

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2013-5093

CMS CONTRACT MANAGEMENT SERVICES,
THE HOUSING AUTHORITY OF THE CITY OF BREMERTON,
NATIONAL HOUSING COMPLIANCE,
ASSISTED HOUSING SERVICES CORP., NORTH TAMPA HOUSING DEVELOPMENT
CORP., CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC., SOUTHWEST
HOUSING COMPLIANCE CORPORATION, and NAVIGATE AFFORDABLE HOUSING
PARTNERS

(formerly known as Jefferson County Assisted Housing Corporation),

Plaintiffs-Appellants,

v.

MASSACHUSETTS HOUSING FINANCE AGENCY,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellee

Appeal from the United States Court of Federal Claims in consolidated case
Nos. 12-CV-0852, 12-CV-0853, 12-CV-0862, 12-CV-0864, and 12-CV-0869,
Judge Thomas C. Wheeler

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OPINION AND ORDER

WHEELER, Judge.

This consolidated bid protest involves five substantially equivalent suits challenging a 2012 Notice of Funding Availability (“NOFA”) issued by the U.S. Department of Housing and Urban Development (“HUD”). The purpose of the NOFA is to fund HUD’s Performance-Based Contract Administrator (“PBCA”) Program for the administration of Project-Based Section 8 Housing Assistance Payment Contracts. HUD plans to award 53 state-wide contracts to Public Housing Authorities (“PHAs”) for the oversight and administration of certain housing subsidy contracts with the private owners of multifamily housing projects. Plaintiffs are Public Housing Authorities and their non-profit subsidiaries and they allege that certain terms of the NOFA, in particular a preference given to in-state applicants, are in violation of the Competition in Contracting Act and the Federal Acquisition Regulation. The Government voluntarily has refrained from awarding the contracts pending the issuance of the Court’s decision in this protest.

¹ When it entered this litigation, Navigate Affordable Housing Partners was known as Jefferson County Assisted Housing Corporation.

HUD does not dispute that the NOFA fails to meet the competitive requirements mandated by federal procurement laws and regulations. Instead, it argues that these requirements are inapplicable to the contracts it plans to award under the NOFA because they are not “procurement” contracts at all, but rather are assistance agreements outside the domain of procurement law. Based on this position, the Government moves to dismiss Plaintiffs’ claims for lack of subject matter jurisdiction and, in the alternative, for judgment on the administrative record. The Plaintiffs oppose both of these motions and cross-move for judgment on the administrative record.

Reaching a decision in this matter has required the Court’s review of a morass of arcane housing assistance statutes and regulations. After performing this review, and for the reasons explained below, the Court finds that the Government is entitled to judgment on the administrative record because the contracts in question are properly classified as cooperative agreements, not procurement contracts.

Background

In 1974, Congress amended the Housing Act of 1937 (“1937 Act” or “1937 Housing Act”) to create what is known as the Section 8 Housing Program (“Section 8 Program”). See 42 U.S.C. § 1437f *et seq.*; Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974). Created “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing,” 42 U.S.C. § 1437f(a), the Section 8 Program provides federally-subsidized housing to millions of low-income families and individuals through a range of rental assistance programs, both tenant- and project-based. Under all types of Section 8 programs, tenants make rental payments based upon their income and ability to pay, and HUD then provides, under various delivery mechanisms, “assistance payments” to private landlords to make up the difference between the tenant’s contribution and the agreed-upon “contract rent.” 42 U.S.C. § 1437f *et seq.*; see also, e.g., Park Village Apartment Tenants Ass’n v. Mortimer Howard Trust, 636 F.3d 1150, 1152 (9th Cir. 2011) (describing the program); Park Props. Assocs., L.P. v. United States, 82 Fed. Cl. 162, 164 (2008) (same).

The tenant-based Section 8 program, which is perhaps the better known of the two types of assistance, involves HUD’s provision of a limited number of “Housing Choice Vouchers” to local PHAs throughout the country. The PHAs distribute the vouchers to eligible low-income individuals and families who may use the vouchers to help them obtain eligible private-market rental units of their choice,² within certain cost parameters. Generally, these vouchers are portable, in that the tenant may carry the benefit of the

² Eligible units are those that meet HUD-established standards for decent, safe, and sanitary housing and that are owned by a landlord willing to accept the voucher. See 42 U.S.C. § 1437f(f)(7) and (o); 24 C.F.R. § 982.1(b)(1).

voucher to a new rental unit should he or she decide to move. 24 C.F.R. Part 982; see also, e.g., Graoch Assocs. #33, L.P. v. Louisville / Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 380 (6th Cir. 2007) (Merritt, J. concurring) (explaining operation of tenant-based program); Langlois v. Abington Hous. Auth., 207 F.3d 43, 45 (2d Cir. 2000) (same).

The dispute in this case involves the second, lesser-known type of Section 8 assistance, which is project-based. Like the voucher holders, beneficiaries of project-based Section 8 programs³ make income-based rental payments, with the difference between that payment and the contract rent made up by the program. However, as the name of this program suggests, project-based rental assistance is attached to specific units or buildings owned by private-sector landlords. Thus, project-based assistance is not portable, and when a tenant vacates a subsidized unit, the benefit becomes available to the unit's next occupant. See 42 U.S.C. § 1437f(f)(6).

The Section 8 Program has undergone many statutory revisions since its enactment in 1974, and a close examination of the revisions, as well as HUD's responses to the same, is necessary to the resolution of the issues now before this Court. Accordingly, the Court will outline the most significant portions of this statutory and program history below.

³ HUD asserts, and Plaintiffs do not contest, that there are seven separate project-based Section 8 programs directly at issue in this bid protest: (1) the Housing Assistance Payments ("HAPs") Program for New Construction (24 C.F.R. Part 880); (2) the HAPs Program for Substantial Rehabilitation (24 C.F.R. Part 881); (3) the HAPs Program for State Housing Agencies (24 C.F.R. Part 883); (4) the HAPs Program for New Construction Set-Aside for Section 515 Rural Rental Housing Projects (24 C.F.R. Part 884); (5) the Loan Management Set-Aside Program (24 C.F.R. Part 886 Subpart A); (6) the Housing Assistance Program for the Disposition of HUD-Owned Projects (24 C.F.R. Part 886 Subpart C); and (7) the HAPs Program for Section 202 Projects (24 C.F.R. Part 891). See HUD Mem. at 5 n.4.

In addition, HUD asserts, and Plaintiffs do not contest, that two other project-based Section 8 programs, while not directly at issue in this case, bear the potential to be affected by its outcome: the Moderate Rehabilitation Program (24 C.F.R. Part 882 Subparts A – G); and the Moderate Rehabilitation Single Room Occupancy Program for Homeless Individuals (24 C.F.R. Part 882 Subpart H). These programs are administered by HUD's Office of Public and Indian Housing and Office of Community Planning and Development, respectively. See HUD Mem. at 5 n.4.

In the interest of simplicity, however, the Court will refer throughout this opinion to all of these programs collectively, and in the singular, as the "project-based Section 8 program."

I. The Pertinent Statutes

A. The Housing and Community Development Act of 1974

As noted above, the Section 8 Program first came into being with the enactment of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974) (“1974 Housing Act” or “1974 Act”), which amended certain provisions of the 1937 Housing Act. At the time it was enacted, and as relevant to this case, Section 8, subsection (a) of this Act provided that “[rental] assistance payments may be made with respect to” three categories of housing: “[(1)] existing, [(2)] newly constructed, and [(3)] substantially rehabilitated housing.” 88 Stat. 662-63, codified at 42 U.S.C. § 1437f(a)(1). Section 8, subsection (b), in turn, distinguished the proper administration of the program according to the type of housing in question, as follows:

- (1) The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of *existing* dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.
- (2) To the extent of annual contributions authorizations under section 5(c) of this Act, the Secretary is authorized to make assistance payments pursuant to contracts with *owners or prospective owners who agree to construct or substantially rehabilitate housing* in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners or prospective owners.

88 Stat. 662-63 (emphasis added).

Thus, subsection (b)(1), which remains in effect as initially enacted, governs *existing* housing, and provides that in administering this segment of the Section 8 Program, HUD is, whenever possible, to enter into “annual contributions contracts” (“ACCs”) with PHAs holding jurisdiction over the locality in question. The PHAs, in turn, contract with owners of private housing “to make assistance payments ... in accordance with this section.” This second contract, to which the owner is a party and through which that entity receives the assistance payment, is known as the Housing Assistance Payment (“HAP”) contract. 24 C.F.R. § 880.201. Under the terms of the

ACC, HUD provides the PHA with funds to cover (1) the housing assistance payments that the PHA, through the HAP, makes to owners, and (2) the costs of the PHA's administrative services related to the program. 24 C.F.R. § 982.151(a)(1). Importantly, under subsection (b)(1) HUD is authorized to bypass the PHA and enter directly into a HAP contract with an owner of existing housing *only* in jurisdictions where no qualified local PHA exists.

In contrast, subsection (b)(2), which has since been repealed – but which as explained below has enjoyed a rather complicated afterlife – governed both *new* and *substantially rehabilitated* housing. Under subsection (b)(2), HUD could subsidize low-income housing by *either* (i) entering into HAP contracts directly with owners or prospective owners of multifamily housing, including, in some instances, PHAs that themselves built or rehabilitated qualifying housing (“sentence one” projects), *or* (ii) establishing ACCs with local PHAs, pursuant to which the PHAs would, in turn, enter into HAP contracts with the owners or prospective owners of multifamily housing (“sentence two” projects). Thus, subsection (b)(2) authorized three possible, and non-exclusive, program designs: (1) private-owner / HUD projects, (2) PHA-owner / HUD projects, and (3) private-owner / PHA projects. See, e.g., 24 C.F.R. § 880.201 (noting these configurations).

At its inception, subsection 8(b)(1) was primarily intended to support tenant-based programs. In 1998, however, the Quality Housing Work Responsibility Act (“QHWRA”), Pub. L. No. 105-276, §§ 545, 550, relocated the authority for tenant-based programs to Section 8(o), codified at 42 U.S.C. § 1437f(o). However, subsection (b)(1) has also supported certain specific project-based programs.

With respect to subsection (b)(2), in the approximate decade following the enactment of the 1974 Act, HUD implemented its authority in, broadly speaking, two ways. First, under its “sentence one” authority, HUD entered into approximately 21,000 HAP contracts with owners who either constructed or substantially rehabilitated qualifying housing. Although HUD was authorized to enter into such contracts with both private owners and PHA-owners, as a matter of practice the vast majority of these “sentence one” HAP contracts were with private owners. See AR 1418, 53 Fed. Reg. 8050 (March 11, 1988) (noting that less than 10 percent of HUD's project-based HAP contracts were for PHA-owner / HUD projects). Pursuant to program regulations, HUD served as the “Contract Administrator” for all of these HAP contracts, the terms of which were generally 20 to 40 years. 24 C.F.R. § 880.201; 88 Stat. 665 (limiting HAP contracts to these terms unless owned or financed by a state or local agency); AR 1702 (HUD Occupancy Handbook).

Second, pursuant to its “sentence two” authority, HUD entered into ACCs with PHAs, which in turn entered into HAP contracts with private owners. Approximately 4,200 such HAP contracts originated in this manner. AR 428 (1999 Request for

Proposals, discussed below); HUD Supp. Mem. at 9-10. The PHAs served as the Contract Administrator for these HAP contracts. 24 C.F.R. § 880.201.

B. The Housing and Urban-Rural Recovery Act of 1983

In 1983, Congress repealed the portion of Section 8 that provided ongoing authority for the inclusion of newly constructed and substantially rehabilitated housing within the program. Specifically, Section 209(a) of the Housing and Urban-Rural Recovery Act of 1983 (“HURRA”) made two revisions to Section 8. First, it deleted the reference to “newly constructed, and substantially rehabilitated” housing in 42 U.S.C. § 1437f(a)(1). Second, it repealed entirely the then-existing version of 42 U.S.C. § 1437f(b)(2). Pub. L. No. 98-181, § 209(a)(1)-(2), 97 Stat. 1153, 1183 (1983).

However, while HURRA repealed HUD’s authority to enter into any *additional* HAP contracts with owners or prospective owners of new or substantially rehabilitated housing (or to enter into ACCs with PHAs to do the same), it also included a savings provision that expressly preserved HUD’s ability to continue funding the HAP contracts entered into pursuant to (b)(2) authority prior to the close of 1984. Specifically, Section 209(b) of HURRA provided that: “[t]he amendments made by subsection (a) shall take effect on October 1, 1983, except that the provisions repealed shall remain in effect ... with respect to any funds obligated for a viable project under section 8 of the United States Housing Act of 1937 prior to January 1, 1984[.]” *Id.* § 209(b).

As is plain from the above, and as all parties agree, HURRA had no effect on HUD’s authority to enter into ACCs with PHAs for existing housing pursuant to Section (b)(1) of the 1937 Act, and indeed, this authority remains intact today. 42 U.S.C. § 1437f(b)(1); see also HUD Mem. at 11. The parties further agree that HURRA did not – or at least not immediately – affect HUD’s ability to continue its administration of the existing HAP contracts that HUD had entered into pursuant its now-expired (b)(2) authority. See HUD Mem. at 11 (following the enactment of HURRA, “HUD and PHAs under ACCs with HUD continued to have authority to administer existing HAP contracts that had been previously entered into for newly constructed and substantially rehabilitated housing”). Thus, in the aftermath of HURRA, “HUD ... continued to administer those contracts to which it was a party, and PHAs continued to administer those contracts to which they were a party.” HUD Reply at 10.

However, as discussed below, the parties sharply disagree as to HURRA’s longer-term effect on the programmatic design of project-based Section 8 assistance.

C. The Multifamily Assisted Housing Reform and Affordability Act of 1997

Pursuant to former Section 8(e)(1) of the 1974 Act, new construction and substantial rehabilitation HAP contracts (the “(b)(2)” contracts) were limited to terms of 20 to 40 years. Pub. L. No. 93-383, 88 Stat. 633, 665. Although some of these original contracts are still in existence today, most of them, with the passage of time, began to expire in the mid- to late-1990s. To address this problem, in 1996 Congress authorized a handful of limited demonstration programs providing for the renewal of certain project-based HAP contracts. See Pub. L. No. 104-99, Title IV, § 405, 110 Stat. 26 (1996); Pub. L. No. 104-120, § 2(a), 110 Stat. 834 (1996); Pub. L. No. 104-204, Title II, § 211, 110 Stat. 2874 (1996).

Then, in 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act (“MAHRA”) in order to, *inter alia*, provide a permanent and generalized mechanism by which HUD could renew the expiring contracts. Pub. L. No. 105-65, Title V, § 524, 111 Stat. 1384, 1408 (1997), 42 U.S.C. § 1437f note (Supp. III 1997). As relevant to this case, § 524(a)(1) of MAHRA, entitled “Section 8 Contract Renewal Authority,” provided that:

[F]or fiscal year 1999 and henceforth, the Secretary may use amounts available for the renewal of assistance under section 8 or the United States Housing Act of 1937, upon termination or expiration of a contract for assistance under section 8 (other than a contract for tenant-based assistance ...) to provide assistance under section 8 of such Act at rent levels that do not exceed comparable market rents for the market area. The assistance shall be provided in accordance with terms and conditions prescribed by the Secretary.

(“Section 524”). In 1999, Congress replaced this language with a provision stating that:

[HUD’s] Secretary shall, at the request of the owner of the project and to the extent sufficient amounts are made available in appropriation Acts, use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project. The assistance shall be provided under a contract having such terms and conditions as the Secretary considers appropriate, subject to the requirements of this section.

Pub. L. No. 106-74, Title IV, Subtitle C, § 531(a), 113 Stat. 1047, 1109-10, 42 U.S.C. § 1437f note (2006).

Although certain other statutory provisions and amendments are relevant to this case, it is fair to say that the parties’ basic dispute boils down to their competing

interpretations of HURRA and MAHRA – or more specifically, to their competing interpretations of how these two statutes interact with one another and the remainder of the 1937 Act.

HUD, for its part, makes two different arguments regarding this statutory overlay. Its first and primary argument begins with the premise that after HURRA’s repeal of subsection 8(b)(2) in 1983, the agency’s “statutory authority to enter into *new* rental assistance agreements survived only in Section 8(b)(1) of the Housing Act.” HUD Reply at 7 (emphasis added). HUD further argues here that when HUD renewed the expiring (b)(2) contract pursuant to MAHRA, the renewal contracts were necessarily “‘*new*’ contracts for *existing* projects” – *i.e.*, executed pursuant to HUD’s (b)(1) authority – as opposed to “mere ‘extensions’ of [the] HAP contracts” the agency originally had executed under its now-expired (b)(2) authority. *Id.* at 10 (emphasis added). In support of this theory, HUD offers various textual arguments, which the Court will discuss and analyze below. In the main, however, HUD’s argument is that by the time it renewed the assistance for the projects initiated under subsection 8(b)(2), such projects had “been in existence for more than twenty years,” and “common sense” therefore counsels that they were “‘existing dwelling units,’ as that phrase is used in Section 8(b)(1).” HUD Reply at 11-12.

The import of this argument derives from the fact that subsection (b)(1) instructs HUD to enter into ACCs with PHAs, which in turn enter into HAP contracts to provide assistance payments to owners. Under this provision, HUD is permitted to enter into a HAP contract directly with a project owner *only* when no qualified local PHA exists for a given jurisdiction. Thus, in HUD’s words, “[i]f the Renewal contracts are new contracts under Section 8 of the 1937 Act, that Section 8 authority can only come from Section 8(b)(1), and as such, HAP contract administration lies only with a PHA.” *Id.* at 12. Since all parties agree that “(b)(1)” ACCs between HUD and PHAs are properly considered cooperative agreements, this result would foreclose the Plaintiffs’ claim that HUD must abide by procurement standards in its actions that are the subject of this suit.

The Plaintiffs offer various legal theories in opposition to this argument, but all agree on two central points. First, with respect to HURRA’s repeal of subsection 8(b)(2), the Plaintiffs contend that “[t]here is nothing in the statutory language or legislative history at the time of th[is] repeal ... or thereafter to indicate that Congress made any attempt to move any of HUD’s repealed authority under the repealed [sub]section 8(b)(2) to [sub]section 8(b)(1), or that Congress ever repealed the savings clause.” NHC Mem. at 5. Second, they argue that MAHRA neither “effect[ed] a transformation of projects established under [sub]section (b)(2) into ‘existing housing’ under [sub]section (b)(1),” nor “otherwise compel[led] HUD to solicit cooperative agreements to obtain HAP contract administration services.” AHSC Reply at 7. To the contrary, the Plaintiffs contend that “HUD remained responsible [under subsection (b)(2)] for ensuring that HAP

contract administration was performed, either by itself or by contracting with a third party.” Id.

HUD, however, also makes a second, alternative argument, to the effect that even if the Plaintiffs are correct that the contracts that are the subject of this suit are governed by (b)(2), nothing in that provision requires HUD to directly administer the renewal HAP contracts. As explained above, subsection (b)(2) consists of two sentences: the first grants HUD authority to enter into HAP contracts directly with project owners, and the second – which, it is worth noting, is effectively identical to subsection (b)(1) – grants HUD authority to enter into ACCs with local PHAs, which in turn enter into HAP contracts with project owners. Here, HUD contends that:

even if HUD was a contract administrator under the initial [HAP] contract, the 1937 Act does not mandate that either HUD or a PHA enter into a HAP contract, and it does not mandate that either HUD or a PHA administer the HAP contract. [subs]ection (b)(2) provide[s] that either HUD or PHAs [may] be contract administrators.... Therefore, for contracts already in existence, HUD had discretion to choose between direct administration of HAP contracts and assignment of HAP contracts to PHAs for administration.

HUD Reply at 12.

The Plaintiffs, unsurprisingly, disagree, though their reasoning varies considerably from party to party. In the main, the Plaintiffs contend that MAHRA “commands HUD to enter into HAP renewals,” CMS Reply at 11, and therefore obliges HUD to act as the contract administrator for the renewal contracts. As such, in contracting out this responsibility to the PHAs, Plaintiffs contend that HUD “is receiving a direct benefit” in the form of “services that HUD itself is otherwise required to perform,” and is therefore engaged in a procurement activity under the standards of the Federal Grant & Cooperative Agreement Act, 31 U.S.C. §§ 6301-6308 (“FGCAA”). NHC Mem. at 24. The Court will analyze these arguments below, but first turns to the program and procedural history underlying this bid protest.

II. Factual and Procedural History

A. “HUD 2020” Reforms and the 1999 Request for Proposals

On June 26, 1997, then-HUD Secretary Andrew Cuomo announced an agency-wide management reform plan called “HUD 2020.” AR 2766. Among the key reforms announced in this plan was a commitment to cut HUD’s staff by nearly one-third, “from the current 10,500 to 7,500 by the end of the year 2000.” Id. Four months later, on October 27, 1997, Congress enacted MAHRA, instituting (among other reforms) the

renewal authority for project-based Section 8 assistance outlined above. Consistent with Secretary Cuomo's "HUD 2020" reform plan, MAHRA's "Findings and Purposes" observed that "due to Federal budget constraints, the downsizing of [HUD], and diminished administrative capacity, the Department lacks the ability to ensure the continued economic and physical well-being of the stock of federally insured and assisted multifamily housing projects." MAHRA § 511(10). Congress further stated that MAHRA was intended to address such problems by introducing "reforms that transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities." Id. § 511(11)(C).

In March 1998, HUD's Office of Inspector General ("OIG") informed Congress that as part of its "extensive reorganization under [the] HUD 2020 Management Plan," the agency would issue a "Request for Proposals for outside contractors to administer HUD's portfolio of Section 8 contracts." AR 2763 (internal Advisory Report on Section 8 Contract Administration, issued October 26, 1998, summarizing the March 1998 OIG Semiannual Report to Congress). Thereafter, HUD's Fiscal Year 2000 Budget Request included a request for \$209 million to fund an initiative to assign contract administration of its project-based HAP contracts to state-based governmental agencies. AR 256, 258-59. The Budget Request stated that HUD "plan[ned] to procure the services of contract administrators to assume [contract administration] duties, in order to release HUD staff for those duties that only government can perform and to increase accountability for subsidy payments." Id. at 259. The Budget Request further stated:

The Department would solicit for competitive proposals from eligible public agencies to assume these contract administration duties.... The solicitation would specify exact duties, performance measures, and the method of selection and award. The evaluation would be based upon the respondent's capabilities and proposed contract prices.

Id.

True to its word, on May 3, 1999, HUD issued a Request for Proposals ("RFP") for "Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts" ("1999 RFP"). AR 428 *et seq.*, 64 Fed. Reg. 27,358 (May 19, 1999). The 1999 RFP stated that "[t]his solicitation is not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR) but will follow many of those principles," and sought proposals "to provide contract administration services" for "most of" the approximately 20,000 project-based Section 8 HAP contracts that HUD was, at that time, administering (*i.e.*, the (b)(2) "sentence one" projects). Id. Although the RFP was initially limited to the "sentence one" projects, it expressly noted the existence of an additional 4,200 projects that were being administered by PHAs (*i.e.*, the (b)(2) "sentence two" projects). The RFP stated that PHAs "will generally continue to administer these HAP Contracts until expiration....[but] [w]hen HUD renews [these contracts] ... HUD

generally expects to transfer contract administration of the renewed HAP Contracts to the Contract Administrator (CA) it selects through this RFP for the service area where the property is located.” Id.

The RFP specified that the contract administration duties would be performed pursuant to a performance-based ACC (“PBACC”⁴) entered into with HUD, that “[b]y law, HUD may only enter into an ACC with a legal entity that qualifies as a “public housing agency” (PHA) as defined in the United States Housing Act of 1937 (42 U.S.C. [§] 1437 *et seq.*),”⁵ and that responsive proposals would “cover an area no smaller than an individual State (or U.S. Territory).” AR 428-29, 64 Fed. Reg. at 27,358-59.

The RFP further provided that:

successful offerors under this RFP will oversee HAP Contracts, in accordance with HUD regulations and requirements.... After execution of the ACC, the CA [*i.e.*, Contract Administrator] will subsequently assume or enter into HAP Contracts with the owners of the Section 8 properties. The Contract Administrator will monitor and enforce the compliance of each property owner with the terms of the HAP Contract and HUD regulations and requirements.

AR 428, 64 Fed. Reg. at 27,358. Further:

⁴ The 1999 RFP does not expressly use the term “performance-based ACC,” nor, as far as the Court can determine, does any HUD document related to this protest adopt the abbreviation “PBACC” in reference to these ACCs. However, the 1999 RFP did state that “[f]or work performed under ACCs awarded in response to this RFP, HUD will use Performance-Based Service Contracting (PBSC),” defined as a contracting method that utilizes “measurable, mission-related [goals and] established performance standards and review methods to ensure quality assurance[,] [and which] ... assigns incentives to reward performance that exceeds the minimally acceptable and assesses penalties for unsatisfactory performance.” AR 430, 64 Fed. Reg. at 27,360. Moreover, later relevant HUD documents refer to the Contract Administrators for these ACCs by the more specific term Performance-Based Contract Administrators (“PBCAs”).

As the 1999 RFP clearly demonstrates, and no party contests, since the ACCs in question in this bid protest have been performance-based since the 1999 RFP, the Court will use the term “PBCAs” throughout the remainder of this opinion.

⁵ As HUD noted in the 1999 RFP, the 1937 Housing Act defines a “public housing authority” as a “State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing.” 42 U.S.C. § 1437a(b)(6)(A); see AR 429, 64 Fed. Reg. at 27,359.

However, the 1999 RFP also expressly provided that this limitation did “not preclude joint ventures or other partnerships between a PHA and other public or private entities to carry out the PHA’s contract administration responsibilities under the ACC between the PHA and HUD.” Id.

[t]he major tasks of the Contract Administrator under the ACC and this RFP include, but are not limited to:

- Monitor[ing] project owners' compliance with their obligation to provide decent, safe, and sanitary housing to assisted residents.
- Pay[ing] property owners accurately and timely.
- Submit required documents accurately and timely to HUD (or a HUD designated agent).
- Comply with HUD regulations and requirements, both current and as amended in the future, governing administration of Section 8 HAP contracts.

AR 429, 64 Fed. Reg. at 27,359.

Finally, although the 1999 RFP did not mention “staff downsizing,” it stated that “[u]nder the approximately 20,000 Section 8 HAP Contracts this RFP covers, HUD pays billions of dollars annually to owners on behalf of eligible property residents. HUD seeks to improve its performance of the management and operations of this function through this RFP.” *Id.* 428, 64 Fed. Reg. at 27,358. The RFP was silent regarding any statutory amendments or directives mandating that HUD issue the RFP or use ACCs to shift its HAP contract administration duties to PHAs.

As a result of the 1999 RFP, HUD ultimately awarded 37 PBACCs. AR 271. Between 2001 and 2003, HUD then awarded seven more PBACCs under a separate, substantially equivalent, RFP. Finally, between 2003 and 2005, it awarded nine additional PBACCs under a related invitation for the submission of applications.⁶ *Id.* At some point not clearly established in the record, HUD received approval to extend the contracts for an additional ten years. *Id.* 272.

B. The 2011 Invitation for Submission of Applications

On February 25, 2011, HUD issued an “Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments Contracts” (“2011 Invitation” or “Invitation”). AR 522-43. The Invitation was for the purpose of receiving new applications from PHAs to administer the Project-Based Section 8 Housing Assistance Payments Contracts as Performance-Based Contract

⁶ The 1999 RFP, as well as the 2011 and 2012 notices discussed below, covered 53 “states” – the 50 states of this country, plus the District of Columbia, Puerto Rico, and the Virgin Islands.

Administrators (“PBCAs”). As relevant to this bid protest, the terms of the 2011 Invitation largely tracked those of the 1999 RFP.

After HUD awarded PBACCs under the 2011 Invitation for each of the covered jurisdictions, some of the disappointed PHAs filed protests at the Government Accountability Office (“GAO”), contesting the award of 42 PBACCs. AR 2843 (GAO Decision). The protests generally alleged that the PBACCs were procurement contracts and not properly awarded in accordance with federal procurement law, that out-of-state PHAs were not legally qualified to administer the Section 8 program within a given state, and that HUD’s evaluation of the applications was flawed. Immediately thereafter, HUD began receiving a deluge of correspondence from various State Attorney Generals, offering opinions on whether their respective state law permits an out-of-state PHA to operate lawfully within its jurisdiction. In every case, the Attorney General opined that his or her state’s law did not permit such operation.⁷

On August 10, 2011, HUD awarded PBACCs for the 11 “states” for which it had received only one application from a qualified PBCA. AR 220. These ACCs remain in effect today, and are not involved in this litigation. On the same date, HUD announced that it would not, at that time, award PBACCs in the remaining 42 jurisdictions, but would instead evaluate and revise its award process for these contracts. *Id.* 2843. Accordingly, GAO dismissed the protests to allow HUD to take corrective action. *Id.*

C. The 2012 Notice of Funding Availability

On March 9, 2012, HUD issued a “Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts” (“2012 NOFA”), the document that is the subject of this litigation. AR 551-89. The terms of the 2012 NOFA differ in four material ways from the 1999 RFP and 2011 Invitation. First, the 2012 NOFA expressly invokes subsection (b)(1) as its authority for awarding the ACCs, stating, “[t]he PBCA program ... effectuates the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into an ACC with a PHA [as defined by the Act].” AR 552. Second, the NOFA expressly states that the “ACCs HUD seeks to award are cooperative agreements,” and that:

a principal purpose of the ACC between HUD and the PHA is to transfer funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry

⁷ Links to these various state attorney general opinions transmitted to HUD can be found at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA%20NOFA (last visited April 17, 2013).

out the public purposes of supporting affordable housing as authorized by sections 2(a) and 8(b)(1) of the 1937 Act.

Id. 557.

Third, the NOFA establishes a preference for in-state applicants, stating that although “HUD believes that nothing in the 1937 Act prohibits” a PHA “from acting as a PHA in a foreign State:”

HUD will consider applications from out-of-state applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications HUD receives from an out-of-State applicant for that state.

Id. at 554 (emphasis added).⁸ Finally, in the Question and Answer section of the NOFA, the NOFA effectively creates an additional preference for a particular type of PHA – namely, a state Housing Finance Authority (“HFA”). In this section, HUD confirms that where the Attorney General of a given state submits a letter to HUD concluding that under that state’s law, the state HFA alone possesses statewide jurisdiction as a PHA, HUD will award the ACC for the state to the HFA. AR 617, 618, 622 (NOFA Q&As 163, 170, 191).

D. 2012 GAO Protest

In May 2012, prior to the due date for the submission of applications under the 2012 NOFA, seven protesters⁹ filed bid protests at the GAO, making substantially similar arguments as they make here – namely that the NOFA’s preference for in-State PHAs, as well as its effective preference for state HFAs in particular, violated the terms of the Competition in Contracting Act, 41 U.S.C § 3301, (“CICA”) as well as the terms of the Federal Acquisition Regulation (“FAR”).

On August 15, 2012, the GAO issued a decision sustaining the protests. AR 2838-52. The GAO decision did not consider the complex statutory history outlined above, but instead focused on (1) the stand-alone terms of the 1999 RFP, 2011 Invitation, and 2012 NOFA, and (2) the standards distinguishing procurement contracts, grants, and cooperative agreements under the FGCAA, 31 U.S.C. §§ 6301-6308.

⁸ The NOFA further provides that, if no qualified applicant applies “for any jurisdiction, HUD will administer the HAP contracts for that state internally, in accordance with past practice and the United States Housing Act of 1937.” AR 608.

⁹ The GAO protesters included all of the Plaintiffs here, with the exception of California Affordable Housing Initiatives, Inc., which has protested the 2012 NOFA solely in this venue.

Summarizing the FGCAA standards, the GAO stated that HUD could properly characterize the ACCs at issue as cooperative agreements only if “the principal purpose of the[se] agreement[s] is to provide assistance to the recipient [*i.e.*, the PHA] to accomplish a public objective authorized by law.” AR 2847. “In contrast, if the federal agency’s principal purpose is to acquire goods or services for the direct benefit or use of the federal government, then a procurement contract must be used.” *Id.* In particular, the GAO further opined that “if the agency otherwise would have to use its own staff to provide the services offered by the intermediary to the beneficiaries, then a procurement contract is the proper instrument.” *Id.*

Applying these criteria, the GAO concluded that the purpose of the ACCs in question was not to “assist” PHAs because, *inter alia*, the PHAs served as mere “conduits” for the HAP payments from HUD to property owners, and certain statements made by HUD in advance of the 1999 RFP indicated that HUD saw its principal purpose in awarding the ACCs as facilitating a staff reduction. AR 2850-51.

HUD decided to disregard the GAO decision and proceed with the NOFA. The Plaintiffs then filed their respective actions challenging HUD’s determination in this Court, again alleging that the ACCs in question are procurement contracts, and that the NOFA’s preference for in-State PHAs, and for the statewide HFAs in particular, violated CICA and the FAR. On December 13, 2012, the Court consolidated the judicial actions and established a briefing schedule on the cross-motions regarding subject matter jurisdiction and for judgment on the administrative record. On February 19, 2013, the Court heard oral argument on the parties’ respective motions.

The Plaintiffs in this case are as follows, and will be referred to by the abbreviations herein: CMS Contract Management Services and the Housing Authority of the City of Bremerton (collectively, “CMS”); Assisted Housing Services Corp., North Tampa Housing Development Corp., and California Affordable Housing Initiatives, Inc. (collectively, “AHSC”); Southwest Housing Compliance Corporation (“SHCC”); Navigate Affordable Housing Partners (“NAHP”); National Housing Compliance (“NHC”); and Intervenor Plaintiff Massachusetts Housing Finance Agency (“MHFA”). All Plaintiffs are PHAs within the meaning of the 1937 Housing Act. In addition, the Court permitted the *amicus* participation of the National Council of State Housing Authorities (“NCSHA”).

Analysis

HUD does not dispute that the 2012 NOFA fails to comply with CICA and the FAR, AR 1151, but instead argues that these statutory and regulatory requirements have no applicability to its actions here, as the contracts to be awarded under the NOFA are cooperative agreements, not procurement contracts. Accordingly, the Government has

moved, pursuant to Rule of the Court of Federal Claims (“RCFC”) 12(b)(1), to dismiss all of the Plaintiffs’ challenges to the propriety of the 2012 NOFA for lack of subject matter jurisdiction. In the alternative, the Government moves pursuant to RCFC 52.1(c) for judgment on the administrative record. The Plaintiffs have opposed these motions and cross-moved under RCFC 52.1(c) for judgment on the administrative record. However, the Plaintiffs have, for the most part, made these motions separately, and offered somewhat divergent arguments supporting their respective positions.

The Court will address the Government’s motion to dismiss for lack of subject matter jurisdiction, and the parties’ cross-motions for judgment on the administrative record, in turn below.

