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24 CFR Part 1000

Revision to Cost Limits for Native American Housing; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 1000

[Docket No. FR–4517–F–02]

RIN 2577–AC14

Revision to Cost Limits for Native American Housing

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This rule revises HUD's regulations regarding the way construction costs are controlled in the Indian Housing Block Grant (IHBG) program administered by IHBG grantees, who are Indian tribes or their tribally designated housing entities (TDHEs). This rule replaces the system of HUD-established Dwelling Construction and Equipment costs (DC&Es) with a choice between HUD-established Total Development Costs (TDCs) or standards established by the tribe/TDHE based on standards in its geographic area. This rule also provides that the construction, acquisition, or assistance of non-dwelling structures is either subject to tribally developed standards or to documentation of comparability to the size, design and amenities of similar buildings constructed in the geographic area. This rule follows an April 20, 2000 proposed rule and takes into consideration the public comments received on the proposed rule. After careful consideration of all the public comments received on the April 20, 2000 proposed rule, HUD has decided to adopt the proposed rule without significant change.

DATES: Effective Date: October 29, 2001. The information collection requirements required by this rule, however, will not be effective until the Office of Management and Budget (OMB) approves them under the Paperwork Reduction Act of 1995 and assigns them a control number. Publication of the control number, which will be by separate **Federal Register** notice, notifies the public that OMB has approved these information collection requirements.

FOR FURTHER INFORMATION CONTACT: Bruce Knott, Office of Native American Programs, at 303–675–1600, extension 3302, or email him at the following address: Bruce_A._Knott@hud.gov. Persons with hearing or speech impairments may access the above telephone number via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION

I. Statutory Background

The implementing regulations for the Native American Housing Assistance and Self-Determination Act (NAHASDA) (25 U.S.C. 4101 *et seq.*) provide for the control of construction costs through HUD-established Dwelling Construction and Equipment limits, also referred to as DC&Es. (see 24 CFR 1000.156). The DC&E limits replaced a limit called Total Development Cost (TDC) which included an amount for DC&E as well as other costs such as administration, planning, site acquisition and financing. The tribe/TDHE is responsible for insuring that the amount of IHBG funds used for each unit does not exceed the most recently published DC&E limit for the area.

In an effort to provide flexibility in high cost situations, DC&E standards were designed to limit only the hard costs of construction within five feet of the foundation. Nevertheless, tribes/TDHEs which began using DC&E limits in place of TDC limits in accordance with 24 CFR part 1000 discovered that the new limits were still inadequate.

II. The April 20, 2000 Proposed Rule

On April 20, 2000 (65 FR 21288), HUD published a proposed rule to amend 24 CFR part 1000. The purpose of the proposed rule was to implement changes for dwelling cost limits by replacing the system of HUD-established DC&E limits with a choice between HUD-established TDC limits or tribally developed standards based on an assessment of local factors. The proposed rule also provided that the construction, acquisition, or assistance of non-dwelling structures be subject to tribally developed standards or to documentation of comparability to the size, design and amenities of similar buildings constructed in the geographic area.

III. Public Comments, Generally

The public comment period for the proposed rule closed on June 19, 2000. HUD received six public comments on the proposed rule. The comments were received from housing authorities, affiliated organizations and a law firm representing a municipality participating in the IHBG program.

Although the commenters expressed varying degrees of concern with the rule, most focus was on the narrow issue of mandatory HUD approval of excess construction costs where tribally developed alternative standards were in place. HUD appreciates the suggestions offered by the commenters and carefully considered the issues raised by them. Nonetheless, HUD's responsibility to protect the interests of all tribal grant recipients is of paramount importance. Additionally, the extensive and diverse tribal participation in the development of the rule coupled with the low overall number of comments submitted on the proposed rule indicates that the rule and its underlying policies are supported by a majority of the affected entities.

Several of the commenters suggested technical changes that did not alter the substance of the proposed rule. These changes were incorporated where appropriate to improve readability or better explain the policies and procedures contained in the rule. For example, one commenter suggested that the term ''non-dwelling buildings'' be changed to ''non-dwelling activities'' or ''non-dwelling affordable housing activities.'' HUD responded to this suggested change by replacing ''non-dwelling building'' with ''non-dwelling structure.'' Another commenter suggested moving a sentence from 24 CFR 1000.158 to 1000.156. HUD responded by moving the sentence as suggested since the modification improved the clarity of the rule.

