



## MEMORANDUM

Re: Background and Talking Points for HUD PBCA Stakeholder Meeting

Date: January 2024

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This memorandum provides legal and policy history on Performance Based Contract Administration (PBCA) procurement, information about HUD's most recent legislative PBCA proposal and current congressional proposals, and NCSHA talking points on the PBCA issue.

### **Legal and Policy History**

Section 8 of the United States Housing Act of 1937, 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 housing assistance to low-income families. Under Section 8's project-based rental assistance program (PBRA), HUD subsidizes rents for low-income families residing in certain housing units.

For many years, HUD provided PBRA in one of two ways: either by negotiating its own housing assistance payment (HAP) contracts directly with private owners, or by entering into annual contribution contracts (ACCs) with state and local PHAs, which would then enter into HAP contracts with private owners.

In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act (MAHRA), which authorized HUD to replace expiring HAP contracts with new contracts. However, MAHRA's stated goal was to "transfer and share many of the loan and contract administration functions and responsibilities . . . with capable state, local and other entities." HUD was therefore prohibited from entering into HAPs directly with project owners, and instead permitted only to enter into ACCs with PHAs.

In 1999, HUD initiated a competition to award an ACC to a PHA in each of the 50 states (including two in California), along with the District of Columbia and Puerto Rico, under which each selected PHA would assume responsibility for all HAP contracts within the state. HUD's notice of competition at the time explicitly stated that the solicitation was "not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR)."

In 2009, the HUD Office of Inspector General (OIG) audited the ACCs and issued a report finding that HUD did not obtain best value for funds spent on PBCA services through existing ACCs.

The report recommended that HUD determine a more cost-effective method of performing PBCA tasks.

In 2011, HUD decided to recompete the ACCs. Many incumbent PHAs that had been awarded ACCs in the 1999 competition opposed this decision and filed post-award protests of the new awards. HUD responded by withdrawing the ACC awards for certain states, and, in 2012, issued a new solicitation for ACCs in those states through a Notice of Funding Availability (NOFA), which contemplated the use of “cooperative agreements” to formalize the contractual relationship between PHAs and HUD. The 2012 NOFA stipulated that HUD would consider applications from out of state PHAs only in states where an in-state PHA did not apply.

In 2012, the U.S. Government Accountability Office (GAO) issued an opinion that HUD should have issued the ACCs as procurement contracts as opposed to cooperative agreements. HUD nevertheless proceeded with the 2012 NOFA as originally issued. At that time, a number of entities filed protests in the Court of Federal Claims (CFC) to enjoin HUD from proceeding under its 2012 NOFA, which resulted in significant litigation over the issue.

In April 2013, the CFC ruled in HUD’s favor, noting that “the consistent policy of the Housing Act has been for HUD to implement federal housing goals through close cooperation and coordination with the states.” An appellate court reversed the CFC’s decision, however; HUD then sought certiorari from the Supreme Court but was unsuccessful.

In 2016, HUD contracted with Deloitte to prepare a report making recommendations to address outstanding concerns with the PBCA program and to procure new PBCA contracts. Among the findings in its report, Deloitte suggested that “[t]he workload associated with awarding 53 ACCs and monitoring the performance of each PBCA . . . creates many potential areas for inconsistencies, a lack of standardization, and a large administrative burden” for the Department. The report further recommended a PBCA procurement consisting of “up to three multiple award Indefinite Delivery, Indefinite Quantity (IDIQ) contracts in each of ... five regional areas.” The report envisioned a total of 15 IDIQ contracts signed across the five regions and would inform HUD’s PBCA procurement activity for the foreseeable future.

In December 2017, HUD published draft Requests for Proposals (RFPs) soliciting bids for national and regional PBCA contractors. This provided the first opportunity to see how HUD intended to procure this work in the wake of the prior litigation as well as the Deloitte report. Stakeholders, including NCSHA, overwhelmingly responded that, if implemented, the plans would be detrimental to the long-term federal investment in the performance-based rental assistance (PBRA) portfolio and to the 1.2 million vulnerable households who rely on this housing.

