expressed these concerns to HUD and will continue to do so moving forward.

Although this is concerning for a multitude of reasons, it is especially concerning for agencies joining the MTW expansion. NAHRO does not believe that HUD has the authority to unilaterally change the ACC or any amendments to the ACC, however, past actions by the Department prove HUD believes otherwise. As such, NAHRO fears HUD may unilaterally change the MTW CACC Amendment without MTW agency input or that HUD could terminate the MTW CACC Amendment through the ACC unilaterally. Agencies that agree to enter the current MTW expansion have no guarantee that their funding formula will remain the same and have no guarantees that the flexibilities granted in this operations notice will remain if HUD can unilaterally change the ACC.
NAHRO has further concerns that the flexibility inherent to the MTW Demonstration through the use of waivers may be impacted by the requirement that MTW agencies strictly adhere to all “HUD Requirements” as defined by the revised ACC. Along with the requirement that PHAs must follow the law, HUD regulations, and other federal regulations and executive orders, the new ACC also requires PHAs to follow HUD-issued notices and HUD-required forms or agreements. NAHRO has serious concerns with defining HUD requirements in this manner. PHAs should not be legally required to follow HUD-required forms through the inclusion of such language in the ACC. HUD-issued notices are the agency’s interpretation of governing laws and regulations, however HUD-issued notices do not have the force and effect of law. HUD’s language in the revised ACC would give it authority to terminate funding if agencies are not following all HUD requirements, including notices and guidance. This will make it increasingly challenging for agencies entering the MTW expansion to pursue MTW activities.

NAHRO recommends that HUD create a standalone standard contract between HUD and the MTW Expansion agencies that formalizes an agency’s participation in the MTW expansion and can only be modified during the 12-year term of participation if both parties agree to the modifications. Through this standalone agreement, PHAs will still “agree to abide by the program structure, flexibilities, and terms and conditions detailed in the [specific, finalized] Operations Notice for the term of the agency’s participation in [the] MTW demonstration.” The standalone contract could reference the final Operations notice by incorporation. The new contract should incorporate this specific Operations Notice to ensure that any modifications to the Operations Notices are made with transparency and undergo the proper participatory process and receive stakeholder input.

2. Operations Notice

The MTW CACC Amendment requires PHAs to operate under the MTW Operations Notice and its respective MTW cohort selection notice. NAHRO has greatly appreciated HUD’s efforts to improve and streamline the MTW Operations Notice and their continued outreach to industry partners and agencies while drafting the document. However, as the Operations Notice is a Notice, and not a Standard Agreement, HUD has the ability to unilaterally change the document as they see fit in the future. As agencies that sign the MTW CACC Amendment will be tied to the requirements in the Operations Notice for the implementation and the continued operations of the MTW Expansion, NAHRO strongly recommends HUD continue to receive feedback from the public and impacted stakeholders before implementing any changes to the Operations Notice. Public listening sessions and public comment periods will help ensure the MTW Operations Notice remains viable to agencies entering the MTW Expansion moving forward. In relation to the Operations Notice, HUD has thus far proven adept at this, and we hope they continue to do so moving forward.

3. Specific Concerns

Discontinuing Activities

NAHRO is concerned over HUD’s ability in the MTW CACC Amendment to force an agency to discontinue an activity that has been pursued through the waiver process.

The Amendment notes in Section 5(D) that HUD reserves the right to “discontinue any activity or to revise any activity to comply with the Operations Notice and other applicable HUD requirements in the event of an MTW activity and such requirements, as determined by HUD.”
NAHRO understands that by joining the MTW Expansion, MTW agencies without a Standard Agreement are beholden to follow the Operations Notice. That said, as HUD can make changes to the Operations Notice at HUD’s discretion, there is concern that pre-approved activities once allowable under the Operations Notice may cease to be allowable if HUD opts to unilaterally change the Operations Notice. As such, NAHRO recommends HUD include language grandfathering in agencies that have implement policies that may no longer comply with Operations Notice, so as they were in compliance with the Operations Notice at initial implementation.

NAHRO is concerned by HUD’s definition of “HUD requirements” in the revised ACC and referenced to in Section 5(D). Along with the requirement that PHAs must follow the law, HUD regulations, and other federal regulations and executive orders, the new ACC also requires PHAs to follow HUD-issued notices and HUD-required forms or agreements. NAHRO has serious concerns with defining HUD requirements in this manner. HUD-required forms should not be included in the ACC. HUD-issued notices are the agency’s interpretation of governing laws and regulations, however HUD-issued notices do not have the force and effect of law. There are serious concerns that the flexibility inherent to the MTW Demonstration through the ability to use waivers may be impacted by the requirement that MTW agencies to strictly adhere to all “HUD Requirements” as defined by the revised ACC.