IV. This Final Rule

For the reasons discussed below, HUD has decided to adopt the April 20, 2000 proposed rule without significant change. The following section of the preamble contains a discussion of the significant issues raised by the public commenters and HUD's response to their comments.

V. Discussion of the Public Comments Received on the April 20, 2000 Proposed Rule

Comment: Existing DC&E standards are adequate to cover the cost of constructing affordable residential dwellings. If TDC limits are restored, difficulties will arise in completing the construction of projects. DC&E standards should be retained.

HUD Response: The proposed rule change was initiated at the request of a large number of Indian tribes and organizations whose past experiences under the rule indicated that DC&E standards created barriers to the provision of affordable housing. Given the minimal comment on this proposed rule, HUD believes that the majority of tribes and TDHEs agree.

Comment: HUD should allow participants to continue using DC&E standards rather than requiring them to choose between published TDCs or tribally developed standards since TDCs are inadequate in areas with particularly high infrastructure costs. If

it is necessary to reinstate the TDC limits for the benefit of a majority of tribes, the rule should allow tribes the option to use DC&E limits as an acceptable alternative. While the option of allowing tribes to determine their own TDC limits may appear to be a solution to the way construction costs are controlled, this option can result in a significant amount of research and effort on the part of a tribe.

HUD Response: Although infrastructure costs within a housing site are included in TDC limits, the recipient may request an increased cost limit where necessary for a specific dwelling unit or project. The recipient may also provide documentation to HUD supporting a general increase in cost limits for their area if the cost of developing housing is consistently higher than the published cost limits. Furthermore, the TDC standard contained in the final rule poses no limitation on the cost of infrastructure outside the boundaries of a housing site. Given the ability of recipients to request an increase in cost limits where justified by local conditions, HUD believes that the potential benefit of maintaining dual limits is outweighed by the administrative burden of establishing and enforcing a second set of standards.

Comment: The term ''local'' should be expressly defined in the rule. This term is used throughout the rule and given the importance of the term for tribal formulations of written standards for houses and non-dwelling buildings, HUD should define this term.

HUD Response: To the maximum extent allowable under the enabling legislation, 24 CFR part 1000 encourages tribes to develop and implement programs in a regulatory environment supportive of self-determination. For the purposes of the final rule, the term ''local'' is given its usual and customary meaning, referring to the tribe's general geographic area.

Comment: HUD should describe in detail the procedure for reviewing tribally developed written standards for affordable housing programs. The rule should contain provisions for discussion or negotiation between a tribe and HUD before HUD makes a final decision to disapprove or modify tribal standards and a specific certification process should be included to address those instances when HUD accepts tribal standards under 24 CFR 1000.158 or 1000.162(c).

HUD Response: The rule does not include provisions for HUD's review and approval of tribally developed standards. HUD's review of tribally developed standards will, instead, be conducted in accordance with 24 CFR part 1000, subpart F which describes procedures for monitoring of recipients and the process for notification, discussion and appeal of HUD determinations. The rule does contain, in both 24 CFR 1000.158 and 1000.162, a narrative description of the process and the recordkeeping a tribe must employ when it elects to develop and use its own written standards.

Comment: The rule should specifically address the danger of earthquakes as a consideration in the development of written tribal standards. In order to ensure the safety and structural integrity of tribal homes and buildings in areas of active geological fault lines, the rule needs to require standards that address these concerns.

HUD Response: The list of considerations contained in 24 CFR 1000.158 is not exhaustive. It is intended to provide examples of items that may be assessed in the formulation of written tribal standards. A number of other environmental concerns, such as flooding, hurricanes and permafrost, are not expressly included in the list of considerations. These areas, along with the design or retrofitting of structures to withstand earthquake hazards, are addressed under generally applicable environmental regulations or other local codes and ordinances. Thus, they need not be specifically enumerated in the rule. These factors do, however, fall within the listed considerations of environmental concerns and mitigations, climate and design and construction features that are reasonable and necessary to provide decent, safe, sanitary and affordable housing.

