



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-3000

CHIEF FINANCIAL OFFICER

December 31, 2008

The President  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500-0001

Dear Mr. President:

This letter reports a violation of the Antideficiency Act as required by section 1517(b) of Title 31 of the United States Code and by HUD's FY 2003 Appropriations Act (Salaries and Expenses Account; Public Law 108-7). The Antideficiency Act prohibits the obligation of funds in excess of an apportionment, and for HUD, an allotment (31 U.S.C. 1517(a)). A violation of section 1517(a) occurred in connection with the funding of annual contract renewals under the Section 8 Project-Based Assistance Program in Account No. 86x0303, in an approximate amount of \$400 million.

The violation occurred because the intended incremental funding clause in HUD's Housing Assistance Payment contracts was not properly structured and applied to limit HUD's legal liability to the amount of funds available at the time many annual contract renewal actions were executed. As a result, HUD executed contract actions that obligated the government for 12 months of housing assistance payments when HUD often did not have sufficient funding to cover the full 12 month period and was awaiting further appropriations or recaptured program funding to cover the balance due on the contracts. At one point in Fiscal Year 2007, HUD had obligated, but had not recorded, approximately \$2.353 billion for such annual contract renewals but only had about \$1.953 billion in unobligated funds remaining available under its apportionment and allotment. However, no deficiency appropriation was needed to correct this over-obligation because HUD subsequently identified other funds and properly apportioned and allotted those funds to the appropriate account to fully cover the legal obligation on those contracts.

Historically, HUD's initial contracts under this program were long-term 20 to 40 year agreements that were funded with contract authority or budget authority upon execution during the 1970s and 1980s. However, when these original term contracts began to expire, HUD's budget climate did not support continued long-term funding of contract renewals and HUD currently renews funding on an annual basis. In some cases, a contract was renewed for multiple years, often 5-years, but the funding was appropriated and obligated annually in accordance with the following incremental funding clause:

"Subject to the availability of sufficient appropriations to make housing assistance payments *for any year* in accordance with the Renewal Contract, as determined by HUD, the Renewal Contract shall run for a period of \_\_\_\_\_ years, beginning on the first day of the term.

Section 8 housing assistance payments to the Owner during the Renewal Contract shall only be made from budget authority appropriated by the Congress, and available for this purpose.” (Italics added.)

In FY 2007, when each multi-year contract was executed or its funding was renewed “for any year,” HUD had obligated the Federal government to provide 12 months of subsidy payments in exchange for the owner’s agreement to continue to participate in the program for another 12 months. Any subsequent year, however, would be subject to the availability of sufficient appropriations, and accordingly, no obligation for subsequent years would have been incurred when the contract was initially executed or renewed.

HUD also used this same clause in the renewal of its one-year contracts. Use of the “subject to the availability of sufficient appropriations” language was inappropriate in renewing a one-year contract. When the contract was renewed for another one-year period, without more specific language to limit the extent of the obligation, it obligated the Federal government to provide 12 months of subsidy payments in exchange for the owner’s agreement to participate in the program for another year.

This contract language contradicts the argument that the housing project owner was somehow obligated for 12 months but HUD was only obligated if and to the extent of funding availability. Each party expected the other to live up to its 12 month commitment, and under this language in the contracts over the years, HUD, in practice, has ultimately paid the owners for 12 months under such contracts.

For both one-year and multi-year contracts, once a contract was executed or an annual funding renewal was exercised using the language cited above, HUD was responsible for funding the whole year, and the “subject to availability” clause did not limit or excuse that responsibility. See the Comptroller General’s decision in *National Mediation Board*, B-305484 at 9-10 (June 2, 2006), and the two United States Supreme Court cases upon which it relies, *Leiter v. United States*, 271 U.S. 204 (1926), and *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005).

Because program officials believed that the “subject to availability” clause allowed them to initiate or renew the contracts for a year but delay obligating the full amount of funds necessary to cover that one-year period, HUD was not recording the true extent of its obligations. This breach in funds control caused the overobligation of available funding that violated the Antideficiency Act.

