



January 31, 2018

Leroy White
Contracting Officer
United States Department of Housing and Urban Development
801 Cherry Street
Forth Worth, Texas 76113-2905

Dear Mr. White:

The National Council of State Housing Agencies (NCSHA) appreciates the opportunity to provide comments in response to the Sources Sought Notices *Housing Assistance Payments (HAP) Contract National Support Services (HAPNSS)(Formerly known as Performance-Based Contract Administrator (PBCA) Program) – Solicitation No. 86546A18R00001* and *Housing Assistance Payments (HAP) Contract Regional Support Services (HAPRSS) (Formerly known as Performance-Based Contract Administrator (PBCA) Program) – Solicitation No. 86546A18R00002*.

We are deeply concerned that, if HUD goes forward with the plans proposed in these documents, it will: fail to comply with statutory requirements that HUD contract with Public Housing Agencies (PHA); undermine the ability of rental assistance administrators to best serve the needs of assisted tenants, the properties in which they live, the communities in which those properties are situated, and, ultimately, HUD's stated goals; and turn its back on years of programmatic success and effective and loyal partners.

We strongly believe HUD's best course of action would be to reject the proposed approach and rethink whether it must proceed with a traditional procurement. HUD could achieve its goals more successfully by finding a way to renew existing Performance-Based Contract Administration (PBCA) contracts with different terms and pricing. This approach would allow HUD to update its PBCA contracts, improve pricing, and take advantage of the successful, well-positioned, and strategically important PHA partner network already in place.

If HUD determines it must proceed on its procurement path, it should seriously reevaluate the proposed plan and make major changes to it. The proposed plan would add undue risks to HUD and potentially shut out the most highly qualified bidders. It would also negatively

impact the 1.2 million vulnerable households that rely on project-based rental assistance (PBRA) and endanger affordable housing preservation efforts throughout the country. The rest of this letter will describe these concerns more fully.

NCSHA is a nonprofit, nonpartisan organization created by the nation's state HFAs more than 40 years ago to coordinate and leverage their federal advocacy efforts for affordable housing. State HFAs are mission-based, publicly accountable entities created under state law to promote and advance affordable housing in their states and communities. They operate as public or quasi-public agencies with statewide authority and qualify as Public Housing Agencies (PHAs) for purposes of administering federal housing assistance funded by HUD. Most have operated for several decades and have a distinguished track record in successfully administering federal and state housing programs. For years, 36 HFAs have acted as PBCAs, meeting and often exceeding performance expectations for assigned tasks on a state-by-state basis.

Our first and major concern with HUD's proposal is that it fails to comply with the legal requirement under the Housing Act of 1937 that HUD enter into rental assistance contracts only with PHAs. Secondly, we believe HUD should continue to define the PBCA scope of work and required tasks to encompass a comprehensive set of responsibilities that ensure full oversight of the financial and physical condition of assisted properties and owner compliance with applicable laws and requirements. Thirdly, we hold that HUD will achieve the best results if it allows—even encourages—that the PBCA work be done a state-by-state basis that leverages the substantial expertise and resources of state housing agencies.

Adhere to HUD's Statutory PHA Requirement

The Housing Act of 1937 (Housing Act) directs HUD to contract with PHAs to administer federal rental assistance contracts. The two draft RFPs together suggest that HUD is attempting to circumvent this legal obligation by ending the PBCA program and becoming the "sole government party to all HAP contracts" while contracting out all relevant PBCA functions. Hiring vendors to perform all activities associated with administering rental assistance contracts does not appear consistent with the Housing Act.

Rejecting the Housing Act may stem from a misguided belief that it is at odds with the Federal Acquisition Regulation (FAR) and the Competition in Contracting Act (CICA). It is not. In fact, an agency is exempt from the CICA requirement to "obtain full and open competition" if the agency's procurement is "otherwise expressly authorized by statute," as it is for project-based rental assistance contracts under the Housing Act.

Not only is this law clear, but contracting with PHAs is also advisable and justifiable on policy grounds because PHAs, including HFAs acting as PHAs, are publicly accountable, mission-driven entities devoted to the same affordable housing mission as HUD. Limiting applicants to PHAs is a reasonable and appropriate method of ensuring HUD's partners are driven by the same objectives and interests as HUD and will likely result in less intensive HUD training and capacity-building requirements and minimize HUD's supervisory responsibilities. Because of their mission, state HFAs take proactive approaches to reduce non-compliance and leverage their affordable housing resources to improve and preserve properties in their states, resulting in a direct savings to the federal budget.