I. Subject Matter Jurisdiction

A defendant may raise either a facial or a factual challenge to a plaintiff’s assertion that a court possesses subject matter jurisdiction over its claims. See Cedars-Sinai Med. Ctr. V. Watkins, 11 F.3d 1573, 1584 (Fed. Cir. 1993). In a facial challenge, where a defendant challenges the sufficiency of the facts alleged in the complaint to establish jurisdiction, the Court must accept the plaintiff’s well-pleaded factual allegations as true, and draw all reasonable inferences in the plaintiff’s favor. Id. at 1583 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). However, where, as here, “the Rule 12(b)(1) motion denies or controverts the pleader’s allegations of jurisdiction . . . the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion.” Id. (internal citations omitted); Shoshone Indian Tribe of Wind River Reservation v. United States, 672 F.3d 1021, 1030 (Fed. Cir. 2012). In such a case, “[i]n resolving [any] disputed predicate jurisdiction facts, ‘a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings.’” Shoshone Indian Tribe, 672 F.3d at 1030 (quoting Cedars-Sinai Med. Ctr., 11 F.3d at 1584). In addition, it is the plaintiff’s burden to establish any challenged jurisdictional facts by a preponderance of the evidence. Sci. Applications Int’l Corp. v. United States, 102 Fed. Cl. 644, 651 (Fed. Cl. 2011).

The Plaintiffs assert jurisdiction under the Tucker Act, which grants this Court jurisdiction to render judgment on “an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” 28 U.S.C. § 1491(b)(1). The Tucker Act does not itself define “procurement,” Resource Conservation Group, LLC v. United States, 597 F.3d 1238, 1244 (Fed. Cir. 2010). However, in determining the scope of § 1491(b)(1), the Federal Circuit has adopted the definition of “procurement” contained in 41 U.S.C. § 403(2), which has been reorganized into 41 U.S.C. § 111. Distributed Solutions, Inc. v. United States, 539 F.3d 1340, 1345 (Fed. Cir. 2008). Section 111, in turn, provides that the term “‘procurement’ includes all stages

of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with a contract completion and closeout.”

The Government opposes the Plaintiffs’ assertions of jurisdiction, arguing that this Court lacks the authority to adjudicate this case on the merits “because HUD’s award of a cooperative agreement in the form of [an] ACC is not a ‘procurement’ within the meaning of the Tucker Act.” HUD Mem. at 21. However, although the parties jointly conceptualize the jurisdictional question in this case to be whether the PBACCs awarded by HUD under the 2012 NOFA are “procurement contracts” within the meaning of section 1491(b)(1) (or rather cooperative agreements), the Court finds that this issue is properly considered on the merits.

That is, the Court finds under the Tucker Act, it has jurisdiction to review a party’s contention that a particular government contract is a procurement contract and therefore subject to CICA. See 360Training.com, Inc. v. United States, 104 Fed. Cl. 575, 588 (2012) (holding that “the definition of ‘procurement’ under the Tucker Act is broader than the definition of ‘procurement contract’ in the FGCAA,” such that “an agency can engage in a procurement process [for the purposes of the Tucker Act] even though it is using a cooperative agreement, instead of a procurement contract, to memorialize the parties’ agreement”). Because the Plaintiffs have raised exactly such a claim, jurisdiction is proper, and the Court will analyze the question of whether the PBACCs are procurement contracts or cooperative agreements on the merits.

II. Cross-Motions for Judgment on the Administrative Record

A. Standard of Review

In a bid protest, a court reviews an agency’s procurement-related actions under the standards set forth in the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, which provides that a reviewing court shall set aside the agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.*; see also, e.g., Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1350-51 (Fed. Cir. 2004) (internal citation omitted). Under this standard, “[a] bid protest proceeds in two steps.” Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005). First, the Court determines whether a procurement-related decision either (a) lacked a rational basis, or (b) involved a violation of a statute or regulation. Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). “A court evaluating a challenge on the first ground must determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion. When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations.” *Id.* (quoting Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332–33 (Fed. Cir. 2001)).

The inquiry at this first step is “highly deferential,” Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1058 (Fed. Cir. 2000), and *de minimis* errors in a procurement-related process do not justify relief, Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 1000 (Fed. Cir. 1996) (citing Andersen Consulting v. United States, 959 F.2d 929, 932–33, 935 (Fed. Cir. 1992)). If the Court finds that the agency acted without a rational basis or contrary to law, it must then, at the second step, “determine... if the bid protester was prejudiced by that conduct.” Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005). “Prejudice is a question of fact,” which the plaintiff again bears the burden of establishing. Id. at 1353, 1358.

Moreover, in reviewing a motion for judgment on the administrative record made pursuant to RCFC 52.1(c), the court determines “whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record.” Afghan Am. Army Servs. Corp. v. United States, 90 Fed. Cl. 341, 355 (Fed. Cl. 2009). The existence of a material issue of fact, however, does not prohibit the Court from granting a motion for judgment on the administrative record, nor is the court required to conduct an evidentiary proceeding. Id. (“In a manner ‘akin to an expedited trial on the paper record,’ the court will make findings of fact where necessary.”) (quoting CHE Consulting, Inc. v. United States, 78 Fed. Cl. 380, 387 (Fed. Cl. 2007)). Thus, as relevant to this case, in order to prevail on the merits, Plaintiffs must demonstrate, by a preponderance of the evidence, (1) that the terms of the NOFA were unlawful, and (2) that such terms caused them to suffer “a non-trivial competitive injury which can be addressed by judicial relief.” Weeks Marine v. United States, 575 F.3d 1352, 1362 (Fed. Cir. 2009).

B. Discussion

As presented, HUD’s argument on the merits is that if the NOFA is a procurement and therefore subject to CICA, the agency’s decision to forego a CICA-compliant process is nonetheless lawful under the CICA exception that applies where there exist alternate “procurement procedures ... expressly authorized by statute.” HUD Mem. at 39 (citing 41 U.S.C. § 3301(a)). For their part, the Plaintiffs argue variously that HUD may not invoke this exception because the agency did not certify its applicability as required under the relevant regulations, see CMS Mem. at 36 (citing 48 C.F.R. §§ 6.301-1; 6.304); that HUD’s characterization of the PBACCs as cooperative agreements violates the FGCAA, see NAHP Mem. at 35; and that the NOFA – and in particular, its in-state preference – violates CICA’s mandate of “full and open completion” in government contracting, see id. at 42 (citing 41 U.S.C. § 3301).

For the reasons explained below, however, the Court finds that it need not resolve many of these questions in order to dispose of this case. Having found jurisdiction to determine whether the PBACCs are procurement contracts or cooperative agreements,

the Court must now proceed to analyze this question on the merits. If, following such an analysis, the Court finds that the PBACCs are procurement contracts, CICA would apply, and further related analysis would become necessary. However, because the Court does not reach this conclusion, but instead finds that HUD has properly classified the PBACCs as cooperative agreements, it need not reach any CICA-related issues raised by the parties.

Accordingly, the Court will explain why, after examining the Housing Act of 1937, as amended, and in light of the standards set forth in the FGCAA, it has determined that the PBACCs are best classified as cooperative agreements rather than procurement contracts.

1. FGCAA Standards

The Federal Grant and Cooperative Agreement Act of 1977, or FGCAA, “provides guidance to executive agencies in determining which legal instrument to use when forming a [contractual] relationship” between the agency and another party. [360Training.com](#), 104 Fed. Cl. at 579; 31 U.S.C. §§ 6301-6308. The FGCAA establishes what is sometimes referred to as the “principal purpose” test, providing that “[a]n executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government” and a recipient when “the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services *for the direct benefit of the United States Government*[.]” 31 U.S.C. § 6303 (emphasis added). Conversely, the FGCAA counsels that “[a]n executive agency shall use a cooperative agreement ... when (1) “the principal purpose of the relationship is to *transfer a thing of value*” to the recipient in order “*to carry out a public purpose of support or stimulation authorized by a law of the United States,*” and (2) “*substantial involvement* is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.” *Id.* § 6305 (emphasis added).

The FGCAA standards are expressed in mandatory, not precatory, terms. Nonetheless, as HUD and at least some of the Plaintiffs recognize, these standards do not provide hard-and-fast, one-size-fits-all rules. Rather, because every agency has inherent authority to enter into procurement contracts, but must be specifically authorized by statute to enter into assistance agreements, the FGCAA standards must be applied within the context of the agency’s specific statutory mandate in entering into the contractual relationship in question. U.S. Government Accountability Office, Principles of Federal Appropriations Law, Vol. II, p. 10-17 (2006) (“GAO Redbook”) (“[T]he relevant legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions.”); see also HUD Mem. at 26 (“Although Congress enacted the FGCAA ... to establish criteria for Federal agency use of grants, cooperative agreements, and procurement

contracts, the decision as to which legal instrument is appropriate depends, in the initial analysis, on the agency's statutory authority."); NHC Mem. at 39 ("There are two steps involved in conducting an FGCAA analysis, and we do not disagree that the first step in determining the correct funding instrument" is to examine "whether the agency has statutory authority to engage in assistance transactions at all") (quoting GAO Redbook at 10-17"); AHSC Mem. at 37 (similar).

In order to determine whether the PBACCs are procurement contracts or cooperative agreements, the Court will therefore begin with a close examination of the "precise statutory obligations" underlying these contracts,¹⁰ as contained in the 1937 Housing Act, as amended. 360Training.com, 104 Fed. Cl. at 579. Once the nature of these obligations has been determined, the Court will then examine them in light of the standards delineated by the FGCAA. See GAO Redbook at 10-17 ("[D]eterminations of whether an agency has authority to enter into [cooperative agreements] in the first instance must be based on the agency's authorizing or program legislation. Once the necessary underlying authority is found, the legal instrument ... that fits the arrangement as contemplated must be used, using the [FGCAA] definitions for guidance as to which instrument is appropriate.").

2. The PBACCs are Cooperative Agreements

HUD essentially offers two theories of its case. The first of these is based primarily on subsection 8(b)(1) and the second, on subsection 8(b)(2). The Court will address each of these arguments in turn below.

- Subsection 8(b)(1) Does Not Govern the ACCs for the New Construction and Substantial Rehabilitation Projects

HUD readily concedes that, pursuant to subsection (b)(2), it was the party that originally entered into, and was responsible for contract administration of, the HAP contracts in question. HUD Reply at 9. However, HUD argues that taken together, HURRA's repeal of Subsection 8(b)(2) and MAHRA's enactment of renewal authority for expiring project-based HAP contracts create a result where the renewal contracts (of which the HAPs at issue here are a subset) are necessarily "*new*" contracts for *existing* projects," and hence governed by HUD's authority under Section 8(b)(1) of the Housing Act. HUD Reply at 7. Again, Subsection (b)(1) instructs HUD to enter into ACCs with

¹⁰ Plaintiff NHC attempts to make much of the fact that the PBACCs were awarded, and have always been treated, as contracts with HUD. NHC Mem. at 17-18. However, as HUD correctly points out, this fact is of no moment, because "[a] grant agreement is an enforceable contract in this court." HUD Reply at 25 (quoting Knight v. United States, 52 Fed. Cl. 243, 251 (2002), *rev'd on other grounds*, 65 F. App'x 286 (Fed. Cir. 2003)). Thus, the relevant issue here is not whether the PBACCs are "contracts," but rather what *type* of contractual relationship they represent with the Government. The Court will therefore sometimes refer to the PBACCs as "contracts," but this term is without legal significance in its analysis.

PHAs, which in turn enter into HAP contracts to provide assistance payments to owners. Under this provision, *only* when no qualified local PHA exists for a given jurisdiction is HUD permitted to enter into a HAP contract directly with a project owner. Moreover, all parties agree that “traditional” ACCs under subsection (b)(1) are properly considered assistance agreements, not procurement contracts. *See, e.g.*, CMS Reply at 2; AHSC Mem. at 35. Thus, the import of this argument is that, in HUD’s words, “[i]f the Renewal contracts are new contracts under Section 8 of the 1937 Act, that Section 8 authority can only come from Section 8(b)(1), and as such, HAP contract administration lies only with a PHA.” HUD Reply at 12. And, if HAP contract administration lies with the PHAs (as opposed to HUD), then under the FGCAA standards HUD is not “outsourcing” these tasks for its own benefit, and the PBACCs therefore are not procurement contracts.

HUD’s argument here proceeds in two steps. First, HUD maintains that “[a]fter [HURRA’s] repeal of Section 8(b)(2) in 1983, [HUD’s] statutory authority to enter into new rental assistance agreements survived only in Section 8(b)(1) of the Housing Act.” *Id.* at 7. Second, HUD argues that when MAHRA gave the agency authority to renew the expiring (b)(2) contracts, it effectively mandated that such renewals be made pursuant to subsection (b)(1), as “new” contracts for “existing” housing. *Id.* Although these arguments are ultimately very closely linked, the Court will address them separately and in turn below. As the Court will explain, it finds that this argument is fatally flawed by several strained constructions of the relevant statutory language.

- HURRA

In 1983 Congress in HURRA repealed HUD’s ongoing authority under Subsection 8(b)(2) to support privately owned new or substantially rehabilitated housing projects pursuant to either a HAP contract with the owner, or an ACC with a PHA (which in turn would enter into a HAP with the owner). However, HURRA also enacted a savings clause, which provides in relevant part that “the provisions repealed shall remain in effect ... with respect to any funds obligated for a viable project under section 8 of the United States Housing Act of 1937 prior to January 1, 1984[.]” HURRA § 209(b). HUD contends that “[p]rior to January 1, 1984, no funds were obligated for a project beyond the term of the original HAP contract,” and that therefore the savings clause carried legal force with respect to a particular HAP contract only for the length of the original term of that contract. HUD Supp. Mem. at 1 n.1.

Plaintiffs, on the other hand, argue that HUD has identified no statute that ever fully repealed subsection (b)(2) – and, more importantly, that the subsequent statutory history of the Housing Act indicates that Congress has repeatedly and expressly “grandfathered” HUD’s expired (b)(2) authority through many statutory revisions. The first relevant amendment that Plaintiffs point to is the Community Housing and Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (the “1992 Act” or “1992 Housing Act”). Although the 1992 Act implemented many reforms, its

relevance to this case lies in its addition of a single definition to the 1937 Act – to wit, that of “project-based assistance.” The 1992 Act defined this term as “rental assistance under section (b) of this section [*i.e.*, Section 8] that is attached to the structure pursuant to subsection (d)(2)” *Id.* § 146, codified at 42 U.S.C. § 1437f(f)(6).¹¹ Subsection (d)(2), also an addition of the 1992 Act, states, in turn:

In determining the amount of assistance provided under [either (i)] an assistance contract for project-based assistance under this paragraph or [(ii)] *a contract for assistance for housing constructed or substantially rehabilitated pursuant to assistance provided under subsection (b)(2) of this section (as such subsection existed immediately before October 1, 1983)*, the Secretary may consider and annually adjust, with respect to such project, [for the cost of service coordinators for residents who are elderly or disabled].

Id. § 674, currently codified at 42 U.S.C. § 1437f(d)(2)(B)(i) (emphasis added).

HUD denies that these provisions are evidence of its authority under subsection (b)(2) continuing to be grandfathered into the 1937 Housing Act. In making this argument, it emphasizes the first portion of the definition added by section 146 of the 1992 Act: *i.e.*, that “project-based assistance” is “rental assistance *under subsection [8](b)*” (emphasis added). In HUD’s interpretation, because by 1992 the agency’s “statutory authority to enter into new rental assistance agreements survived only in [subs]ection 8(b)(1) of the Housing Act,” HUD Reply at 7, the new definition of “project-based housing” did nothing more than make “explicit” the fact that, post-HURRA, “HUD’s authority to enter into ACCs with PHAs for existing housing under [subs]ection 8(b)(1) ... remained intact, for *both* project-based and tenant-based programs.” HUD Mem. at 11 (emphasis added). In other words, according to HUD, by defining “project-based assistance” as “rental assistance under section [8](b),” section 146 of the 1992 Act simply confirmed that, notwithstanding the repeal of subsection (b)(2), HUD’s remaining (b)(1) authority encompassed the authority to enter into “new” rental assistance agreements for (existing) project-based housing.¹²

¹¹ In full, 42 U.S.C. § 1437f(f)(6) currently defines “project-based assistance” as “rental assistance under section (b) of this section that is attached to the structure pursuant to subsection (d)(2) *or (o)(13)* of this section.” (emphasis added). Subsection (o)(13) applies only to the tenant-based Section 8 program, and provides that a PHA may, subject to certain conditions, divert up to 20 percent of the funding the PHA receives from HUD for its tenant-based program to fund project-based tenant subsidies attached to existing, newly constructed, or rehabilitated housing. As subsection (o)(13) is not relevant here, the Court will exclude it from its analysis.

¹² HUD’s only substantive attempt to deal with the entirety of subsection (d)(2) is an argument that “[t]he fact that subsection (d)(2) identifies several categories or projects, including ‘existing housing’ and new construction and substantially rehabilitated projects, is immaterial; they are all included within the scope of subsection (d)(2).” HUD Reply at 12 n.9. If there is any logic in or point to this statement, the Court fails to perceive it.

Some of the Plaintiffs, however, read these clauses very differently. Plaintiff AHSC summarizes the alternative reading of these amendments most succinctly, as follows:

[Through subsection (d)(2),] Congress acknowledged that there were project-based programs not only ‘under this paragraph,’ *i.e.*[,] under the surviving (b)(1), but *also* under contracts ‘for assistance for housing constructed or substantially rehabilitated pursuant to assistance provided under subsection (b)(2) of this section (as such subsection existed immediately before October 1, 1983).’ In other words[,] Congress specifically recognized that the projects for new construction and substantial rehabilitation entered into before [the close of] 1983 continued to exist[, albeit] in a special category. They were not within Section 8(b)(1), and, therefore, not subject to [the] provisions for [the preferred] use of PHAs [established by Section] 8(b)(1)[.]

AHSC Mem. at 44-45; NHC Mem. at 5-6.

The Court agrees with the Plaintiffs on this point. By making express reference to housing funded under the expired subsection (b)(2) and including it within its definition of “project-based assistance,” the 1992 Act “confirmed” nothing more than that HUD’s authority under this provision continued to be grandfathered into the 1937 Act, its repeal notwithstanding.

Moreover, other more recently enacted statutes confirm this reading. MAHRA, for example, defines “project-based assistance” as “rental assistance described in paragraph (2)(B) of this section that is attached to a multifamily housing project.” MAHRA § 512(11). Paragraph (2)(B) of section 512, in turn, defines “eligible multifamily housing projects” as inclusive of, *inter alia*, properties “that [are] covered in whole or in part by a contract for project-based assistance under ... the new construction or substantial rehabilitation program under section (b)(2) of the United States Housing Act of 1937 (as in effect before October 1, 1983).” *Id.* § 512(2)(B)(i); see also 24 C.F.R. § 402.2 (MAHRA regulations, providing that “[p]roject-based assistance means the types of assistance listed in section 512(2)(B) of MAHRA, or a project-based assistance contract under the Section 8 program renewed under section 524 of MAHRA.”). Similarly, a year later QHWRA defined “project-based assistance” as including, *inter alia*, “the new construction and substantial rehabilitation program under section 8(b)(2) (as in effect before October 1, 1983).” Pub. L. No. 105-276 § 513, 112 Stat. 2461, 2546.

Thus, HUD’s interpretation of HURRA’s savings clause is strongly belied by the subsequent statutory history of the Housing Act, in which Congress repeatedly

recognized the continued existence and viability of “(b)(2)” projects entered into before the close of 1983.

- MAHRA

The second prong of HUD’s “(b)(1)” argument is that when MAHRA gave the agency authority to renew the expiring (b)(2) contracts, it effectively mandated that such renewals be made pursuant to subsection (b)(1).

Again, MAHRA was enacted in 1997 in order to, *inter alia*, provide a permanent and generalized mechanism by which HUD could renew expiring project-based HAP contracts – which, when originally authorized, carried terms of 20 to 40 years. Pub. L. No. 105-65, Title V, § 524, 111 Stat. 1384, 1408 (1997), 42 U.S.C. § 1437f note (Supp. III 1997). As relevant to this case, section 524(a)(1) of MAHRA, entitled “Section 8 Contract Renewal Authority,” provided that:

[HUD’s] Secretary may use amounts available for the renewal of assistance under section 8 of the United States Housing Act of 1937, upon termination or expiration of a contract for assistance under section 8 (other than a contract for tenant-based assistance ...) to provide assistance under section 8 of such Act at rent levels that do not exceed comparable market rents for the market area. The assistance shall be provided in accordance with terms and conditions prescribed by the Secretary.

Id. In 1999, Congress replaced this language with a provision stating that:

[HUD’s] Secretary shall, at the request of the owner of the project and to the extent sufficient amounts are made available in appropriation Acts, use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project. The assistance shall be provided under a contract having such terms and conditions as the Secretary considers appropriate, subject to the requirements of this section.

Pub. L. No. 106-74, Title IV, Subtitle C, § 531, 113 Stat. 1047, 1109-10, 42 U.S.C. § 1437f note (2006).

At this step of its argument, HUD points out that by the time, pursuant to section 524 of MAHRA, that it renewed its assistance for the projects it had initiated under subsection 8(b)(2), such projects had “been in existence for more than twenty years[.]” HUD Reply at 11-12. According to HUD, “common sense” therefore counsels that these projects consisted of “existing dwelling units,” as that phrase is used in [subs]ection 8(b)(1).” Id. In addition, HUD points to two definitional provisions of MAHRA, as well as a clause in the HAP renewal contracts. Specifically, HUD points out that under

MAHRA, (i) “[r]enewal” is defined as ‘the *replacement* of an *expiring ... contract* with a *new contract* under Section 8 of the [1937 Act]...,’ and (ii) that an “expiring contract,” in turn, is defined as “a project-based assistance contract that, by its terms, *will expire*.” 42 U.S.C. § 1437f note (MAHRA § 512(12), (3), respectively) (emphasis added); see HUD Reply at 11. Additionally, the post-MAHRA renewal contracts themselves contain the following clause:

Previously, the Contract Administrator and the Owner had entered into a HAP Contract (“expiring contract”) to make Section 8 housing assistance payments to the Owner for eligible families living in the Project. The term of the expiring contract will end prior to the beginning of the term of the Renewal Contract.

AR 2270-71 (Renewal Contract). On the basis of these provisions, HUD contends that MAHRA thus “provide[d] for the expiring contracts *actually to expire* before new renewal contracts take effect.” HUD Reply at 11. (emphasis added).

However, as the Plaintiffs point out, the renewal contracts also state that the “[t]he purpose of the Renewal Contract is to *renew the expiring contract for an additional term*,” AR 2271 (emphasis added). And, an attachment to these contracts further provides that “[t]he Renewal Contract *must be entered [into] before expiration of the Expiring Contract*.” AR 2282 (emphasis added). That is, MAHRA does not define “expiring contract” as a contract that has expired; rather, it states that such a contract is one that will, at some point in the future, reach the end of its term. Pursuant to the terms of the renewal contracts themselves, all such contracts were expressly required to be executed *prior* to the expiration of the contracts they replaced. Moreover, as Plaintiffs note, “[n]owhere in MAHRA does Congress say that the expiring Section (b)(2) HAP contracts will be replaced with new contracts under Section (b)(1).” SHCC Reply at 5. To the contrary, as discussed above, MAHRA expressly includes properties “that [are] covered in whole or in part by a contract for project-based assistance under ... the new construction or substantial rehabilitation program under section (b)(2) of the United States Housing Act of 1937 (as in effect before October 1, 1983)” as among those eligible for renewal assistance under its terms. MAHRA § 512(2)(B)(i).

Thus, while HUD is correct that the renewal contracts were “new” contracts (as, indeed they could only have been, having come into existence only upon their execution), it simply does not follow from this fact that these contracts were somehow executed pursuant to subsection 8(b)(1), notwithstanding their origin under subsection 8(b)(2). The Court therefore agrees with the Plaintiffs that the renewal contracts, true to their titles, simply renewed the assistance that “(b)(2)” projects had been receiving since their inception, and did so under the same subsection (if not necessarily under the exact same terms) as that under which such projects were originally authorized. That is, the Court finds that notwithstanding its repeal, subsection 8(b)(2) continues to govern the various

contracts for the housing projects that were originally authorized and supported pursuant to the subsection's terms.

This conclusion does not, however, end the Court's analysis. Rather, the question now becomes whether, under the expired but grandfathered subsection 8(b)(2), HUD is given the authority or discretion to use cooperative agreements in providing the renewal assistance in question. The Court will now turn to that issue.

- Section 8(b)(2) Authorizes HUD to Use Cooperative Agreements with PHAs to Provide Assistance to the New Construction and Substantial Rehabilitation Projects.

Again, the full text of Subsection 8(b)(2) of the Housing Act reads:

To the extent of annual contributions authorizations under section 5(c) of this Act, the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners or prospective owners.

88 Stat. 662-63.

The first sentence of subsection (b)(2) permitted HUD to subsidize low-income housing by entering into HAP contracts directly with owners or prospective owners of multifamily housing. Alternatively, the second sentence of this provision, which is effectively identical to the authority conveyed by subsection 8(b)(1), allowed HUD, at its option, to enter into ACCs with PHAs, which, in turn, enter into HAP contracts with owners. Compare id. with 42 U.S.C. § 1437f(b)(1) (“The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners ...”).

HUD's “(b)(2)” argument is that even if the HAP contracts at issue remain subject to subsection 8(b)(2), nothing in that provision *requires* HUD to directly administer the renewal of HAP contracts. HUD readily concedes that it provided support to the vast majority of the housing projects now at issue pursuant to sentence one of this subsection, and thus that, as the Plaintiffs emphasize, “[t]he [PBACCs that] were awarded under the 1999 RFP were for contract administration services that had previously been performed by HUD itself.” NHC Mem. at 17. Nonetheless, HUD argues that because it:

is not, and has never been, *obligated* [under subsection 8(b)(2)] to act as the contract administrator for the projects at issue, contract administration services [for the relevant HAP contracts] are not, and cannot reasonably be construed as being, for HUD's benefit.... A cooperative agreement is the appropriate instrument [through which] to implement the second sentence of [subs]ection 8(b)(2).

HUD Supp. Mem. at 5-6 (emphasis added).

In other words, HUD's "(b)(2)" argument is that, having initiated support for certain projects under sentence one of this subsection, nothing in the relevant statutes or regulations required that, when the agency renewed such assistance, it continue to do so under the "sentence one" model, wherein HUD enters into a HAP contract directly with the owner, without the intermediation of a PHA. The import of this argument is that, as HUD admits, "if the statute mandates that HUD enter into the HAP contract, then HUD has the obligation to administer the contract." HUD Reply at 9 n.7. Under the standards set forth by the FGCAA, HUD further concedes that in such circumstances, the PBACCs would be for HUD's benefit, and thus properly classified as procurement contracts. However, HUD maintains that because no such mandate exists, it is free to use cooperative agreements to continue its "(b)(2)" assistance, and that the PBACCs at issue in the 2012 NOFA are, in fact, such agreements.

The Plaintiffs disagree, for reasons that are divergent and that, in several cases, have evolved over the course of this litigation. Essentially, however, they contend that if the Court were to determine "the [subsection 8](b)(2) authority currently applies to the newly constructed and substantially rehabilitated housing HAP contracts at issue here, then the Government has responsibility to administer them, and as such, is receiving a direct benefit from the PBCA[']s ... [performance of] services that HUD itself is otherwise required to perform." NHC Mem. at 23-24. Their specific arguments in support of this position, broadly speaking, fall into two categories. First, Plaintiffs argue that MAHRA "commands HUD to enter into HAP renewals and, therefore ... [gives] HUD ... the obligation to administer the contract." CMS Reply at 11. Second, Plaintiffs argue that a variety of regulatory provisions confirm this conclusion. The Court will address each set of issues below.

- MAHRA Mandates Only That HUD Provide Assistance.

The Court has twice reproduced substantial portions of both the first and the second versions of MAHRA § 524, above, and will not repeat this text verbatim again here. Briefly, however, the relevant section of the earlier-enacted version of MAHRA stated only that HUD "may" use certain specified funds to provide renewal assistance for, *inter alia*, the expiring "(b)(2)" contracts. 42 U.S.C. § 1437f note; see, e.g., AHSC Mem.

at 11n.10 (noting permissive language in first iteration of § 524).¹³ As some Plaintiffs note, however, in 1999 Congress revised this language to state that HUD’s “Secretary shall, at the request of the owner ... use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project.” Pub. L. No. 106-74, Title IV, Subtitle C, § 531, 42 U.S.C. § 1437f note. Plaintiffs employ this language to make two primary arguments, both of which prove unavailing.

First, Plaintiffs seize on the mandatory phrasing of section 524 – and in particular, its use of the word “shall” – to argue that pursuant to this provision, “upon request of a project owner, HUD *must renew the HAP contract* using Section 8 funds.” AHSC Reply at 9 (emphasis added). While superficially appealing, the problem with this argument is that, carefully read, section 524 is simply not so specific. Rather, Section 524 provides only that the “Secretary shall ... *provide ... assistance*” for qualifying projects. Pub. L. No. 106-74, Title IV, Subtitle C, § 531, 42 U.S.C. § 1437f note (emphasis added). As explained above, subsection (b)(2) provides *two* mechanisms by which HUD may provide assistance to covered projects, only one of which is directly through a HAP contract between HUD and the owner. Thus, while Section 524 makes the renewal of assistance mandatory for any owner who so requests it (subject to the availability of funds), it does not, as Plaintiffs claim, specify the mechanism through which HUD must provide the assistance.

Second, Plaintiffs emphasize the responsibility that Section 524 places on the HUD Secretary (as opposed to the PHAs) in initiating the provision of the renewal assistance. See NAHP Reply at 5 (“MAHRA unequivocally put[] the obligation on ‘the Secretary’ to extend HAP contracts with owners who request it.”); AHSC Reply at 9-10 (“[I]t is noteworthy that this central renewal language provides that it is *the Secretary* who shall renew these contracts.”) (emphasis in original). The Plaintiffs’ point appears to be that “[i]f Congress had intended for local housing agencies to renew HUD’s HAP Contracts, it would have stated ‘*local housing authorities* shall renew an expiring contract.’” CMS Reply at 8 (emphasis in original).

¹³ Plaintiff CMS misleadingly cites to a separate provision of MAHRA, § 524(a)(2), entitled “Exception Projects,” which provides that, “notwithstanding [the permissive language in] paragraph (1),” for certain specified categories of multifamily housing (and these categories *only*) HUD was required, “upon request of the owner,” to “renew an expiring contract in accordance with the terms and conditions prescribed by the Secretary[.]” Pub. L. No. 105-65, Title V, § 524(a)(2); see CMS Mem. at 11. While a few of the categories of housing listed in this subsection appear to be programs at issue in this litigation, the list falls far short of including all such programs – a distinction conveniently omitted by CMS. In any event, as explained above, the Court finds that the latter-enacted version of § 524 is the one relevant here, both because it remains in effect today and because it was enacted prior to the award of the PBCAAs under the 1999 RFP. See AR 1704. Accordingly, the Court finds the mandatory language in the 1997 version of § 524(a)(2) wholly irrelevant to this case.

Again, the Court finds that this argument falls well short of establishing that HUD cannot, pursuant to the second sentence of subsection (b)(2), use assistance agreements to provide renewal assistance. As a preliminary matter, Section 8 is a federal program (albeit one run largely in cooperation with the states). As such, the Secretary is necessarily involved in its administration, even for those portions of the program which the Plaintiffs concede operate pursuant to cooperative agreements. Second, it is a matter of established fact, contested by no party, that HUD was the original counterparty to, and contract administrator of, the vast majority of projects authorized under subsection 8(b)(2). As the Plaintiffs themselves are at great pains to emphasize, until such time as HUD entered into the PBACCs pursuant to the 1999 RFP, PHAs were simply not involved, in any capacity, in such “HUD / private owner” projects. Against this backdrop, however, Plaintiffs fail to explain how Congress could possibly have effected an intention to provide for more programmatic involvement on the part of the states (and their political subdivisions, the PHAs) by directing that the PHAs “renew” HAP contracts to which they were not a party in the first instance.

- Program Regulations and Other Design Features Confirm That HUD May Use Assistance Agreements to Provide Renewal Assistance.

Finally, Plaintiffs point to various regulations and HUD guidance documents in support of two related, but slightly different arguments. The first of these arguments is that HUD has, at a minimum, a regulatory duty to administer itself the HAP contracts in the NOFA portfolio. Here, Plaintiffs cite two regulations naming HUD as the “Contract Administrator.” First, 24 C.F.R. § 880.201 defines a project-based Section 8 “Contract Administrator” as “[t]he entity which enters into the [HAP] Contract with the owner and is responsible for monitoring performance by the owner. The contract administrator is a PHA in the case of private-owner/PHA projects, and HUD in private-owner/HUD and PHA-owner/HUD projects.” Second, 24 C.F.R. § 880.505(a) provides:

Contract administration. For private-owner/PHA projects, the PHA is primarily responsible for administration of the Contract, subject to review and audit by HUD. For private-owner/HUD and PHA-owner/HUD projects, HUD is responsible for administration of the Contract. The PHA or HUD may contract with another entity for the performance of some or all of its contract administration functions.

Taken together, Plaintiffs argue that these regulations establish HUD as the Contract Administrator of the HAP contracts in the 2012 NOFA profile, such that “while ... HUD may contract out performance of its contract administration function to another entity, it cannot shed its responsibility to administer contracts for the projects in the NOFA portfolio.” AHSC Reply at 5-6.

HUD, for its part, counters that under the terms of the PBACCs as well as the Renewal Contracts, the PHAs are clearly designated as the “Contract Administrators” and that, under applicable MAHRA regulations, these contract terms override any contradictory regulations stating that HUD carries this role. Specifically, HUD cites 24 C.F.R. § 402.3 (“Contract provisions”), which provides that “[t]he renewal HAP contract shall be construed and administered in accordance with all statutory requirements, and with all HUD regulations and other requirements, including changes in HUD regulations and other requirements during the term of the renewal HAP contract, *unless the contract provides otherwise.*” (emphasis added). In light of this provision, HUD argues that “[b]ecause the Renewal HAP contract explicitly provides that the PHA, not HUD, is the contract administrator, any regulation to the contrary does not apply.” HUD Reply at 18.

The Plaintiffs do not contest that the renewal contracts in fact designate the PHA, and not HUD, as the Contract Administrator. However, they counter that this nomenclature is without meaning, because as a matter of general principle the terms of the renewal contract cannot trump those of regulations which HUD has promulgated itself and is bound to follow. SHCC Reply at 9; AHSC Reply at 13; CMS Reply at 15. Thus, according to the Plaintiffs:

the fact that the PHA is named as the contract administrator on a HAP contract means nothing more than that HUD outsourced its ultimate authority as the contract administrator to the PHA in accordance with applicable statutes and regulations. The PHA’s role as a contract administrator on a HAP contract does not relieve HUD of its obligation to administer the HAP contracts and provide project-based housing assistance.

SHCC Reply at 9.

What the Plaintiffs miss, however, is that HUD is *not* arguing in general terms that a contract term can trump a regulation, but rather is pointing to a *specific* regulation expressly stating that the terms of the renewal contracts, in particular, take precedence over any conflicting regulations or other program requirements governing the Section 8 program.¹⁴ See 24 C.F.R. § 402.3. The Court therefore agrees with HUD that the Renewal Contracts’ designation of the PHAs as the Contract Administrator is legally meaningful, and overrides the regulations cited by Plaintiffs insofar as they state to the contrary.

Citing 24 C.F.R. § 880.505(c), HUD also contends that this transfer of contract administration duties is legally permissible. That regulation provides:

¹⁴ Plaintiff AHSC attempts to argue that the phrase “unless the contract provides otherwise,” as it is used in 24 C.F.R. § 402.3, applies only to subsequently enacted regulations and requirements. See AHSC Reply at 14. The Court finds this interpretation to contravene the plain language of the regulation.