In March 2018, HUD cancelled these draft RFPs. In its Joint Explanatory Statement on FY 2018 Appropriations, the House and Senate Appropriations Committees agreed with HUD’s decision to cancel the solicitations, citing “overwhelming stakeholder response” and directed HUD,

within 90 days of enactment of the omnibus, to report on the staffing and funding needs that would be necessary to undertake a state-by-state contracting methodology.

In July 2022, HUD issued a new solicitation to procure PBCA contracts which would have had similar negative impacts as the 2017 RFP, in this case by replacing state-level administration of PBCA contracts with large, regional entities and effectively prohibiting HFAs from bidding, thus ending decades of successful partnership with HUD. Again, however, in light of extensive stakeholder engagement, including by many HFAs, the House and Senate Appropriations committees responded by including bill text in the FY 2023 appropriations legislation explicitly prohibiting HUD from proceeding with a procurement action identical or substantially similar to the one issued in July 2022. HUD also was directed by Congress to conduct effective stakeholder outreach prior to initiating further procurement activity related to the PBCA contracts.

### **Current Legislative Proposals**

#### *HUD Proposal (FY 2024 HUD Budget)*

SEC. 237. Notwithstanding sections 3(b) and 8 of the United States Housing Act of 1937 (the Act) and chapter 63 of title 31, United States Code, amounts made available to the Secretary in this or any prior Act under the headings "Project-Based Rental Assistance" or "Housing Certificate Fund" for performance-based contract administrators to carry out section 8 of the Act (42 U.S.C. 1437f), as implemented by the Secretary in chapter VIII of title 24, Code of Federal Regulations, may be awarded through a Notice of Funding Opportunity not subject to procurement laws or regulations: Provided, That such awards shall be deemed for all purposes to be cooperative agreements: Provided further, That for purposes of such Notice, eligible applicants are public housing agencies as defined by section 3(b)(6)(A) of the Act and nonprofits of such agencies when operating outside of the State or territory in which such agency is established: Provided further, That the Secretary shall award one cooperative agreement for each State or territory, except that the Secretary may award more than one cooperative agreement for a State or territory if the population of such State or territory exceeds 25,000,000: Provided further, That the Secretary may select the best qualified applicant regardless of whether it operates within the jurisdiction of the State or territory served: Provided further, That if the Secretary does not select a qualified applicant under such Notice, the Secretary may utilize a procurement contract subject to all procurement laws and regulations to assist in carrying out such section 8.

#### *Senate-Passed THUD Bill Language*

Sec. 251. Notwithstanding section 3(b)(6) of the United States Housing Act of 1937 (the Act) and chapter 63 of title 31, United States Code, amounts made available to the Secretary in this or any prior Act under the headings "Project-Based Rental Assistance" or "Housing Certificate Fund" for performance-based contract administrators to carry out section 8 of the Act (42 U.S.C. 1437f), as implemented by the Secretary in chapter VIII of title 24, Code of Federal Regulations, may be awarded through a Notice of Funding Opportunity (NOFO) not subject to procurement laws or regulations: Provided, That such awards shall be deemed for all purposes to be cooperative agreements: Provided further, That for purposes of such NOFO,