Preserve PBCA's Comprehensive Scope of Work

As detailed in the two draft RFPs, HUD intends to bifurcate the PBCA scope of work between national and regional entities. The HAPNSS draft RFP has a Performance Work Statement (PWS) for national support services that includes HAP renewals, rent adjustments, and risk assessment for the entire national portfolio. The HAPRSS draft RFP includes a PWS for regional support services that largely mirrors the current PBCA scope of work except Housing Assistance Payment (HAP) contract renewals and rent adjustments.

Under HUD's current model, PBCAs handle the administration of all tasks for their respective jurisdictions. This structure allows information to flow smoothly across their organizations; if data impacts multiple tasks, PBCAs can respond holistically to ensure consistency of processing for all core tasks. As the sole provider of HAP contract administration services within their jurisdictions, PBCAs are accountable. HUD and governmental (congressional, state and local government) staff know whom to contact in order to communicate important policy and regulatory guidance or to ask property-specific questions that only the PBCA can answer because of its intimate relationship with the properties. Splitting and assigning tasks within a jurisdiction among multiple contractors will greatly diminish these benefits and increase program complexity.

Dividing these tasks will also necessitate coordination between contractors and likely lead to higher administrative costs and require more HUD oversight. It will sow confusion and could cause slower response times. For example, under HUD's proposed bifurcation, regional entities would be responsible for processing monthly HAP vouchers after rent adjustments are made by the national entity, either through contract renewals or rent adjustments. Despite the clear connection between these tasks, the draft RFPs provide no clear indication of how any interaction would occur between the two responsible entities or what recourse would be available should vouchers be delayed because of contract renewal delays. Communication flow appears to only happen by uploading forms to HUD or through written correspondence with a Contracting

Officer's Representative (COR), who may have no knowledge of the specific details concerning such actions and where any delays could result in disincentives.

Bifurcating PBCA-related tasks as HUD proposes would result in constant referrals to a COR for communication to other responsible parties and reverse communication with the owner/agent and responses through the same channel. This structure would not only add administrative burden for owners/agents and program administrators, but the complexity and confusion of dealing with multiple contractors could lead to more properties simply opting out of the program.

Splitting PBCA services would also increase risk to the Federal Housing Administration Mortgage Insurance Fund. Currently, HUD reports a 0.2 percent delinquency rate among multifamily programs, many of which are within the PBCA contract program. If administration breaks down and certain issues arise from the split of PBCA administration, the FHA Mortgage Insurance Fund will be liable when a development is unable to obtain proper guidance as a result of fractured oversight.

NCSHA recommends that HUD continue to define the PBCA-related scope of work and required tasks to encompass a comprehensive set of responsibilities that ensure full oversight of the financial and physical condition of assisted properties and owner compliance with applicable laws and requirements. This is the best way to ensure efficiency and efficacy in the program with limited oversight, while minimizing burden on owner/agents, tenants, and the program administrators.

Continue the Successful State-by-State Approach

The PBCA program has succeeded on a state-by-state platform, with individual PBCAs meeting—and usually exceeding—performance expectations in large part because of familiarity with their states' particular laws, regulations, and governance. State entities also possess valuable knowledge of local markets; cultivate strong working relationships with tenants, communities, owners, managers, and other housing policy-makers and stakeholders within their states; and have access to other housing resources, including many they administer themselves, that they can bring to bear to support their PBCA portfolios.

It would be short-sighted and detrimental to the PBCA program to move away from the state-by-state framework with HFAs as PBCAs, likely leading to confusion among stakeholders and increased costs to administer and oversee the program. This move would also adversely impact the ability to preserve and improve properties with Section 8 contracts. As Low Income Housing Tax Credits and other preservation resources are administered primarily by state HFAs, and as these resources are oversubscribed by a ratio of 3:1, it is essential for states to have access

to comprehensive and in-depth information about Section 8 properties and to be able to communicate effectively with the relevant parties, in order to direct scarce resources to those properties most at risk of physical deterioration or market conversion.

For current owners or potential buyers, state HFA expertise in the intricacies of HAP contracts and potential financing options makes them extremely effective in providing assistance to preserve HAP contracts, facilitate transfers of properties to preservation buyers, or develop a plan to address capital needs. Finally, state HFAs are in a unique position to bring together collaborative working groups composed of federal, state, and local public agencies, intermediaries, and owners to preserve specific properties and larger portfolios.