Comment: The requirement for HUD approval of project costs exceeding 110% of the TDC limit should be eliminated or, in the alternative, the maximum allowable amount by which costs may exceed the TDC limit without HUD approval should be raised. If the tribe is allowed to develop its own standards for modest low income housing, the tribe should be allowed to develop the local costs of these standards. This requirement renders the development and adoption of local standards essentially meaningless.

HUD Response: The provision requiring HUD approval of project costs in excess of 110% of the TDC limit was added after completion of tribal consultation as a result of discussions conducted during pre-publication clearance. HUD believes that this provision is consistent with the intent of the consulting group since it operates for the general protection of all tribes for which program funds are being used to develop moderately designed housing. Tribes may still adopt written standards pursuant to 24 CFR 1000.158(b) and 1000.162(c)—and must request HUD review and approval only in extreme cost situations. In those situations where published TDC limits are inadequate to develop moderately priced housing, the tribe has the alternative of requesting revised limits for an individual project or their local area. Thus, the imposition of the 110% of TDC threshold for requiring HUD approval does not significantly curtail program flexibility.

Comment: Remove language in 24 CFR 1000.158(c) and 1000.162(a) which includes ''funding from all sources'' in the maximum development cost. A tribe should be allowed to add non-NAHASDA funds on top of the TDC and not have these funds included in the TDC. Under the prior TDC and DC&E guidance, tribes were allowed to exclude donations from TDC consideration. To now include donations in the TDC limit is a substantial deviation from all prior practices and guidance.

HUD Response: Grant recipients are required under 24 CFR 1000.156 to develop housing that is moderate in design and under 24 CFR 1000.160 to develop non-dwelling structures that are reasonable and necessary to accomplish the purpose of the intended building—regardless of the source of funds. In the past, a limited number of recipients have developed housing that was more than moderate in design by providing non-HUD funded assistance in addition to the published maximum HUD assistance for the project. The language in question merely reiterates that maximum cost provisions apply to all units whether assisted in whole or part with NAHASDA funds.

VI. Findings and Certifications

Public Reporting Burden

The information collection requirements contained in the rule will be submitted to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The OMB approval number, once assigned, will be published in the **Federal Register**. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Consultation with Indian Tribal Governments

In accordance with Executive Order 13084, *Consultation and Coordination With Indian Tribal Governments*, issued on May 14, 1998, the Department has

consulted with representatives of tribal governments concerning the subject of this rule. As described above, the rule originated from concerns brought to HUD's attention by tribal representatives.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612) has reviewed and approved this final rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. While many TDHEs may be small entities, the effect of this rule developed in consultation with tribal representatives, will not be likely to have a significant impact on a substantial number of them. As mentioned above, it is expected that fewer than ten TDHEs will be affected by this rule. To the extent that small entities will be affected, the impact is expected to be beneficial, as a result of the consultation that has taken place. Accordingly, the economic impact of this final rule is not significant, and it will not affect a substantial number of small entities.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. This finding remains applicable to this final rule and is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays in the Regulations Division at the address stated above.

Federalism Impact

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule would not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This final rule does not impose a Federal mandate that will result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year.

Regulatory Review

The Office of Management and Budget (OMB) has reviewed this rule under Executive Order 12866, *Regulatory Planning and Review,* issued by the President on September 30, 1993. OMB determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made in this rule as a result of that review are identified in the docket file, which is available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance Program number applicable to 24 CFR part 1000 is 14.867.

List of Subjects in 24 CFR Part 1000

Aged, Community development block grants, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Low and moderate income housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 1000 as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

1. The authority citation for part 1000 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 3535(d).

2. Revise § 1000.156 to read as follows:

§ 1000.156 Is affordable housing developed, acquired, or assisted under the IHBG program subject to limitations on cost or design standards?

Yes. Affordable housing must be of moderate design. For these purposes, moderate design is defined as housing that is of a size and with amenities consistent with unassisted housing offered for sale in the Indian tribe's general geographic area to buyers who are at or below the area median income. The local determination of moderate design applies to all housing assisted under an affordable housing activity, including development activities (*e.g.,* acquisition, new construction, reconstruction, moderate or substantial rehabilitation of affordable housing and homebuyer assistance) and model activities. Acquisition includes assistance to a family to buy housing. Units with the same number of bedrooms must be comparable with respect to size, cost and amenities.