Conversion of Projects from one Ownership/Contractual arrangement to another. Any project may be converted from one ownership/contractual arrangement to another (for example, from a private-owner/HUD to a private-owner/PHA project) if:

- (1) The owner, the PHA and HUD agree,
- (2) HUD determines that conversion would be in the best interest of the project, and
- (3) In the case of conversion from a private-owner/HUD to a private-owner/PHA project, contract authority is available to cover the PHA fee for administering the Contract.

24 C.F.R. § 880.505(c).

Here, HUD argues that “[b]y executing the Renewal Contracts at issue in the NOFA, the owner, the PHA, and HUD expressly agree that the PHA will act as contract administrator.” HUD Supp. Mem. at 4 (citing AR 2268, 2270, 2271, 2278); see also id. at 4-5 (noting that under related regulations, a project “conversion” consists of “the transfer of the responsibility of administering the Contract”) (citing 40 Fed. Reg. 18682, 18683 ¶ 15 (Apr. 29, 1975)). Plaintiffs counter that 24 C.F.R. § 880.505(c) calls for a more formalized conversion process which HUD has not followed, and is therefore irrelevant to this bid protest. AHSC Supp. Mem. at 5-6. Although the Court finds that section 880.505(c) is somewhat ambiguous on this point, it agrees with HUD that the agency’s initiation of the PBCA program pursuant to the 1999 RFP, and subsequent execution of the PBACCs with chosen PHAs, were sufficiently formalized mechanisms that met the requirements of subsections (1)-(3) of this regulation. At any rate, the Court holds that, at a minimum, Plaintiffs have failed to demonstrate that HUD’s procedure here was a “clear and prejudicial violation of applicable ... regulations,” as required under this Court’s standard of review for bid protests. See Axiom Res. Mgmt., 564 F.3d at 1381.

Finally, Plaintiffs’ argue that “[u]nlike a traditional ACC, a PBACC does not actually provide assistance to PHAs or owners. Instead, it provides a fee to contractors to administer the assistance that HUD is already obligated to provide.” CMS Reply at 4-5. In essence, Plaintiffs’ argument is that, in practice, the role of the PBCAs in administering the HAP contract is merely “ministerial,” and therefore primarily for HUD’s benefit – and, by extension, necessarily a procurement contract under the standards of the FGCAA. In support of this argument, Plaintiffs repeatedly cite Section 4350.3 of the HUD Handbook (“Occupancy Requirements of Subsidized Multifamily Housing Programs”), subsection 1-4(B) of which provides:

HUD has primary responsibility for contract administration but has assigned portions of these responsibilities to other organizations that act as Contract Administrators for HUD. ... There are two types of Contract Administrators that assist HUD in performing contract administration functions.

1. Traditional Contract Administrators. These Contract Administrators have been used for over 20 years and have Annual Contribution Contracts (ACCs) with HUD. Under their ACCs, Traditional Contract Administrators are responsible for asset management functions and HAP contract compliance and monitoring functions. They are paid a fee by HUD for their services.
2. Performance-Based Contract Administrators (PBCAs). The use of PBCAs began as an initiative in 2000. Under a performance-based ACC, the scope of responsibilities is more limited than that of a Traditional Contract Administrator. A PBCA's responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts. PBCAs are generally required to administer contracts on a state-wide basis and have strict performance standards and reporting requirements as outlined in their ACC.

AR 2492.

The "Traditional Contract Administrators" ("TCAs") referred to here are PHAs that, pursuant to either subsection 8(b)(1) or sentence two of subsection 8(b)(2), entered into ACCs with HUD and, concurrently, HAP contracts with project owners. As the Handbook indicates, and as Plaintiffs stress in their briefs, the authority retained by the TCAs is somewhat more expansive than that held by the PBCAs pursuant to the PBACCs. For example, under the PBACCs, HUD retains the responsibility to determine when project owners are in default, 24 C.F.R. § 880.506(a); AR 20201, and is the only party capable of terminating a HAP contract, 24 C.F.R. § 880.506(b). In addition, although the PBCAs sign the HAP contracts as the Contract Administrator on HUD's behalf, since 2007 HUD has also signed every renewal HAP contract because, in the determination of HUD counsel, these contracts "represent the official point of obligation of federal funds." See Docket No. 57-2 at 3 (email from Lanier Hylton dated November 20, 2007); see also Order dated February 19, 2013 (granting motions to supplement the administrative record, including with the Hylton email).

The Court acknowledges the limitations on the authority of the PBCAs and HUD's continued oversight role in the administration of the PBCA program. However, in light of the statutory and regulatory scheme analyzed above, the Court finds that such

limitations fall well short of establishing that the PBCA program primarily benefits HUD, rather than serving as a mechanism through which HUD, in cooperation with the states, carries out the statutorily authorized goal of supporting affordable housing for low-income individuals and families.

First, as HUD points out, since its enactment in 1937, the stated policy of the Housing Act has been for HUD and its predecessor agencies to work cooperatively with states and their political subdivisions to promote various housing and community development-related goals. As originally enacted, the Housing Act's "Declaration of Policy" provided that:

It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to *assist the several states and their political subdivisions* to ... remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.

Pub. L. No. 75-412, 50 Stat. 888 (1937) (emphasis added); see also id. (preamble, stating the purpose of the Act to be the provision of "*financial assistance to States and political subdivisions thereof* for the elimination of unsafe and insanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income ...") (emphasis added).

In 1998 Congress somewhat modified this policy statement. It currently reads:

- (a) Declaration of Policy – It is the policy of the United States –
- (1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this Act –
 - (A) *to assist States and political subdivisions of States* to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families;
 - (B) *to assist States and political subdivisions of States* to address the shortage of housing affordable to low-income families; and
 - (C) Consistent with the objectives of this title, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public.

QHWRA, 112 Stat. 2461, 2522-23 (1998), codified at 42 U.S.C. § 1437 (emphasis added).

HUD contends, and the Court agrees, that these revisions serve to reiterate and “further emphasiz[e] the primary role the states and their political subdivisions are to play” in implementing the federal government’s housing policies. HUD Mem. at 14. More important, however, is the fact that the consistent policy of the Housing Act has been for HUD (and its predecessor agencies) to implement federal housing goals through close cooperation and coordination with the states. Moreover, although the Plaintiffs attempt to make much of HUD’s various statements throughout the years regarding the cost-saving effects of the PBCA program, *see* NHC Mem. at 2; SHCC Mem. at 9, the Court finds nothing inconsistent in HUD sharing greater responsibility for program administration with the states while at the same time achieving certain cost efficiencies. Indeed, as HUD points out, such twin goals were expressly set forth in MAHRA, which called on HUD to address “Federal budget constraints ... and diminished administrative capacity” through “reforms that transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities.” MAHRA § 511(10), (11)(C).

In addition, as HUD correctly points out, it has always limited the award of the PBACCs to PHAs, and has done so under the express reasoning that “[b]y law, HUD may only enter into an ACC with a legal entity that qualifies as a ‘public housing agency’ (PHA) as defined in the United States Housing Act of 1937.” AR 428-29, 64 Fed. Reg. at 27,358-59. Were HUD obtaining the services of the PBCAs strictly for its own “ministerial” convenience, the Court does not see how such a restriction would apply – and, indeed, HUD has stated that were the Court to find that it must issue the PBACCs as procurement contracts, HUD does not believe it would be in the agency’s self-interest to continue the restriction going forward. *See* HUD Supp. Mem. at 8. Thus, the PHA-only rule would appear to make sense only if one conceives of these entities as HUD’s governmental partners in the administration of housing programs intended to convey a benefit to low-income families and individuals. And, as HUD notes, consistent with such a design, the PBCA program is in fact “administered by a program office, not a contracting officer. ... [and] all statutory amendments and changes in policies or procedures [to the program] have been implemented not through a FAR-mandated changes clause, but through notices, handbooks, and regulations.” HUD Mem. at 20.

- The PBACCs are Consistent With the Standards for Cooperative Agreements Set Forth in the FGCAA.

As explained above, the FGCAA establishes a “principal purpose” test for the determination of whether a particular governmental contract is properly categorized as a procurement contract or a cooperative agreement. When “the principal purpose of the

instrument is to acquire (by purchase, lease, or barter) property or services *for the direct benefit of the United States Government*,” an agency must use a procurement contract. 31 U.S.C. § 6303 (emphasis added). Conversely, when (1) “the principal purpose of the relationship is to *transfer a thing of value*” to the recipient in order “*to carry out a public purpose of support or stimulation authorized by a law of the United States*,” and (2) “*substantial involvement* is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement,” the agency may use an assistance agreement. *Id.* § 6305 (emphasis added).

Citing these standards, the Government argues that the contracts in question hew much more closely to the latter definition. Specifically, HUD posits that it “has not and is not acquiring any services when it grants administrative authority and transfers funds to PHAs via the ACCs,” but “[r]ather ... is engaged in a core statutory duty of providing funding assistance to state-sponsored PHAs[.]” HUD Mem at 22. Moreover, HUD argues that it “has retained authority to make certain decisions [and] to control the administration of the program ... to ensure that Federal funds are spent in strict accordance with the terms of the HAP contracts and Federal law,” which dovetails with the FGCAA’s instruction that “substantial involvement” on the part of the Government is indicative of a cooperative agreement, not a procurement contract. *Id.* at 32.

The Court agrees with HUD that the PBACCs are properly categorized as cooperative agreements under the standards set forth in the FGCAA. Notwithstanding the fact that HUD originally directly administered the majority of the HAP contracts in the 2012 NOFA portfolio, it is unburdened by any statutory or regulatory obligation to maintain this responsibility in going forward in perpetuity. When MAHRA authorized HUD to renew the expiring HAP contracts, it did not specify any particular model for HUD to use in providing the renewal assistance. Consistent with the policy goals set forth in the Housing Act, HUD instituted the PBCA program and, in so doing, enlisted the states and their political subdivisions, the PHAs, to take on greater program responsibility. That HUD achieved certain cost savings in so doing does not convert the PBCA program into a procurement process that primarily benefits HUD, as opposed to the recipients of the Section 8 assistance.

III. Motions to Supplement the Administrative Record

Finally, the Court will briefly address two post-argument motions to supplement the administrative record, made by Plaintiffs NHC and AHSC. Each of these Plaintiffs seeks to have the Court admit a two-page February 7, 2007 HUD memorandum outlining certain procedures in HUD’s transfer of HAP contracts from the PHAs that had originally (or “traditionally”) administered them, to the PHA that was serving as the PBCA with jurisdiction for the geographic area in which certain projects were located. *See* Docket Entry 90-2 (the February 7, 2007 memorandum). HUD opposes these motions, arguing that they are untimely; that the memorandum is not “necessary to permit meaningful

judicial review,” per the standard established in Axiom Resource Management, Inc. v. United States, 564 F.3d 1374, 1379 (Fed. Cir. 2009); and that, in any event, the memorandum actually supports its position.

The Court agrees with HUD that, in a case as extensively briefed and with an administrative record as large as this one, the February 7, 2007 memorandum cannot meet the Axiom standard for supplementation. It also agrees with HUD that, for the reasons the Court will not belabor but which follow from its above analysis, the memorandum neither undermines nor contradicts the Government’s position in this case. The Court therefore DENIES these motions.

Conclusion

For the reasons stated herein, the Court finds that the 2012 NOFA properly characterizes the PBACCs as cooperative agreements. The NOFA is compliant with the FGCAA, and is not subject to CICA. Accordingly, the Court DENIES HUD’s motion to dismiss for lack of subject matter jurisdiction; DENIES the Plaintiffs’ respective motions for judgment on the administrative record; and GRANTS HUD’s motion for judgment on the administrative record. In addition, the Court DENIES Plaintiffs NHC and AHSC’s motions to supplement the administrative record.

No costs.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

No. 12-852C (and consolidated cases)

(Filed: April 22, 2013)

***** *
 CMS CONTRACT MANAGEMENT *
 SERVICES, et al., *

 Plaintiffs, *

 v. *

 THE UNITED STATES, *

 Defendant. *
 ***** *

ORDER

On April 19, 2013, the Court issued an opinion and order in the above-captioned case, holding that a certain 2012 Notice of Funding Availability (“NOFA”) issued by the U.S. Department of Housing and Urban Development (“HUD”) “is compliant with the FGCAA” (*i.e.*, the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-6308), and “not subject to CICA” (*i.e.*, the Competition in Contracting Act, 41 U.S.C. § 3301). Docket Entry 98 (Order and Opinion) at 37 (emphasis added). Accordingly, the Court granted judgment on the administrative record to HUD, and denied various remaining motions on the merits of this case.

Later that same day, Plaintiffs CMS Contract Management Services and the Housing Authority of the City of Bremerton (collectively, “CMS”) filed a motion for clarification of this decision, as well as a motion to stay the Court’s decision. With respect to the former, CMS appears to seek clarification as to whether the Court’s holding that the NOFA “is compliant with the FGCAA” applies to a provision in the NOFA that creates an in-state preference for the award of the contracts at issue in this case. It does. The FGCAA establishes only a precatory goal that agencies “encourage competition in making grants and cooperative agreements”; nothing in this Act mandates, as does the CICA, “full and open competition.” 41 U.S.C. § 3301(a)(1). Moreover, the contracts in

the NOFA portfolio are “performance-based,” and thus will, in fact, be awarded competitively, pursuant to numerous indicia specified in the terms of the NOFA.

With respect to CMS’s second request, for a stay of the Court’s decision pending appeal, the Court notes only that a likelihood of success on the merits is a necessary component of a party’s entitlement to such relief. Hallmark-Phoenix 3, LLC v. United States, 429 F. App’x 983, 984 (Fed. Cir. 2011). For the reasons explained in detail in the Court’s April 19, 2013 Opinion and Order, the Court finds that CMS cannot establish such a likelihood, and therefore DENIES this motion.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

**Nos. 12-852 C, 12-853 C, 12-862 C,
12-864 C and 12-869 C**

**CMS CONTRACT MANAGEMENT
SERVICES and THE HOUSING
AUTHORITY OF THE CITY OF
BREMERTON, ET AL.
Plaintiffs**

and

**MASSACHUSETTS HOUSING
FINANCE AGENCY
Plaintiff-Intervenor**

JUDGMENT

v.

**THE UNITED STATES
Defendant**

Pursuant to the court's Opinion and Order, filed April 19, 2013, denying defendant's motion to dismiss for lack of subject matter jurisdiction, and granting defendant's alternative motion for judgment on the administrative record, and the court's Order directing entry of judgment, filed April 19, 2013,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant.

Hazel C. Keahey
Clerk of Court

April 30, 2013

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is \$455.00.

.,APPEAL,ECF,LEAD

**US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:12-cv-00852-TCW
Internal Use Only**

CMS CONTRACT MANAGEMENT SERVICES et al v.
USA

Assigned to: Judge Thomas C. Wheeler

Member cases:

1:12-cv-00864-TCW

1:12-cv-00869-TCW

1:12-cv-00853-TCW

1:12-cv-00862-TCW

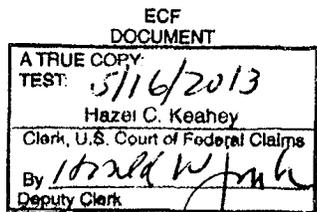
Cause: 28:1491 Tucker Act

Date Filed: 12/10/2012
Date Terminated: 04/30/2013
Jury Demand: None
Nature of Suit: 138 Contract - (Pre Award) Injunctions
Jurisdiction: U.S. Government Defendant

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National Affordable Housing Management Association

Date Filed	#	Docket Text
05/10/2013	<u>103</u>	NOTICE OF APPEAL as to <u>98</u> Order on Motion for Judgment on the Admin. Record, Order on Cross Motion, Order on Motion to Supplement the Administrative Record,, Order on Motion to Dismiss - Rule 12(b)(1),,,,,, <u>102</u> Judgment, Order, filed by NAVIGATE AFFORDABLE HOUSING PARTNERS. Filing fee \$ 455, receipt number 9998-2069424. Copies to judge, opposing party and CAFC. (Gill, Elizabeth) (Entered: 05/10/2013)
04/30/2013		(Court only) ***Civil Case Terminated. (dls) (Entered: 04/30/2013)
04/30/2013	<u>102</u>	JUDGMENT entered (in this, 12-853C, 12-862C, 12-864C and 12-869C), pursuant to Rule 58, in favor of defendant. (Copy to parties) (dls) (Entered: 04/30/2013)
04/22/2013	<u>101</u>	ORDER denying <u>99</u> Motion to Stay Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 04/22/2013)
04/19/2013	<u>100</u>	DECLARATION re <u>99</u> Emergency MOTION to Stay Government Contracts Awards <i>Motion for Clarification of the Court's April 19, 2013 Order and Request for Stay Pending That Clarification or, In the Alternative, Notice of Intent to Appeal and Request for Stay Pending A Declaration of Laura Lyon In Support of Plaintiffs' Motion for Stay Of The Court's April 19, 2013 Order Granting Judgment on the Administrative Record by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON.</i> (Attachments: # <u>1</u> Exhibit 1-7)(Nelson, Colm) (Entered: 04/19/2013)
04/19/2013	<u>99</u>	Emergency MOTION to Stay Government Contracts Awards <i>Motion for Clarification of the Court's April 19, 2013 Order and Request for Stay Pending That Clarification or, In the Alternative, Notice of Intent to Appeal and Request for Stay Pending Appeal</i> , filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. Response due by 5/6/2013. (Nelson, Colm) (Entered: 04/19/2013)
04/19/2013		ORDER -- Pursuant to docket entry <u>98</u> , the Clerk of Court is directed to enter judgment in favor of Defendant. Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 04/19/2013)
04/19/2013	<u>98</u>	ORDER granting <u>21</u> Motion for Judgment on the Administrative Record; denying <u>21</u> Motion to Dismiss - Rule 12(b)(1); denying <u>92</u> Motion to Supplement the Administrative Record; denying <u>90</u> Motion to

		Supplement the Administrative Record; denying <u>28</u> Cross Motion; denying <u>26</u> Motion for Judgment on the Administrative Record Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. Modified on 4/22/2013 - corrected pdf caption (jt1). (Entered: 04/19/2013)
04/11/2013	<u>97</u>	NOTICE, filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION of <i>Party Name Change</i> (Gill, Elizabeth) (Entered: 04/11/2013)
03/22/2013	<u>96</u>	RESPONSE to Cross-Motion re <u>90</u> MOTION to Supplement the Administrative Record , filed by NATIONAL HOUSING COMPLIANCE. (Golden, Michael) Modified on 3/28/2013 (ar). (Entered: 03/22/2013)
03/22/2013	<u>95</u>	RESPONSE to Cross-Motion re <u>92</u> MOTION to Supplement the Administrative Record , filed by ASSISTED HOUSING SERVICES CORP.. (O'Donnell, Neil) Modified on 3/28/2013 (ar). (Entered: 03/22/2013)
03/20/2013	<u>94</u>	Cross-MOTION to Strike <u>91</u> Supplemental Brief, <u>93</u> Supplemental Brief and Response to <u>92</u> and <u>90</u> motions to supplement the administrative record filed by plaintiffs NHC and AHSC, filed by USA. Response due by 4/8/2013.(Mickle, Douglas) Modified on 3/21/2013 to correct docket entry (ar). (Entered: 03/20/2013)
03/15/2013	<u>93</u>	SUPPLEMENTAL BRIEF re: <u>83</u> Order , filed by ASSISTED HOUSING SERVICES CORP.. (O'Donnell, Neil) (Entered: 03/15/2013)
03/15/2013	<u>92</u>	MOTION to Supplement the Administrative Record , filed by ASSISTED HOUSING SERVICES CORP..Response due by 4/1/2013. (O'Donnell, Neil) (Entered: 03/15/2013)
03/15/2013	<u>91</u>	SUPPLEMENTAL BRIEF re: <u>83</u> Order , filed by NATIONAL HOUSING COMPLIANCE. (Golden, Michael) (Entered: 03/15/2013)
03/15/2013	<u>90</u>	MOTION to Supplement the Administrative Record , filed by NATIONAL HOUSING COMPLIANCE. Response due by 4/1/2013. (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Exhibit)(Golden, Michael) (Entered: 03/15/2013)
03/15/2013	<u>89</u>	SUPPLEMENTAL BRIEF re: <u>83</u> Order , filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION. (Gill, Elizabeth) (Entered: 03/15/2013)
03/15/2013	<u>88</u>	SUPPLEMENTAL BRIEF re: <u>83</u> Order , filed by USA. (Mickle, Douglas) (Entered: 03/15/2013)
03/15/2013	<u>87</u>	SUPPLEMENTAL BRIEF re: <u>83</u> Order For Supplemental Briefing, filed by NATIONAL COUNCIL OF STATE HOUSING AGENCIES. (Mullen, Kevin) (Entered: 03/15/2013)
03/15/2013	<u>86</u>	RESPONSE to <u>83</u> Order For Supplemental Briefing, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. (Vacura, Richard) (Entered: 03/15/2013)

03/15/2013	<u>85</u>	SUPPLEMENTAL BRIEF re: <u>83</u> Order <i>Requesting Additional Brief</i> , filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Nelson, Colm) (Entered: 03/15/2013)
03/15/2013	<u>84</u>	RESPONSE to <u>83</u> Order <i>For Supplemental Briefing</i> , filed by MASSACHUSETTS HOUSING FINANCE AGENCY. (Kennon, Gabe) (Entered: 03/15/2013)
03/05/2013		(Court only) Remark : Supplemental briefs cannot exceed 12 pages in length. (ar) (Entered: 03/05/2013)
03/05/2013	<u>83</u>	ORDER -- Request for supplemental briefing -- Notice of Compliance due by 3/15/2013 . Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 03/05/2013)
02/27/2013		<u>82</u> TRANSCRIPT of Proceedings held on February 19, 2013 before Judge Thomas C. Wheeler. Total No. of Pages: 1-120. <u>Procedures Re: Electronic Transcripts and Redactions</u> . For copy, contact Heritage Court Reporting, (202) 628-4888. <u>Forms to Request Transcripts</u> . Notice of Intent to Redact due 3/6/2013. Redacted Transcript Deadline set for 4/1/2013. Release of Transcript Restriction set for 5/31/2013. (dw1) (Entered: 02/27/2013)
02/27/2013	<u>81</u>	Notice Of Filing Of Certified Transcript for proceedings held on February 19, 2013 in Washington, DC. (dw1) (Entered: 02/27/2013)
02/19/2013		Minute Entry for proceeding held in Washington, DC on 2/19/2013, ended on 2/19/2013, before Judge Thomas C. Wheeler: Oral Argument. [Total number of days of proceeding: 1]. Official record of proceeding taken by court reporter. (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.)(ak) (Entered: 02/19/2013)
02/19/2013		ORDER granting <u>57</u> Motion to Supplement the Administrative Record; granting <u>62</u> Motion to Supplement the Administrative Record; granting <u>63</u> Motion to Amend/Correct; granting <u>66</u> Motion to Amend/Correct Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 02/19/2013)
02/15/2013	<u>80</u>	RESPONSE to <u>63</u> MOTION to Amend/Correct , <i>or in the Alternative Supplement, the Administrative Record</i> , <u>66</u> MOTION to Amend/Correct <i>Administrative Record</i> , <u>62</u> MOTION to Supplement the Administrative Record Administrative Record, <u>57</u> MOTION to Supplement the Administrative Record, filed by USA. Reply due by 2/25/2013 . (Mickle, Douglas) (Entered: 02/15/2013)
02/14/2013		ORDER granting <u>75</u> Motion for Leave to File Signed by Judge Thomas C. Wheeler. (ak) (Entered: 02/14/2013)
02/13/2013	<u>79</u>	REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record

		(<i>Corrected Reply</i>), filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION. (Gill, Elizabeth) (Entered: 02/13/2013)
02/13/2013	<u>78</u>	REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record <i>CORRECTED REPLY</i> , filed by NATIONAL HOUSING COMPLIANCE. (Golden, Michael) (Entered: 02/13/2013)
02/13/2013	<u>77</u>	REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record <i>Reply in Support of MJAR</i> , filed by ASSISTED HOUSING SERVICES CORP.. (O'Donnell, Neil) (Entered: 02/13/2013)
02/13/2013	<u>76</u>	REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record (<i>Corrected Reply</i>), filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. (Vacura, Richard) (Entered: 02/13/2013)
02/13/2013	<u>75</u>	MOTION for Leave to File a Corrected Version of Its (1) Reply in Support of Its Cross-Motion for Judgment on the Administrative Record; (2) Opposition to Defendant's Motion to Dismiss, and in the Alternative, Motion for Judgment Upon the Administrative Record; and (3) Response to the Briefs Filed by Intervenor MassHousing and Amicus Curiae National Council of State Housing Agencies, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. Response due by 3/4/2013. (Vacura, Richard) (Entered: 02/13/2013)
02/13/2013	<u>74</u>	REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record, filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Attachments: # <u>1</u> Appendix H, # <u>2</u> Appendix I)(Nelson, Colm) (Entered: 02/13/2013)
02/12/2013		(Court only) Set/Reset Deadlines: Notice of Compliance due by 2/15/2013. (ar) (Entered: 02/14/2013)
02/12/2013	<u>73</u>	ORDER denying <u>56</u> Motion for Leave to File Excess Pages; denying <u>59</u> Motion for Leave to File Amicus Brief; denying <u>60</u> Motion for Leave to File Excess Pages; denying <u>64</u> Motion for Leave to File Excess Pages; denying <u>68</u> Motion for Leave to File ; granting <u>69</u> Motion for Leave to File Excess Pages; striking <u>72</u> Motion to Amend/Correct Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 02/12/2013)
02/12/2013		ORDER granting <u>71</u> Motion to Amend/Correct Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 02/12/2013)
02/11/2013	<u>72</u>	See Order [73] of February 12, 2013 striking this document Corrected Reply to Response <u>67</u> Reply to Response to Motion, Motion to Correct (Include Electronic Signature) Corrected Reply, filed by ASSISTED HOUSING SERVICES CORP.. Response due by 2/28/2013. (O'Donnell, Neil) Modified on 2/12/2013 to correct docket text(ar). Modified on 2/14/2013 (ar). (Entered: 02/11/2013)

02/11/2013	<u>71</u>	MOTION to Amend/Correct <u>67</u> Reply to Response to Motion, <i>Motion to Correct (Include Electronic Signature)</i> , filed by ASSISTED HOUSING SERVICES CORP..Response due by 2/28/2013.(O'Donnell, Neil) (Entered: 02/11/2013)
02/08/2013	<u>70</u>	REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. (Vacura, Richard) (Entered: 02/08/2013)
02/08/2013	<u>69</u>	Consent MOTION for Leave to Exceed Page Limit of Plaintiff Southwest Housing Compliance Corporation's: (1) Reply in Support of Its Cross-Motion for Judgment on the Administrative Record by 1 pages, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION.Response due by 2/25/2013.(Vacura, Richard) (Entered: 02/08/2013)
02/08/2013	<u>68</u>	MOTION for Leave to File <u>67</u> <i>Exceed Page Limits</i> , filed by ASSISTED HOUSING SERVICES CORP..Response due by 2/25/2013.(O'Donnell, Neil) (Entered: 02/08/2013)
02/08/2013	<u>67</u>	See Order [73] of February 12, 2013 striking this document REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12 (b)(1) MOTION for Judgment on the Administrative Record <i>Reply in Support of MJAR</i>, filed by ASSISTED HOUSING SERVICES CORP..(O'Donnell, Neil) Modified on 2/14/2013 (ar). (Entered: 02/08/2013)
02/08/2013	<u>66</u>	MOTION to Amend/Correct <i>Administrative Record</i> , filed by ASSISTED HOUSING SERVICES CORP..Response due by 2/25/2013.(O'Donnell, Neil) (Entered: 02/08/2013)
02/08/2013	<u>65</u>	See Order [73] of February 12, 2013 striking this document RESPONSE to <u>44</u> Reply to Response to Motion, <u>47</u> Response to Cross Motion [Dispositive], Response to Cross Motion [Dispositive], filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION. (Gill, Elizabeth) Modified on 2/14/2013 (ar). (Entered: 02/08/2013)
02/08/2013	<u>64</u>	MOTION for Leave to Exceed Page Limit of Response To Briefs Of Intervenor And Amicus Curiae And Reply To Defendants Response In Opposition To Plaintiffs Cross-Motions For Judgment Upon The Administrative Record by 10 pages, filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION.Response due by 2/25/2013. (Gill, Elizabeth) (Entered: 02/08/2013)
02/08/2013	<u>63</u>	MOTION to Amend/Correct , <i>or in the Alternative Supplement, the Administrative Record</i> , filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION.Response due by 2/25/2013. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit)(Gill, Elizabeth) (Entered: 02/08/2013)
02/08/2013	<u>62</u>	MOTION to Supplement the Administrative Record Administrative Record, filed by NATIONAL HOUSING COMPLIANCE.Response due by 2/25/2013. (Attachments: # <u>1</u> Exhibit 1)(Hordell, Michael)

		(Entered: 02/08/2013)
02/08/2013	<u>61</u>	See Order [73] of February 12, 2013 striking this document RESPONSE to 44 Reply to Response to Motion, 47 Response to Cross Motion [Dispositive], Response to Cross Motion [Dispositive], filed by NATIONAL HOUSING COMPLIANCE. (Hordell, Michael) Modified on 2/14/2013 (ar). (Entered: 02/08/2013)
02/08/2013	<u>60</u>	MOTION for Leave to Exceed Page Limit of NHC Reply to Govt Response to Motion for Judgment on AR by 10 pages, filed by NATIONAL HOUSING COMPLIANCE. Response due by 2/25/2013. (Hordell, Michael) (Entered: 02/08/2013)
02/08/2013	<u>59</u>	MOTION for Leave to File Amicus Brief in Support of Full and Open Competition in PBCA Contracting, filed by National Affordable Housing Management Association. Response due by 2/25/2013. (Perkins, Giles) (Entered: 02/08/2013)
02/08/2013	<u>58</u>	Refer to Order 73 of February 12, 2013 striking this document REPLY to Response to Motion re 21 MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record, filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Attachments: # <u>1</u> Appendix II, # <u>2</u> Appendix I)(Nelson, Colm) Modified on 2/14/2013 (ar). (Entered: 02/08/2013)
02/08/2013	<u>57</u>	MOTION to Supplement the Administrative Record, filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. Response due by 2/25/2013. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4)(Nelson, Colm) (Entered: 02/08/2013)
02/08/2013	<u>56</u>	MOTION for Leave to Exceed Page Limit of Plaintiffs CMS Contract Management Services' and The Housing Authority of the City of Bremerton's Reply in Support of Their Cross-Motion for Judgment Upon The Administrative Record by 10 pages, filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. Response due by 2/25/2013. (Nelson, Colm) (Entered: 02/08/2013)
02/01/2013	<u>55</u>	ORDER denying <u>53</u> Motion to Amend Schedule Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 02/01/2013)
02/01/2013	<u>54</u>	ORDER granting <u>33</u> Motion for Leave to File Amicus Brief; denying <u>38</u> Motion for Leave to File Amicus Brief; granting <u>48</u> Motion for Leave to File Amicus Brief Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 02/01/2013)
01/31/2013	<u>53</u>	MOTION to Amend Schedule <i>Order and For Extension of Time</i> , filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION. Response due by 2/19/2013. (Gill, Elizabeth) (Entered: 01/31/2013)

01/31/2013	<u>52</u>	RESPONSE to <u>43</u> Order <i>AND RESPONSE (CORRECTED) OF AMICI THE NEW MEXICO MORTGAGE FINANCE AUTHORITY, ARIZONA DEPARTMENT OF HOUSING, DELAWARE STATE HOUSING AUTHORITY, KENTUCKY HOUSING CORPORATION, RHODE ISLAND HOUSING AND WEST VIRGINIA HOUSING DEVELOPMENT FUND TO PLAINTIFFS' OPPOSITION TO MOTIONS FOR LEAVE TO FILE AMICUS BRIEFS</i> , filed by NEW MEXICO MORTGAGE FINANCE AUTHORITY. (Nucci, Katherine) (Entered: 01/31/2013)
01/31/2013	<u>51</u>	RESPONSE to <u>43</u> Order <i>AND RESPONSE OF AMICI THE NEW MEXICO MORTGAGE FINANCE AUTHORITY, ARIZONA DEPARTMENT OF HOUSING, DELAWARE STATE HOUSING AUTHORITY, KENTUCKY HOUSING CORPORATION, RHODE ISLAND HOUSING AND WEST VIRGINIA HOUSING DEVELOPMENT FUND TO PLAINTIFFS' OPPOSITION TO MOTIONS FOR LEAVE TO FILE AMICUS BRIEFS</i> , filed by NEW MEXICO MORTGAGE FINANCE AUTHORITY. (Nucci, Katherine) (Entered: 01/31/2013)
01/31/2013	<u>50</u>	REPLY to Response to Motion re <u>33</u> MOTION for Leave to File Amicus Brief MOTION for leave to participate in the Court's teleconference scheduled for 01/24/2013 at 2:00 PM and participate in oral argument on 02/19/2013 at 10:00AM, filed by NATIONAL COUNCIL OF STATE HOUSING AGENCIES. (Mullen, Kevin) (Entered: 01/31/2013)
01/31/2013	<u>49</u>	ORDER granting <u>46</u> Motion for Leave to File Excess Pages Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 01/31/2013)
01/30/2013	<u>48</u>	MOTION for Leave to File Amicus Brief, filed by NATIONAL COUNCIL OF STATE HOUSING AGENCIES. Response due by 2/19/2013. (Attachments: # <u>1</u> Brief of Amicus Curiae)(Mullen, Kevin) (Entered: 01/30/2013)
01/30/2013	<u>47</u>	RESPONSE and reply to <u>26</u> MOTION for Judgment on the Administrative Record <i>and Opposition to Defendant's Motion to Dismiss</i> , <u>28</u> CROSS MOTION and RESPONSE to <u>21</u> Motion to Dismiss - Rule 12(b)(1), Motion for Judgment on the Administrative Record filed by USA, filed by USA. Reply due by 2/19/2013. (Mickle, Douglas) (Entered: 01/30/2013)
01/30/2013	<u>46</u>	Unopposed MOTION for Leave to Exceed Page Limit of consolidated reply and response brief by 4 pages, filed by USA. Response due by 2/19/2013. (Mickle, Douglas) (Entered: 01/30/2013)
01/30/2013	<u>45</u>	AMICUS BRIEF <i>FOR NEW MEXICO MORTGAGE FINANCE AUTHORITY, ARIZONA DEPARTMENT OF HOUSING, DELAWARE STATE HOUSING AUTHORITY, KENTUCKY HOUSING CORPORATION, RHODE ISLAND HOUSING AND WEST VIRGINIA HOUSING DEVELOPMENT FUND</i> , filed by NEW MEXICO MORTGAGE FINANCE AUTHORITY. (Nucci, Katherine) (Entered: 01/30/2013)