Section 5(E) notes that “HUD reserves the right to require the [PHA] to discontinue any activity derived from a waiver granted by the Operations Notice should it have significant negative impacts on families or the agency’s operation of its assisted housing programs…” Although NAHRO understands the concern that MTW activities may inadvertently have negative impacts on residents, HUD is not clear in either the MTW CACC Amendment nor the Operations Notice how HUD would determine if an activity is negatively impacting a resident. HUD must include additional clarity demonstrating instances wherein HUD may interfere with a PHA if HUD deems that an MTW activity is having negative impacts on residents. This could include PHA submitted data that demonstrates residents are being negatively impacted by MTW activities. However, it is critical that HUD first discuss these concerns with the MTW PHA, as HUD may not have a complete understanding of what’s occurring at the agency level. Overall impacts of MTW activities may take time momentarily result in negative impacts before positive impacts occur. In this instance, HUD and the PHA could work together to find a solution, as opposed to HUD stepping in and unilaterally forcing a PHA to discontinue an allowable MTW activity.

Furthermore, NAHRO believes that most agencies would realize if their policies are negatively impacting their residents through their staff, board, residents, and community. The PHA Board must approve all MTW waivers yearly, as they are a part of the MTW Supplement to the PHA Plan. Approval of a PHA Plan requires a lengthy public participation process. As such, agencies in the MTW Expansion and the communities they serve should notice if their MTW activities are negatively impacted residents and adjust their MTW activities appropriately.

Transition Plan

Currently, agencies entering the MTW Expansion will be in the Demonstration for a term of 12 years. As such, Section 6 of the MTW CACC Amendment requires that “[a]t least one year prior to expiration of this MTW CACC Amendment, the [PHA] shall submit a transition plan to HUD.” For most agencies, this will be 11 years into their participation in the MTW Demonstration, unless the agency opts to exit the demonstration before the term of the MTW CACC Amendment expires. Furthermore, Section 6 states that “[i]t is the [PHA’s]
responsibility to be able to end all MTW activities through its MTW Supplement to the PHA Plan upon expiration of this MTW CACC Amendment.” This ensures PHAs will be in compliance with all statutes and regulations under the 1937 U.S. Housing Act that may have been waived during their participation in the demonstration.

NAHRO requests additional clarity within Section 6 for agencies that may extend their participation in the MTW Demonstration (if that becomes an option either through HUD or Congressional action) and additional clarity for agencies that HUD may require to continue using a cohort-specific waiver for the purposes of completing HUD’s research and evaluation component of the MTW expansion.

Although there is no guarantee that the MTW expansion will continue after the initial 12-year term, the MTW Demonstration Program has been around for over two decades. As such, there may be decisions and actions that occur either at the agency level or at the Congressional level that would extend the 12-year term. If this occurs, the MTW CACC Amendment as written would still require the MTW PHA to submit a transition plan in year 11, even if they ultimately continue to have their MTW status past year 12. This would be an administrative waste of time for both the MTW PHA and HUD staff.

Furthermore, the Operations Notice allows HUD to require an agency to continue to use a cohort-specific waiver after the 12-year term if HUD has not completed their research and evaluation on that specific cohort’s policy intervention. Section 6 of the MTW Amendment to the CACC should include language that clarifies to the MTW PHA how they should move forward if HUD requires them to continue to use the MTW Cohort-Specific after the initial 12-year term ends.

5. Conclusion

As always, NAHRO appreciates the opportunity to comment on this important Amendment. NAHRO has long called for meaningful expansion of the MTW demonstration and is deeply supportive of Congress’s efforts to authorize the expansion. Although NAHRO is supportive of a legal document that formalizes and agency’s participation in the MTW Expansion, we are concerned about attaching this document to the ACC. NAHRO remains deeply troubled by HUD’s efforts to unilaterally revise the ACC and feel HUD’s actions weaken the formality of the MTW CACC Amendment. As such, NAHRO recommends that HUD create a standalone standard contract between the MTW Expansion agencies that formalizes an agency’s participation in the MTW expansion and can only be modified during the 12-year term of participation if both parties agree to the modifications.

Thank you,

Eric Oberdorfer
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