3. Add new §§ 1000.158, 1000.160, and 1000.162 to read as follows:

§ 1000.158 How will a NAHASDA grant recipient know that the housing assisted under the IHBG program meets the requirements of § 1000.156?

(a) A recipient must use one of the methods specified in paragraph (b) or (c) of this section to determine if an assisted housing project meets the moderate design requirements of § 1000.156. For purposes of this requirement, a project is one or more housing units, of comparable size, cost, amenities and design, developed with assistance provided by the Act.

(b) The recipient may adopt written standards for its affordable housing programs that reflect the requirement specified in § 1000.156. The standards must describe the type of housing, explain the basis for the standards, and use similar housing in the Indian tribe's general geographic area. For each affordable housing project, the recipient must maintain documentation substantiating compliance with the adopted housing standards. The standards and documentation substantiating compliance for each activity must be available for review by the general public and, upon request, by HUD. Prior to awarding a contract for the construction of housing or beginning construction using its own workforce, the recipient must complete a comparison of the cost of developing or acquiring/rehabilitating the affordable housing with the limits provided by the TDC discussed in paragraph (c) of this section and may not, without prior HUD approval, exceed by more than 10 percent the TDC maximum cost for the project. In developing standards under this paragraph, the recipient must establish, maintain, and follow policies that determine a local definition of moderate design which considers:

(1) Gross area;

(2) Total cost to provide the housing;

(3) Environmental concerns and mitigations;

(4) Climate;

(5) Comparable housing in geographical area;

(6) Local codes, ordinances and standards;

(7) Cultural relevance in design;

(8) Design and construction features that are reasonable, and necessary to provide decent, safe, sanitary and affordable housing; and

(9) Design and construction features that are accessible to persons with a variety of disabilities.

(c) If the recipient has not adopted housing standards specified in paragraph (b) of this section, Total Development Cost (TDC) limits published periodically by HUD establish the maximum amount of funds (from all sources) that the recipient may use to develop or acquire/rehabilitate affordable housing. The recipient must complete a comparison of the cost of developing or acquiring/rehabilitating the affordable housing with the limits provided by the TDC and may not, without prior HUD approval, exceed the TDC maximum cost for the project.

§ 1000.160 Are non-dwelling structures developed, acquired or assisted under the IHBG program subject to limitations on cost or design standards?

Yes. Non-dwelling structures must be of a design, size and with features or amenities that are reasonable and necessary to accomplish the purpose intended by the structures. The purpose of a non-dwelling structure must be to support an affordable housing activity, as defined by the Act.

§ 1000.162 How will a recipient know that non-dwelling structures assisted under the IHBG program meet the requirements of 1000.160?

(a) The recipient must use one of the methods described in paragraph (b) or (c) of this section to determine if a non-dwelling structure meets the limitation requirements of § 1000.160. If the recipient develops, acquires, or rehabilitates a non-dwelling structure with funds from NAHASDA and other sources, then the cost limit standard established under these regulations applies to the entire structure. If funds are used from two different sources, the standards of the funding source with the more restrictive rules apply.

(b)(1) The recipient may adopt written standards for non-dwelling structures. The standards must describe the type of structures and must clearly describe the criteria to be used to guide the cost, size, design, features, amenities, performance or other factors. The standards for such structures must be able to support the reasonableness and necessity for these factors and to clearly identify the affordable housing activity that is being provided.

(2) When the recipient applies a standard to particular structures, it must document the following: (i) Identification of targeted population to benefit from the structures;

(ii) Identification of need or problem to be solved;

(iii) Affordable housing activity provided or supported by the structures;

(iv) Alternatives considered;

(v) Provision for future growth and change;

(vi) Cultural relevance of design;

(vii) Size and scope supported by population and need;

(viii) Design and construction features that are accessible to persons with a variety of disabilities;

(ix) Cost; and

(x) Compatibility with community infrastructure and services.

(c) If the recipient has not adopted program standards specified in paragraph (b) of this section, then it must demonstrate and document that the non-dwelling structure is of a cost, size, design and with amenities consistent with similarly designed and constructed structures in the recipient's general geographic area.

Dated: August 27, 2001.

Mel Martinez,

Secretary.

[FR Doc. 01–24269 Filed 9–27–01; 8:45 am]

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