		01/30/2013)
01/30/2013	<u>44</u>	REPLY to Response to Motion re <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record, filed by MASSACHUSETTS HOUSING FINANCE AGENCY. (Kennon, Gabe) (Entered: 01/30/2013)
01/30/2013	<u>43</u>	ORDER Notice of Compliance due by 1/31/2013. Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 01/30/2013)
01/29/2013	<u>42</u>	RESPONSE to <u>33</u> Leave to File Amicus Brief,, Motion for Miscellaneous Relief, <i>from NCSHA</i> , filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. (Vacura, Richard) (Entered: 01/29/2013)
01/29/2013	<u>41</u>	RESPONSE to <u>33</u> Leave to File Amicus Brief,, Motion for Miscellaneous Relief, <i>from National Council of State Housing Agencies</i> , filed by NATIONAL HOUSING COMPLIANCE. (Golden, Michael) (Entered: 01/29/2013)
01/29/2013	<u>40</u>	RESPONSE to <u>33</u> MOTION for Leave to File Amicus Brief MOTION for leave to participate in the Court's teleconference scheduled for 01/24/2013 at 2:00 PM and participate in oral argument on 02/19/2013 at 10:00AM <i>Opposition</i> , filed by ASSISTED HOUSING SERVICES CORP.. <i>Reply due by 2/8/2013</i> . (O'Donnell, Neil) (Entered: 01/29/2013)
01/29/2013	<u>39</u>	RESPONSE to <u>33</u> Leave to File Amicus Brief,, Motion for Miscellaneous Relief, <i>from National Council of State Housing Agencies</i> , filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION. (Gill, Elizabeth) (Entered: 01/29/2013)
01/29/2013	<u>38</u>	MOTION for Leave to File Amicus Brief, filed by NEW MEXICO MORTGAGE FINANCE AUTHORITY, ARIZONA DEPARTMENT OF HOUSING, DELAWARE STATE HOUSING AUTHORITYA, KENTUCKY HOUSING CORPORATION, RHODE ISLAND HOUSING, WEST VIRGINIA HOUSING DEVELOPMENT FUND. <i>Response due by 2/15/2013</i> .(Nucci, Katherine) (Entered: 01/29/2013)
01/29/2013	<u>37</u>	DECLARATION re <u>35</u> Amicus Brief, <i>of Colm Nelson in Opposition to National Council of State Housing Agencies' Motion for Leave to Participate as Amicus Curiae</i> by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4)(Nelson, Colm) (Entered: 01/29/2013)
01/29/2013	<u>36</u>	DECLARATION re <u>35</u> Amicus Brief, <i>of Carlita Alegria in Opposition to National Council of State Housing Agencies' Motion for Leave to Participate as Amicus Curiae</i> by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Nelson, Colm) (Entered: 01/29/2013)
01/29/2013	<u>35</u>	RESPONSE to <u>33</u> <i>National Council of State Housing Agencies' Motion</i>

		<i>for Leave to Participate as Amicus Curiae</i> , filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Nelson, Colm) (Entered: 01/29/2013)
01/24/2013		(Court only) Set/Reset Deadlines: Notice of Compliance due by 1/30/2013. Response due by 1/29/2013. Reply due by 1/31/2013. (jt1) (Entered: 01/25/2013)
01/24/2013		Minute Entry for proceeding held in Washington, DC on 1/24/2013, ended on 1/24/2013, before Judge Thomas C. Wheeler: Telephone Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.)(ak) (Entered: 01/24/2013)
01/24/2013	34	ORDER Signed by Judge Thomas C. Wheeler. (ak) Copy to parties. (Entered: 01/24/2013)
01/24/2013	33	MOTION for Leave to File Amicus Brief (Response due by 2/11/2013.), MOTION for leave to participate in the Court's teleconference scheduled for 01/24/2013 at 2:00 PM and participate in oral argument on 02/19/2013 at 10:00AM, filed by NATIONAL COUNCIL OF STATE HOUSING AGENCIES. (Attachments: # 1 Proposed Order)(Mullen, Kevin) (Entered: 01/24/2013)
01/23/2013		ORDER granting 32 Motion to Amend/Correct Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/23/2013)
01/22/2013	32	MOTION to Amend/Correct 28 CROSS MOTION and RESPONSE to 21 Motion to Dismiss - Rule 12(b)(1), Motion for Judgment on the Administrative Record filed by USA, filed by NATIONAL HOUSING COMPLIANCE. Response due by 2/8/2013. (Attachments: # 1 Exhibit) (Golden, Michael) (Entered: 01/22/2013)
01/22/2013	31	ORDER re 25 Response to Motion to Modify Intervenor's Briefing Schedule filed by MASSACHUSETTS HOUSING FINANCE AGENCY Notice of Compliance due by 1/30/2013. Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/22/2013)
01/22/2013		ORDER granting 27 Motion for Leave to File Excess Pages Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/22/2013)
01/18/2013	30	RESPONSE to 21 Motion to Dismiss - Rule 12(b)(1), Motion for Judgment on the Administrative Record <i>and Cross-Motion for Judgment on the Administrative Record</i> , filed by JEFFERSON COUNTY ASSISTED HOUSING CORPORATION. (Gill, Elizabeth) (Entered: 01/18/2013)
01/18/2013	29	RESPONSE to 21 MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record <i>Cross-Motion for Judgment on the the Administrative Record</i> , filed by ASSISTED HOUSING SERVICES CORP.. Reply due by 1/28/2013. (O'Donnell,

		Neil) (Entered: 01/18/2013)
01/18/2013	<u>28</u>	RESPONSE and CROSS MOTION to <u>21</u> Motion to Dismiss - Rule 12 (b)(1), Motion for Judgment on the Administrative Record filed by USA, filed by NATIONAL HOUSING COMPLIANCE. Response due by 2/4/2013. (Golden, Michael) (Entered: 01/18/2013)
01/18/2013	<u>27</u>	MOTION for Leave to Exceed Page Limit of Response Memorandum and Cross-Motion by 8 pages, filed by NATIONAL HOUSING COMPLIANCE. Response due by 2/4/2013. (Golden, Michael) (Entered: 01/18/2013)
01/18/2013	<u>26</u>	MOTION for Judgment on the Administrative Record <i>and Opposition to Defendant's Motion to Dismiss</i> , filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. Response due by 2/19/2013. (Vacura, Richard) (Entered: 01/18/2013)
01/18/2013	<u>25</u>	RESPONSE to <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record <i>And Motion To Modify Intervenor's Briefing Schedule 19</i> , filed by MASSACHUSETTS HOUSING FINANCE AGENCY. Reply due by 2/4/2013. (Kennon, Gabe) (Entered: 01/18/2013)
01/18/2013	<u>24</u>	RESPONSE to <u>21</u> MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION for Judgment on the Administrative Record <i>and Cross-Motion for Judgment upon the Administrative Record</i> , filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. Reply due by 2/4/2013. (Attachments: # <u>1</u> Appendix A, # <u>2</u> Appendix B, # <u>3</u> Appendix C, # <u>4</u> Appendix D, # <u>5</u> Appendix E, # <u>6</u> Appendix F, # <u>7</u> Appendix G) (Nelson, Colm) (Entered: 01/18/2013)
01/17/2013		ORDER granting <u>11</u> Motion for Leave to File Corrected Appendix Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/17/2013)
01/17/2013		ORDER finding as moot <u>6</u> Motion for TRO Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/17/2013)
01/17/2013	<u>23</u>	ORDER setting teleconference for Thursday, January 24, 2013, at 2:00 PM (EST). Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/17/2013)
01/16/2013		(Court only) ***Motion terminated: <u>22</u> Consented MOTION to Substitute Attorney Colm P. Nelson in place of W. Gregory Guedel filed by THE HOUSING AUTHORITY OF THE CITY OF BREMERTON, CMS CONTRACT MANAGEMENT SERVICES. (dls) (Entered: 01/17/2013)
01/16/2013		***Attorney Colm P. Nelson added for CMS CONTRACT MANAGEMENT SERVICES and THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. Attorney William Gregory Guedel terminated. (dls) (Entered: 01/17/2013)

01/16/2013	<u>22</u>	Consented MOTION to Substitute Attorney Colm P. Nelson in place of W. Gregory Guedel, filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON.(Guedel, William) (Entered: 01/16/2013)
01/07/2013		ORDER granting <u>20</u> Motion for Leave to File Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/07/2013)
01/04/2013	<u>21</u>	MOTION to Dismiss pursuant to Rule 12(b)(1) (Response due by 2/4/2013.), MOTION for Judgment on the Administrative Record, filed by USA.(Mickle, Douglas) (Entered: 01/04/2013)
01/04/2013	<u>20</u>	MOTION for Leave to File file opening brief that exceeds the page limits by 2 pages, filed by USA. Response due by 1/22/2013.(Mickle, Douglas) (Entered: 01/04/2013)
01/02/2013	<u>19</u>	ORDER granting <u>18</u> Motion to Intervene Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 01/02/2013)
12/28/2012	<u>18</u>	MOTION to Intervene, filed by MASSACHUSETTS HOUSING FINANCE AGENCY. Response due by 1/14/2013.(Kennon, Gabe) (Entered: 12/28/2012)
12/17/2012		ADMINISTRATIVE RECORD (on CD), filed by USA. (jb) (Entered: 12/18/2012)
12/17/2012	<u>17</u>	NOTICE, filed by USA <i>Notice of Filing of Administrative Record</i> (Pixley, Joseph) (Entered: 12/17/2012)
12/13/2012		(Court only) ***Party NATIONAL HOUSING COMPLIANCE, ASSISTED HOUSING SERVICES CORP., NORTH TAMPA HOUSING DEVELOPMENT CORP., CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC., JEFFERSON COUNTY ASSISTED HOUSING CORPORATION and SOUTHWEST HOUSING COMPLIANCE CORPORATION added. (dls) (Entered: 12/14/2012)
12/13/2012	<u>16</u>	NOTICE, filed by USA <i>to Stay the Awards of All Annual Contributions Contracts</i> (Mickle, Douglas) (Entered: 12/13/2012)
12/13/2012	<u>15</u>	SCHEDULING ORDER: Administrative Record due by 12/17/2012. Oral Argument set for 2/19/2013 10:00 AM in Courtroom before Judge Thomas C. Wheeler. Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 12/13/2012)
12/13/2012	<u>14</u>	ORDER regarding consolidation of bid protests. Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 12/13/2012)
12/13/2012		Minute Entry for proceeding held in Washington, DC on 12/13/2012 before Judge Thomas C. Wheeler: Hearing. [Total number of days of proceeding: 1]. Official record of proceeding taken by court reporter. (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.)(md) (Entered: 12/13/2012)

12/12/2012	<u>13</u>	DECLARATION re <u>6</u> MOTION for Temporary Restraining Order <i>Supplemental Affidavit</i> by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Attachments: # <u>1</u> Exhibit 27)(Guedel, William) (Entered: 12/12/2012)
12/12/2012	<u>12</u>	DECLARATION re <u>11</u> MOTION for Leave to File Corrected Appendix by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Attachments: # <u>1</u> Exhibit 1)(Guedel, William) (Entered: 12/12/2012)
12/12/2012	<u>11</u>	MOTION for Leave to File Corrected Appendix, filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. Response due by 1/2/2013. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order) (Guedel, William) (Entered: 12/12/2012)
12/11/2012	<u>10</u>	NOTICE of Appearance by Douglas K. Mickle for USA. (Mickle, Douglas) (Entered: 12/11/2012)
12/10/2012	<u>9</u>	NOTICE, filed by All Plaintiffs re <u>1</u> Complaint, <u>8</u> Declaration, <u>7</u> Declaration, <u>6</u> MOTION for Temporary Restraining Order <i>Statement of Notice</i> (Guedel, William) (Entered: 12/10/2012)
12/10/2012	<u>8</u>	DECLARATION re <u>6</u> MOTION for Temporary Restraining Order <i>Affidavit of Colm P Nelson</i> by All Plaintiffs. (Attachments: # <u>1</u> Exhibit Ex 1-6, # <u>2</u> Exhibit Ex 7-9, # <u>3</u> Exhibit Ex 10-15, # <u>4</u> Exhibit Ex 16 A, # <u>5</u> Exhibit Ex 16 B, # <u>6</u> Exhibit Ex 17-22, # <u>7</u> Exhibit Ex 23 A, # <u>8</u> Exhibit Ex 23 B, # <u>9</u> Exhibit Ex 24-26)(Guedel, William) (Entered: 12/10/2012)
12/10/2012	<u>7</u>	DECLARATION re <u>6</u> MOTION for Temporary Restraining Order <i>Affidavit of Laura Lyon</i> by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (Attachments: # <u>1</u> Exhibit Exhibit 1, # <u>2</u> Exhibit Exhibit 2, # <u>3</u> Exhibit Exhibit 3, # <u>4</u> Exhibit Exhibit 4, # <u>5</u> Exhibit Exhibit 5, # <u>6</u> Exhibit Exhibit 6, # <u>7</u> Exhibit Exhibit 7)(Guedel, William) (Entered: 12/10/2012)
12/10/2012	<u>6</u>	MOTION for Temporary Restraining Order, filed by All Plaintiffs. Response due by 1/2/2013. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order)(Guedel, William) (Entered: 12/10/2012)
12/10/2012	<u>5</u>	SCHEDULING ORDER: Hearing set for 12/13/2012 10:00 AM in Courtroom before Judge Thomas C. Wheeler. Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 12/10/2012)
12/10/2012	<u>4</u>	NOTICE of Designation of Electronic Case. (jt1) (Entered: 12/10/2012)
12/10/2012	<u>3</u>	NOTICE of Assignment to Judge Thomas C. Wheeler. (jt1) (Entered: 12/10/2012)
12/10/2012	<u>2</u>	Rule 7.1 Disclosure Statement, filed by CMS CONTRACT

		MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. (jt1) (Entered: 12/10/2012)
12/10/2012	<u>1</u>	COMPLAINT against USA (HUD) (Filing fee \$350, Receipt number 074481) (Copy Served Electronically on Department of Justice), filed by CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON. Answer due by 2/8/2013. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Civil Cover Sheet)(jt1) (Entered: 12/10/2012)

.,CLOSED,ECF,MEMBER

**US Court of Federal Claims
 United States Court of Federal Claims (COFC)
 CIVIL DOCKET FOR CASE #: 1:12-cv-00869-TCW
 Internal Use Only**

SOUTHWEST HOUSING COMPLIANCE CORPORATION v. USA
 Assigned to: Judge Thomas C. Wheeler
 Lead case: 1:12-cv-00852-TCW
 Member cases:

Date Filed: 12/13/2012
 Date Terminated: 04/30/2013
 Jury Demand: None
 Nature of Suit: 138 Contract - (Pre Award) Injunctions
 Jurisdiction: U.S. Government Defendant

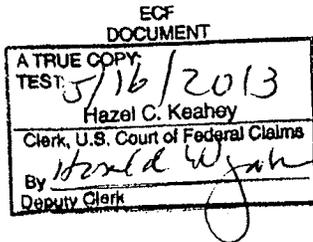
- [1:12-cv-00864-TCW](#)
- [1:12-cv-00869-TCW](#)
- [1:12-cv-00853-TCW](#)
- [1:12-cv-00862-TCW](#)

Cause: 28:1491 Tucker Act

Plaintiff

SOUTHWEST HOUSING COMPLIANCE CORPORATION

represented by **Richard James Vacura**
 Morrison & Foerster LLP
 1650 Tysons Boulevard
 Suite 300
 McLean, VA 22102
 (703) 760-7764
 Fax: (703) 760-7777
 Email: rvacura@mfo.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED



V.

Defendant

USA

Date Filed	#	Docket Text
05/10/2013		(Court only) See lead case for notice of appeal. (hw1) (Entered: 05/16/2013)
04/30/2013		(Court only) ***Civil Case Terminated. (dls) (Entered: 04/30/2013)
04/30/2013		SEE CASE NO. 12-852C FOR JUDGMENT entered, pursuant to Rule 58, in favor of defendant. (dls) (Entered: 04/30/2013)
12/13/2012		This case has been consolidated under case number 12-852C pursuant to the order of December 13, 2012. (dls) (Entered: 12/13/2012)

12/13/2012	<u>9</u>	MEMORANDUM re: <u>8</u> Motion for Preliminary Injunction, <u>7</u> Motion for TRO, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. (Vacura, Richard) (Entered: 12/13/2012)
12/13/2012	<u>8</u>	MOTION for Preliminary Injunction, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. Response due by 1/2/2013. (Vacura, Richard) (Entered: 12/13/2012)
12/13/2012	<u>7</u>	MOTION for Temporary Restraining Order, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. Response due by 1/2/2013. (Vacura, Richard) (Entered: 12/13/2012)
12/13/2012	<u>6</u>	ORDER regarding consolidation of bid protests. Signed by Judge Thomas C. Wheeler. (md) Copy to parties. (Entered: 12/13/2012)
12/13/2012		Minute Entry for proceeding held in Washington, DC on 12/13/2012 before Judge Thomas C. Wheeler: Hearing. [Total number of days of proceeding: 1]. Official record of proceeding taken by court reporter. (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.) (md) (Entered: 12/13/2012)
12/13/2012	<u>5</u>	Rule 7.1 Disclosure Statement, filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. (ar) (Entered: 12/13/2012)
12/13/2012	<u>4</u>	NOTICE of Directly Related Case(s) [12-852, 12-853, 12-862, 12-864], filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. (ar) (Entered: 12/13/2012)
12/13/2012	<u>3</u>	NOTICE of Designation of Electronic Case. (ar) (Entered: 12/13/2012)
12/13/2012	<u>2</u>	NOTICE of Assignment to Judge Thomas C. Wheeler. (ar) (Entered: 12/13/2012)
12/13/2012	<u>1</u>	COMPLAINT against USA (Filing fee \$350, Receipt number 074500) (Copy Served Electronically on Department of Justice), filed by SOUTHWEST HOUSING COMPLIANCE CORPORATION. Answer due by 2/11/2013. (Attachments: # <u>1</u> Civil Cover Sheet)(ar) (Entered: 12/13/2012)



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

NOV 19 2012

MEMORANDUM FOR: Shaun Donovan, S

FROM:

A handwritten signature in black ink, appearing to read "Carol J. Galante".

Carol J. Galante, Acting Assistant Secretary for Housing –
Federal Housing Commissioner, H

SUBJECT: PBCA NOFA Status, Post-GAO Recommendations

On August 15, 2012, the Government Accountability Office (GAO) sustained seven protests against a Notice of Funding Availability (NOFA) published by the Office of Housing (Housing) to award Annual Contributions Contracts (ACCs) to Public Housing Agencies (PHAs) as performance-based contract administrators (PBCAs), providing for the administration of Project-Based Section 8 Housing Assistance Payment (HAP) Contracts. The GAO recommended that Housing cancel the NOFA and award ACCs through a procurement process. Despite the GAO recommendations, Housing has determined to proceed with the awards pursuant to the NOFA.

I. Background

In February 2011, Housing published an "Invitation for Submission of Applications" (Invitation) for the award of ACCs to PHAs. Housing announced 53 awards under the Invitation: one ACC for each state, the District of Columbia, Puerto Rico, and the Virgin Islands (States). Unsuccessful applicants then filed 67 protests affecting 42 States to the GAO. Concerned that litigation delays would interrupt program assistance to tenants and project owners, Housing decided not to award ACCs for any jurisdiction under protest. Housing did award an ACC in each of the 11 states where there was only a single applicant under the Invitation and there was no protest filed at GAO. For the remaining 42 states, Housing decided to extend the existing ACCs, re-evaluate its competitive procedures, clarify any areas of confusion, and re-compete the ACCs through a NOFA.

On March 9, 2012, Housing published the NOFA for the remaining 42 States. The NOFA clarified Housing's long-held position that the ACCs are "cooperative agreements" evidencing an "assistance relationship" between HUD and the PHAs and are not "procurement contracts," as those terms are defined in the Federal Grant and Cooperative Agreement Act (FGCAA). The protesters countered, and GAO ultimately agreed, that the ACCs evidence a procurement for services, and that Housing should have followed the Competition in Contracting Act (CICA) and the Federal Acquisition Regulation (FAR) for the competition for the ACCs. Notwithstanding our lengthy history of administering all of the Section 8 programs as an assistance relationship between HUD and PHAs, the protesters argued that it is HUD's responsibility to administer the Project-Based Section 8 program and its HAP contracts, and HUD is hiring the PHAs to administer the program for HUD. The GAO concluded that the ACCs provide contract administration services for HUD's direct benefit, and a procurement contract is therefore required to obtain these services. GAO recommended that HUD cancel the NOFA and solicit the contract administration services through a procurement instrument.

As a result of the GAO's recommendation, Housing has carefully reviewed the various options for proceeding. We are unable to reconcile GAO's decision with the express authorization language in the statute. In addition, it has become clear that every option, including proceeding through procurement, involves a high likelihood of challenges in litigation. It has also become clear that proceeding with a procurement would entail large disruptions to the program, lengthy delays, and budget implications. Accordingly, the Office of Housing will continue the NOFA process and award the ACCs.

II. The GAO failed to consider HUD's statutory authority.

The GAO decision did not address the statutory authority for the project-based Section 8 program. It is Housing's position that GAO would have reached the opposite conclusion had it considered this statutory authority. The program is authorized through the United States Housing Act of 1937 (the Act). In 1974, Congress amended the Act to create the Section 8 programs. The statutory framework for the project-based Section 8 program is set out in Sections 2, 3 and 8 of the Act. The Act directs HUD to enter into ACCs with public housing agencies and, in turn, authorizes the PHAs to enter into and administer HAP contracts with Section 8 owners. Through the ACC, HUD transfers the Section 8 funding, which has been specifically appropriated by Congress, to the PHAs to provide for the payment of HAP rents and other costs of administering the program. PHAs then transmit housing assistance payments to owners per the terms of the HAP Contract.

HUD has been administering the Section 8 programs, including the project-based program, using assistance agreements with PHAs since the program was established by Congress in 1974. ACCs have never been awarded through a procurement process. HUD has never followed CICA in awarding ACCs, and ACCs have never included FAR-required provisions. Nor is HUD alone in this interpretation. In this specific case, the Office of Management and Budget reviewed and approved the NOFA before it was published, including the use of a cooperative agreement instead of a procurement contract. Congress has never indicated that HUD's interpretation of the Act, its administration of the program, or its treatment of PHAs is erroneous. In 38 years of oversight, Congress has amended Section 8 on occasions too numerous to count, and has considered annual appropriations for the program every year. Congress has never criticized HUD for failing to make the ACC a procurement contract. HUD's treatment of ACCs is also consistent across programs. The same ACC structure (establishing an assistance relationship between HUD and a PHA, awarded without regard to CICA or the FAR) is used in the various project-based Section 8 programs, the tenant-based Section 8 programs and the public housing program.

This ACC structure reflects the expressly stated purposes of the Act, set forth in Section 2 of the Act. This section applies to the entire Act and directs HUD to assist States, and their political divisions, in providing decent, safe and affordable housing for low-income families. The Act directs HUD to assist the States in addressing shortages of affordable housing and to vest responsibility for program administration in PHAs, with appropriate accountability. In this way, the statute sets up the ACCs as the mechanism to assist States and political subdivisions of States in providing affordable housing to low-income families. Section 8 of the Act also provides that HUD should administer the program where no PHA has been organized or where

HUD determines that none is capable of implementing the Section 8 program. While the GAO concluded that the contract administration services were for HUD's direct benefit, such a determination depends on interpreting the statute to require that HUD administer the program. Because the statute requires that PHAs administer the program, except where no PHA has been organized or is capable of implementing the Section 8 program, Housing believes that the GAO's conclusion is not consistent with the express language of the statute.

Yet, even if GAO's interpretation is plausible, GAO should have deferred to HUD's interpretation of the statute and its characterization of its relationship with the PHAs. The FGCAA establishes the criteria for distinguishing between procurement contracts and assistance agreements. The GAO has interpreted the FGCAA to give deference to an agency's characterization of the relationship it proposes to enter as a grant, cooperative agreement, or contract if the agency has the appropriate statutory authority and there is a rational basis for the agency's determination. As set forth above, Housing's interpretation of the program's authorization and its determination that the ACC establishes an assistance relationship between HUD and a PHA was not without a rational basis and was not clearly contrary to the guidance set forth in the FGCAA. Therefore, GAO should have given deference to Housing's interpretation.

III. Procurement would require fundamentally restructuring the project-based Section 8 program.

Implementing the project-based Section 8 program to comply with procurement laws and regulations would require numerous, significant programmatic changes not only to the structure of the competition awarding the ACCs but also to the entire administration of the program.

Currently, the relationship between HUD and PHAs is governed by administrative regulations, handbooks and notices. This structure is both flexible and efficient. Congress routinely and frequently amends the Act, often resulting in changes to all programs authorized by the Act. HUD has been able to implement effectively and uniformly Congress's changes by publishing Notices on HUD's website, updating handbooks and revising regulations through the rule-making process. The PHAs are then responsible for implementing these changes. In contrast, procurement contracts must include certain mandatory provisions and are structured in ways that limit flexibility. For example, a procurement contract must have a "changes" clause giving contractors the right to an equitable price adjustment whenever requirements change and a "disputes" clause providing contractors with judicial and quasi-judicial procedures to resolve disputes and claims. If HUD were to run the program through procurement, any amendment to the Act passed by Congress could require renegotiating terms in the ACCs, changing the tasks to be performed, and altering the compensation appropriately. Not only would this process impede HUD's ability to uniformly implement any such amendments across programs, it could yield different results for each of the 53 ACCs and requires renegotiating each modification 53 times.

Other changes may also be required to the ACC, not only to include FAR-required provisions, but remove FAR-prohibited provisions. For example, if the ACC is deemed to be a procurement contract, the FAR may require HUD to pay the monthly vouchers directly to project owners, rather than have PHAs make the HAP payments as the ACC currently provides. The disbursement of public funds is considered an "inherently governmental function," which,

according to the FAR, may not be contracted out via a procurement contract. Since the ACCs have never been treated as procurement contracts, this kind of analysis would be a matter of first impression and potentially subject to challenge.

Furthermore, to structure the program as a procurement of services, Housing could no longer administer the program alone and would need to restructure the internal oversight of the program. Housing would have to engage and develop new mechanisms in the project-based Section 8 program for collaborating with the Office of the Chief Procurement Officer (OCPO), which is responsible for the solicitation, award and administration of all HUD procurement contracts. Housing would need to work with OCPO to plan the procurement process and to draft a formal solicitation in a format set by the FAR. Once the ACCs were awarded, any of the changes noted above would have to be reviewed and approved by the designated Contracting Officer. However, to date, OCPO has had no involvement in the administration of any Section 8 program. Ultimately, procurement takes the administration of ACCs out of the direct control of the program specialists in Housing and requires administration through the OCPO. (This is more appropriate for buying furniture, not implementing one of the farthest-reaching and most successful rental assistance programs in the country.)

IV. Restructuring as a procurement also involves litigation risk.

Finally, administering the program through procurement does not free HUD from litigation risk. In this uncharted territory, the risks of litigation may be greater.

CICA generally requires full and open competition to the greatest extent possible, although there are some exceptions to that rule. Housing (relying on its interpretation of the Act) limited competition in the NOFA to PHAs. Because the Act does not include explicit language limiting the competition for ACCs, it would be a matter of first impression as to whether HUD can fit into a CICA exception to limit competition. Either way, Housing faces challenge. If Housing limits a procurement competition to PHAs, it could face challenge from non-PHA entities asserting arguments logically following the GAO determination: that if HUD is procuring services, it is doing so under authority to administer the HAPs itself, for its own benefit, and is not limited to contracting with PHAs. If Housing does not limit procurement to PHAs, it faces challenge from PHAs asserting arguments very similar to those it asserted to GAO: that the structure of the Act intends PHAs to administer the program and, if CICA applies, justifies a relaxing of CICA's competition requirements. Then there is the issue of crossing state lines. In the NOFA, Housing not only limited competition to PHAs, but it also gave primary consideration to in-state PHAs. Could Housing similarly limit competition under a procurement? Again, either way, Housing faces challenge. If Housing limits competition to in-state entities, out of state entities will allege CICA violations. If Housing does not limit competition to in-state entities, in-state entities will allege, as 20 state attorneys general already have, that only in-state entities have the authority to perform the functions required by the ACCs under their State's laws.

V. Conclusion

Consideration of all of these factors leads me to conclude that Housing should continue with the NOFA. Housing has the statutory authority to administer the program through an assistance relationship with the PHAs, as it has for almost four decades. Converting a long-standing program into a procurement contract at this time with possible unknown consequences would result in lengthy delays, continued uncertainty, unreasonable administrative burden, almost certain litigation, and little apparent benefit.



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

October 19, 2012

Comptroller General
United States Government Accountability Office (GAO)
441 G Street, N.W.
Washington, DC 20548

Re: PBCA Protests: B-406738.1, Protest of Assisted Housing Services Corp., et al.

Dear Sir:

Pursuant to 31 U.S.C. § 3554(b)(3), the United States Department of Housing and Urban Development (HUD) reports on the status of its response to the GAO recommendations, dated August 15, 2012 (the Recommendations), regarding the above-cited and related protests. Those protests relate to the award of 42 Annual Contributions Contracts (ACCs) between HUD and public housing agencies (PHAs) for the Performance-based Contract Administration (PBCA) project-based Section 8 programs. The GAO recommended that HUD (1) cancel its notice of funding availability (NOFA), (2) solicit the contract administrative services for the project-based Section 8 program through a procurement competition, (3) address the other concerns expressed by the protestors to the extent appropriate, and (4) reimburse the protestors their costs of filing and pursuing the protests. HUD is still in the process of assessing the Recommendations, particularly in light of HUD's Congressional mandates and potential implications for other Section 8 programs. HUD will continue its thorough and expeditious review of these issues, after which HUD will determine how to proceed regarding the Recommendations. Below HUD explains the reasons for proceeding cautiously.

I. Use of procurement for ACCs would be uncharted territory.

To implement the Recommendations, HUD would have to change decades' worth of practice regarding the award and use of ACCs. ACCs have been specifically authorized by the United States Housing Act ("US Housing Act") since its enactment in 1937 (42 U.S.C. § 1437 *et seq.*). The Act first authorized HUD's predecessor agency to enter into ACCs with PHAs to implement the public housing program. In 1974, Congress amended the Act to create the Section 8 programs, using the same structure of an ACC between HUD and PHAs. The ACC structure reflects the public purposes of the Act, which include promoting the general welfare of the nation and assisting the states in providing decent and safe housing for low-income families.

Over the course of the 38-year history of the Section 8 programs, ACCs never have been awarded through a procurement process. HUD therefore requires additional time to assess the legal and operational feasibility of such a deviation from settled practice.

II. Procurement may require a new programmatic structure.

A change from ACCs to procurement contracts would require numerous, significant programmatic changes. Currently, the relationship between HUD and the PHAs, including with respect to PBCAs, is governed by flexible administrative regulations, handbooks and notices. In contrast, procurement contracts include mandatory provisions that limit flexibility, such as a "changes" clause giving contractors the right to a price adjustment whenever requirements change and a "disputes" clause providing contractors with judicial and quasi-judicial procedures to resolve disputes and claims.

Among the other complexities presented by the Recommendations, administering the program as a procurement would require HUD to determine how to implement changes to the program, including changes that result from Congressional action. For example, Congress has passed several amendments to Section 8, including changes to the admission, occupancy and termination of assistance provisions. The PHAs are responsible for implementing these changes. To date, HUD has implemented these changes by publishing Notices on HUD's website and through rulemaking. Were it to operate through procurement contracts, however, HUD could no longer implement changes such as these in the same way. HUD is in the process of assessing the feasibility of implementing such changes through procurement.

Furthermore, were procurement used in this context, the Office of Housing would have to develop new mechanisms for collaborating with HUD's Office of the Chief Procurement Officer (OCPO), which is responsible for the solicitation, award and administration of all HUD procurement contracts. Any of the changes noted above would have to be reviewed and approved by the designated Contracting Officer. To date, OCPO has had no involvement in the administration of any Section 8 program, and thus this administrative change at HUD would be extensive.

III. Procurement may implicate other statutory requirements.

Proceeding with a procurement may require HUD to build an entirely new competition structure in order to comply with other statutory requirements. In the NOFA process, competition is limited to PHAs, in accordance with the US Housing Act. In the procurement context, however, the Competition in Contracting Act (CICA) generally does not allow limits on competition, and it could dictate that the competition be open to non-PHA entities. However, the CICA does provide exceptions. In order to limit the competition to PHAs, HUD would have to determine that the US Housing Act gives HUD sufficient authority to satisfy the CICA's exceptions to conduct a limited procurement. Since the authorization of the program predates CICA, such authority is not explicitly provided. HUD is in the process of determining how, if at all, the provisions of Section 8(b)(1) of the US Housing Act can be reconciled with the Recommendations and the CICA.

Assuming that HUD could limit the procurement to PHAs, HUD is also assessing whether its preference for in-state PHAs is reconcilable with the Recommendations. A PHA's authority to operate is established under state law. HUD has received opinions from a substantial number of state Attorneys General stating that only in-state PHAs may act as a PHA within a state. Taking these opinions into account, HUD made the decision that, program-wide, it would award ACCs for

each state only to in-state applicants, unless there was no in-state applicant. In its most recent NOFA, HUD revisited and reiterated the primacy of in-state applicants, which it believes provides the greatest stability for the program in the long-run, but HUD is now in the process of determining whether this policy choice is reconcilable with the Recommendations.

There are several other issues raised by the protesters that HUD is evaluating in order to determine whether to proceed with a procurement. Is a limit on subcontracting required? If so, what should the limit be? Is it permissible to evaluate applications based upon the prior experience of a subcontractor? Is it permissible to impose a cap on the administrative fee that can be proposed by applicants? If not, how would that affect the overall cost of the program? Is HUD's evaluation process too mechanical and formulaic? If so, how does the evaluation process need to be changed? What mandatory contract clauses would be required? How should HUD accommodate any additional burdens caused by these requirements with the least impact on the program? HUD is in the process of assessing these issues.

IV. In addition to practical and legal considerations, HUD must assess policy implications of procurement.

In addition to assessing the practical and legal considerations discussed above, HUD must also assess policy considerations, including efficiency. For example, if the PHAs are not implementing a statutorily required program, but only providing services to HUD, HUD must consider whether it can and should provide those services directly itself.

In light of the Recommendations, HUD must also consider whether its current program could remain but be restructured to set forth more clearly an assistance relationship.

HUD is also assessing possible implications that any change to the program may have on other Section 8 programs. Other project-based Section 8 programs were not at issue in the NOFA and not addressed in the protests. But all Section 8 programs are authorized by the US Housing Act, and thus, before it can implement the Recommendations, HUD must determine the possible implications for other Section 8 programs, including potential regulatory changes.

V. Conclusion

HUD continues to assess the legal and operational issues raised by the Recommendations. HUD is committed to continuing its careful consideration of the statutory, regulatory, economic, policy and administrative implications prior to determining how to proceed regarding the Recommendations.

Sincerely,



Carol J. Galante
Acting Assistant Secretary for Housing –
Federal Housing Commissioner



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
451 SEVENTH STREET, SW
WASHINGTON, DC 20410-1000

OFFICE OF MULTIFAMILY HOUSING PROGRAMS
OFFICE OF THE DEPUTY ASSISTANT SECRETARY

December 3, 2012

NOTICE:

The Department has decided to move forward with the 2012 PBCA NOFA and plans to announce awards on December 14, 2012.