eligible applicants are public housing agencies as defined by section 3(b)(6)(A) of the Act and nonprofits of such agencies when operating outside of the State or territory in which such agency is established, notwithstanding any provisions of such section 8(b) to the contrary: Provided further, That the Secretary shall award one cooperative agreement for each State or territory, except that the Secretary may award more than one agreement for a State or territory if the population of such State or territory exceeds 35,000,000: Provided further, That any cooperative agreements issued by the Secretary shall, at minimum, assign the rights and responsibilities as provided in section 8 of the Act: Provided further, That the Secretary shall assign such rights and responsibilities to the furthest extent possible to ensure effective and efficient program oversight and monitoring: Provided further, That when selecting a performance-based contract administrator, the Secretary shall provide a preference to applicants that have demonstrated experience with properties receiving project-based assistance, experience in multifamily housing preservation, addressing the concerns of low-income tenants, making assistance payments to owners, and performing the other functions assigned to a public housing agency under section 8(b) of the Act: Provided further, That if no qualified applicant applies under NOFO, the Secretary may utilize a procurement contract subject to all procurement laws and regulations to assist in carrying out section 8 of the Act: Provided further, That the Secretary shall provide for incentive-based fees as part of such awards.

*House THUD Subcommittee Report Language*

The Committee understands that HUD continues to work to develop a new solicitation for PBCA contracts that takes into account decisions by the Federal Circuit and Court of Appeals, complies with the Competition in Contracting Act, and meets requirements under the Federal Acquisition Regulations. The Committee reiterates that it is HUD's responsibility to implement a new competition and award procedure that includes stakeholder comments, full and open competition, and is compliant with all Federal laws and regulatory requirements.

### **Talking Points**

Housing Finance Agencies (HFAs) and other PHAs have overseen Project-Based Section 8 Rental Assistance (PBRA) payments, contract renewals, property inspections, and rent increases for decades. As state-based, mission-driven organizations, HFAs have a deep knowledge of local housing markets and their needs, 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. Recent attempts by HUD to obtain regionalized PBCA services through a competitive procurement subject to the Competition in Contracting Act, if successful, would have placed state HFAs at a competitive disadvantage while harming the level of service provided to PBRA property owners and tenants.

- The Housing Act of 1937 explicitly requires HUD to partner with PHAs for the administration of federal rental assistance.

- PBCAs are integral to HUD's efforts to be more effective and efficient in the oversight of the project-based rental assistance portfolio, maintaining and protecting the long-term historic federal investment in this affordable housing.
- For years, 33 state HFAs have acted as PBCAs, meeting and often exceeding performance expectations on a state-by-state basis.
- HFAs have been successful PBCAs in large part because of their familiarity with their states' particular laws, regulations, and governance.
- State HFAs also possess valuable knowledge of local markets; cultivate strong working relationships with tenants, communities, owners, managers, and other housing policymakers 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.
- Many HFAs make significant investments in their PBCA portfolios that exceed the compensation they receive through their contracts with HUD, including for preserving HUD-assisted affordable housing.

Accordingly, State Housing Finance Agencies (HFAs) would like to see the following expressly acknowledged by HUD and/or included in legislation to be adopted by Congress through either appropriations or authorizing legislation.

- HUD should use cooperative agreements to select State Housing Finance Agencies or other Public Housing Agencies (PHAs) for performance-based contract administrators (PBCAs).
- HUD should award those cooperative agreements through a Notice of Funding Opportunity not subject to the FAR. The cooperative agreement should continue using the compensation methodology in the current ACC and provide for an incentive-based administrative fee percentage (percentage multiplied by the fair market rent for a two-bedroom unit) to the extent feasible.
- HUD should award one cooperative agreement for each state or territory (except in the case of California).
- Any cooperative agreement issued by HUD should, at minimum, assign the responsibilities currently included within the Annual Contributions Contracts for the Section 8 PBCAs. In addition, HUD should delegate policy discretion and authority for Section 8 funds to the greatest extent possible and empower states to retain PBRA budget authority within their state based on the needs of the local housing market.
- When selecting a PBCA, HUD should provide a preference to in-state experience and to the proposer's ability to leverage other federal and state resources to maintain safe, stable, and affordable housing and to improve the quality of life for low-income tenants and families.
- If an entity that may be selected as the PBCA for a state or territory is not authorized to administer Section 8 funds statewide under state law, then HUD should offer a right of first refusal to an interested and qualified statewide entity that is authorized to do so.