To mitigate the violation, all initial contracts or annual funding renewals that were executed without 12 months of funding were provided with 12 months of funding and recorded in their full amounts. The subsequent processing of additional annual contract or funding renewals were given sufficient funding at the time of execution to cover the full extent of HUD’s obligations to the owners. Since HUD did not have sufficient funding to initiate or renew contracts for 12 months, the contracts clearly stated the amount being obligated at the time of execution and the approximate number of months that the amounts covered. If HUD had less than 12 months of funding for a contract or renewal, then HUD obligated only what it could and made the rest of the 12 month term subject to availability of sufficient appropriations and written notice. When additional funding

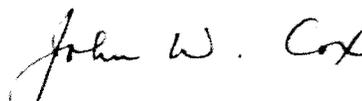
became available, HUD gave written notice to the owner of how much funding was being provided and, when combined with funding previously made available for the contract, approximately how many months of the annual increment were covered by such combined funding. If less than 12 months, further funding was made subject to the availability of sufficient appropriations. These revised contracts and funds control procedures helped to mitigate the violation and have reduced and will continue to reduce the risk of further violations.

The funding and program officials responsible for these obligations did not willfully violate the Antideficiency Act since they believed that the "subject to availability" clause allowed them to initiate and renew the contracts but delay obligating all of the funds until they became available. The current officials responsible for the funds control for this program were a party to the identification and correction of the longstanding flawed practice that they inherited. These officials have been advised that they must have a full year's funding allotted when they exercise a contract action for a full year. They now know that, if they have funding for only part of a year, the contract renewal must explicitly state that it is limited to a specific amount and approximate period, that the rest is subject to availability of funds, and that it can be extended only upon availability of additional funds and written notice from HUD.

The misunderstanding with respect to the "subject to availability" clause and resulting funding practice has existed for at least ten years. Requiring HUD to investigate those prior periods for the purpose of identifying and reporting potential further violations would create an overwhelming administrative hardship at substantial administrative cost. Additionally, all that work would not change overall payments to the housing project owners since the owners ultimately, although incrementally, were paid their subsidy amounts for the full 12 months for each year for all those years. Instead, HUD is reporting the Antideficiency Act violation that did occur in FY 2007 and has revised its contracts and funding practices as described above to avoid further violations.

Identical letters are being submitted to the presiding officer of each House of Congress and the Comptroller General.

Sincerely,

  
John W. Cox



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-3000

CHIEF FINANCIAL OFFICER

December 31, 2008

The Honorable Richard B. Cheney  
President of the Senate  
Washington, DC 20510

Dear Mr. President:

This letter reports a violation of the Antideficiency Act as required by section 1517(b) of Title 31 of the United States Code and by HUD's FY 2003 Appropriations Act (Salaries and Expenses Account; Public Law 108-7). The Antideficiency Act prohibits the obligation of funds in excess of an apportionment, and for HUD, an allotment (31 U.S.C. 1517(a)). A violation of section 1517(a) occurred in connection with the funding of annual contract renewals under the Section 8 Project-Based Assistance Program in Account No. 86x0303, in an approximate amount of \$400 million.

The violation occurred because the intended incremental funding clause in HUD's Housing Assistance Payment contracts was not properly structured and applied to limit HUD's legal liability to the amount of funds available at the time many annual contract renewal actions were executed. As a result, HUD executed contract actions that obligated the government for 12 months of housing assistance payments when HUD often did not have sufficient funding to cover the full 12 month period and was awaiting further appropriations or recaptured program funding to cover the balance due on the contracts. At one point in Fiscal Year 2007, HUD had obligated, but had not recorded, approximately \$2.353 billion for such annual contract renewals but only had about \$1.953 billion in unobligated funds remaining available under its apportionment and allotment. However, no deficiency appropriation was needed to correct this over-obligation because HUD subsequently identified other funds and properly apportioned and allotted those funds to the appropriate account to fully cover the legal obligation on those contracts.

Historically, HUD's initial contracts under this program were long-term 20 to 40 year agreements that were funded with contract authority or budget authority upon execution during the 1970s and 1980s. However, when these original term contracts began to expire, HUD's budget climate did not support continued long-term funding of contract renewals and HUD currently renews funding on an annual basis. In some cases, a contract was renewed for multiple years, often 5-years, but the funding was appropriated and obligated annually in accordance with the following incremental funding clause:

"Subject to the availability of sufficient appropriations to make housing assistance payments *for any year* in accordance with the Renewal Contract, as determined by HUD, the Renewal Contract shall run for a period of \_\_\_\_\_ years, beginning on the first day of the term.

Section 8 housing assistance payments to the Owner during the Renewal Contract shall only be made from budget authority appropriated by the Congress, and available for this purpose.” (Italics added.)