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
451 SEVENTH STREET, SW
WASHINGTON, DC 20410-1000

OFFICE OF MULTIFAMILY HOUSING PROGRAMS
OFFICE OF THE DEPUTY ASSISTANT SECRETARY

December 14, 2012

NOTICE:

Litigation has been filed in the Court of Federal Claims seeking to enjoin HUD from proceeding with the PBCA NOFA. HUD has agreed not to proceed with making the awards until the Court rules on the matter. A decision is currently expected to be reached by or before February 22, 2013. Any party who wants to be heard in this matter may move to intervene in the Court proceeding or to file an amicus brief. The cases have been consolidated under docket number: Fed CI no. 12-852C.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**[Docket No. FR-5600-N-33]****HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts****AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.**ACTION:** Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2012 Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.**SUMMARY:** HUD announces this NOFA for the Performance-Based Contract Administrator Program for the Administration of Project-Based Section 8 Housing Assistance Payments (HAP) Contracts. Specifically, this NOFA provides applicant information, submission deadlines, funding criteria and other requirements for this Program including the availability of an annual contributions contract (ACC) with a public housing agency (PHA) for each of the 42 States for which an ACC has not previously been awarded, to provide for the administration of project-based Section 8 HAP contracts for Section 8 projects located in the 42 States identified in Appendix A to this NOFA.

There are 53 "States," as defined in the ACC, as each of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. After publication on its website of an Invitation for Submission of Applications on February 25, 2011, HUD awarded an ACC to a PHA for each of the following 11 states: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming and the United States Virgin Islands. HUD now seeks to award an ACC to a PHA for each of the remaining 42 states through this program NOFA. See Appendix A of this NOFA for the list of remaining 42 states.

In addition to the application requirements set forth in this NOFA, applicants must also comply with all terms and conditions contained in the Notice of HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA), Policy Requirements, and **General Section** to HUD's FY2012 NOFAs for Discretionary Programs (**General Section**), posted to www.Grants.gov (Grants.gov) on September 19, 2011.

APPLICATION DEADLINE DATE: The application deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date.**FOR FURTHER INFORMATION CONTACT:** Questions regarding specific program requirements should be directed to the agency contact identified in this NOFA. Questions regarding the FY2012 **General Section** should be directed to the Grants Management Office; at 202-708-0667 (this is not a toll-free number). Persons with hearing or speech impairments may access the number via TTY by calling the Federal Relay Service at 800-877-8339.

OVERVIEW INFORMATION:

A. Federal Agency Name: U.S. Department of Housing and Urban Development.

B. Funding Opportunity Title: Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.

C. Announcement Type: Initial announcement.

D. Funding Opportunity Number: The Federal Register number for this NOFA is FR-5600-N-33. The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control number 2577-0157, 2502-0582, 2502-0587, 2577-0169, 2577-0229, 2510-0011, 2577-0259, 2502-0542, 2535-0116, and 2577-0270. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

E. Catalog of Federal Domestic Assistance (CFDA) Number(s): 14.327

F. Application Deadline Date: The deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date. Applications must meet the timely receipt requirements of the **General Section**. See Section IV of the **General Section** regarding application submission procedures and timely filing requirements. Applicants need to be aware that following receipt, applications go through a validation process in which the application may be accepted or rejected. Please allow time for the process to ensure that you meet the timely receipt requirements.

Please see the FY2012 **General Section** for instructions for timely receipt, including actions to take if the application is rejected. Applicants should carefully read the section titled "INSTRUCTIONS ON HOW TO DOWNLOAD AN APPLICATION PACKAGE AND APPLICATION INSTRUCTIONS" in the **General Section**. This section contains information on using Adobe Reader, HUD's timely receipt and grace period policies, and other application information. The latest version of Adobe Reader used by Grants.gov is Adobe Reader 9.4 which is compatible with PCs and MAC computers.

G. Additional Information:

1. Purpose of the Program. The purpose of HUD's PBCA program is to implement the policy of the United States, as established in section 2 of the United States Housing Act of 1937 (1937 Act), of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the maximum amount of responsibility and flexibility in program administration in PHAs that perform well. The PBCA program furthers these policies by effectuating the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based programs authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the funding

mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. See the ACC at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

2. Available Funds. Funding for this NOFA is subject to the availability of appropriations.

3. Type of Funds. Administrative fees to PBCAs.

4. Award Information. Funding for this NOFA is subject to the availability of appropriations.

5. Matching Funds. There is no matching requirement for applications under this program NOFA.

6. Eligible Applicants. PHAs as described in further detail in this NOFA.

7. Eligible Activities. PHAs selected must complete PBTs and meet the performance and compliance requirements in the ACC. The tasks that successful PHAs must perform include but are not limited to the following: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring that payments to property owners are calculated accurately and paid in a timely manner; and submitting required documents to HUD (or a HUD-designated agent).

FULL TEXT OF ANNOUNCEMENT

I. FUNDING OPPORTUNITY DESCRIPTION.

A. Program Description. HUD announces this NOFA for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments (HAP) Contracts. Specifically, this NOFA provides applicant information, submission deadlines, funding criteria and other requirements for this Program, including the availability of an annual contributions contract (ACC) with a public housing agency (PHA) for each of the 42 States for which an ACC has not yet been awarded (as identified in Appendix A to this NOFA) to provide for the administration of project-based Section 8 HAP contracts for Section 8 projects located in each of those States.

There are 53 "States," as defined in the ACC as each of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. After publication on its website of an Invitation for Submission of Applications on February 25, 2011, HUD awarded an ACC to a PHA for each of the following 11 states: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming and the United States Virgin Islands. HUD now seeks to award an ACC to a PHA for each of the remaining 42 States through this program NOFA.

B. Purpose of the Program. The purpose of HUD's PBCA program is to implement the policy of the United States, as established in section 2 of the 1937 Act, of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the

maximum amount of responsibility and flexibility in program administration in PHAs that perform well. The PBCA program furthers these policies by effectuating the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based programs authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the funding mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. The ACC includes Exhibit A, section 4 of which includes a detailed treatment of the Administrative Fee. Section 5, "Performance Requirements Summary" (PRS), includes a table that specifies the Acceptable Quality Level (AQL) for performance of each of the 8 Performance-Based Tasks (PBTs), the Performance-Based Allocation Percentage, the method used to evaluate performance, and the frequency with which HUD will assess and pay the Basic Administrative Fee Earned. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

C. Authority. The NOFA is issued pursuant to section 102 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101-235; 103 Stat. 1987 (Dec. 15, 1989); and section 8 of the United States Housing Act of 1937 (1937 Act), 42 U.S.C. § 1437f, Pub. L. 93-383; 88 Stat. 662 (Aug. 22, 1974) (Section 8). Funding for this NOFA is subject to the availability of appropriations.

D. Crossing State Lines. HUD believes that nothing in the 1937 Act prohibits an instrumentality PHA that is "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act from acting as a PHA in a foreign State. However, HUD will consider applications from out-of-State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.

Based on past experience, HUD expects to receive at least one application from a legally qualified in-State applicant for the majority of the 42 States identified in Appendix A of this NOFA. However, HUD advises that, in connection with the February 25, 2011 Invitation, HUD received no application from an in-State applicant for Alaska, Hawaii, Mississippi, Nebraska, or Utah.

All opinions recently issued by states' Attorneys General relevant to the administration of the Section 8 PBCA program will be posted at time of publication of this NOFA on http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

E. Terms and Definitions.

1. In-State Applicant. An in-State Applicant is an applicant formed under the laws of the same State for which it proposes to serve as PBCA. An in-State applicant may be a governmental entity or an instrumentality of a governmental entity. However, in either case, the entity must demonstrate that it (a) satisfies the definition of PHA in section 3(b)(6)(A) of the 1937 Act and (b) has the legal authority to operate throughout the entire State.

2. Out-of-State Applicant. An out-of-State Applicant is an applicant formed under the laws of a State other than the State for which it proposes to serve as PBCA. An out-of-State applicant is typically an instrumentality of a governmental entity. An out-of-State applicant must demonstrate that it (a) satisfies the definition of PHA in section 3(b)(6)(A) of the 1937 Act; and (b) has the legal authority, both under the law of the State of its creation and under the law of the State for which it is applying to act as PBCA, to operate throughout the entire State for which it is applying.

Out-of-State entities are typically limited in their area of operation under the law of the State of their creation to the locality or to the State that they were established to serve. To overcome this obstacle, such entities typically create an instrumentality under the law of its own State (e.g., the State's nonprofit corporation statute), which typically authorizes the nonprofit corporation to operate anywhere inside or outside the State of its creation. Under such a scenario, the resulting nonprofit corporation, rather than the parent entity that created it, becomes the out-of-State applicant.

HUD requires that an out-of-State applicant establish not only that the law of the State under which it was created (e.g., State A) authorizes it to operate throughout the entire State in which it proposes to serve as PBCA (e.g., State B) but also that the law of such State (e.g., State B) does not prohibit such an arrangement. HUD also requires that each out-of-State applicant supplement its Reasoned Legal Opinion (RLO) (see definition below) with a Supplemental Letter (SL) (see definition below) signed by an attorney authorized to practice law in the State for which it applies (e.g., State B) certifying that nothing in the laws of such State in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying.

3. Instrumentality. Whether an in-State applicant or an out-of-State applicant, an instrumentality must be created *directly* by “any State, county, municipality, or other governmental entity or public body” within the meaning of section 3(b)(6)(A) of the 1937 Act. Submission of an RLO on behalf of an instrumentality that itself was created by one or more instrumentalities will result in the disqualification of the application.

An instrumentality entity must be fully formed and in legal existence under applicable laws on the date on which the RLO is signed. A copy of the corporate charter and all other organizational documents in final form (e.g., duly executed and filed with all appropriate State and/or other authorities, as may be required by law) that meet all requirements of this NOFA must be attached to and labeled as an exhibit to the RLO. An instrumentality of a governmental entity or public body satisfies the 1937 Act's definition of PHA provided that the instrumentality is “authorized to engage in or assisted in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act.

4. Statutory Definition of “Public Housing Agency” and Related Statutory Definitions. A PHA is a creature of State law. Its authority and power to act derive from the State law(s) under which it was created. “Public housing agency” is also a defined term in the 1937 Act, which authorizes HUD to enter into ACCs with a “public housing agency” as defined in section 3(b)(6)(A) of the 1937 Act, for the administration of Section 8 HAP Contracts. Before entering into an ACC, HUD must ascertain that the entity satisfies the 1937 Act's definition of PHA.

Section 3(b)(6)(A) of the 1937 Act, which applies to the project-based Section 8 program, provides in relevant part: “the term ‘public housing agency’ means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing.” Applicants are advised that section 3 of the 1937 Act, 42 U.S.C. § 1437a, contains definitions of terms that appear within the foregoing definition (e.g., “public housing,” “development,” “operation”). Section III. D. 2.b. below sets forth the specific elements of an RLO required for applicants other than an instrumentality (generally referred to as a “governmental entity”). Section III. D.2.c. below sets forth the specific elements of an RLO required for instrumentality applicants.

5. Performance-Based Tasks (PBTs). PBTs are described in Exhibit A, Section 3 of the ACC and listed below for reference. There are eight of these tasks for which the PHA, as contract administrator, is responsible. The principal tasks of the PHA in accordance with the ACC include, but are not limited to: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring payments to property owners are calculated accurately and paid in a timely manner; submitting required documents to HUD (or a HUD-designated agent); and complying with applicable Federal law and regulations, including 24 C.F.R. parts 880, 881, 883, 884, 886 subpart A, 886 subpart C and/or 891 subpart E, as applicable, and other program requirements, as they exist at the time of ACC execution and as amended or otherwise issued. In this NOFA PBTs are listed in the rating factors as:

- PBT #1 – Management and Occupancy Reviews;
- PBT #2 – Adjust Contract Rents;
- PBT #3 – Review and Pay Monthly Vouchers;
- PBT #4 – Renew HAP Contracts;
- PBT #5 – Tenant Health, Safety, and Maintenance Issues;
- PBT #6 – Administration – Monthly and Quarterly Reports;
- PBT #7 – Administration – Annual Reports and Certifications; and
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End.

6. Reasoned Legal Opinion (RLO). HUD requires that each applicant, whether an in-State or an out-of-State applicant, establish through an RLO that the State statute under which it was created authorizes it to operate throughout the entire State in which the entity proposes to serve as PBCA. HUD requires that out-of-State applicants supplement their RLO with an SL that establishes that nothing in the laws of the State for which the applicant is applying in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying. If an RLO or an SL fails to satisfy any criterion or any part of any criterion required to establish legal eligibility under this NOFA, the applicant will not be provided an opportunity to cure such failure, and the application will be rejected without further review.

7. Full Time Equivalent (FTE). One FTE is defined as 280 hours per work year.

8. Supplemental Letter (SL). In addition to an RLO, HUD requires that each out-of-State applicant submit a Supplemental Letter (SL) signed by an attorney authorized to practice law in

the State for which it applies (e.g., State B) certifying that nothing in the laws of such State in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying.

II. AWARD INFORMATION

A. Funding Availability. Funding for this NOFA is subject to the availability of appropriations.

B. Type of Awards. The ACCs that HUD seeks to award via this NOFA are cooperative agreements. Pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (FGCA) (31 U.S.C. § 6304 *et seq.*), a cooperative agreement is the appropriate vehicle for making such an award when the principal purpose of the relationship between the Federal government and a State, or the political subdivision of a State (e.g., a PHA), is the transfer of money and services in order to accomplish a public purpose of support authorized by Federal statute, and substantial involvement is anticipated between HUD and the PHA during performance of the ACC. 31 U.S.C. § 6305. A principal purpose of the ACC between HUD and the PHA is to transfer funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by sections 2(a) and 8(b)(1) of the 1937 Act. HUD will notify all applicants as to whether or not they have been selected for an award. If selected, HUD's notice will constitute HUD's approval, subject to the execution of a cooperative agreement. HUD intends to have substantial and ongoing involvement in the review, development, and operation of the PBCA Program. The cooperative agreement will state the expected substantial involvement of HUD during the period of performance. Note that the ACC is not subject to A-102 (Grants and Cooperative Agreements With State and Local Governments) which is codified for HUD at 24 CFR Part 85 based on the Department's determination that the Section 8 programs are not appropriate for management under the uniform requirements of Part 85. However, the Department has determined that the PBCA program is subject to A-87 (Cost Principles for State, Local, and Indian Tribal Governments).

C. Number of Awards. Only one applicant per state may be awarded an ACC. HUD expects to provide 42 awards.

D. Period of Performance. The PBCA will administer the HAP Contracts that HUD assigns during the ACC term. The ACC shall have a term of twenty-four (24) months unless extended at the sole election of HUD. HUD anticipates that ACCs awarded under this NOFA will become effective on October 1, 2012. The full text of the ACC may be found at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or in Appendix C of this NOFA.

III. ELIGIBILITY INFORMATION

A. Eligible Applicants. Eligible applicants are qualified PHAs. The applicant's RLO must identify the applicant entity as one of the following:

- 1. A general or special purpose governmental entity.** A general or special purpose governmental entity includes:
- a. A State, municipality, housing authority, or governmental public benefit corporation;
 - b. A multi-state, interstate or regional governmental entity; or
 - c. An instrumentality entity.

Any and all determinations concerning an applicant's legal eligibility rest solely with HUD.

B. Cost Sharing or Matching. There is no matching requirement for applications under this program NOFA.

C. Eligible Activities. PHAs selected must complete PBTs and comply with the performance and compliance requirements in the ACC.

HUD will enter into an ACC which will identify the State in which the PBCA is required to be the contract administrator. Exhibit B of the ACC will identify the HAP Contracts that HUD assigns to the PHA. HUD has the authority under the ACC to unilaterally amend Exhibit B of the ACC in order to add or withdraw HAP contracts that the PBCA is responsible for administering, and, upon exercising this authority, HUD will provide the PBCA with written notice of the revised Exhibit B.

Exhibit A of the ACC contains the PBTs for which the PHA, as contract administrator, is responsible. The principal tasks of the PHA in accordance with the ACC include, but are not limited to: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring payments to property owners are calculated accurately and paid in a timely manner; submitting required documents to HUD (or a HUD designated agent); and complying with applicable Federal law and regulations, including 24 C.F.R. parts 880, 881, 883, 884, 886 subpart A, 886 subpart C and/or 891 subpart E, as applicable, and other program requirements, as they exist at the time of ACC execution and as amended or otherwise issued.

D. Threshold Requirements.

1. General HUD Threshold Nondiscrimination and Other Requirements. See Section III.C.2 through Section C.5 of the **General Section** for threshold requirements applicable to all programs. Applicants should review those provisions that could result in the failure to receive funding, including the Dun and Bradstreet Universal Numbering System (DUNS) Number Requirement, Resolution of Outstanding Civil Rights Matters, provisions relating to Delinquent Federal Debts, and the Name Check Review. HUD will not make awards to entities that are debarred, suspended, or are on the HUD Limited Denial of Participation List. **Non-compliance with a threshold requirement will result in disqualification.** See Section V.B.1. below for more detail regarding threshold compliance.

2. Reasoned Legal Opinion Requirement. HUD requires the submission of a RLO demonstrating that the applicant is legally eligible to serve as PBCA in the State for which it applies.

NOTE: This is the first threshold requirement which must be satisfied before HUD will review the remainder of an application.

a. General RLO Requirements. The following information must be enumerated at the top of the first page of the RLO:

- (1) The full legal name of the applicant (i.e., the entity that, if selected, would enter into an ACC with HUD);
- (2) The State under the laws of which the applicant was formed; and
- (3) The State for which the applicant proposes to serve as PBCA.

If an entity applies to serve as PBCA for more than one State, a separate RLO must be submitted in support of each application. The RLO must be signed by an attorney. It may not be signed by or in the name of a law firm or other business entity. The RLO must state that the signatory is licensed to practice law in the State under the laws of which the applicant was formed. It must contain a succinct but reasoned (i.e., non-conclusory) analysis establishing that each of the requirements in Section III. D.2.b.(Governmental Entities) or Section III. D.2.c (Instrumentality Entities), as applicable, is satisfied.

It must include proper citation to each provision of Federal, State, and/or local law on which the analysis relies. A legible copy of each such provision, other than any provision of the 1937 Act, must be attached to and labeled as an exhibit to the RLO. Any RLO that does not satisfy any of these requirements will be rejected without any further review.

While not subject to any page limitation, the RLO should be succinct. The RLO shall have a cover sheet that specifies the title of the document, identifies the PHA submitting the document, and identifies the State for which the document is being submitted. Each page must be printed on a single side of an 8.5" by 11" sheet of paper using a standard 12-point font. One copy of the RLO shall be submitted as a Portable Document Format (PDF) file using this file name format: Two-Letter State Postal Abbreviation of the State for which the applicant is applying_Two-Letter State Postal Abbreviation of the State under the laws of which the applicant was formed_Complete Legal Name of the Applicant_RLO.pdf. The name of the RLO file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the RLO file.

b. Required Elements of Reasoned Legal Opinion for a Governmental Entity. In the case of a governmental entity, the RLO must establish that the entity:

- (1) Was created under a statute that confers powers that qualify the entity as a PHA, as defined in the 1937 Act. Although the statute may not explicitly enumerate the power "to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred;

(2) Was created under a statute that confers powers that include the power to administer project-based Section 8 HAP Contracts, including the power to perform each of the eight PBTs identified in Exhibit A, Section 3, of the ACC. Although the statute may not explicitly enumerate such powers, the attorney signing the RLO must conclude and unequivocally state that all such powers are within the scope of those explicitly conferred;

(3) Was created under a statute that explicitly authorizes the entity to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences an unequivocal legislative intent for such entity to have such authority; and

(4) Has properly registered to do business in the State in which the entity proposes to serve as PBCA to the extent that the laws of such State require it to do so. If the laws of such State do not require it to do so, the RLO must contain an affirmative statement to this effect.

c. Required Elements of Reasoned Legal Opinion for an Instrumentality Entity. In the case of an instrumentality entity, the RLO must establish that:

(1) The parent entity (or, in the case of multiple parent entities, each such entity) and the instrumentality entity were created under laws that confer powers that qualify the parent entity (or each such entity) and the instrumentality entity as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Specifically, the RLO must establish that:

(a) The parent entity (or each such entity) was created under a statute that confers powers that qualify the parent entity (or each such entity) as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred; and

(b) The instrumentality entity was created under a statute (e.g., a State non-profit corporation law) that confers powers that qualify the instrumentality entity as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred;

(2) The corporate charter or other organizational documents of the instrumentality entity explicitly provide that it is authorized “to engage in or assist in the development or operation of public housing,” within the meaning of section 3(b)(6)(A) of the 1937 Act, with citation to such specific provision(s);

(3) The corporate charter or other organizational documents of the instrumentality entity explicitly confer the right on the parent entity (or on each such entity) to:

(a) Approve the corporate charter or other organizational documents of the instrumentality, including the right to approve any amendments, with citation to such specific provision(s);

(b) Authorize the instrumentality entity to execute the ACC with HUD, with citation to such specific provision(s);

(c) Control the operation of the instrumentality, with specific identification of the means by which the corporate charter or other organizational documents authorize the parent entity (or entities) to exert such control (e.g., by requiring that the Parent Entity hold a majority of the shares of the instrumentality entity, have a majority vote on the Board of Directors of the instrumentality entity), with citation to the specific provision(s) that confer such authority; and

(d) Take title to all property, real and/or personal, held by the instrumentality entity upon dissolution or termination of the instrumentality entity, with citation to such specific provision(s);

(4) The instrumentality entity was created under a statute that confers powers that include the power to administer project-based Section 8 HAP Contracts, including the power to perform each of the eight PBTs identified in Exhibit A, Section 3, of the ACC. Although the statute may not explicitly enumerate such powers, the attorney signing the RLO must conclude and unequivocally state that all such powers are within the scope of those explicitly conferred;

(5) The corporate charter or other organizational documents explicitly authorize the instrumentality to administer project-based Section 8 HAP Contracts, with citation to such specific provision(s);

(6) The instrumentality entity was created under a statute that explicitly authorizes entities created there under to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences an unequivocal legislative intent for such entities to have such authority;

(7) The corporate charter or other organizational documents explicitly authorize the instrumentality entity to operate throughout the entire State in which the entity proposes to serve as PBCA, with citation to such specific provision(s); and

(8) The entity has properly registered to do business in the State in which the entity proposes to serve as PBCA to the extent that the laws of such State require it to do so. If the laws of such State do not require it to do so, the RLO must contain an affirmative statement to this effect.

d. General Supplemental Letter (SL) Requirements. If an applicant proposes to serve as PBCA in a State other than the State under the laws of which it was formed, an SL must be enclosed with the RLO. The following information must be enumerated at the top of the first page of the SL:

(1) The full legal name of the applicant (i.e., the entity that, if selected, would enter into an ACC with HUD);

(2) The State under the laws of which the applicant was formed; and

(3) The State for which the applicant proposes to serve as PBCA.

The SL must be signed by an attorney. It may not be signed by or in the name of a law firm or other business entity. The SL must state that the signatory is licensed to practice law in the

State in which the applicant proposes to serve as PBCA. The substantive content of the SL must meet the standard of Section III. D.2.e. It must include proper citation to each provision of Federal, State, and/or local law on which the analysis relies. A legible copy of each such provision, other than any provision of the 1937 Act, must be attached to and labeled as an exhibit to the SL. Any SL that does not satisfy any of these requirements will be rejected without any further review.

e. Standard for Entities Proposing to Serve as PBCA in a State Other than the State under the Laws of Which the Entity was Formed. HUD will consider the substantive content of the SL requirement satisfied so long as it meets the requirements of this section.

(1) The SL must contain an unequivocal statement that the signatory has examined all the laws of the State governing the creation and operation of PHAs, including any provision of State law that defines that term or comparable term, and that nothing in such laws in any manner prohibits or precludes the applicant, having been formed under the laws of a sister State, from acting as a PHA in and throughout the State for which it is applying to serve as PBCA.

(2) The SL must state that the applicant has registered to do business in the State. Conclusive documentary proof of such registration must be attached to and labeled as an exhibit to the SL. If the law of the State in which the applicant proposes to act as PBCA does not require such registration, the SL must contain an affirmative statement to this effect.

(3) The SL must contain an unequivocal statement as to whether the laws of the State or any other applicable laws impose any requirements or conditions that must be satisfied before the applicant may act throughout the State as a PHA. To the extent that they do, the SL must identify each such requirement, with citation to the state law provision imposing each such requirement. A legible copy of each such statutory provision must be attached to and labeled as an exhibit to the SL. Conclusive documentary proof that all such requirements or conditions have been satisfied must be attached to and labeled as an exhibit to the SL. For example, if the laws of such State or any other applicable laws require the existence of any cooperative agreements, contracts, or any other legally binding agreements between the applicant and any other party, including any PHA(s) established under the laws of the State, in order for the applicant to have the authority to operate throughout the entire State, the SL must clearly identify such law(s), and a copy of any and all such cooperative agreements, contracts, or other legally binding agreements, duly executed for a term through the anticipated term of the ACC (i.e., September 30, 2014), must be attached to and labeled as an exhibit to the SL.

f. Required by All Applicants. The RLO and any SL must conclude with a definitive, *unqualified* statement explicitly certifying that all representations therein are true and correct. Any RLO and any SL that does not contain such a statement will be rejected without any further review.

3. Basic Administrative Fee Percentage. The proposed Basic Administrative Fee Percentage for a State is not to exceed 2.0%. Applications proposing a fee that exceeds 2.0% will be rejected.

IMPORTANT NOTES RELATED TO THE BASIC ADMINISTRATIVE FEE PERCENTAGE:

NOTE 1: The Basic Administrative Fee Percentage is calculated as follows:

The Grand Total (All Years) amount from the Grant Application Detailed Budget (form HUD-424-CB) is divided by two (2) to arrive at the annualized grand total. Then, the annualized grand total is divided by the sum of the annual per-unit per-month 2-bedroom FMRs for the State as published in the portfolio of Active PBCA Assigned Section 8 Contracts for this NOFA at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

NOTE 2: Exhibit A, Section 3.1, PBT #1 – Management and Occupancy Reviews has been revised to include a risk-based requirement and a separate requirement for Mark-to-Market projects. Two Exhibits have been added to the ACC:

Exhibit G: MOR Ratings for Projects with PBCA Administered HAP Contracts

Exhibit H: Mark-to-Market Projects with PBCA Administered HAP Contracts

The information for each State is available at

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp in two documents titled “MOR Ratings for Projects” and “Mark-to-Market Projects”.

NOTE 3: The ACC defines the Basic Administrative Fee Percentage as “The percentage of the applicable annual per unit per month 2-bedroom Fair Market Rent within the State, which is used to calculate the monthly Basic Fee.” The Basic Administrative Fee Amount is “The amount that results when the Administrative Fee Percentage, approved by the United States Department of Housing and Urban Development, is multiplied by the current applicable 2-Bedroom Fair Market Rent for each Covered Unit under a Housing Assistance Payments Contract on the first day of the month during the Performance-Based Annual Contributions Contract Term.”

The annual per unit per month 2-bedroom Fair Market Rent for each Covered Unit for the Assigned Active HAP Contracts in each State is titled “Active PBCA Assigned Section 8 Contracts for NOFA” and is available at

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

NOTE 4: To view basic administrative fee percentages proposed by applicants in the prior competition, please see

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

E. Program Requirements. Successful applicants will not be awarded until Program Requirements are met.

1. Disaster Plan. The applicant shall provide a Disaster Plan that details how the PHA and, if applicable, contractors that perform services that provide fifty (50) percent or more of the full time equivalent (FTE) employees required to perform PBTs Numbers one (1) through six (6) as specified in Exhibit A, Section 3, of the ACC will ensure continued operations in the event of a natural or human-caused disaster. The Disaster Plan portion of the application is not subject to a page limitation but should be written in a concise manner. The Disaster Plan is not a Factor for

Award but will be reviewed to ensure that each of the topics described below is addressed. It must include a cover sheet specifying the title of the document and identifying the PHA submitting the document and the State for which the document is being submitted. Each page must be printed on a single side of an 8.5" by 11" sheet of paper using a standard 12-point font. One copy of the Disaster Plan portion of the application shall be submitted as a PDF file using this file name format: Two Letter State Postal Code_PHA Complete Name_DISASTER. File names cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

a. Elements of the Disaster Plan. The PHA Disaster Plan portion shall include:

(1) Incident Response Staff; including the names, titles, incident response authority and responsibilities, and contact information for assigned staff and any contractors or sub recipients.

(2) Communication Back-up Plans and Systems, including:

(a) Procedures and methods of notifying and updating owners, and residents regarding changes in service procedures and the resumption of routine operation; and

(b) Procedures and methods of notifying HUD in the event of an incident, including updating HUD regarding changes in service procedures until the resumption of routine operations, the performance status of each PBT or, if any PBT is not being fully performed, actions being taken to restore full performance of each PBT.

(3) Operating and Management Back-Up Plans and Systems. Procedures to relocate functions and staff to alternative office locations and/or telework sites; ensure access to IT systems; maintain internal and external communication systems (telephone, fax, email); and maintain supervisory, accounting, financial, and human resource functions.

(4) Information Technology (IT) Back-up Plans and Systems. Procedures to maintain IT staff support and ensure operability, data protection and system security.

(5) Preparedness. Plan to provide annual training for employees and, if applicable, contractor employees, and annual testing of back-up plans and systems.

b. The Disaster Plan Coordinator. The PHA shall have a Disaster Plan Coordinator who has the education and experience to develop, manage, and test disaster, continuity of operations, or emergency management plans. The Disaster Plan Coordinator shall be considered "qualified" if he/she has education (e.g., professional degree and/or professional certification or training) and experience as a practitioner in emergency management and response, emergency operations, continuity of operations (COOP), disaster planning and response, or risk management. The Disaster Plan Coordinator must attach a qualifications statement or resume to the application. The Disaster Plan Coordinator shall review and approve the disaster plan for the organization. The Disaster Plan must address required elements of the disaster plan. The Disaster Plan Coordinator must ensure that all employees and, if applicable, contractor employees, will

participate in disaster plan training within the next twelve (12) months and that all backup plans and systems identified in the disaster plan will be tested within in the next twelve (12) months. A signed copy of the plan must be submitted to the designated HUD CAOM (Contract Administration Oversight Monitor).

2. FTE Chart. See Appendix B of this NOFA for template and Rating Factor 2 for more information. The PHA shall submit a FTE Statement that identifies the FTEs required to perform PBTs numbers one (1) through six (6) as specified in Exhibit A of the ACC for the first twelve (12) month period of the ACC Term. For each PBT, identify the positions by title responsible for managing, supervision, and performing each PBT. Include the FTEs for PHA and contractor employees. Only include contractors that contract directly with the PHA. Do not include sub-contractors of contractors. One (1.00) FTE is defined as 2,080 work hours per year.

The FTE Statement shall be in the following format with the actual number of contractors, if any, included in the table below:

Identify the Contractor(s) by name and DUNS Number enumerated in the columns.

Contractor #1: Name of Contractor/ DUNS #

Contractor #2: Name of Contractor/ DUNS #

Contractor #3: Name of Contractor/ DUNS #

Contractor #4: Name of Contractor/ DUNS #

Add additional Contractors or position titles to list and add additional columns to the table as required.

3. HUD's Electronic Line of Credit Control System. Applicants must be eligible to acquire rights and access under HUD's Electronic Line of Credit Control System (eLOCCS).

4. Prohibition Against Lobbying Activities. Unless excluded from this requirement by other provisions of law, applicants are subject to the provisions of Section 319 of Public Law 101-121 (approved October 23, 1989) (31 U.S.C. § 1352) (the Byrd Amendment), which prohibits recipients of Federal contracts, grants, or loans from using appropriated funds for lobbying the executive or legislative branches of the Federal government in connection with a specific contract, grant, or loan. In addition, applicants must disclose, using Standard Form SFLLL "Disclosure of Lobbying Activities," any funds, other than federally appropriated funds, that will be or have been used to influence Federal employees, members of Congress, or congressional staff regarding specific grants or contracts. Federally recognized Indian tribes and tribally designated housing entities (TDHEs) established by federally recognized Indian tribes as a result of the exercise of the tribe's sovereign power are excluded from coverage of the Byrd Amendment, but state-recognized Indian tribes and TDHEs established only under state law must comply with this requirement.

5. Compliance with Fair Housing and Civil Rights Laws. Applicants who are selected for award must comply with the fair housing and civil rights requirements specified in Section III.C.5.a of the **General Section**. In addition, successful applicants must certify that they will comply with the requirements of the Fair Housing Act (42 U.S.C. §§ 3601-19), Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), Section 504 of the Rehabilitation Act of 1973 (29

U.S.C. § 794), the Age Discrimination Act of 1975 (42 U.S.C. § 6101), and title II of the Americans with Disabilities Act of 1990 (42 USC §§ 12131-12134).

6. Affirmatively Furthering Fair Housing. Under Section 808(e)(5) of the Fair Housing Act, HUD has a statutory duty to affirmatively further fair housing. HUD requires the same of its funded recipients. Successful applicants will have a duty to affirmatively further fair housing. In addition, successful applicants will be required to certify that they will affirmatively further fair housing. Successful applicants must comply with certain requirements regarding affirmatively furthering fair housing, including affirmative fair housing marketing, rather than the **General Section**. Specifically, successful applicants must: (1) adopt actions and procedures and maintain records of the implementation of the actions and procedures taken to affirmatively further fair housing; (2) make information available on the existence and location of housing, facilities, and services that are accessible to persons with disabilities; and (3) ensure that reasonable steps are taken to perform affirmative fair housing marketing. The purpose of the affirmative fair housing marketing plan is to provide equal opportunity to those individuals least likely to apply for the housing regardless of race, color, national origin, sex, religion, familial status, or disability. Please see Rating Factor 3 for more information on submitting the Affirmatively Furthering Fair Housing narrative.

7. Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency (LEP). Executive Order 13166 seeks to improve access to federally assisted programs and activities for individuals who, as a result of national origin, are limited in their English proficiency. Applicants obtaining Federal financial assistance from HUD shall take reasonable steps to ensure meaningful access to their programs and activities to LEP individuals. As an aid to recipients, HUD published *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* in the Federal Register on January 22, 2007 (72 FR 2732), found at http://www.lep.gov/guidance/HUD_guidance_Jan07.pdf Also see Section III.C.5.c of the **General Section** for more information.

8. Effective Communication. Successful applicants must ensure that all communications shall be provided in a manner that is effective for persons with hearing, visual, and other communications-related disabilities consistent with Section 504 of the Rehabilitation Act of 1973. (This includes ensuring that training materials are in appropriate alternative formats as needed, e.g., Braille, audio, large type, sign language interpreters, and assistive listening devices). See 24 CFR § 8.6.

9. Monitoring. The PBCA will monitor each property owner and ensure compliance with the terms of the HAP Contract. In discharging these and all other responsibilities under the ACC, the PBCA will comply, and will ensure compliance by owners, with Federal law, HUD’s implementing regulations, the Section 8 Renewal Guide, and all other requirements and guidance that HUD deems applicable, as they exist at the time of ACC execution and as amended or otherwise issued from time to time during the ACC term. In the case of HAP Contracts that expire during the ACC term, the PBCA will enter into a renewal contract with Section 8 owners, as appropriate, in accordance with the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) (42 U.S.C. § 1437f note), HUD’s implementing regulations, and the

provisions of the Section 8 Renewal Guide, which may be found at:
http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14528.pdf.

10. Page Specifications. Each page must be printed on a single side of an 8.5" by 11" sheet of paper using a standard 12-point font.

