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Section 8 Housing Assistance Payment (HAP) Contract Renewals: Implications of the New Short-Term Funding Language

This NAHMAanalysis discusses controversial new language in project-based Section 8 HAP contracts in which HUD obligates funding for a period of time less than the term of the contract. At issue is the extent of owners' responsibilities under these contracts if HUD does not pay them beyond the number of months committed. The analysis will examine the public policy issues raised by the new language. Are owners left "holding the bag" for the remainder contract term when the money promised by HUD runs out? What happens to the tenants? Why not just provide full funding for the full term of the contracts?

DISCLAIMER: *The information presented in this NAHMAanalysis is in no way intended to constitute legal or business advice to our members. Members are encouraged to seek competent expert and /or legal advice as may be needed for their specific situations.*

Effective Date

HUD began using the new short-term funding language for contract renewals in the 4th quarter of FY 2007 (i.e. July, August, and September of this year). The Department intends to continue using this language indefinitely.

Background

At the insistence of HUD's attorneys, the project-based Section 8 HAP contracts now include a new section 2, which allows HUD to obligate funding to owners for a period of time (expressed in months) less than the term of the contract (either one-year or multiyear). HUD's lawyers believe the new language is necessary to continue providing short-term payments on contracts when funds for the whole term of the contract are insufficient.

The HAP contract forms are available as attachments to the Section 8 Renewal Guide and posted to HUD's website at: <http://www.hud.gov/offices/hsg/mfh/exp/guide/s8renewpgchg80907.pdf>. They will have to be signed by owners, executed by PBCAs and returned to HUD. HUD states funding will be available once the contracts are executed. The new contracts are already being used to renew contracts that expired in the 4th quarter of FY 2007.

The substance of this new section 2 is very similar across the different project-based Section 8 HAP contracts, but there are some modifications to the wording based on contract type. For example, Section 2 of the new Basic One-Year Term contract reads:

2 TERM AND FUNDING OF RENEWAL CONTRACT

- a The Renewal Contract begins on _____ and shall run for a period of one year.
- b Execution of the Renewal Contract by the Contract Administrator is an obligation by HUD of \$ _____, an amount sufficient to provide housing assistance payments for approximately _____ months of the Renewal Contract term.
- c HUD will provide additional funding for the remainder of the Renewal Contract term subject to the availability of sufficient appropriations. When such appropriations are available, HUD will obligate additional funding and provide the Owner written notification of (i) the amount of such additional funding, and (ii) the approximate period of time within the Renewal Contract term to which it will be applied.

Whereas Section 2 of the new Basic Multi-Year Contract states:

2 TERM AND FUNDING OF RENEWAL CONTRACT

- a The Renewal Contract begins on _____ and shall run for a period of _____ years.
- b Execution of the Renewal Contract by the Contract Administrator is an obligation by HUD of \$ _____, an amount sufficient to provide housing assistance payments for approximately _____ months of the first annual increment of the Renewal Contract term.
- c HUD will provide additional funding for the remainder of the first annual increment and for subsequent annual increments, including for any remainder of such subsequent annual increments, subject to the availability of sufficient appropriations. When such appropriations are available, HUD will obligate additional funding and provide the Owner written notification of (i) the amount of such additional funding, and (ii) the approximate period of time within the Renewal Contract term to which it will be applied.

In the case of multi-year contracts, HUD is sending a letter to owners at every anniversary date which will notify owners when HUD does not have sufficient appropriations to make payments for the entirety of the next annual increment, and it is obligating a specified dollar amount to provide HAP payments for a specific number of months in the next annual increment. The letter is also stating HUD will obligate additional funding when appropriations are available and owners will receive written notification “of (i) the amount of such additional funding, and (ii) the approximate period of time within the remaining portion of the annual increment to which it will be applied.”

A number of NAHMA members have expressed serious concerns that the new language legally binds them to provide housing under Section 8 rules and rent limitations for a year (or more) with no assurance of payment beyond the months to which HUD commits. While NAHMA cannot provide legal or business advice to our members, we have consulted the Washington, D.C. law firm Coan & Lyons to research the public policy questions raised by HUD’s new contract language.