Provide a Level Playing Field for HFAs and Other PHAs

NCSHA is confident that a state-by-state approach would comply with FAR and CICA and is justifiable—and preferable—on legal, policy, and efficacy grounds to other approaches. However, if HUD proceeds with a regional or national approach, state HFAs are prepared to explore how they could administer the PBRA contracts under such a scenario through cooperative or similar entities. Because of the legal, administrative, and policy obstacles that forming and coordinating such entities must overcome, we urge HUD to eliminate any barriers to such arrangements that are under its control and provide sufficient time for all eligible bidders to respond to the RFPs.

State HFAs are governmental entities and are subject to statutory and regulatory requirements that must be adhered to when both structuring a response and responding to a RFP. The creation of a qualifying structure, under a regional or national approach, will take time and could require approval at multiple levels of state government, such as governors, attorneys general, and HFA boards of directors. HUD must recognize that HFAs have requirements that private companies do not have and HUD must provide a reasonable response time for HFAs to prepare proposals. NCSHA strongly recommends that HUD provide a minimum of 90 days for responses.

In addition, the draft RFPs include many elements that may complicate or even preclude HFAs forming such regional entities. To ensure the best possible pool of potential bidders, HUD should eliminate these elements. For example,

- State HFAs may not be able to share the risk or profit outside of their jurisdictions.
- According to federal procurement regulations, only for-profits are eligible to be small businesses. This limitation unfairly disadvantages HFAs that already abide by state procurement rules that allow nonprofits to be considered small businesses.

- Even if some bidders were to get waivers for the small business set-aside, they would still be disadvantaged as they would not be eligible to receive the points associated with this evaluation factor.
- The labor standards clause disadvantages high cost areas because the economic model is based on where labor is located. This treats unfairly state entities that cannot simply move locations, especially out of their jurisdictions, as other entities could to lower their labor costs.

Recognize State Sovereignty

HUD must ensure that it selects entities that have clear authority to administer federal rental assistance contracts in and throughout each state they propose to serve. More than 20 state Attorney General opinions suggest that out-of-state entities cannot lawfully operate within those states under state law.

Comments and Questions on both HAPNSS and HAPRSS Draft RFPs

The HAPNSS and HAPRSS draft RFPs separate interrelated tasks between national and regional entities. Beyond this structural flaw, the documents also contain many outstanding questions and inconsistencies that require attention.

Contract Award Restrictions and Limitations

In the HAPRSS draft RFP, HUD states that it has identified a need to restrict the number of awards. It does so not by limiting the number by state or even by region, but rather HUD intends to award 15 sub-regional contracts. HUD then sets limits so that a contractor can only bid on two contracts per region and no more than two regional areas. NCSHA encourages HUD to explain why it has made such a determination as to size of contracts as well as number of contractors.

NCSHA is concerned that, under this approach, contracts could become too concentrated, as a HAPRSS contractor could seemingly also be the HAPNSS contractor. Entities intending to submit both a HAPNSS proposal and one or more HAPRSS proposals can realize a higher revenue stream than those that submit for only HAPRSS. Such entities can low-bid the HAPRSS RFP, with the possibility of making a significant profit on HAPNSS. Combined national and regional offerors would have a distinct unfair advantage regarding pricing and could low-bid the regional tasks.

Under this scenario, one entity could be responsible for all PBCA-related tasks for 27

percent of the entire portfolio in addition to handling 100 percent of all the tasks detailed in the HAPNSS RFP. This concentration is concerning enough, but HUD has also inserted a peculiar clause in the HAPRSS draft RFP that would allow it to noncompetitively realign contracts “for any reason” and thus further concentrate who provides these services. NCSHA strongly recommends that HUD change this approach and distribute work more broadly and evenly by awarding contracts for a comprehensive scope of work at the state level.

Vague Communication Structure with COR

In both draft RFPs, contractors would work with a COR, although there are few details on this position and the communications structure between the CORs for the national and regional entities. Is this a new HUD position? What technical training will the COR have? Will the COR be at HUD’s headquarters or a local field office? Will the COR be the same for the national and regional entities? The draft RFPs also fail to adequately address if sub-contractors will be able to communicate directly with HUD and what the communication system would be. NCSHA urges HUD to fully develop and describe these communication structures in its final procurement proposals. We would also add that these outstanding questions and the potential for confusion bolster the argument against bifurcating the scope of work.