11. Compliance with Standards in the ACC. Applicants must meet all performance, reporting and task standards listed in the ACC.

12. Point Threshold. Applicants must receive at least 45 points of 70 available in Rating Factors for Capability, Soundness of Approach and Policy Priorities to qualify for award.

IV. APPLICATION AND SUBMISSION INFORMATION

A. Address to Request an Application Package. See the **General Section** for specific procedures concerning the electronic application submission and timely receipt requirements. Copies of the published NOFAs and application forms for HUD programs announced through NOFAs may be downloaded from the Grants.gov website at <http://www.Grants.gov>. Applicants need to download the application and the instructions for this NOFA from Grants.gov.

B. Grants.gov Customer Support. If applicants have difficulty accessing the information, customer support is available from Grants.gov by calling its Support Desk at 800-518-GRANTS (toll-free), or by sending an email to www.support@Grants.gov. Grants.gov now also provides a toll number for those that have difficulty accessing a toll-free number. The number is 606-545-5035 (toll charge). The Grants.gov help desk is open 7 days a week, 24 hours a day, except Federal holidays.

C. Content and Form of Application Submission.

1. Electronic Submission. Applications must be submitted electronically, as prescribed in the **General Section** using the Grants.gov website. To submit via Grants.gov, applicants must have a DUNS number which is registered in the Central Contractor Registration (CCR); have a User ID and password for the Grants.gov system; and be authorized by the eBusiness Point of Contact for the applicant identified in box 8a of the SF424, to be the authorized agency representative to submit the application. Failure to meet these registration steps or to not properly enter the registered DUNS number and User ID and password associated to the applicant DUNS number in the Grants.gov system, can result in the application being rejected by Grants.gov. Please carefully read the registration requirements. Registration can take 2-4 weeks to complete.

2. Page Limitation, Font Size and Format for Naming of Files. Narrative statements cannot exceed the number of single-sided standard 8.5" by 11" pages specified in the application document descriptions. Application documents must be in 12 point font. File names must conform to the requirements specified in the application document descriptions and cannot contain spaces, special characters (!, @, #, \$, %, ^, &, *, (,),) or exceed 50 characters in length including any underscores. Files names that do not adhere to these directions will result in the application receiving a virus detect message and being rejected from the Grants.gov system. Spaces and underscores count to the 50 characters. Please see the **General Section** for details regarding submission to grants.gov and file naming requirements. All files must be in

Microsoft® Word® except the FTE Statement document which must be in Microsoft Excel format to preserve its integrity as executed by the PHA and, if applicable, the contractor.

3. Application Submission Requirements.

- a. Applicants must read and follow the application submission requirements carefully.
- b. Applications must be filed following the instructions for this opportunity as specified in the **General Section** and this NOFA posted to the Grants.gov website.
- c. Applications must be formatted for 8.5" by 11" viewing and printing.
- d. All pages of each document must be numbered sequentially.
- e. All application document files are assigned required file names that begin with the two letter State postal code of the State for which the applicant is applying.
- f. Zip files contained within zip files cannot be accommodated; documents in such files will not be reviewed.
- g. Zip files must use this file name format: Two Letter State Postal Code_PHA Complete Name_APPLICATION. The name of the file cannot exceed 50 characters , including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

h. By submitting an application on Grants.gov, you are certifying that:

- The Executive Director of the PHA certifies that information provided in the Application is true and correct;
- If the PHA is contracting with an entity that provides services equal to fifty (50) percent or more of the FTE employees required to perform PBTs Numbers one (1) through six (6) as detailed in the FTE Statement, the information provided in this Application relative to its services and performance is true and correct.

4. Application Requirements.

a. Content of Application. This section sets forth the contents of the application and the procedures applicants must follow to submit applications in response to this NOFA. Failure to comply with these procedures may result in the applicant being disqualified from award consideration. Each application submitted in response to this NOFA shall include the following documents:

(1) Abstract. Consisting of up to four-pages, it is a summary of the proposed project, which will not be scored and does not count toward the narrative page limit. The abstract must contain the following:

- (a) Name of PHA Entity**

- (b) **Street Address**
- (c) **City, State, Zip Code**
- (d) **Contact Name and Title**
- (e) **Contact Telephone Number**
- (f) **Contact E-mail Address**
- (g) **Name of State of Application**
- (h) **Proposed Basic Administrative Fee Percentage (not to exceed 2.0%)**

(2) Supporting Documents. A list of supporting documents and forms in the following order found in the application and instruction download. **A list of documents for each zip file.**

(3) SF424 Application for Federal Assistance. Applicants must include the nine digit ZIP code (ZIP code plus four digits) associated with the applicant address in box 8d of the SF424. Applicants must also provide a project name in Line 11 of the SF424 and use the same project name in all references to the application as the information will pre-populate the other forms contained in the application download package.

(4) SF424 Supplement Survey on Equal Opportunity for Applicants. Titled “Faith Based EEO Survey” (SF424SUPP) on Grants.gov (optional submission).

(5) SFLLL_Disclosure_of_Lobbying_Activities. Note that federally recognized Indian tribes are not required to submit this form (see the **General Section**).

(6) HUD2880_Applicant_Recipient_Disclosure_Update_Report. Titled “HUD Applicant Recipient Disclosure Report” on application download on Grants.gov.

(7) HUD 2993 Acknowledgement of Application Receipt. For applicants submitting paper applications only. This is not applicable to those using Grants.gov.

(8) Narrative Response to Factors for Award. The total narrative response cannot exceed the equivalent of 60 single-sided standard 8-1/2” x 11” pages total in 12 point font, not including attachments for each narrative. There are no page limits for Rating Factors 3 and 4.

(a) Capability Statement, see Rating Factor 1. (10 page limit). Includes General Experience, Experience with PBTs, Experience Training Personnel to Ensure Performance of PBTs and Ensuring Compliance.

The Capability Statement portion of the Application must describe the applicant’s experience actually performing the ACC and the PBTs described in Exhibit A, Section 3, of the ACC or experience performing tasks which are strongly related to the PBTs, such as: managing a portfolio of affordable multifamily housing units, managing public housing projects, managing a housing choice voucher program, managing a project-based voucher program, serving as a Traditional Contract Administrator, completing health and safety work order requests submitted by tenants, tracking and resolving tenant complaints and submitting reports to state or federal regulatory agencies. The applicant may describe the experience of the PHA, the PHA’s instrumentality, or one or more contractors with whom the PHA has contracted, or proposes to contract with, to provide services related to the Capability Statement. The Capability Statement is a Factor for Award.

The applicant is to provide a narrative response for each of the subfactors in the rating factor. The applicant's responses must be in the same order and numbered as the subfactors appear. Only information submitted for a specific subfactor will be considered for the corresponding subfactor for which it was written.

One copy of the Capability Statement of the Application shall be submitted as a Microsoft® Word® file using this file name format: Two Letter State Postal Code_PHA Complete Name_CAPABILITY. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

(b) Technical Approach narrative (30 page limit). See Rating Factor 2. The Technical Approach portion of the Application must describe the applicant's technical approach to performing the ACC and the PBTs described in Exhibit A of the ACC. The applicant may describe the technical approach of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted or proposes to contract with, to provide services related in the Technical Approach. Rating Factor 2 includes descriptions of five (5) subfactors that the applicant must address in the Technical Approach and the points for each section.

The applicant is to provide a narrative response for each of the subfactors and the FTE Chart (Not a Factor for Award). The applicant's response may include tables and graphs. The applicant's responses must be in the same order and numbered as the subfactors appear. Only information submitted for a specific subfactor will be considered for the corresponding subfactor for which it was written

One copy of the Technical Approach portion of the Application shall be submitted as a Microsoft® Word® file using this file name format: Two Letter State Postal Code_PHA Complete Name_TECHNICAL. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

The FTE chart shall be submitted as an Microsoft Excel file using this file name format: Two Letter State Postal Code_PHA Complete Name_APPCERT. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

(c) Quality Control Plan narrative (20 page limit). See Rating Factor 2. The Quality Control Plan portion of the application must describe the internal control procedures that the

applicant will implement to ensure quality performance of the ACC and the PBTs described in Exhibit A, Section 3, of the ACC. The applicant may describe the internal control procedures of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted or proposes to contract with, to provide services related to each Subfactor in the Quality Control Plan. Rating Factor 2, includes descriptions of seven (7) "Subfactors" that the applicant must address in the Quality Control Plan and the points for each Subfactor.

The applicant is to provide a narrative response for each of the subfactors. The applicant's responses must be in the same order and numbered as the subfactors appear. Only information submitted for a specific subfactor will be considered for the corresponding subfactor for which it was written.

One copy of the Quality Control Plan portion of the Application shall be submitted as a Microsoft® Word® file using this file name format: Two Letter State Postal Code_PHA Complete Name_QCP. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.
Note: the Two Letter State Postal Code is for the State for which the application is submitted.

(d) Narrative on Affirmatively Furthering Fair Housing. Applicants must submit a narrative describing how they intend to fulfill the Affirmatively Furthering Fair Housing requirement, including describing how they will address impediments to fair housing as described in Section III.E.6. above. See Rating Factor 3.

(e) Policy Priority Narrative on Job Creation, See Rating Factor 4.

(f) Proposed Fee, See Rating Factor 5. Include fee percentage in Abstract, described above in part (1).

(9) Reasoned Legal Opinion (RLO), including charter and other required organizational documents, and Supplemental Letter, if applicable. The RLO file must use the following file name format :the two letter State postal code of the State for which the applicant is applying, _ the two letter State postal code of the State under the laws of which the applicant was formed, _ the complete legal name of the applicant. Refer to Section III.D.2.a above for General RLO Requirements. The name of the RLO file cannot exceed 50 characters, if it does, it will be rejected; and rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters in the naming of the RLO file.

(10) Disaster Plan. See Program Requirements at Section III.E.1

(11) Fair Housing Requirements. Applicants must describe how they will address impediments to fair housing.

(12) HUD_424_CB_Detailed_Budget. A budget for all funds (Federal and non-Federal). The HUD 424 CB is a standard form budget template, and includes budget lines that are not allowable items under the Program, e.g., land and building acquisition costs. When completing

the HUD 424 CB, applicants should please ensure that only budget items allowed under the PBCA Program are populated.(in the application download)

(13) HUD96011_Facsimile_Transmittal (“Facsimile Transmittal Form” on Grants.gov). The form must be submitted with each application and be used as the coversheet for any facsimile sent for the application, if the applicant is not faxing any documents, the applicant must still complete the facsimile transmittal form. In the section of the form titled “Name of Document Transmitting,” the applicant should enter the words “Nothing Faxed with this Application.” Complete the remaining highlighted fields and enter the number “1” in the section of the form titled “How many pages (including cover) are being faxed?” The applicant must move the form to the right side of the Grants.gov application to open and complete the form. Forms on the right side of the application get uploaded as part of the application submission with the forms getting embedded ID numbers. The embedded ID numbers allow HUD to match the faxes to each application submission. **Please refer to the General Section for a detailed discussion.**

NOTE: HUD will not accept entire applications submitted by fax, unless a waiver has been obtained pursuant to Section IV.C.5, below (Waiver of Electronic Application Requirement), or applicant is responding to a curable deficiency pursuant to Section V.B.4 (Corrections to Deficient Applicants). If an applicant submits an application by fax or in paper copy and has not received a waiver to the electronic application submittal, the entire application will be disqualified.

5. Receipt Dates and Times. The deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date. Applications must meet the timely receipt requirements of the **General Section**. See Section IV of the **General Section** regarding application timely filing requirements.

6. Other Submission Requirements.

a. Waiver of Electronic Application Requirement. Applicants must follow the electronic application instructions included in the **General Section**, unless granted a waiver for cause of the required electronic application requirement. The request for a waiver must provide a justification for cause in accordance with HUD’s waiver policy at 24 CFR 5.1005. Applicants requesting a waiver must submit the request in writing no later than fifteen (15) days prior to the application deadline date. The letter must be addressed to Carol J. Galante, Acting Assistant Secretary for Housing, Federal Housing Commissioner at the address below. The waiver can be submitted via email or fax to:

U.S. Department of Housing and Urban Development
 451 Seventh Street SW, Room 6151
 Washington, DC 20410
 ATTN: Mr. Kerry E. Hickman, Acting Director, Office of Housing Assistance Contract
 Administration Oversight (HACAO)
 Telephone Number: (202) 402-3885
 Email: Kerry.E.Hickman@hud.gov
 FAX: 202-708-1010

Paper applications will not be accepted from applicants that have not been granted a waiver. If an applicant is granted a waiver, the approval notice will provide instructions for application submission and receipt requirements. All applications in paper format must have received a waiver to the electronic application requirement and must be received no later than 3:59:59 p.m. Eastern Time close of business on the application deadline date to allow scanning of any packages in accordance with HUD Security procedures.

V. APPLICATION REVIEW INFORMATION

A. Rating Criteria. Applications will be scored based upon their response to the subfactors associated with each rating factor, or “Factor for Award.” The technical point value associated with each subfactor is the maximum value that can be assigned. The points awarded for the rating factors will be up to 100 points. Points will be assigned to each of the rating factors identified below. Applicants should review the rating factors carefully and respond specifically to each factor. This NOFA does not include bonus points under the EZ/EC/RC-II or the Preferred Sustainable Status Bonus Points. Applicants must receive a total score of 45 of 70 points available in the Rating Factors 1 through 4 for Capability, Soundness of Approach and Policy Priorities to qualify for an award.

1. Rating Factor 1: Capability of the Applicant and Relevant Organizational Experience (Up to 20 Points). The applicant must submit a detailed Capability Statement that describes the applicant’s relevant organizational and past experience performing each of the following subfactors. The applicant may describe the experience of the PHA, the PHA’s instrumentality, and contractors with which the PHA has contracted to provide services in each subfactor a. through d.

a. General Experience (up to 8 points). The applicant should describe the nature and length of its experience serving as contract administrator for multifamily housing projects with project-based Section 8 HAP contracts (actual experience). The applicant may also describe the nature and length of its experience administering functions and processes strongly related to serving as contract administrator or providing strongly related contract administration activities for multifamily housing projects and rent subsidy programs (strongly related experience). Examples of strongly related experience include, but are not limited to the following: managing a portfolio of affordable multifamily housing units, managing public housing projects, managing a Housing Choice Voucher program, managing a project-based voucher program, serving as a Traditional Contract Administrator, completing health and safety work order requests submitted by tenants, tracking and resolving tenant complaints, and submitting reports to state or federal regulatory agencies. To receive the maximum points, the applicant’s response must be comprehensive (i.e. whether its experience addresses all of the required components described in each subfactor) and include specific examples of its experience. The applicant’s response must include the number of years of its general experience.

Nature of Experience (up to 5 points)

Up to 5 points will be awarded based on the comprehensiveness of the response, demonstrated knowledge of contract administration and clarity of response. The same points will be assigned for actual and/or strongly related experience.

Duration of Experience (up to 3 points)

Up to 3 points will be awarded for length of experience indicated in the response.

- If the applicant has five (5) or more years of actual or strongly related experience, three (3) points will be assigned.
- If the applicant has three (3) to four (4) years of actual or strongly related experience, two (2) points will be assigned.
- If the applicant has one (1) to two (2) years of actual or strongly related experience, one (1) point will be assigned.
- If the applicant has less than one (1) year of actual or strongly related experience, zero (0) points will be assigned.

b. Experience with Performance-Based Tasks (PBTs) (up to 6 points). The applicant should describe, for each PBT in Exhibit A, Section 3 of the ACC (and listed below for reference), its experience performing the PBT or performing tasks that are strongly related to the PBT. The same points will be assigned for actual and/or strongly related experience. Up to six (6) points may be assigned. To receive the maximum points, the applicant's response must be comprehensive (i.e. experience addresses all of the required components described in each subfactor) and include specific examples of its experience performing a wide range of PBTs. The applicant's response must include the number of years of its general experience. No additional points are assigned to the years of experience but applicants with less than one year of experience will be assigned zero (0) points. The applicant's experience performing each of the following PBTs will be evaluated and assigned points as follows:

Experience with PBTs #1 through #5 (up to 4 points):

Experience with PBTs #6 through #8 (up to 2 points). The list of PBTs is provided for your reference below:

- PBT #1 – Management and Occupancy Reviews
- PBT #2 – Adjust Contract Rents
- PBT #3 – Review and Pay Monthly Vouchers
- PBT #4 – Renew HAP Contracts
- PBT #5 – Tenant Health, Safety, and Maintenance Issues
- PBT #6 – Administration – Monthly and Quarterly Reports
- PBT #7 – Administration – Annual Reports and Certifications
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End

c. Experience Training Personnel to Ensure Performance of PBTs (up to 4 points). Each applicant should describe its experience training personnel to ensure performance of each of PBTs #1 through #6 or tasks that are strongly related to PBTs #1 through #6. The number of years of experience is not applicable to the descriptions. The same points will be assigned for actual and/or strongly related experience. To receive the maximum points the applicant's response must be comprehensive and include specific examples of training sessions and successful results.

The applicant's experience training personnel to perform each of the PBTs will be evaluated and assigned points as follows:

- Experience with all of PBTs #1 through #6 will be assigned four (4) points.
- Experience with three (3) to five (5) of PBTs #1 through #6, must include PBT#1, will be assigned three (3) points.
- Experience with three (3) to five (5) of PBTs #1 through #6, not including PBT#1, will be assigned two (2) points.
- Experience with one (1) or two (2) of PBTs #1 through #6 will be assigned one (1) point.
- No experience with any of PBTs #1 through #6 will be assigned zero (0) points.

d. Experience Ensuring Compliance (up to 2 points). Each applicant should describe its experience monitoring Federal statutes, regulations, and program requirements, identifying and interpreting changes or additions, and implementing policies and procedures that ensured efficient, effective and consistent compliance. This includes experience complying with fair housing and equal opportunity statutes, regulations, and program requirements. This may be demonstrated, for example, by describing relevant policies and procedures (reasonable accommodations, effective communication), affirmative outreach requirements, efforts to ensure program accessibility for persons with disabilities, etc. To receive the maximum points the applicant's response must be comprehensive and include specific, successful examples that relate to the program and ACC.

2. Rating Factor 2: Soundness of Approach (up to 48 Points) including: Technical Approach (up to 24 Points), and Quality Control Plan (up to 24 Points).

a. Technical Approach (up to 24 Points). Each applicant should submit a description of its technical approach, including relevant organizational staff, to performing each of the following subfactors as they relate to the ACC (in addition to the FTE Chart if working on elements required by the ACC not a PBT listed in the subfactors below). The applicant may describe the technical approach of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted to provide services in each subfactor. Up to 24 points may be assigned to the Technical Approach.

b. Technical Approach: Annual Work Plan (up to 2 points). Each applicant should describe a sound technical approach to planning the performance of all PBTs during the first twelve (12) month period of the ACC term as required in the ACC under PBT #7, Annual Work Plan. Up to

two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response (i.e. approach addresses all of the required components described in each subfactor) and the reasonableness of the proposed approach to ensure performance of all PBTs. See example of point allocation in Section V.A.2.e, above.

c. Technical Approach: PBTs (up to 12 points). Each applicant should describe a sound technical approach to performing each of the PBTs specified in Exhibit A, Section 3 of the ACC and listed below for reference. Up to twelve (12) points may be assigned. To receive the maximum points, the applicant must describe an effective approach that includes specific steps to ensure performance of all eight (8) PBTs. If contractor entities are used or proposed to be used for more than 50% of FTEs for PBTs 1-6 in multiple states (as noted in the FTE statement) applicant must describe how they will balance the workload for the PBTs 1-6. Points will be assigned based on the comprehensiveness of the response (i.e. whether the approach addresses all of the required components described in each subfactor) and the proposed approach to ensure performance of all required PBTs.

The technical approach for each of the following components will be evaluated and assigned points as follows:

- PBT #1 – Management and Occupancy (up to 2 points).
- PBT #2 – Adjust Contract Rents (up to 2 points).
- PBT #3 – Review and Pay Monthly Vouchers (up to 2 points).
- PBT #4 – Renew HAP Contracts (up to 2 points).
- PBT #5 – Tenant Health, Safety, and Maintenance Issues (1 point or zero point).
- PBT #6 – Administration – Monthly and Quarterly Reports (1 point or zero point).
- PBT #7 – Administration – Annual Reports and Certifications (1 point or zero point).
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End (1 point or zero point).

Applicants must complete and submit **the FTE statement** (see Appendix B of this NOFA) showing all staff and contractors who will be performing PBTs 1-6.

d. Technical Approach: General ACC Requirements (up to 2 points). Each applicant should describe a sound technical approach to administering the general requirements of the ACC. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the reasonableness of the proposed approach to ensure performance of all required components of the ACC. For example, a response that addresses each of the below components and relates directly to performance requirements in the ACC will receive 2 points. One point may be given for less complete responses. Responses that are nonresponsive to the ACC or don't address the above components will receive 0 points. The technical approach should include the following components.

- Executive leadership and oversight (if applicable, include a detailed description of planned oversight of all contractors with whom the applicant PHA intends to contract directly);
- Legal representation;
- Equal opportunity management with staff, tenants, and applicants;
- Plan for communication with HUD;
- Plan for communication/engagement with owners and management agents;
- Plan for communication/engagement with tenants; and
- Plan for communication/engagement with tenants and applicants with disabilities.

e. Technical Approach: Information Systems and Security (up to 2 points). Each applicant should describe a sound technical approach to information and information system security and privacy for data entered into or pulled from HUD Systems. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the reasonableness of the proposed approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above. The technical approach should include the following components:

- Security for HUD Systems—TRACS;
- Security for HUD Systems—EIV System;
- Security for HUD Systems—iREMS;
- Security for Non-HUD Information Technology Systems that contain program related data; and
- Security for print-based program documents.

f. Technical Approach: Preparing to Assume ACC Responsibilities (up to 6 points). Each applicant should describe a sound technical approach to preparing to assume responsibility for administration of the ACC and performance of the PBTs upon the effective date of the ACC in each of the three (3) components that follow. If specific items do not need to be acquired or added, the applicant must describe what is in place (i.e. surplus office space within the PHA's facility) or why it is not required. Up to six (6) points may be assigned. Points will be assigned based on the comprehensiveness of the response (i.e. approach addresses all of the required components described in each subfactor) and the proposed impact of the approach to ensure performance of all required components. To receive the maximum points, the applicant must describe a sound approach that explains specific steps to ensure performance of all three (3) components listed below. The technical approach for each of the following components will be evaluated and assigned points as follows:

- A description of office facilities, communication systems, information technology systems to be acquired or added to existing operations and a timeline from award to full readiness (up to 2 points);
- A description of accounting systems; banking, insurance and fidelity bonding arrangements to be acquired or added to existing operations and timeline from award to full readiness (up to 2 points); and
- A description of hiring and training of personnel to be added and a timeline from initiation to full readiness (up to 2 points).

g. Quality Control Plan (up to 24 Points). Each applicant should submit a detailed Quality Control Plan (QCP) that describes internal control procedures for each of the following subfactors (1) through (7). The applicant may describe the internal control procedures of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted to provide services in each subfactor. Up to 24 points may be assigned to the QCP. Points will be assigned based on the comprehensiveness of its internal control procedures, as they relate to the ACC, to ensure the applicant's organizational expertise and capacity to ensure the steps and procedures described meet the objectives of the subfactors.

(1) Internal Control Procedures: PBTs (up to 8 points). For each PBT specified in Exhibit A, Section 3 of the ACC (and listed below for reference), describe how they will achieve Acceptable Quality Level (AQL) performance of the specified PBT in the Performance Requirements Summary (PRS) Table, Exhibit A, Section 5 of the ACC. Up to eight (8) points may be assigned. To receive the maximum points, the applicant must describe an effective plan that includes specific steps to measure and evaluate the performance of all eight (8) PBTs listed below at the specified AQL. Points will be assigned based on the comprehensiveness of the response (i.e. approach addresses all of the required components described in each subfactor) and the proposed approach to ensure performance of all required components.

The QCP for each of the PBTs will be evaluated and points assigned as follows:

- PBT #1 - Management and Occupancy (1 point or zero points).
- PBT #2 – Adjust Contract Rents (1 point or zero points).
- PBT #3 – Review and Pay Monthly Vouchers (1 point or zero points).
- PBT #4 – Renew HAP Contracts (1 point or zero points).
- PBT #5 – Tenant Health, Safety, and Maintenance Issues (1 point or zero points).
- PBT #6 – Administration – Monthly and Quarterly Reports (1 point or zero points).
- PBT #7 – Administration – Annual Reports and Certifications (1 point or zero points).
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End (1 point or zero points).

(2) Internal Control Procedures: Conflicts of Interest (up to 2 points). Each applicant should describe the internal control procedures that will be implemented to ensure that the conflicts of interest stipulated in Section 10, "Conflicts of Interest," of the ACC are prevented, detected and resolved. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response (i.e. whether the approach addresses all of the required components described in each subfactor) and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above. See ACC for outcomes.

(3) Internal Control Procedures: Accountability (up to 2 points). Each applicant should describe the internal control procedures that will be implemented to ensure accountability and separation of duties to detect and prevent fraud, waste, and abuse of funds. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above.

(4) Internal Control Procedures: Privacy (up to 2 points). Each applicant should identify the internal control procedures that will be implemented to prevent, detect, record, and report privacy breaches. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above.

(5) Internal Control Procedures: Information Systems (up to 2 points). Each applicant should describe the internal control procedures for information and information system access, management, and security for HUD systems, non-HUD systems that contain program related data, and print-base program documents. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above.

(6) Internal Control Procedures: Training (up to 2 points). Each applicant should describe how they will provide initial and continuous training and cross training of staff to perform PBTs and comply with the requirements of the ACC and HUD. Up to two (2) points may be assigned. Points will be assigned based on how clear the plan is, how staff is identified to be trained and frequency of training.

(7) Internal Control Procedures: QCP Elements 1 through 6 (up to 6 points). Each applicant should describe the internal control procedures that will be implemented to review the effectiveness of each element of the QCP and the date(s) scheduled for each QCP element review. Up to six (6) points may be assigned. To receive the maximum points, the applicant must describe a plan that includes specific steps to ensure the six (6) internal control descriptions in the QCP. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components.

- PBTs (1 point or zero point);
- Conflicts of Interest (1 point or zero point);
- Accountability (1 point or zero point);
- Privacy (1 point or zero point);
- Information Systems (1 point or zero point); and
- Training (1 point or zero point).

3. Rating Factor 3: Policy Priority: Affirmatively Furthering Fair Housing (up to 1 Point).

Applicants will be awarded one (1) point for demonstrating how their application affirmatively furthers Fair Housing. Each applicant should identify specific activities, outputs and outcomes that further these policy priorities over the period of performance.

HUD is interested in funding housing and community development activities that afford residents an opportunity to live in a variety of neighborhoods and not be confined to affordable housing choices in areas of high poverty or areas that are not racially or ethnically diverse. Recognizing that housing and community development efforts must address a complex network of social and economic factors in order to promote more diverse, inclusive communities, HUD seeks to encourage applicants to undertake comprehensive and effective strategies to affirmatively further fair housing. Each applicant should describe how it will take affirmative steps to achieve the following outcome: **Address impediments to fair housing and promote fair housing rights and choice.** The applicant must describe the methods that will be used to achieve these outcomes. Examples include review of HUD-assisted projects to ensure compliance with federal civil rights and equal opportunity regulations, implement actions and procedures to affirmatively further fair housing, perform affirmative fair housing marketing, and make information available on the existence and location of housing, facilities, and services that are accessible to persons with disabilities, and maintain records of the actions, goals, and outcomes. The applicant should also present a timetable for achieving the identified outcomes.

4. Rating Factor 4: Policy Priority: Job Creation (1 Point).

Applicants will be awarded one (1) point for demonstrating how their application creates jobs and promotes economic development in the community. Each applicant should identify specific activities, outputs and outcomes that further these policy priorities over the period of performance.

Under the Job Creation/Employment policy priority, HUD seeks to fund applicants that undertake activities that sustain economic development and create jobs in low-income communities. Each applicant should describe the number and type of activities that will improve access to job opportunities in the community through information sharing, coordination with Federal, state, and local entities, and other means. To receive one policy priority point, applicants are expected to describe how they will achieve the following outcome: **Expand job creation and other economic opportunities in the community.** The applicant must describe the methods that will be used to achieve these outcomes. Examples include specifying the number of jobs created and specifying the number of other activities that expand job creation and other economic opportunities. According to the proposed methods, the applicant should identify the anticipated outputs (i.e. number of jobs created, number of activities planned) during the period of performance.

5. Rating Factor 5: Scaled Fee Score. Basic Administrative Fee (up to 30 Points)

In addition to technical points, applicants will receive up to 30 points for the basic administrative fee percentage proposed in the application. All proposed fees will be rounded to the nearest .01%. The proposed Basic Administrative Fee Percentage for a State is not to exceed 2.0%.

Points will be assigned as follows:

- 1.0% or below 30 points
- 1.01-1.1% 28 points
- 1.11-1.2% 25 points
- 1.21-1.3% 22 points
- 1.31-1.4% 19 points
- 1.41-1.5% 16 points
- 1.51-1.6% 13 points
- 1.61-1.7% 10 points
- 1.71-1.8% 7 points
- 1.81-1.9% 4 points
- 1.91-2.0% 1 point

The proposed fee points are added to the technical points to obtain the total score. The application with the highest total score in the state will be awarded the ACC.

In circumstances where the highest total scores for a state are equal, the applicants with tied scores will have a tie-breaker based on highest point score for Rating Factor 5. If there is still a tie, HUD will select the applicant with the highest point score for Rating Factor 1.

B. Certifications. By signing the electronic application on Grants.gov, the applicant certifies that the Disaster Plan will be complete and correct before awards are made. The applicant is also certifying that all the statements and information contained in the application is true and correct and upon which HUD can rely.

C. Reviews and Selection Process.

a. Application Screening. Applicants requesting funds will be screened for completeness. Applications from ineligible entities will not be reviewed. Applicants that do not include the Reasoned Legal Opinion in their application will not be reviewed. If an applicant proposes an administrative fee over 2%, the application will not be reviewed. Applications that do not meet the timely receipt requirements or provide file formats that do not meet HUD requirements as specified in the FY2012 **General Section** cannot be read by HUD and therefore will not be reviewed.

b. Technical Evaluation Panel. Applications that pass the initial screening review will be forwarded to the Technical Evaluation Panel (TEP). The TEP is composed of teams of Multifamily Housing staff who will review and evaluate the applications forwarded to them. HUD will conduct the substantive review of the application in accordance with the rating criteria described in this NOFA. As part of the review process, HUD may contact the applicant by telephone, email, or mail for the sole purpose of clarifying or confirming application

information, but not to improve the substance of the application. Detailed rules regarding corrections to deficient applications appear in Section V. B. 4. below. If contacted for clarifying or confirming information, the applicant must respond within the time parameters as provided in Section V. B. 4. Rating factors and subfactors are not curable deficiencies.

Each application will be evaluated and scored on its own merit by a TEP Team.

c. Corrections to Deficient Applications. After the application deadline, and in accordance with the electronic submission grace period, HUD may not, consistent with its regulations in 24 CFR part 4, subpart B, consider any unsolicited information provided by an applicant. After HUD receives an application, HUD may contact an applicant to clarify an item in its application or to correct curable (correctable) technical deficiencies. HUD may not seek clarification of items or responses that improve the substantive quality of an applicant's response to any rating factors or which correct deficiencies which are in whole or part of a rating factor. In order not to unreasonably exclude applications from being rated and ranked, HUD may contact applicants to ensure proper completion of the application, and will do so on a uniform basis for all applicants.

Curable (correctable) technical deficiencies are limited to: inconsistencies in the funding request, failure to submit certifications or statements that are not threshold requirements and do not impact the score of an applicant, and failure to submit an application that contains a signature by an official able to make a legally binding commitment on behalf of the applicant (e.g. Disaster Plan or FTE Chart). In the case of an applicant that received a waiver of the regulatory requirement to submit an electronic application, the technical deficiency may include failure to submit an application that contains an original signature. If HUD finds a curable deficiency in the application, HUD will notify the applicant by electronic mail describing the clarification or technical deficiency. Clarifications or corrections of technical deficiencies in accordance with the information provided by HUD must be received by HUD within 14 calendar days of the date of receipt of the HUD notification and be sent by electronic mail to the address provided in the notice. (If the deadline date falls on a Saturday, Sunday, or Federal holiday, then the applicant's correction must be received by HUD on the next day that is not a Saturday, Sunday, or Federal holiday).

In the case of electronic submissions to Grants.gov, any clarifications or cure items must be submitted electronically using the facsimile telephone number 800-HUD-1010 and form HUD96011, Facsimile Transmittal, contained in the last application package submitted to HUD. The additional information provided by facsimile will be matched to the electronic application in HUD's files. When submitting technical deficiency cure items, please place the following information in the box labeled "Name of Document Submitting" on form HUD96011: Technical Cure plus the name of the document. If the name of the document is long and you need space to fit the document name, simply label the Technical Cure as TC followed by the document name. When submitting a facsimile, applicants must follow the facsimile requirements found elsewhere in this notice. If the deficiency is not corrected within the above time frame, HUD will reject the application as incomplete, and it will not be considered for funding.

For paper applications the applicant must be registered in CCR with an active registration on the deadline date and have a DUNS number. An application with the wrong DUNS number entered in the SF424 will be treated as a technical deficiency and the applicant will be permitted to

provide a corrected SF424 to the location indicated in the waiver approval within the specified cure period and in accordance with the notification of the need to cure the application. Failure to correct the deficiency and meet the requirement to have a DUNS number and active registration in the CCR will render the application ineligible for funding. All applicants are advised to check and maintain their DUNS numbers and CCR registrations with the posting of this NOFA so any updates or changes are completed well in advance of application deadline dates.

d. Ranking and Selection.

(1) Threshold Requirements. Applicants that do not meet the threshold requirements of the **General Section** or this NOFA will not receive an award of funds from HUD regardless of score or ranking.

(2) Minimum Score. HUD will make awards to applicants meeting the threshold and minimum score requirements.

(3) HUD reserves the right to not fund an application if information comes to the attention of HUD that adversely affects an applicant's eligibility or integrity in managing an award, adversely affects HUD's evaluation or scoring of an application, or indicates evidence of fraud or mismanagement on the part of an applicant.

(4) HUD will rank applications in order by score and select the highest rated application by State. If there are multiple applications covering a state, HUD will select the highest rated application for that State and then skip all others within that State. If there is a tie score for a given State, HUD will use the tie breaker methodology identified in this NOFA.

(5) Limitations on Award Amounts. HUD reserves the right to reduce or adjust the funding amount based upon:

- (a)** The reasonableness of the overall program relative to the number of units covered;
- (b)** The level of funds available for award under the program; and
- (c)** Workload reduction.

(6) If there are funds remaining that are less than the requested level of an applicant deemed eligible for funding, HUD may offer the remaining funds to the applicant at a reduced funding amount. If an applicant turns down an award offer, HUD will make an offer of funding to the next highest-ranking eligible application.

VI. AWARD ADMINISTRATION.

A. Selection and Notification. HUD will notify all applicants as to the outcome of the selection process. If an applicant is selected, HUD's notice concerning the amount of the award (based on the approved application) will constitute HUD's selection, subject to execution of the award documents by HUD. Successful PBCA Program applicants will be notified of the selection and will receive instructions for proceeding. The selection does not become final until the cooperative agreement and other award documents are signed and executed.