Summary

Three major public policy questions are raised by a worst-case scenario where HUD stops making payments after the initial months specified in the contract. These questions include:

- (1) Is the owner released from obligations under the HAP contract?
- (2) Do the statutory tenant notice provisions prevent rents from being increased until there has been compliance with the one-year contract termination notice period?
- (3) Are the tenants eligible for section 8 enhanced vouchers?

Research suggests owners could terminate their HAP contracts if HUD cannot provide the subsidy. An *uncured* material failure to perform under the contract by HUD relieves the owner of its remaining duties under the contract. Moreover, in the landmark Section 515 prepayment case, *Franconia Assocs. v. United States*, 536 U.S. 129 (2002), the Supreme Court held that contracts between the federal government and housing providers are subject to the same rules as contracts between private parties. This is not to suggest owners can terminate the HAP contracts due to late payments. According to the research by Coan & Lyons, the threshold for an uncured material failure would be more consistent with scenarios in which, “the government provides no funding or inadequate funding and expresses an intent not to provide additional funding or expresses no intent at all.”

While it is assumed that termination of the HAP contract for non-payment would release owners of federal obligations to assisted tenants, Coan & Lyons raises the possibility of lawsuits by tenants or on their behalf based on the statutory one-year tenant notification requirements. Under the tenant notification requirements, owners may not increase assisted tenants’ rents or evict them for nonpayment of the higher rent until one year after owners notify HUD and the tenants that the HAP contract won’t be renewed when it terminates. The question arises because the statutory definition of “termination” involves contract expiration or non-renewal; it does not address dissolution of the contract for HUD’s failure/inability to make the payments.

While it would seem bizarre that a court could allow an owner to terminate a HAP contract and then hold the owner to income limitations for previously assisted tenants, the point is there is not a lot of evidence to *rule out* that possibility. Coan & Lyons explains,

The potential adverse impact of the tenant notice period can probably be abated if enhanced vouchers are provided as soon as possible after assistance payments terminate. It is not clear whether enhanced vouchers would be provided by HUD prior to the close of the one-year notice period. Enhanced vouchers are also subject to the availability of appropriations and, therefore, in any fiscal crisis might not be available on a timely basis.

HUD has exercised discretion as to when enhanced vouchers are given, either after the 12-month notice period has elapsed or at the time project-based assistance is terminated. HUD regulations governing the mark-to-market program are the most specific in stating that vouchers will not be given to tenants until the completion of the 12-month notice period, even when a project is rejected for restructuring. 24 C.F.R. § 401.602. However, a 12-month notice period is not required if a project is converted to tenant-based assistance under the mark-to-market program. With respect to owner opt-outs outside of mark-to-market, the regulations do not specifically bar the issuance of enhanced vouchers before the end of the notice period. 24 C.F.R. § 402.8. However, HUD’s practice has been to give short-term extensions of project-based subsidy until the completion of the 12-month notice period, rather than to give enhanced vouchers. One federal appeals court has ruled, however, that the statutory language requires enhanced vouchers to be given when project-based assistance terminates even if that occurs prior to the completion of the 12-month notice period. *People to End Homelessness v. Develco*, 339 F. 3d 1 (1st Cir. 2003).

The remaining question is whether tenants would be eligible for enhanced vouchers in projects where the owner terminated the HAP contact because of non-payment by HUD. Again, there is not a clear answer.

Enhanced vouchers are authorized on the *expiration date* of an un-renewed HAP contract. Coan & Lyons observes,

The term “date of the expiration” of a contract is even more suggestive than use of the word “expiration” in the tenant notice provision, that Congress means the date in the contract specifying the end of the contract. Section 8(t), on the other hand, merely refers to the “termination or expiration” of the contract.

HUD would interpret this language before any court test, and its interpretation is likely to be given some deference by a court. Which way HUD leans may depend on why the funding crisis exists. If it is the government’s intent to voucher out projects, HUD might be more willing to interpret the statute as authorizing enhanced vouchers, but if its intent is to reduce housing assistance, HUD might find the tenants ineligible for enhanced vouchers if an owner is discharged from its obligations under the contract prior to the expiration date. It is likely, however, that Congress would step in to resolve any uncertainty in favor of the tenants.