In FY 2007, when each multi-year contract was executed or its funding was renewed “for any year,” HUD had obligated the Federal government to provide 12 months of subsidy payments in exchange for the owner’s agreement to continue to participate in the program for another 12 months. Any subsequent year, however, would be subject to the availability of sufficient appropriations, and accordingly, no obligation for subsequent years would have been incurred when the contract was initially executed or renewed.

HUD also used this same clause in the renewal of its one-year contracts. Use of the “subject to the availability of sufficient appropriations” language was inappropriate in renewing a one-year contract. When the contract was renewed for another one-year period, without more specific language to limit the extent of the obligation, it obligated the Federal government to provide 12 months of subsidy payments in exchange for the owner’s agreement to participate in the program for another year.

This contract language contradicts the argument that the housing project owner was somehow obligated for 12 months but HUD was only obligated if and to the extent of funding availability. Each party expected the other to live up to its 12 month commitment, and under this language in the contracts over the years, HUD, in practice, has ultimately paid the owners for 12 months under such contracts.

For both one-year and multi-year contracts, once a contract was executed or an annual funding renewal was exercised using the language cited above, HUD was responsible for funding the whole year, and the “subject to availability” clause did not limit or excuse that responsibility. See the Comptroller General’s decision in *National Mediation Board*, B-305484 at 9-10 (June 2, 2006), and the two United States Supreme Court cases upon which it relies, *Leiter v. United States*, 271 U.S. 204 (1926), and *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005).

Because program officials believed that the “subject to availability” clause allowed them to initiate or renew the contracts for a year but delay obligating the full amount of funds necessary to cover that one-year period, HUD was not recording the true extent of its obligations. This breach in funds control caused the overobligation of available funding that violated the Antideficiency Act.

To mitigate the violation, all initial contracts or annual funding renewals that were executed without 12 months of funding were provided with 12 months of funding and recorded in their full amounts. The subsequent processing of additional annual contract or funding renewals were given sufficient funding at the time of execution to cover the full extent of HUD’s obligations to the owners. Since HUD did not have sufficient funding to initiate or renew contracts for 12 months, the contracts clearly stated the amount being obligated at the time of execution and the approximate number of months that the amounts covered. If HUD had less than 12 months of funding for a contract or renewal, then HUD obligated only what it could and made the rest of the 12 month term subject to availability of sufficient appropriations and written notice. When additional funding

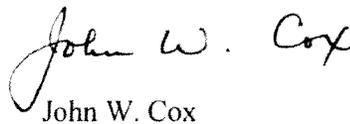
became available, HUD gave written notice to the owner of how much funding was being provided and, when combined with funding previously made available for the contract, approximately how many months of the annual increment were covered by such combined funding. If less than 12 months, further funding was made subject to the availability of sufficient appropriations. These revised contracts and funds control procedures helped to mitigate the violation and have reduced and will continue to reduce the risk of further violations.

The funding and program officials responsible for these obligations did not willfully violate the Antideficiency Act since they believed that the "subject to availability" clause allowed them to initiate and renew the contracts but delay obligating all of the funds until they became available. The current officials responsible for the funds control for this program were a party to the identification and correction of the longstanding flawed practice that they inherited. These officials have been advised that they must have a full year's funding allotted when they exercise a contract action for a full year. They now know that, if they have funding for only part of a year, the contract renewal must explicitly state that it is limited to a specific amount and approximate period, that the rest is subject to availability of funds, and that it can be extended only upon availability of additional funds and written notice from HUD.

The misunderstanding with respect to the "subject to availability" clause and resulting funding practice has existed for at least ten years. Requiring HUD to investigate those prior periods for the purpose of identifying and reporting potential further violations would create an overwhelming administrative hardship at substantial administrative cost. Additionally, all that work would not change overall payments to the housing project owners since the owners ultimately, although incrementally, were paid their subsidy amounts for the full 12 months for each year for all those years. Instead, HUD is reporting the Antideficiency Act violation that did occur in FY 2007 and has revised its contracts and funding practices as described above to avoid further violations.

Identical letters are being submitted to the President, the presiding officer of the House of Representatives, and the Comptroller General.

Sincerely,

A handwritten signature in cursive script that reads "John W. Cox". The signature is written in black ink and is positioned above the printed name.

John W. Cox



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-3000

CHIEF FINANCIAL OFFICER

December 31, 2008

The Honorable Nancy Pelosi  
Speaker of the House of Representatives  
Washington, DC 20515-6501

Dear Madam Speaker:

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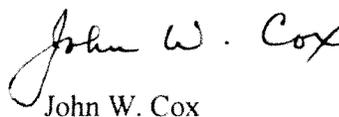
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