B. LOCCS Access. Applicants must be eligible to acquire rights and access under HUD's Electronic Line of Credit Control System (eLOCCS). The award notice will provide directions for obtaining LOCCS access.

C. Debriefing. For a period of 120 days, beginning not more than 30 days after the final awards for assistance are publicly announced, HUD will provide a debriefing to a requesting unsuccessful applicant related to that application. A debriefing request must be made in writing or by email by the applicant's authorized official whose signature appears on the SF424, or by his or her successor in the office and submitted to Kerry.E.Hickman@hud.gov or to:

Mr. Kerry E. Hickman, Acting Director
Office of Housing Assistance and Contract Administration Oversight
Multifamily Housing Programs
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 6151
Washington, DC 20410

Information provided during a debriefing will include, at a minimum, the final score received for each rating factor, final evaluation comments for each rating factor, and the final assessment indicating the basis upon which the award was provided or denied.

D. Administrative and National Policy Requirements. In addition to the requirements listed below, please review all requirements in the **General Section**.

E. Reporting Requirements.

1. Monthly and Quarterly Reporting Requirements. All Awardees must report to HUD monthly and quarterly as specified under PBT #6, Exhibit A of the ACC.

2. Annual Reporting Requirement. All awardees must report to HUD annually as specified under PBT #7 and PBT #8, Exhibit A of the ACC.

3. General Requirements. Generally Federal funds maintain their Federal character with regard to program eligible uses in perpetuity, and continue to remain subject to all annual reporting requirements. Specifically, after the close of the award period, Awardees with funds remaining in financing programs will prospectively be required to report basic information on the Program on an annual basis until the funds are either: (1) rolled into another eligible activity; or (2) fully disbursed through default. HUD reserves the right to require the grantee to report on real property managed by the applicant during the award period and for uses in perpetuity.

4. Racial and Ethnic Data. If you are collecting client-level data, HUD requires that funded recipients collect racial and ethnic beneficiary data. HUD has adopted the Office of Management and Budget's Standards for the Collection of Racial and Ethnic Data. In view of these requirements, the applicant should use HUD27061, Racial and Ethnic Data Reporting Form found on www.hudclips.org or a comparable electronic data system for this purpose.

5. Transparency Act Reporting. Recipient Reporting is required under the Federal Financial Assistance Accountability and Transparency Act of 2006, as amended.

a. Prime Awardee Reporting. Prime recipients of HUD financial assistance are required to report sub-awards made either as pass-through awards, sub-recipient awards, or vendor awards in the Federal government-wide website www.fsrc.gov or its successor system. Starting with awards made October 1, 2010, prime financial assistance awardees receiving funds directly from

HUD are required to report sub-awards and executive compensation information both for the prime award and sub-awards, including awards made as pass-through awards or awards to vendors, where the initial award is \$25,000 or greater or the cumulative award will be \$25,000 or greater if funding incrementally as directed by HUD in accordance with OMB guidance.

The reporting of award and sub-award information is in accordance with the requirements of Federal Financial Assistance Accountability and Transparency Act of 2006, as amended by section 6202 of Public Law 110-252, hereafter referred to as the "Transparency Act" and OMB Guidance issued to the Federal agencies on September 14, 2010 (75 FR 55669) and in OMB Policy guidance. The prime awardee will have until the end of the month plus one additional month after a sub-award or pass-through award is obligated to fulfill the reporting requirement.

The Transparency Act requires the creation of a public government-wide website in which the following sub-award data will be displayed:

- (1) Name of entity receiving award;
- (2) Amount of award;
- (3) Funding agency;
- (4) North American Industry Classification System (NAICS) code for contracts/CFDA program for financial assistance awards;
- (5) Program source;
- (6) Award title descriptive of the purpose of the funding action;
- (7) Location of the entity (including Congressional district);
- (8) Place of Performance (including Congressional district);
- (9) Unique identifier of the entity and its parent; and
- (10) Total compensation and names of top five executives.

For the purposes of reporting into the Federal Funding Accountability and Transparency Act (FFATA) Sub-award Reporting System (FSRS) reporting site, the unique identifier is the DUNS number the entity has obtained from Dun and Bradstreet, and for Prime awardees the DUNS number registered in the Central Contractor Registration as required by HUD regulation 24 CFR 5.1004.

b. Prime Awardee Executive Compensation Reporting. Prime awardees must also report in the government-wide website the total compensation and names of the top five executives in the prime awardee organization if:

- (1) More than 80 percent of the annual gross revenues are from the Federal government, and those revenues are greater than \$25 million annually; and
- (2) Compensation information is not readily available through reporting to the Securities and Exchange Commission (SEC).

c. Sub-award Executive Compensation Reporting. Prime awardees must also report in the government-wide website the total compensation and names of the top five executives in the sub-awardees, pass-through or vendor organization if:

- (1) More than 80 percent of the annual gross revenues are from the Federal government, and those revenues are greater than \$25 million annually; and

(2) Compensation information is not readily available through reporting to the SEC.

d. Transparency Act Reporting Exemptions. The Transparency Act exempts any sub-awards less than \$25,000 made to individuals and any sub-awards less than \$25,000 made to an entity with annual expenditures less than \$300,000. Sub-awards with a cumulative total of \$25,000 or greater are subject to sub-award reporting beginning the date the sub-award total award amount reaches \$25,000. Any other exemptions to the requirements must be approved by the Office of Management and Budget.

6. Compliance with Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), hereafter referred to as "Section 872". Section 872 requires the establishment of a government-wide data system – the Federal Awardee Performance and Integrity Information System (FAPIIS) - to contain information related to the integrity and performance of entities awarded Federal financial assistance and making use of the information by Federal officials in making awards. OMB is in the process of issuing regulations regarding Federal agency implementation of Section 872 requirements. A technical correction to this **General Section** may be issued when such regulations are promulgated.

HUD anticipates that the terms and conditions to its FY2012 awards will contain requirements related to meeting FFATA and Section 872 requirements.

F. Funding Restrictions.

1. Pre-award Costs. Awards under this NOFA are not allowed for reimbursement of pre-award costs (i.e., applicants may not use funding received under this NOFA for the cost of preparing their application).

2. Rescission of Award or Termination of ACC Based on False Certification. If, at any time after making an award to or executing an ACC with an applicant, HUD determines that any material representation in the RLO or any SL is false, such determination shall constitute a basis for HUD to rescind the award or terminate the ACC.

VII. AGENCY CONTACTS.

Further Information and Technical Assistance. Before the application deadline date, HUD staff may provide general guidance and technical assistance about this NOFA. However, staff is not permitted to assist in preparing the application. Also, following selection of applicants, but before awards are announced, staff may assist in clarifying or confirming information that is a prerequisite to the offer of an award. An applicant may contact Mr. Kerry E. Hickman, Acting Director, Office of Housing Assistance and Contract Administration Oversight, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 6151, Washington, DC 20410, by email to Kerry.E.Hickman@hud.gov or telephone 202-402- 3885 (this is not a toll-free number). This number can be accessed via TTY by calling the toll-free Federal Relay Service Operator at 800-877-8339.

For technical support for downloading an application or electronically submitting an application, please call Grants.gov help desk at 800-518-GRANTS (this is a toll-free number) or send an email to www.support@Grants.gov.

VIII. OTHER INFORMATION

A. Paperwork Reduction Act Statement. If it is determined that the Paperwork Reduction Act of 1995 (44 U.S.C. §§ 3501-3520) is applicable to the information collection requirements in this Notice, using OMB control numbers 2577-0157, 2502-0582, 2502-0587, 2577-0169, 2577-0229, 2510-0011, 2577-0259, 2502-0542, 2535-0116, and 2577-0270. In accordance with the Paperwork Reduction Act, HUD may not consider or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid OMB control number. HUD expects to hold an information webcast via satellite for potential applicants to learn more about the Program and preparation of an application. For more information about the date and time of this webcast, consult the HUD website at www.hud.gov.

B. Environmental Impact. This NOFA does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 C.F.R. 50.19(c)(1), this NOFA is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 USC 4321).

Dated: FEB 29 2012



Carol J. Galante,
Acting Assistant Secretary for Housing – Federal Housing
Commissioner

[FR-5600- N-33]

Appendix A. List of Available States for Applications by PHAs for PBCAs

1. Alabama
2. Alaska
3. Arizona
4. Arkansas
5. California
6. Colorado
7. Connecticut
8. Delaware
9. Florida
10. Georgia
11. Hawaii
12. Idaho
13. Illinois
14. Indiana
15. Kansas
16. Kentucky
17. Louisiana
18. Maryland
19. Massachusetts
20. Michigan
21. Mississippi
22. Missouri
23. Nebraska
24. Nevada
25. New Jersey
26. New Mexico
27. New York
28. North Carolina
29. Ohio
30. Oklahoma
31. Oregon
32. Pennsylvania
33. Rhode Island
34. South Carolina
35. Tennessee
36. Texas
37. Utah
38. Virginia
39. Washington
40. West Virginia
41. Wisconsin
42. The District of Columbia

Appendix B. FTE Chart Found in the Instructinos Download

Appendix C. Performance-Based Annual Contributions Contract (ACC) found in the Instructions Download

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Performance-Based Annual Contributions Contract (ACC)

2. ACC

a. Purpose

- (1) This ACC is a contract between the PHA and HUD to administer project-based Section 8 Contracts as a PBCA. The ACC was awarded by HUD pursuant to a Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.
- (2) Under Section 8, HUD is authorized to enter into an ACC with a PHA that enters into a HAP Contract with an owner of a multifamily housing project to make housing assistance payments for housing units occupied by eligible households, including a HAP Contract assigned to the PHA by HUD for contract administration under the ACC. Under the ACC, the PHA will perform contract administration for Covered Units.
- (3) The ACC does not apply to contract administration of Section 8 projects assisted under the Section 8 moderate rehabilitation program (24 CFR part 882), including the Section 8 moderate rehabilitation single room occupancy program, or to contract administration of projects assisted under the Section 8 project-based voucher program or the project-based certificate program (24 CFR part 983).

b. Exhibits

This ACC includes the following exhibits, each of which is part of the ACC:

Exhibit A: PHA Contract Administration Responsibilities

Exhibit B: HAP Contracts

Exhibit C: Annual Financial Operations Report & FTE Certification

Exhibit D: Disaster Plan Certification

Exhibit E: Service Area

Exhibit F: Basic Administrative Fee Percentage

Exhibit G: MOR Ratings for Projects with PBCA Administered HAP Contracts

Exhibit H: Mark-Market Projects with PBCA Administered HAP Contracts

HUD may unilaterally amend Exhibit B from time to time to add HAP Contracts and/or withdraw HAP Contracts by giving the PHA written notice of the revised Exhibit B. Each such notice shall constitute an amendment of Exhibit B.

c. ACC Term

- (1) The PHA shall provide contract administration services for Covered Units during the initial ACC Term, which shall consist of twenty-four (24) months commencing on the first day of the month of HUD's first assignment to the PHA of existing HAP contracts for Covered Units for contract administration pursuant to this ACC.
- (2) After the initial term of the ACC, HUD may unilaterally elect to extend the ACC at HUD's sole discretion and shall exercise such extension by written notice to the PHA of HUD's election. HUD shall give any such extension notice at least three (3) calendar months before the expiration of the term of the ACC or an extension, if any.

3. PHA CONTRACT ADMINISTRATION RESPONSIBILITIES

1. Coverage

- (1) The PHA shall enter into or assume HAP Contracts with owners of Covered Units to make housing assistance payments to the owners of such units during the HAP Contract term.
- (2) During the ACC Term, the PHA shall provide contract administration services for the Covered Units in the Service Area.
- (3) HUD will assign to the PHA existing HAP Contracts for Covered Units. The PHA agrees to accept all such assignments by HUD for the purpose of administering such HAP Contracts in accordance with the ACC during the ACC Term. Upon assignment by HUD, the PHA immediately and automatically assumes, during the ACC Term, the contractual rights and responsibilities of HUD, or of any PHA that is or was party to the HAP Contract, pursuant to such HAP Contracts for Covered Units in accordance with the ACC and HUD requirements.

2. Responsibilities

- (1) The PHA shall perform all PHA responsibilities under the ACC in accordance with applicable provisions of:
 - The 1937 Act; and
 - MAHRA; and

3. The PHA shall take prompt and vigorous action, to HUD's satisfaction, and as required or directed by HUD, to ensure owner compliance with the terms of HAP Contracts for Covered Units within the scope of the ACC.

4. PROGRAM RECEIPTS

a. Housing Assistance Payments

- (1) HUD will make housing assistance payments to the PHA for Covered Units in accordance with HUD requirements.
- (2) The amount approved and paid by HUD for housing assistance payments shall be sufficient for timely payment by the PHA to owners under HAP Contracts for Covered Units. If the PHA is unable to make timely payments to owners because of HUD delay in paying the PHA the amount sufficient for such payment (and such HUD delay is not caused by the PHA's action or failure to act), the PHA's failure to make timely payments to owners shall not be a default by the PHA under the ACC.

b. Administrative Fees

- (1) The PHA earns a Basic Administrative Fee for each Covered Unit on the first day of the month in accordance with Exhibit A.
- (2) In addition to the Basic Administrative Fee, the PHA may earn annual Incentive Fees for Performance and Customer Service in accordance with Exhibit A.
- (3) The payment of Administrative Fees is subject to the availability of appropriated funds.
- (4) Basic Administrative Fees are subject to Disincentive Deductions if performance of the PBTs specified falls below the AQL specified in the PRS (Exhibit A, Section 5).
- (5) HUD will not pay a Basic Administrative Fee for any Covered Units for which the HAP Contract has been terminated.

c. Interest Earned

The dollar amount of interest earned on housing assistance payments deposited in a financial institution in connection with administration of the Section 8 program under the ACC.

5. FINANCIAL MANAGEMENT

a. Use of Program Receipts

- (1) The PHA shall use program receipts in compliance with the U.S. Housing Act of 1937 and all HUD regulations and other requirements.
- (2) The PHA shall use Administrative Fees to pay the operating expenses of the PHA to administer HAP Contracts.
- (3) The Administrative Fees that exceed the PHA's costs to perform the ACC are not subject to HUD requirements governing use of Program Receipts. The PHA may use or distribute any such excess Administrative Fees for any purpose.
- (4) The PHA shall use HAP funds to pay housing assistance to owners for Covered Units.
- (5) HAP funds in excess of current needs for payments for Covered Units shall be invested in accordance with HUD requirements and, if required, as determined by HUD, promptly remitted to HUD.
- (6) Interest earned on HAP funds shall be remitted to HUD at the end of the ACC year (see Annual Interest Certification requirement Exhibit A, PBT #8) or shall be invested in accordance with HUD requirements.

b. Depository

Unless otherwise required or permitted by HUD, all Program Receipts shall be promptly deposited with an institution under the control of, and whose deposits are insured by, the Federal Deposit Insurance Corporation under the following conditions:

- (1) The PHA must determine that the financial institution has a rating consistent at all times with current minimally acceptable ratings as established by Government National Mortgage Association (GNMA).
- (2) The PHA must monitor the institution's ratings no less than on a quarterly basis, and change institutions when necessary.
- (3) The PHA must document the ratings of the institution where funds are deposited and maintain the documentation in the administrative record for three years, including the current year.
- (4) The PHA shall enter into a Depository Agreement in the form prescribed by HUD.

- This requirement informs the applicant that a minimum of 45 total points must be assigned by the Technical Evaluation Panel team to its responses to Rating Factors #1, #2, #3 and #4 for the applicant to qualify for an award.
93. It appears that HUD would like the total for both years to be shown, but instructions and form in grants.gov does not allow this, even though the form provides for an All Years presentation. The input does not allow this to be changed to that presentation. Please clarify how HUD form 424CB should be completed.
- The form automatically fills the total for the first year and both years in if the subtotal lines at the bottom left of the form are completed.
94. Will HUD allow Joint Ventures or Partnerships as long as an in-state PHA is part of the Joint Venture or Partnership?
- HUD will consider joint ventures or partnerships as long as the joint venture or partnership meets all the applicant requirements in the NOFA. Any joint venture must itself constitute a PHA, as defined in section 3(b)(6)(A) of the 1937 Act, and meet all other legal requirements identified in the NOFA. For example, if the joint venture purports to be an instrumentality PHA, the Reasoned Legal Opinion submitted on its behalf must establish that the entity meets all requirements in section III. D. 2. c. of the NOFA.
95. Are there State Attorney General Opinions for all 42 states?
- No.
96. If HUD is relying on the State Attorney Generals opinions as a basis for its foreign state restriction, why does the foreign state restriction in the application extend to states where an opinion has not been issued?
- HUD is not relying solely on State Attorneys' General opinions as a basis for its decision to not permit the crossing of state lines, except in limited circumstances. However, the State Attorney General opinions that HUD has received, which are posted on the Office of Multifamily Housing's website, have been a factor in HUD's decision. HUD notes that nothing would prohibit a State Attorney General who has not yet written to HUD from submitting an opinion to HUD during the selection process or even after an award has been made, concluding that its State law does not permit the crossing of State lines. HUD has determined that such a possibility poses an unacceptable risk of interruption to its administration of the PBCA program.
97. Under Terms and Definitions, paragraph 3, Instrumentality, the last sentence states that "Submission of an RLO on behalf of an instrumentality that itself was created by one or more instrumentalities will result in disqualification of the application." What types of arrangements is HUD intending to prohibit by this language?
- An applicant that is the instrumentality of an instrumentality.
98. What is the basis for the prohibition if such an entity would otherwise be eligible to compete?

- The basis is that such an entity is not a “public housing agency” within the meaning of section 3(b)(6)(A) of the United States Housing Act of 1937. HUD interprets this provision to require that any instrumentality be created *directly* by a governmental entity that is “authorized to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A), not an entity that is created by an instrumentality or other subsidiary of such entity.

99. In paragraph D of the Funding Description, HUD states that it “believes that nothing in the 1937 Act prohibits an instrumentality PHA that is ‘authorized . . .’ from acting as a PHA in a foreign state.” In the next sentence, HUD states that it will consider applications from out-of-State applicants “only for States for which HUD does not receive an application from a legally qualified in-State applicant and that receipt by HUD of an application from a legally qualified in-State applicant will result in rejection of any application received from an out-of-state applicant for that state.” HUD’s position appears contradictory. If the 1937 Act does not prohibit PHA’s from providing services in a foreign state, what is the basis for HUD’s decision to effectively prohibit PHA’s from bidding in other States?

- The statements are not contradictory. The 1937 neither requires nor prohibits a PHA from crossing state lines. PHAs are organized pursuant to the laws of their states. Some States have made their position known to HUD that their State laws prohibit an out-of-state PHA from acting as a PHA to the extent necessary to comply with the 1937 Act and the ACC within their State. As stated in the NOFA, HUD has made the decision to consider applications from out-of-state applicants *only* for States for which HUD does not receive an application from a qualified in-state applicant.

100. Will HUD consider eliminating the restrictive language?

- No.

101. Do the responses in the Q&A amend or revise the requirements contained in the NOFA for PBCA? If there are answers in the Q&A that contradict the information included in the NOFA. Which should applicants follow?

- The answers that HUD posts on its website in response to questions supplement the NOFA. HUD does not believe that any of the answers it posts contradict the information provided in the NOFA. To the extent the applicant perceives any contradictions; they are urged to alert HUD to the potential contradiction and prepare applications based on the answers that HUD posts.

102. Item #4 of the Technical Correction states: “HUD anticipates that ACCs awarded under this NOFA will become effective on December 1, 2012.”
For the current 42 incumbents, HUD issued an ACC amendment for a 6 month base period plus three 3 month optional extensions.

- ✓ Based period: Oct 1, 2011 – March 31, 2012
- ✓ 1st 3-mo. extension: April 1, 2012 – June 30, 2012
- ✓ 2nd 3-mo. extension: July 1, 2012 – September 30, 2012
- ✓ 3rd 3-mo. extension: October 1, 2012 – December 31, 2012

Does HUD intend to change the 3rd extension to a two-month extension?

To the extent that the actual effective date for ACCs awarded under the NOFA is December 1, 2012, HUD intends to request that PHAs that are party to the ACC amendment to agree to a 3rd extension, which would run from October 1, 2012 through November 30, 2012.

April 2007

PROJECT-BASED RENTAL ASSISTANCE

HUD Should Update Its Policies and Procedures to Keep Pace with the Changing Housing Market



GAO

Accountability * Integrity * Reliability

recommendations that could reduce administrative costs and encourage owners to stay in the program.

Background

The Housing and Community Development Act of 1974, a major overhaul of housing laws, created the tenant-based and project-based Section 8 rental assistance programs for low-income households. The tenant-based program (now called Housing Choice Vouchers) provides rental assistance to eligible households to rent houses or apartments in the private market from landlords who are willing to accept the vouchers. Under the project-based rental assistance program, HUD enters into contracts with property owners to provide rental assistance for a fixed period of time.

The project-based Section 8 program has multiple subprograms, including Section 8 New Construction and Substantial Rehabilitation, Loan Management Set-Asides, Preservation, and Property Disposition.⁸ Rental assistance under these project-based Section 8 subprograms has been generally used in conjunction with other public funding. For example, a Section 8 New Construction/Substantial Rehabilitation property could have been financed by a Federal Housing Administration (FHA) insured loan, a Section 202 direct loan, a U.S. Department of Agriculture Section 515 direct loan, or state housing finance agency bonds. Some of these programs provided financing for the construction or rehabilitation of affordable rental housing prior to the 1974 Act. (See table 1).

⁸In 1978, a moderate rehabilitation portion of the Section 8 program was added but has not been funded since 1989. The authorization for the new construction and substantial rehabilitation components of the Housing and Community Development Act of 1974 were repealed in 1983.

Table 1: Project-Based Section 8 Rental Assistance Programs with Corresponding Financing Programs

Rental Assistance Program	Description
Section 8 New Construction and Substantial Rehabilitation	Provides rent subsidies in new or substantially rehabilitated projects. Subsidy initially covered the difference between tenants' payment and fair market rent, as determined by HUD. Subsidy contracts were for 20 to 40 years. Tax incentives and financing arrangements also reduced owners' effective mortgage interest rates and project rents. No new contracts have been issued since the 1990s, and only existing contracts have been renewed.
Section 8 Loan Management Set-Aside	HUD contracts with owners of HUD-insured multifamily or HUD-held housing projects experiencing financial problems. The program seeks to minimize defaults on HUD-insured multifamily rental projects by ensuring a reliable income stream. Families receive a rental subsidy equal to the difference between their share of the rent and the rent charged by the owners, which was not to exceed applicable fair market rents.
Section 8 Property Disposition	HUD forecloses on subsidized properties with HUD-held multifamily mortgages for properties with project-based Section 8 or sells HUD-owned multifamily properties with project-based Section 8 assistance.
Section 8 Preservation	This program assists multifamily properties by providing project-based Section 8 subsidies to a property in order to preserve its low-income status. There are no new contracts for this program.
Financing Program	
FHA Insurance	The FHA Multi-Family Mortgage Insurance program enhances credit for rental housing developments through the provision of federal loan guarantees. These guarantees provide a financing option in addition to those available in the private conventional market. FHA provides mortgage insurance for multifamily housing, supporting the construction of new apartment projects, and the refinancing of older ones.
Section 202 Elderly and Disabled Housing Direct Loan Program	Provides direct loans at below-market rates for up to 40 years to finance the construction of rental housing for low-income elderly and disabled households. Projects built between 1974 and 1991 also receive project-based Section 8 rent subsidies. The program is no longer active, although projects developed under it continue to operate. In 1990, the program was restructured to provide capital advances for the development of elderly housing under Section 202, and a Section 811 capital advance program was implemented to develop housing for persons with disabilities. Both 202 and 811 projects receive operating assistance through Project Rental Assistance Contracts.
Section 515	USDA's Rural Housing Service Section 515 program began in the early 1960s. At that time, loans were generally made for 40 years, but borrowers were encouraged to refinance their properties in the private market and to prepay their loans. The program provides direct loans to developers at a 1 percent interest rate. Supplementary rental assistance is provided to approximately half of the units through USDA, while some units also receive rental assistance through the Section 8 programs. After 1989, loans were precluded from prepayments, and loans that were made before that date were restricted.
Housing Finance Development Authority	Projects financed by state Housing Finance Agencies (HFAs) through mortgage revenue or multifamily housing bonds.

Source: GAO.

Project-based Section 8 assistance may be provided only for tenants with incomes no greater than 80 percent of an area's median income. Tenants generally pay rent equal to 30 percent of adjusted household income. As

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- In 1999, because of staffing constraints (primarily in HUD’s field offices) and the workload involved in renewing the increasing numbers of rental assistance contracts reaching the end of their initial terms, HUD began an initiative to contract out the oversight and administration of most of its project-based contracts. The entities that HUD hired—typically public housing authorities or state housing finance agencies—are responsible for conducting on-site management reviews of assisted properties; adjusting contract rents; reviewing, processing, and paying monthly vouchers submitted by owners; renewing contracts with property owners; and responding to health and safety issues at the properties. These performance-based contract administrators (PBCA) now administer the majority of project-based Section 8 contracts.

In the late 1980s, initial Section 8 contracts began expiring; by 2003, all of the original 20-year contracts had expired. Forty-year contracts will expire between 2014 and 2023. Section 8 owners are offered six options upon contract expiration. According to the HUD Section 8 Renewal Guide, Section 8 owners may⁹

- renew without any modifications, with rents capped at HUD’s market levels;
- renew with rents that are elevated to market rents through the Mark-up-to-Market program;
- renew with rents that are reduced to market rents through the Mark-to-Market program;
- renew as a Section 8 “exception project;”¹⁰

⁹The Section 8 Renewal Guide provides comprehensive guidance for renewing expiring project-based Section 8 contracts.

¹⁰In general, Section 8 exception projects are those projects with project-based Section 8 rental assistance, but without FHA mortgage insurance. Owners of exception projects may maintain above-market rents if justified on a cost basis.

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- renew as a Section 8 preservation or portfolio reengineering demonstration projects;¹¹ and
 - opt out of the Section 8 contract.

When their contract expires, project-based Section 8 owners may decide not to renew their Section 8 contracts and convert their units from affordable housing to market rents. Once owners remove their properties from HUD programs, Section 8 households receive enhanced vouchers as long as they remain in their units.¹²

Owners are required to give both tenants and HUD notice of their intention to renew or opt out 1 year before the Section 8 contract's expiration (see fig. 1). An owner who intends to opt out must also provide HUD with a 120-day notification. An owner who intends to renew is required to submit to HUD or the PBCA a request for contract renewal and a rent comparability study (when required) at least 120 days before the contract expires. Local HUD offices review the study to determine if the property's current rents are at, above, or below market rates. If rents are at or below market rates, HUD field office staff will make any necessary adjustments and execute a new Section 8 contract. If rents are above market, HUD staff renews the contract (at above-market rents) for up to 1 year and forward the owner's submission to the HUD Office of Affordable Housing Preservation (OAHP) for a Mark-to-Market restructuring. OAHP assigns properties to participating administrative entities (PAE) to carry out restructurings under the Mark-to-Market program on behalf of HUD.¹³ The owner then signs a renewal contract with the contract administrator.

¹¹Preservation projects are those projects maintained as affordable housing under the Emergency Low Income Housing Preservation Act of 1987 (ELIPHRA) and the Low Income Housing Preservation and Resident Home Ownership Act of 1990 (LIHPRA). The Portfolio Reengineering Demonstration program was the predecessor to the Mark-to-Market program.

¹²To protect Section 8 households from rent increases that may result when owners opt out of their contracts or prepay their subsidized mortgages, HUD provides a special type of tenant protection voucher known as an enhanced voucher. Rents are set at market comparable levels, instead of the regular voucher payment standard. A tenant with an enhanced voucher is entitled to remain in his unit as long as the property remains a rental property, provided the rent is reasonable.

¹³The PAE is responsible for structuring Mark-to-Market transactions, under contract with HUD. PAEs may be public or private entities or joint ventures.

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- continued to make progress in improving its information and financial management systems but much work remained: Some of the projects would not be completed until the year 2000. In addition, we noted that HUD reported that most of its systems did not comply with the FMFIA and therefore could not be relied upon to provide timely, accurate, and reliable financial information and reports to management.
 - had completed a field reorganization that eliminated its regional office structure and transferred direct authority for staff and resources to the Assistant Secretaries, and was planning additional reorganization efforts. Although HUD had not evaluated the effects of its reorganization, most field directors we surveyed rated it successful overall and believed that the reorganization had achieved most of the intended goals—namely, eliminating previously confused lines of authority within programs, enhancing communications, reducing levels of review and approval, and improving customer service.⁶
 - had made some progress in addressing the problems with staff members' skills and with resource management. The Department had increased staff training since our 1995 report and begun to implement a needs assessment process to plan future training. We noted that HUD directors we surveyed generally believed that the skills of their staff had improved over the previous 2 years; however, 40 percent of the directors rated the Department's training as less than good. In addition, we and HUD's Inspector General continued to identify staff resource problems in HUD's major program areas, specifically in public housing and the Federal Housing Administration (FHA). Finally, we reported that the problem of inadequate staff resources to monitor and administer HUD's current array of programs likely would be compounded as the Department implemented plans to downsize.

Our February 1997 report concluded that HUD programs continued to pose a high risk to the government in terms of their vulnerability to waste, fraud, abuse, and mismanagement; that HUD needed to complete its corrective actions; and that HUD and the Congress needed to work together to implement a restructuring strategy that focuses HUD's mission and consolidates, reengineers, or reduces HUD's programs to bring its responsibilities in line with its management capacity.

In its March 1998 report on the audit of the agency's fiscal year 1997 consolidated financial statements, HUD's Inspector General reported that

⁶HUD: Field Directors' Views on Recent Management Initiatives (GAO/RCED-97-34, Feb. 12, 1997).

track every grant. However, HUD plans to convert the current version of IDIS for use in the new grants management system, which may occur over the next several years. Also of immediate concern is the fact that IDIS is not secure, which opens up the possibility of unapproved access to program funds.

Because of the poor quality of information in IDIS and a replacement system not being readily available, we are concerned that the activities and projects under CDBG may not be sufficiently reported and considered for budget request offsets. This is of particular concern because past budget requests show that actual CDBG unobligated balances have been increasing at a rate well over \$50 million annually since fiscal year 1996. Moreover, in 1998, the authority to use about \$7.6 million in CDBG funds expired. Although a reasonable explanation for this expiration may exist, we would not expect funds to expire without benefiting grantees, given the flexibility for the uses of CDBG funds and the discretion grantees have for their use.

The Success of HUD's New Contract Administration Program Depends on Adequate Contract Selection, Administration, and Oversight

Contract Administration is a new initiative in fiscal year 2000 under HUD's Housing Certificate Fund. HUD is requesting \$209 million for this program, of which \$42 million will be available to contractors who have not formerly participated in this activity. According to HUD, the use of contract administrators to manage project-based Section 8 housing assistance contracts will relieve HUD field staff of many duties they currently perform in this regard, allowing them to concentrate on their direct responsibilities, such as monitoring program effectiveness and ensuring that property owners are accountable for the rental subsidy payments they receive. Duties to be shifted to the new contract administrators include conducting annual physical inspections of the properties, reviewing project financial statements, and verifying tenants' income and eligibility for program rental assistance benefits. HUD's Section 8 Financial Management Center would oversee the work of contract administrators, and the Department would select contract administrators through a competitive procurement process.

However, because of the documented weaknesses in HUD's contracting practices in other areas, we question whether HUD is prepared to administer a new contracting initiative of this size. We, HUD's Inspector General, and the National Academy of Public Administration have cited weaknesses in HUD's contracting and procurement practices: inadequate oversight of contracted services because of a lack of skilled, trained staff; workload imbalances; and unclear duties, time frames, costs, and



Housing Certificate Fund (Including Contract Renewals)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HOUSING CERTIFICATE FUND (INCLUDING CONTRACT RENEWALS)

PROGRAM HIGHLIGHTS

	ACTUAL 1998 a/	BUDGET ESTIMATE 1999	CURRENT ESTIMATE 1999	ESTIMATE 2000	INCREASE + DECREASE - 2000 vs 1999
(Dollars in Thousands)					
Appropriation/ Request	\$11,321,772	\$8,981,188	\$10,326,542	\$11,522,095 b/	\$1,195,553
Carryover/Recaptures .....	...	...	\$2,555,166 c/	\$2,350,000	(\$205,166)
Total Resources Available	\$11,321,772	\$8,981,188	\$12,881,708	\$13,872,095	\$990,387
New Unit Reservations	18,376	42,655	58,261	112,000	53,739
Renewals (Units)	1,779,503	2,046,231	2,087,621	2,383,687	296,066
Outlays	\$6,870,000	\$6,334,324	\$7,364,000	\$9,868,000	\$2,504,000

NA = Not Applicable

~/ Reflects program level.

Includes advance appropriation of \$4.2 billion.

c/ The actual total carryover was \$2.66 billion. However, \$107 million was rescinded in the fiscal year 1999 Appropriations Act.

SUMMARY OF BUDGET ESTIMATES

1. SUMMARY OF BUDGET REQUEST

A total of \$13.9 billion is expected to be available for the Housing Certificate Fund in fiscal year 2000. This includes \$11.5 billion in new budget authority, \$4.2 billion of which is requested as an advance appropriation to be available on October 1, 2000. The remaining \$2.4 billion is anticipated in recaptures, carryover from fiscal year 1999, and transfers from the Annual Contributions for Assisted Housing account. These budgetary resources will be used for the purposes described below.

A total of \$13 billion will be used for contract renewal needs. Of this amount, \$4.2 billion will be in the form of an advance appropriation for Section 8 contracts where the cost falls in fiscal year 2001. Also included in the total is \$25.1 million to fund Family Self-Sufficiency Coordinators.

Of the remaining \$.9 billion, \$491 million will be used to support 85,000 incremental units. These include 42,000 vouchers for Section 8 incremental rental assistance, 25,000 vouchers for Welfare-to-Work and 18,000 vouchers for the homeless. An additional 15,000 vouchers for the elderly are requested as mandatory funding for the Housing for Special Populations program. The incremental units are part of an overall total request of 100,000 incremental units of tenant-based assistance.

Finally, \$209 million is requested for Contract Administrators, \$134 million for tenant protection activities to support 27,000 units, \$22 million for Multifamily Enforcement, \$20 million for Regional Opportunity Counseling, and \$6 million for anticipated administrative fee increases resulting from the enactment of the Quality Housing and Work Responsibility Act of 1998. Section 8 Amendments require no additional discretionary budget authority in fiscal year 2000 and will be funded through recaptures of budget authority remaining on expiring contracts.