Evaluation Factors

The draft RFPs list several factors that will be used in awarding contracts but lack clarity in the actual mechanics of such evaluations, including any thresholds or point systems. Further, the evaluation factors could be unfair to entities such as state HFAs. For example, the draft RFPs make small business participation a factor for award and HUD states its subcontracting goal is 55 percent. This is clearly unfair to many state HFAs that utilize internal staff to perform these tasks. Furthermore, each HFA is a government agency and does not qualify as a small business. It is clearly unfair to utilize a factor for award that many offerors cannot meet. NCSHA recommends that either the small business factor for award be eliminated or an offset should be awarded to entities performing all tasks in-house. Failing to allow for such differences in entity models would unfairly harm and restrict HUD’s ability to gain the benefit of working with otherwise qualified bidders.

The draft RFPs also include “best value” as an evaluation factor. While we were pleased to see that HUD realizes that the lowest cost may not be the best overall value, we are concerned that the definition—“the expected outcome of the acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement”—is too vague. Instead, we encourage HUD to recognize in this consideration a shared mission and public purpose, experience with and access to state and federal programs, and familiarity with state and local housing markets and needs.

Comments and Questions Specific to HAPNSS Draft RFP

The HAPNSS draft RFP calls for HAP Contract support services, including renewing contracts, adjusting contract rents, and performing risk assessments in assigned portfolios of properties yet skates over the volume of work. This information is critical to determine capacity and needs to be included in any further draft or final RFP.

The draft RFP is also vague in its description of HAP Contract Opt-Out and Termination support tasks. We urge HUD to include more clarification here as these tasks have a significant impact on preservation efforts, Section 8bb procedures, and HAP contract bifurcations.

Comments and Questions Specific to HAPRSS Draft RFP

The HAPRSS draft RFP calls for support services that largely mirror current PBCA work but also add some features and requirements. The draft RFP also raises numerous questions and requests for clarification and reconsideration. First, in *Attachment J.1 Multifamily Regions and Sub-Regions*—a breakdown of how HUD intends to award contracts at a sub-regional level—it appears that subregions were created largely to make the number of properties in each sub-region roughly equivalent. Was this HUD's intention or was there another reason for this structure? It also appears that the number of properties listed in each sub-region are greater than the total properties assigned to current PBCAs. What is the reason for this discrepancy? Further, Alaska wasn't included in any sub-region. Does HUD intend to end the contract or was this an error? NCSHA urges HUD to respond to these inquiries, and to share property locations in future draft or final RFPs so that offerors are able to determine travel costs for pricing.

Clarify Evaluation Plans

In the HAPRSS draft RFP, HUD states that it will develop a Quality Assurance Surveillance Plan (QASP) to assess performance; however, it provides no additional information. NCSHA urges HUD to provide details, including when and how often HUD would conduct such reviews, as well as if there will there be an opportunity to appeal and how will findings be issued.

Option to Increase/Decrease the Geographic Service Area is Highly Problematic

As briefly discussed earlier in these comments, NCSHA is deeply concerned with Section H.1. Option to Increase/Decrease the Geographic Service Area, which apparently provides HUD carte blanche to realign contracts among regional entities. HUD states its intention is to incentivize high performers by expanding their geographic service area and provide a

disincentive for nonperformance by reducing their geographic service area. What determines high performers versus contractors that fail to meet expectations, especially with no information provided on the QASP? Will HUD provide contractors an opportunity for appeal or correction? HUD doesn't limit its ability to realign contracts based on performance, though; it also "reserves the right to realign for any reason." HUD's stated unilateral ability to change the regional composition is also extremely problematic for public entities with potential jurisdictional authority and limitations. NCSHA strongly urges HUD to remove Section H.1, as the draft RFP already establishes disincentives to deter poor performance, and this section would only serve to create unpredictability within the program.

Thank you for this opportunity to share NCSHA's reaction to these draft RFPs. If HUD proceeds with procurement, it is critical that it get it right by contracting only with PHAs, pursuant to the Housing Act; ensuring applicants have the legal authority to administer federal rental assistance contracts in and throughout each state they propose to serve; and continuing to define the PBCA scope of work and required tasks to encompass a comprehensive set of responsibilities. Additionally, to ensure high-quality applications, HUD should allow plenty of time for applicants to assemble comprehensive and well-thought-out responses.

Please contact me should you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Garth Rieman", with a long horizontal flourish extending to the right.

Garth Rieman
Interim Executive Director