In addition to the eligibility issue, there must be sufficient appropriations available for enhanced vouchers. If tenants are ineligible for enhanced vouchers, HUD may give them regular vouchers, but again there must be sufficient appropriations available for that purpose. Tenant protection vouchers, either enhanced or regular, are not entitlements. The statute is quite clear that their provision is subject to the availability of appropriations.

Issues of Concern to NAHMA

At the very root of this problem is insufficient funding for project-based Section 8 contract renewals. The Bush Administration’s insufficient budget requests for project-based Section 8 and unwillingness on the part of the Office of Management and Budget (to date) to formally request additional funding for Fiscal Year 2008 threatens to wreak havoc on the program. Historically, the Administration has not requested enough money from Congress to ensure HAP payments will be made on time and in full. For FY 08, the Administration has actually requested a cut for contract renewals. This is particularly troubling as the start of Fiscal Year 2008 approaches on October 1 and a temporary continuing resolution to keep the government operating is looming.

NAHMA also remains concerned and disappointed by Congress’ response to date. Despite projected shortfalls for FY 08 HAP renewals which were voiced in Senate appropriations hearings in early 2007, funding for project-based Section 8 contract renewals will fall well short of the actual need. While the House appropriations bill increases funds above the FY 07 level, it will not be sufficient to fully fund the 12 month renewals. The program fares worse under the Senate bill, which adopted the Administration’s proposed cut.

It is possible that funding for project-based Section 8 contract renewals will be increased in the final appropriations bill—whether it’s the stand-alone Transportation-HUD bill or an omnibus funding measure which combines several different spending bills. Another vehicle for increasing funds could be an emergency supplemental appropriations bill, which provides money for the Iraq war. For either of these actions to occur, NAHMA needs every member at every membership level to ask their elected officials to support this important program.

Positive Aspects of This Policy/Proposal

According to HUD, the benefits of the new contract renewal language are two-fold. First, it allows the Department to keep some money flowing to owners when funding for the full contract term is not available. Second, it notifies owners about the status of funding for the contract.

NAHMA's position

NAHMA believes the project based Section 8 program is at a crossroads. It is well past time for Congress and the Administration to stabilize funding for this important program and to ensure HAP payments are made on time and in full.

The new short-term funding language in the HAP renewal contracts only underscores the importance of fully funding HAP renewals for the full 12 month term (or 12 month annual increments for multiyear contracts). Our advocacy efforts will continue to insist on these points. Owners and agents should not have to resort to terminating their HAP contracts, testing the courts on eviction of assisted tenants, providing routine opt-out notices "just in case" the federal government fails to follow through on its commitments, or trying to make HUD change its contract language (which the Department is extremely unlikely to do). Likewise, we believe Congress should amend the enhanced voucher statute to make these tenant protections available when HAP payments stop for any reason (especially due to the government's failure to pay owners) and also to provide these vouchers to tenants even before the end of a one year notice period.

NAHMA calls on Congress to take *immediate decisive* steps to solve this problem *before* owners find it necessary for owners to test the legal questions discussed earlier. Congress has known for years that HUD has not been making timely HAP payments—as evidenced by conclusions of GAO reports, constituent contacts from agents and owners, and House Committee report language which accompanied the last two HUD appropriations bills. NAHMA believes the time is long overdue for Congress to hold formal oversight hearings on the timeliness of project-based Section 8 HAP payments, with particular emphasis on the true funding need for FY 08. Furthermore, if the Administration will not submit a revised funding request, Congress should use its own best judgment to increase funding for project-based Section 8 HAP contract renewals. NAHMA believes HUD will need an additional \$1.2 billion to fully fund (for 12 months) the FY 07 renewals, and an additional increase above the FY 08 request of about \$2 billion is necessary to fully fund the 12 month terms of contract renewals in FY 08.

NAHMA strongly urges all members to contact their Senators and Representatives as soon as possible and tell them to find the necessary \$3 billion in appropriations to fully fund project-based Section 8 HAP renewals for the 12 month terms of FY 07 and FY 08 contracts.