



National Council of
State Housing Agencies

July 11, 2023

The Honorable Marcia L. Fudge
Secretary
U.S. Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410

RE: Section 237 of the General Provisions of the Department's Fiscal Year 2024 Budget Request

Dear Secretary Fudge:

The National Council of State Housing Agencies (NCSHA),¹ on behalf of its state Housing Finance Agency (HFA) members, respectfully offers these comments on proposed statutory language included as Section 237 in the Department's Fiscal Year 2024 (FY24) Budget Request (Section 237), related to the Performance-Based Contract Administrator (PBCA) program. NCSHA is a nonprofit, nonpartisan organization created to advance, through advocacy and education, the efforts of the nation's state HFAs and their partners to provide affordable housing to those who need it.

NCSHA agrees legislation is necessary and appropriate in light of the previous ruling by the U.S. Court of Appeals for the Federal Circuit regarding the PBCA program and Congress's recent action prohibiting HUD from proceeding with the procurement it proposed last summer and directing HUD to propose legislation if necessary to take a different approach. We recognize HUD's intent to rebid the PBCA work and the importance of having a method for bringing on new PBCAs in cases where an existing PBCA does not wish to continue or HUD believes replacing them is necessary.

Despite its intent and efforts, for a variety of reasons, HUD has struggled over several years to rebid the PBCA work. Therefore, we welcome the Department's most recent efforts to engage meaningfully, in collaboration with Congress and PBCA program stakeholders, to chart

¹ NCSHA is a nonprofit, nonpartisan organization. None of NCSHA's activities related to federal legislation or regulation are funded by organizations that are prohibited by law from engaging in lobbying or related activities.

a path forward and resolve outstanding issues related to a potential PBCA rebid. NCSHA supports the elements of HUD's proposal that would authorize it to engage public housing agencies, including state HFAs, as PBCAs through cooperative agreements and to solicit PBCAs on a state-by-state basis via a Notice of Funding Opportunity (NOFO).

We believe the proposal should be strengthened by establishing criteria that prioritize the selection of applicants with statewide program experience; affordable housing mission; financing expertise; strong relationships with tenants, owners, managers, and other affordable housing stakeholders throughout the state; and control over state and local resources that can be brought to bear on preserving, improving, and maintaining Section 8-assisted properties as affordable housing that best meets the needs of their tenants and communities.

We understand that some parties object to the use of cooperative agreements for the PBCA program, question HUD's authority to enter into cooperative agreements under the United States Housing Act of 1937 (Housing Act), and believe HUD cannot continue to enter into Annual Contribution Contracts (ACC) with PBCAs if it follows a NOFO-cooperative agreement system. We do not share these views.

Section 8 of the Housing Act, as amended (42 U.S.C. 1437f) authorizes HUD to enter into agreements with state and local public housing agencies (PHAs) by which the parties jointly provide project-based rental assistance (PBRA) to low-income families. Pursuant to this authority, HUD has partnered for decades with state HFAs and other PHAs to oversee Project-Based Section 8 Rental Assistance (PBRA) payments, contract renewals, property inspections, and rent increases.

This long partnership has been very successful. As state-based, mission-driven organizations, HFAs have a deep knowledge of local housing markets and priorities, as well as robust relationships with the PBRA property owners and tenants they serve. These connections facilitate efficient and effective implementation of PBRA contracts, timely response to tenant complaints, and the leveraging of other federal and state resources to maintain affordability. In short, the interests of HFAs and HUD in the effective management of the PBRA program are in near-perfect alignment and a proven track record attesting to the value of the program.

Through the issuance of ACCs as cooperative agreements, HUD can continue the program in much the same manner as it exists today, exert its inherent discretion and authority to allocate Section 8 funds to the greatest extent possible, and empower states to maintain their role overseeing and preserving affordable housing properties and retain PBRA resources within their states, based on each state's unique needs and circumstances as assessed by HUD and each state PBCA.

Any cooperative agreements issued by HUD should and can, at a minimum, assign the responsibilities currently included within the ACCs for the Section 8 PBCAs in order to assist HUD in "address[ing] the shortage of housing affordable to low-income families" (42 U.S.C. § 1437(a)(1)(B)). Such assistance is well within the scope of a cooperative agreement, which as defined is designed to "carry out a public purpose authorized by a law of the United States" (2 C.F.R. 200.1). A procurement subject to the Competition in Contracting Act (CICA), however, would result in a procurement process and contract that imposes more administrative burdens, limitations, and costly compliance hurdles for HUD and PBCAs, potentially undermining some of the best features of the current PBCA program, including its flexibility and success in leveraging and forging effective partnerships between HUD and PBCAs on behalf of affordable housing properties and residents.

Furthermore, using cooperative agreements for the PBCA program should not prevent HUD from continuing to use the ACC to structure and formalize those agreements. An ACC can be a cooperative agreement. All grants, including cooperative agreements, are inherently "contracts" as they are at their base an agreement between two parties. Both a procurement contract and a cooperative agreement are defined in part as a "legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient..." (Compare 31 USC § 6303 with 31 USC § 6305.) While the terms grant, cooperative agreement, and contract have different statutory definitions (see 31 USC §§ 6303-6305), the differences are focused on HUD's role and do not preclude the parties from negotiating terms or allow HUD to unilaterally dictate the terms.

Because of the U.S. Court of Appeals decision, concerns about HUD's use of cooperative agreements for the PBCA program, and problems with traditional procurements for the PBCA work, we believe Congress must authorize HUD to enter into cooperative agreements with HFAs and potentially other PHAs on a state-by-state basis, which would be consistent with HUD's present state-by-state approach, and continue using the incentive-based compensation methodology set forth in the current ACCs. This is really the only way to continue this high-performing program without sacrificing key elements fundamental to its success.

Under cooperative agreements, HUD will be able to continue delegating key elements of administering PBRA to PBCAs and maintain the productive partnerships with HFAs and PHAs to meet the needs of the citizens both HUD and the PBCAs serve. Cooperative agreements allow for close collaboration and coordination to manage and preserve critical units of PBRA housing in communities around the country.

With the proper statutory authority, which we believe a slightly revised version of Section 237 could provide, HUD would be able to move forward with soliciting and selecting PBCAs through a NOFO and entering into cooperative agreements with PBCAs to handle the important work of overseeing the management and operation of HUD-assisted affordable housing. We look forward to this happening.

We hope these comments are helpful and look forward to continuing to work with you to ensure the successful ongoing management and preservation of our nation's PBRA housing stock through effective collaboration as PBCA partners.

Sincerely,

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

Garth Rieman
Director of Housing Advocacy and Strategic Initiatives

cc: Julia Gordon
Ethan Handelman
Elayne Weiss