JA300/AR0256

AR 256

2. CHANGES FROM 1998 ESTIMATES INCLUDED IN THE 1999 BUDGET

3. Incremental Rental Assistance. For fiscal year 2000, the Department is requesting \$243 million in budget authority to support a total of 42,000 incremental vouchers. This assistance will allow the Department to reduce the level of "worst case" need. The "worst case" need reflects those families that are paying more than 50 percent of their income toward rent or are living in substandard housing. Certificates and vouchers will also be used for the following in fiscal year 2000:
 - Family Unification Program. This program provides rental assistance to eligible families whose lack of adequate housing is a primary factor in the imminent placement or the delayed discharge of the family's child or children into or from out-of-home care.
 - Portability. Families receiving tenant-based assistance can move from the jurisdiction of the initial housing agency that issues the rental voucher or certificate to the jurisdiction of any receiving housing agency in the United States that administers the rental assistance program. The proposed funding would alleviate this regional imbalance; moreover, as the most popular locations often have superior job markets, this assistance would play a supporting role in self-sufficiency efforts.
 - Litigation. Approximately 2,000 units are required by the Department in fiscal year 2000 to meet the requirements of litigation settlements.
4. Welfare-to-Work Vouchers. For fiscal year 2000, the Department is requesting \$144 million in budget authority to support 25,000 vouchers. These vouchers will be used to help families make the transition from welfare to work. The lack of affordable, stable housing, or housing located close to employment, impedes the efforts of families moving from welfare to work. These vouchers will provide States and communities with a new flexible tool to help families who need housing assistance in order to achieve self-sufficiency.

The additional vouchers will be available on a competitive basis to the local housing agencies (including Tribally Designated Housing Entities.) Local housing agencies will submit an application plan, developed in consultation with State, local or Tribal welfare agency and the local Welfare-to-Work formula funds grantee (generally the local Private Industry Council), allowing both state and local participation in the effort. The vouchers will be used where they are essential to a successful transition from welfare to work, that is, where housing assistance is critical for a family to get or keep employment. For example, a family could use a welfare-to-work housing voucher to move to an area where there are more job opportunities, to reduce an extremely long commute, or to stabilize its housing situation in order to improve attendance and performance at work.

Families who receive the vouchers must be initially eligible for or currently receiving Temporary Assistance for Needy Families (TANF) or have received TANF within the past 2 years. However, local agencies will have great flexibility to design and operate the welfare-to-work voucher program within broad national guidelines. For example, the agencies would propose whether to focus on particular groups of welfare recipients and how to structure the assistance to meet local needs. The application would request any waivers of administrative provisions that are needed to substantially further the objectives of the program. HUD will review and select the local plans after consultation with the Departments of Health and Human Services and the Labor. HUD will evaluate the impact of this program.

5. Homeless Vouchers. For fiscal year 2000, the Department is requesting \$104 million for Section 8 Incremental Vouchers for permanent housing. This level of funding would support 18,000 vouchers. This assistance is for both disabled and non-disabled people leaving Continuum of Care transitional facilities and will address the need for additional permanent housing within or related to homeless assistance in general. Since 1987, competitive Supportive Housing Demonstration Program and Supportive Housing Program funds have supported the development or operation of nearly 110,000 beds of transitional housing for homeless families and individuals. On average, usage of those beds turn over every 6-9 months as people receive the services and housing they need to achieve independent living. Very frequently, although they are ready to graduate to permanent housing, affordable permanent housing is not available to them. These Section 8 Incremental Vouchers will offer them the resource they so desperately need to move into the housing mainstream at the point they are ready to do so.
6. Contract Administrators. The Administration will take further steps to improve the oversight of HUD's project-based program. The Department currently administers approximately 21,000 Section 8 Housing Assistance Payments (HAP) contracts executed between HUD and private owners of multifamily housing developments. These developments are financed by HUD-insured, HUD-held or direct loans. HUD staff currently perform a wide variety of duties relative to the subsidy contracts and the mortgages on these properties. Many of the duties performed by HUD staff could be performed by non-HUD personnel. These include conducting annual physical inspection, reviewing project financial statements, conducting management and occupancy reviews, reviewing management agents, reviewing insurance draws and releases from replacement reserves, reviewing

owner verification of tenant income and eligibility, and pre-validating monthly subsidy payments. The Department plans to procure the services of contract administrators to assume many of these specific duties, in order to release HUD staff for those duties that only the government can perform and to increase accountability for subsidy payments.

The Department would solicit for competitive proposals from eligible public agencies to assume these contract administration duties, with a portion of these funds available for a demonstration of administration public or non- public agencies. The solicitation would specify exact duties, performance measures, and the method of selection and award. The evaluation would be based upon the respondent's capabilities and proposed contract price.

7. Tenant-Based Programs

PUBLIC AND INDIAN HOUSING

a. Regional Opportunity Counseling. The Department is committed to increasing the housing opportunities available to low-income families. The Budget request includes \$20 million to pay for special counseling conducted by public housing agencies in partnership with local non-profit agencies to expand housing opportunities and to de-concentrate the number of families living in high poverty neighborhoods. The program is authorized under the administrative fee provision, Section 8(q)(2)(A)(ii) of the United States Housing Act of 1937. It is estimated that this will fund 10-20 sites.

Some of the results the Department expects to receive by providing intense regional opportunity counseling include: (1) expanding landlord participation in Section 8 and increasing the number and diversity of neighborhoods in which Section 8 recipients locate; (2) assisting and encouraging Section 8 families to move to low poverty neighborhoods that offer high quality housing, education, and employment opportunities; (3) addressing existing barriers to mobility and choice in the Section 8 program, including administrative barriers to portability; (4) promoting greater cooperation and joint problem-solving among Section 8 programs operating in a metropolitan housing market; and (5) creating or strengthening institutions which administer the Section 8 program on a regional basis, including the provision of regional mobility counseling.

b. Family Self-Sufficiency (FSS) Coordinators. The Family Self-Sufficiency program was established by the National Affordable Housing Act (NAHA) in 1990. In support of the program, Congress mandated that any housing agency that received new funding for rental vouchers and/or certificates in fiscal year 1993 and October 21, 1998 would be required to establish a self-sufficiency program equal to the number of rental vouchers or certificates received.

Since fiscal year 1993, Congress has appropriated funds to support approximately one service coordinator in each eligible PHA. Current funding supports approximately 530 FSS coordinators for a 1-year period. The HAS that received funding for FSS program coordinators were agencies that administered fewer than 1,500 rental vouchers and certificates.

The Department is committed to administering the FSS program for families receiving assistance under the rental voucher and certificate programs and is including \$25.1 million in the contract renewal budget authority request to allow the smallest housing agencies to hire FSS coordinators. Under the FSS program, families receive job training and employment that should lead to a decrease in their dependency on welfare programs and move towards economic self-sufficiency.

8. Tenant-Protection Set-asides

HOUSING

The Housing Certificate Fund will also serve a dual role of supporting families in FHA-insured, privately owned assisted housing projects affected by changes in project status. It is intended that eligible families who, through no fault of their own, are affected by HUD's management of the multifamily inventory be aided through the Housing Certificate Fund.

The \$134 million requested for fiscal year 2000 for Housing's Tenant-Protection will be used to provide funding for an estimated 27,000 Property Disposition, Opt Out/Termination and Portfolio Re-engineering protection requirements. The \$22 million for Multifamily Enforcement will provide funding for additional costs for revised policies on eligibility and type of Tenant- Protection's (terminated vouchers, relocation assistance, etc.) available to impacted families.

**U.S. Department of Housing and Urban Development
Office of Housing**

Project-based Section 8

**HOUSING ASSISTANCE PAYMENTS
BASIC RENEWAL CONTRACT
ONE-YEAR TERM**

PREPARATION OF CONTRACT

Reference numbers in this form refer to notes at the end of the contract text. These endnotes are instructions for preparation of the Basic Renewal Contract. The instructions are not part of the Renewal Contract

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U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FISCAL YEAR 2013 PROGRAM AND BUDGET INITIATIVES
AFFORDABLE HOUSING RENTAL ASSISTANCE

In Fiscal Year 2013, HUD is requesting \$34.36 billion to provide affordable rental housing for low-income families across the country.

In an era when more than one-third of all American families rent their homes and 7.10 million of these families spend more than 50 percent of their income on rent, it remains more important than ever to provide a sufficient supply of affordable rental homes for low-income families. In many communities, affordable rental housing does not exist without public support. Each year, HUD spends the lion's share of its budget maintaining and improving crucial public housing resources, and helping families find affordable housing in private markets. Together with federal, state, and private partners, HUD is working to keep rents affordable for all families nationwide.

PROJECT-BASED RENTAL ASSISTANCE

HUD's Project Based Rental Assistance (PBRA) program provides rental assistance funding to privately-owned multifamily rental housing projects. Eligible private owners include for-profit and non-profit organizations, cooperatives, Limited Liability Corporations, Limited Partnerships and other types of joint ownership structures. The amount of PBRA funding paid to each owner is the difference between what a household can afford (up to 30% of income) and the approved rent for an affordable housing unit in a multifamily rental housing project. These properties are financed in the same manner as entirely market rate rental developments; utilizing private financing and equity or FHA insurance. **In Fiscal Year 2013, HUD is requesting a total \$8.7 billion in funding for PBRA programs, which includes:**

- ***\$8.44 billion for the renewal and amendment of existing PBRA contracts***
- ***\$260 million for Project-Based Contract Administrators to effectively administer the PBRA program***

The FY2013 funding level is \$640 million below the FY2012 enacted, which represents a one-time reduction generated by providing less than 12 months of funding upfront on many PBRA contracts that straddle fiscal years. This change will not reduce or delay payments to landlords nor impact the number of families served by the program. With this funding, HUD expects to serve approximately 1.2 million low-income families, many of whom would face worst case housing or homelessness without such assistance. In addition, communities benefit from projects receiving this funding, as owners must hire and maintain local property management firms, maintenance workers, and other construction/rehabilitation firms to ensure that the project provides decent, safe and sanitary housing for residents, as well as professional legal, security, and insurance services. Taken together, PBRA supports over 100,000 jobs either directly or indirectly, nationwide. PBRA also serves as both a redevelopment and preservation tool for private multifamily rental housing owners, creating a credit enhancement for the financing of the project, and in turn allowing owners to refinance, redevelop and preserve their assets.



TENANT-BASED RENTAL ASSISTANCE

HUD's Section 8 Tenant-Based Rental Assistance (TBRA), also called the Housing Choice Voucher program, is the nation's largest and preeminent rental assistance program for low-income families. For over 35 years it has served as a cost-effective means for delivering safe and affordable housing in the private market. **In Fiscal Year 2013, HUD is requesting \$19.07 billion for TBRA programs.** With this request, HUD expects to assist over 2.2 million families by renewing existing vouchers and issuing new incremental vouchers to homeless veterans, victims of natural disasters and other vulnerable families. Moreover, this request will support over 191,000 jobs either directly or indirectly.

State	Recipient	Address	City	state	ZipCode
AK	CMS Contract Management Services	4040 Wheaton Way, Suite 204	Bremerton	WA	98310
AL	The Jefferson County Assisted Housing Corporation	500 Office Park Drive, Suite 300	Birmingham	AL	35223
AR	Southwest Housing Compliance Corporation	1124 South IH-35	Austin	TX	78704
AZ	Idaho Housing and Finance Association	565 W Myrtle Street	Boise	ID	83707
CA	Los Angeles LOMOD Corporation	515 Columbia Avenue 3rd Floor	Los Angeles	CA	90017
CO	Southwest Housing Compliance Corporation	1124 South IH-35	Austin	TX	78704
CT	Connecticut Housing Finance Authority	999 West Street	Rocky Hill	CT	06067
DC	District of Columbia Housing Finance Agency	815 Florida Avenue, NW	Washington	DC	20001
DE	The Jefferson County Assisted Housing Corporation	500 Office Park Drive, Suite 300	Birmingham	AL	35223
FL	National Housing Compliance	1975 Lakeside Parkway, Suite 310	Tucker	GA	30084
GA	North Tampa Housing Development Corporation, Inc.	1529 West Main Street	Tampa	FL	33607
HI	Idaho Housing and Finance Association	565 W Myrtle Street	Boise	ID	83707
IA	Iowa Finance Authority	2015 Grand Avenue	Des Moines	IA	50312
ID	Idaho Housing and Finance Association	565 W Myrtle Street	Boise	ID	83707
IL	Illinois Housing Development Authority	401 N Michigan Avenue, #700	Chicago	IL	60611
IN	Indiana Housing and Community Development Agency	30 S. Meridian Street, Suite 1000	Indianapolis	IN	46204
KS	Southwest Housing Compliance Corporation	1124 South IH-35	Austin	TX	78704
KY	Kentucky Housing Corporation	1231 Louisville Road	Frankfort	KY	40601
LA	Southwest Housing Compliance Corporation	1124 South IH-35	Austin	TX	78704
MA	Cambridge Housing Services LLC	675 Massachusetts Avenue	Cambridge	MA	02139
MD	Summit Multi-Family Housing Corporation	100 West Cedar Street	Akron	OH	44307
ME	Maine State Housing Authority	353 Water Street	Augusta	ME	4330
MI	Quality Affordable Housing Services Corporation	19300 Purlingbrook	Livonia	MI	48152
MN	Minnesota Housing Finance Agency	400 Sibley Street, Suite 300	St. Paul	MN	55101
MO	Missouri Housing Development Commission	3435 Broadway	Kansas City	MO	64111
MS	The Jefferson County Assisted Housing Corporation	500 Office Park Drive, Suite 300	Birmingham	AL	35223
MT	Montana Department of Commerce	301 South Park Avenue, Room 240	Helena	MT	59601
NC	North Carolina Housing Finance Agency	3508 Bush Street	Raleigh	NC	27609
ND	North Dakota Housing Finance Agency	2624 Vermont Avenue, P.O. Box 1535	Bismarck	ND	58502

NE	CMS Contract Management Services	4040 Wheaton Way, Suite 204	Bremerton	WA	98310
NH	New Hampshire Housing Finance Authority	32 Constitution Drive	Bedford	NH	03110
NJ	Summit Multi-Family Housing Corporation	100 West Cedar Street	Akron	OH	44307
NM	Southwest Housing Compliance Corporation	1124 South IH-35	Austin	TX	78704
NV	Los Angeles LOMOD Corporation	515 Columbia Avenue, 3rd Floor	Los Angeles	CA	90017
NY	Summit Multi-Family Housing Corporation	100 West Cedar Street	Akron	OH	44307
OH	Ohio Housing Finance Agency	57 East Main Street	Columbus	OH	43215
OK	Oklahoma Housing Finance Agency	100 NW 63rd Street, Suite 200	Oklahoma City	OK	73116
OR	CMS Contract Management Services	4040 Wheaton Way, Suite 204	Bremerton	WA	98310
PA	Pennsylvania Housing Finance Agency	211 North Front Street	Harrisburg	PA	17101
PR	Puerto Rico Housing Finance Authority	606 Barbosa Avenue, 3rd Floor	San Juan	PR	919
RI	The Jefferson County Assisted Housing Corporation	500 Office Park Drive, Suite 500	Birmingham	AL	35223
SC	South Carolina State Housing Finance and Development Authority	300-C Outlet Pointe Boulevard	Columbia	SC	29210
SD	South Dakota Housing Development Authority	3060 East Elizabeth Street	Pierre	SD	57501
TN	The Jefferson County Assisted Housing Corporation	500 Office Park Drive, Suite 300	Birmingham	AL	35223
TX	LoneStar Multifamily Housing Solutions	3939 N. Hampton Road	Dallas	TX	75212
UT	Idaho Housing and Finance Association	565 W Myrtle Street	Boise	ID	83707
VA	Virginia Department of Housing and Community Development	600 East Main Street, Suite 300	Richmond	VA	23219
VI	North Tampa Housing Development Corporation, Inc.	1529 West Main Street	Tampa	FL	33607
VT	Vermont State Housing Authority	One Prospect Street	Montpelier	VT	05602
WA	Wisconsin Housing and Economic Development Authority	201 W Washington Avenue, Suite 700	Madison	WI	53703
WI	Wisconsin Housing and Economic Development Authority	201 W. Washington Ave, Ste 700	Madison	WI	53703
WV	West Virginia Housing Development Fund	814 Virginia Street East	Charleston	WV	25301
WY	Housing Authority of the City Of Cheyenne	3304 Sheridan Street	Cheyenne	WY	82009

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May 15, 2012

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Via Electronic Delivery (protests@gao.gov)

General Counsel
U.S. Government Accountability Office
441 G. Street, N.W.
Washington, DC 20548

Protest
CICA SUSPENSION OF AWARD
REQUESTED
31 U.S.C. § 3553 (c)(1)

Attention: Procurement Law Control Group

Re: Protest of United States Department of Housing and Urban Development Notice of Funding Availability Docket No. FR-5600-N-33

Dear Sir or Madam:

We submit this protest on behalf of our client, The Jefferson County Assisted Housing Corporation (“JeffCo”). JeffCo protests the terms and conditions of a solicitation issued by the U.S. Department of Housing and Urban Development (“HUD”) on March 8, 2012. HUD has characterized the solicitation as a “Notice of Funding Availability” and assigned it Docket No. FR-5600-N-33 (“NOFA” or “Solicitation”). As set forth herein, HUD is really seeking services for its own benefit, namely to assist HUD in administering contracts it has with owners of Section 8 housing projects around the country, making this a procurement action. JeffCo protests HUD’s failure to use a procurement instrument, and the Solicitation’s failure to comply with requirements of federal procurement law, including but not limited to HUD’s attempts to create sole source arrangements for the vast majority of contracts it intends to award.

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Introduction and Summary of Protest

Through the Solicitation HUD is seeking contract administration services to assist HUD in administering contracts HUD has awarded to owners of Section 8 housing projects around the country. From the inception of the Section 8 program in the early 1970's until the late 1990's, HUD performed these contract administration functions in-house with government employees. Beginning in the late 1990's, HUD began exercising its statutory authority to outsource these contract administration functions through the use of Performance Based Contract Administrator, Annual Contributions Contracts ("PBCA-ACCs"). For the better part of the last decade HUD has entered contracts for these services in each of the 50 states and the District of Columbia, Puerto Rico and the US Virgin Islands. JeffCo is a PHA and has contracted with HUD to perform these services in several states for nearly ten years. In accordance with HUD's statutory authority, it has competed these contracts among entities that qualify as "Public Housing Agencies" ("PHAs") as defined under federal law – until now.

1. *HUD has improperly characterized the Solicitation as a NOFA and the resulting PBCA-ACC contracts as "cooperative agreements."*

In March of this year, HUD issued the Solicitation in question. While virtually nothing has changed with respect to the services HUD seeks to procure and there has been no change in relevant law, HUD has made several radical changes to its approach to this contracting program.

Most notably, HUD has for the first time characterized the PBCA-ACC contracts it intends to award as "cooperative agreements" and characterized the solicitation as a "NOFA" – an instrument HUD typically uses when awarding grants and cooperative agreements. This approach is legally unsound for a variety of reasons including each of the following:

- * HUD has identified no change in law, policy or the underlying nature of the services it is procuring to support its change in approach;
- * While HUD has attempted to re-brand the resulting contracts as "cooperative agreements," HUD has explicitly exempted the PBCA-ACC from large swaths of the regulations governing grants and cooperative agreements under the Non-Procurement Common Rule and HUD's own regulations, including through waiving some applicable OMB Circulars in their entirety;
- * HUD has also explicitly agreed to pay what amounts to profit to awardees, a practice which is generally contrary to federal law governing grants and cooperative agreements and therefore inconsistent with HUD's characterization; and

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contracts. Many of the losing bidders who protested were the in-state, statewide Housing Finance Agencies (“HFAs”) in the jurisdictions in question. In many cases, the in-state, state-wide HFA’s proposed pricing was substantially higher than those of out-of-state PHAs who were designated for award. Among other things many protesters argued that HUD erred by giving any consideration to price in evaluating the proposals and making an award decision.

While HUD’s effective use of competition stood to save taxpayers \$100 million a year, this basic act of fiscal sanity was anathema to these protesters, many of which were in-state, statewide HFAs. Leading up to 2011, HFA’s held 35 of the PBCA-ACC contracts. The 2011 award decisions would have resulted in 28 PBCA-ACC contracts changing hands. 26 contracts were awarded to out-of-state PHAs. As a result of competition HFAs lost in 16 of the 35 states they held. In the 19 states HFAs won, nine (9) were in states where the HFA was the sole bidder. Put another way, when HFAs faced competition they were successful in only ten (10) out of 42 states.

The day before HUD’s Agency Reports were due to GAO, HUD announced it was cancelling all 42 of the challenged contracts. HUD did not respond to the substance of the protests and HUD did not offer any substantive explanation for its decision to cancel the PBCA-ACC contracts. However, the termination of the contracts had the effect of mooted the protests at the GAO and thus requiring their dismissal by GAO.

HUD announced its intention to re-release the PBCA-ACC opportunities within 60 days, but HUD failed to meet this self-imposed deadline. In the interim HUD also entered into extension agreements with the existing PBCA-ACC contractors for the 42 protested jurisdictions, including with JeffCo in Alabama, Connecticut, Mississippi, and Virginia. For the 11 jurisdictions which were not protested (there was only a single bidder in each of these jurisdictions), HUD entered into ACCs with the selected PHAs pursuant to the 2011 Invitation.

5. The 2012 Procurement

After cancelling the 42 awarded contracts, HUD spent more than six months re-formulating its solicitation. HUD did not engage in any formal notice and comment process, did not release a “draft” of the forthcoming solicitation for public review, and made public statements that it would not discuss the forthcoming “NOFA.” However, HUD has now acknowledged that it was under intense lobbying pressure from one highly interested subset of PHAs: the in-state, statewide HFAs. HUD selectively held numerous meetings and had communications with advocates for the HFA community, including their trade association – NCSHA, and several of their legal counsel - the state attorneys general. HUD actively but selectively sought input affecting the terms of the new solicitation from the HFA entities and their counsel (which are their states’ attorneys general), but failed to include other eligible PHAs in these discussions concerning the solicitation.

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HUD's proclaimed wide-scale exemption from the basic regulatory framework governing grants and cooperative agreements, besides being in violation of applicable law and regulation, is evidence that HUD doesn't really view the PBCA-ACCs as cooperative agreements at all. Instead, it is clear that the actual characteristics of the PBCA-ACC contracts are entirely consistent with procurement contracts which allow for the payment of profits and give the awardee complete latitude in using and distributing those profits.

For each of these reasons, the NOFA contemplates a procurement. Therefore GAO has jurisdiction over this protest because it relates to an alleged violation of a procurement statute or regulation, including in particular the Competition in Contract Act (see below). 31 U.S.C. § 3552(a) (2012).

2. Second Ground of Protest: The NOFA's Anti-Competitive Provisions Violate Statute and Regulation.

In light of HUD's efforts to sole source the ACC contracts to a preferred class of PHAs, the motivation for HUD's strained mis-characterization of the PBCA-ACC contracts as a "cooperative agreement" is clear: it wishes to avoid the requirements of the Competition in Contracting Act.

The Competition in Contracting Act expressly requires agencies to obtain full and open competition and to use competitive procedures. 41 U.S.C. § 3301(a) (2012). Agencies may not restrict competition except as authorized by 41 U.S.C. § 3303 (2012). The FAR provisions implementing CICA state that "contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts." 48 C.F.R. § 6.101. These regulations clearly note that "contracting without providing for full and open competition ... is a violation of statute" unless permitted by one of the exceptions included in the regulation. 48 C.F.R. § 6.301. An agency can only exclude sources for supply of property or services if the agency head determines that doing so would, among other things, increase or maintain competition and result in reduced overall cost, be in the interest of national defense, satisfy an unusual or compelling urgency, ensure the continuous availability of a reliable source of supply of the property or service, or be authorized or required by statute. 41 U.S.C. § 3303(a)(1) (2012); 48 C.F.R. § 6.302.

The Housing Act stipulates that "public housing agencies" are eligible to be awarded PBCA-ACC contracts. 42 U.S.C. § 1437f (2012). Consistent with this statutory provision, HUD has found PHAs generally to be eligible for award of PBCA-ACC contracts, including "instrumentality" PHAs. This is evidenced by the fact that HUD has awarded PBCA-ACC contracts to out-of-state PHAs on numerous occasions. For example, JeffCo, an instrumentality PHA, has performed and continues to perform PBCA-ACC contracts in Connecticut, Mississippi and Virginia, in addition to its home state of Alabama. In 2011, HUD selected out-of-state PHAs to perform PBCA-ACC contracts in 26 states.

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Despite the fact that there has been no change in law and no court decision or ruling mounting to a change in law HUD has included a highly restrictive eligibility provision in the NOFA to preclude PHAs from “crossing state lines”:

HUD will consider applications from out-of State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that State.

See Ex. 6, at p. 4 (emphasis in original).

As noted above, this highly restrictive eligibility requirement will result in HUD considering only a single offer for award in nearly all states to the exclusion of otherwise qualified PHAs. As JeffCo has also noted, HUD has acknowledged that it expects to receive an offer from an in-state, state-wide PHA in nearly every state. HUD has not, and cannot, articulate any legal basis for creating these sole source contracting arrangements and otherwise limiting competition. HUD certainly has not offered a reason which meets one of the exceptions to CICA and the provisions set forth in FAR Part 6. In fact, HUD has explicitly acknowledged that there is nothing in Federal law that precludes a PHA from performing a PBCA-ACC contract in other than its home state. *Id.*

HUD has provided on a special website dedicated to the PBCA-ACC NOFA:

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA%20NOFA

On this website, HUD has posted letters from the Attorneys General of several states which purport to address the issues of whether the Attorneys’ General clients – the in-state, state-wide Housing Finance Agencies – are the only entities which can perform the HUD PBCA-ACC contracts in their particular states. HUD has failed to articulate precisely how these letters support its across-the-board restriction on crossing state lines. JeffCo has registered its concerns on this issue with HUD via a letter just prior to the NOFA’s release and another submitted to HUD on April 23, 2012. *See* Exhibit 8. JeffCo has also raised a number of questions with HUD through the NOFA “Q&A” process. JeffCo has yet to receive a response to its letters or complete and responsive answers to all of its questions. JeffCo reserves the right to supplement this protest upon HUD making more information available regarding the issue.

To summarize, the Attorneys General letters do not support HUD’s anti-competitive eligibility restrictions for a host of reasons including the following:

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A. The Attorneys General letters are offered not as objective analyses of the law but at the request of and with input only from the clients of the Attorneys General: the in-state, state-wide HFAs.

B. The Attorneys General letters do not address all the relevant facts and are not on-point. For example,

i. Many of the letters discuss the definition of and requirements associated with being a “public housing authority” as defined by state law – an issue which is inapposite here – and then proceed to conflate the term “public housing authority” with “public housing agency” which is a distinct term defined by federal law.

ii. Others address only the question of whether an in-state, but not state-wide PHA can perform the PBCA-ACC contract but do not address whether an out-of-state PHA could perform the contract.

C. HUD has made the crossing-state-lines restrictions applicable to all 42 states despite the fact that HUD only had Attorney General letters from six states at the time the NOFA was published (HUD has subsequently added two additional letters which post-date the NOFA). HUD acknowledges that the Attorneys General letters at most apply only to their own state’s laws and has not asserted any basis for applying the restriction to 34 of the 42 jurisdictions.

D. Even if a state law created an eligibility restriction, it is preempted by federal law particularly given that the PHA is in direct privity of contract with HUD.

E. HUD has arbitrarily engaged in communications with the HFAs, their trade association, and their counsel (the Attorneys General offices) to the exclusion of other interested parties such as JeffCo on this issue. In at least one case (Oregon), HUD clearly has not been seeking an objective view, but rather has been working to support a pre-ordained outcome: the creation of sole source contracting arrangements with a favored group.

F. HUD has made a vague allusion to litigation risk, presumably stemming from these Attorneys General letters, (Exhibit 7, Q&A, #96) but has ignored the fact that out-of-state PHAs have performed PBCA-ACC contracts in numerous states for more than 10 years and never been subjected to legal challenge, much less been found ineligible to perform those contracts.

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G. HUD has also ignored the fact that as a matter of law Attorneys General letters are not binding and are of limited legal effect. HUD has also seemingly forgotten that it has consistently required PHAs to submit Reasoned Legal Opinions from counsel in each of the states in which they intend to bid. *See* 2011 Invitation.

H. Despite being on notice of each of these issues and others, HUD has remained absolutely rigid in its position – when asked if it would re-consider its restrictions on crossing state lines it answered emphatically: “No”. Exhibit 7, Q&A # 100.

For each of these reasons and others, the Attorney General letters are of no meaningful effect and certainly do not form a basis for HUD to avoid its obligations to provide for competition.

Simply put the restrictive provisions established by HUD do not fall within any of the exceptions to CICA’s requirement for full and open competition. The NOFA prejudices JeffCo and other similarly situated PBCA-ACC contractors who will be restricted from the competitions. JeffCo requests GAO to find that the NOFA violates CICA and its implementing regulations and sustain this protest.

3. Third Ground of Protest: HUD’s Acquisition Process Violates Other Requirements of Federal Procurement Law.

In addition to failing to meet statutory and regulatory competition requirements, the NOFA violates numerous other requirements for federal procurements. For example, agencies are required to make solicitations and other notices related to a procurement available through a government-wide point of entry. 48 C.F.R. Subpart 5.101 et seq. The government-wide point of entry recognized in the FAR is the website at fedbizopps.gov. HUD failed to publicize the NOFA or any of the supporting documentation through the government-wide point of entry. Additionally, all Federal solicitations are required to include certain mandatory FAR clauses, which HUD has failed to include in the NOFA. For example, the NOFA does not include FAR 52.203-5, Covenant Against Contingency Fees, FAR 52.203-7, Anti-Kickback Procedures, 52.216-24, Limitation of Government Liability, 52.233-2, Service of Protest, or 52.244-6, Subcontracts for Commercial Items. GAO should sustain JeffCo’s protest due to HUD’s failure to follow statutory and regulatory competition requirements.

Exhibit 1:
1999 Request for Proposals (64 Fed. Reg. 27358 May 19, 1999).

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

[Docket No. FR-4511-N-01]

**Request for Proposals; Contract
Administrators for Project-Based
Section 8 Housing Assistance
Payments (HAP) Contracts**

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

ACTION: Notice of Request for Proposals.

SUMMARY: The Request for Proposals (RFP) provided in this notice was issued by HUD on May 3, 1999, and is also published in the *Federal Register* to ensure a wider dissemination. Through this RFP, HUD is seeking sources interested in providing contract administration services for project-based Housing Assistance Payment Contracts under Section 8. This solicitation is not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR) but will follow many of those principles. The Request for Proposals follows this Summary.

Dated: May 11, 1999.

William C. Apgar,

*Assistant Secretary for Housing-Federal
Housing Commissioner.*

**Request for Proposals; Contract
Administrators for Project-Based
Section 8 Housing Assistance Payments
(HAP) Contracts**

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1. Introduction

This is the Department of Housing and Urban Development's (HUD) Request For Proposals (RFP) to provide contract administration services for project-based Housing Assistance Payments (HAP) Contracts under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) (Section 8). Of the approximately 24,200 project-based Section 8 HAP Contracts in effect, Public Housing Agencies (PHAs) currently administer approximately 4,200. These PHAs will generally continue to administer these HAP Contracts until expiration. HUD administers the balance of approximately 20,000. This RFP covers contract administration for most of these HUD administered contracts.

When HUD renews the expired project-based HAP Contracts that PHAs currently administer, HUD generally expects to transfer contract administration of the renewed HAP Contracts to the Contract Administrator (CA) it selects through this RFP for the service area where the property is located. This RFP does not apply to contract administration of Section 8 projects assisted under the Section 8 moderate rehabilitation program (including the Section 8 moderate rehabilitation single room occupancy program) or the Section 8 project-based certificate program, or to contract administration of Section 9 projects to be assisted under the Section 8 project-based voucher program.

The successful offerors under this RFP will oversee HAP Contracts, in accordance with HUD regulations and requirements. The CAs responsibilities will be governed by an Annual Contributions Contract (ACC) entered into with HUD (Attachment III). After execution of the ACC, the CA will subsequently assume or enter into HAP Contracts with the owners of the Section 8 properties. The Contract Administrator will monitor and enforce the compliance of each property owner with the terms of the HAP Contract and HUD regulations and requirements.

Proposals in response to this RFP may cover an area no smaller than an individual State (or U.S. Territory). Proposals may cover one or more HUD Multifamily Hubs or one or more States (or U.S. Territory). Geographic Service Area Jurisdiction (Attachment II) describes the jurisdictions of the Multifamily Hubs. HUD encourages proposals through joint ventures and other public/private partnerships between public housing agencies and other private or non-profit entities.

Under the approximately 20,000 Section 8 HAP Contracts this RFP covers, HUD pays billions of dollars annually to owners on behalf of eligible property residents. HUD seeks to improve its performance of the management and operations of this function through this RFP.

Specifically, HUD seeks through this solicitation to achieve three programmatic and three administrative objectives.

Programmatic Objectives

- Calculate and pay Section 8 rental subsidies correctly.
- Administer project-based Section 8 HAP Contracts consistently.
- Enforce owner obligations to provide decent housing for eligible families.

Administrative Objectives

- Execute ACCs only with entities that have the qualifications and expertise necessary to oversee and manage affordable housing and that have the capacity to perform the required services with requisite personnel and other resources.
- Get the best value for dollars spent for CA services.
- Encourage the development of joint ventures and/or partnerships for contract administration services to obtain the benefit of the best practices of both public and private sectors.

2. Overview of Contract Administrator's Responsibilities

Contract Administrators must administer Section 8 HAP Contracts in accordance with the ACC, Federal law, and HUD regulations and requirements, both current and as amended in the future. The ACC with the CA will specify the area where the CA is required to provide contract administration services (service area). The ACC will specify the Section 8 assisted units under HAP Contracts that HUD assigns to the Contract Administrator for servicing (covered units). From time to time during the term of the ACC, HUD may add or delete covered units for contract administration under the ACC. Some units may be assigned to Participating Administrative Entities (PAE) by the Office of Multifamily Housing Assistance Restructuring (OMHAR) for contract administration. On an annual basis, the CA will request funds from the HUD Financial Management Center (FMC) to cover the Section 8 funds to be disbursed to owners for eligible units under the HAP Contract.

Under this RFP, the offerors will competitively bid to perform contract administration services for properties with project-based Section 8 HAP Contracts. A list of the projects which may be assigned under this RFP is located at www.hud.gov/fha/mfh/rfp/sec8rfp.html.

The Statement of Work details core functions (tasks) that the Contract Administrator must perform.

The major tasks of the Contract Administrator under the ACC and this RFP include, but are not limited to:

- Monitor project owners' compliance with their obligation to provide decent, safe, and sanitary housing to assisted residents.
- Pay property owners accurately and timely.
- Submit required documents accurately and timely to HUD (or a HUD designated agent).
- Comply with HUD regulations and requirements, both current and as amended in the future, governing administration of Section 8 HAP contracts.

2.1 Eligibility for Participation

By law, HUD may only enter into an ACC with a legal entity that qualifies as a "public housing agency" (PHA) as defined in the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*). However, that does not preclude joint ventures or other partnerships between a PHA and other public or private

entities to carry out the PHA's contract administration responsibilities under the ACC between the PHA and HUD.

Under the law, a public housing agency is defined as a:

"* * * State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing." (42 U.S.C. 1437a(b)(6)).

2.2 Definition of a Public Housing Agency

To qualify as a PHA that may enter into a Section 8 ACC with HUD, the legal entity must be one of the following:

A general or special purpose governmental entity: Such governmental entities include a State, municipality, housing authority, or governmental public benefit corporation.

A multi-state, interstate or regional governmental entity.

An instrumentality entity: Such instrumentality entity must act as an instrumentality of a parent governmental entity, or multiple parent governmental entities. The instrumentality entity may be a for-profit or not-for-profit entity.

HUD may require the submission of legal opinions and organizational documents needed to determine whether an entity qualifies as a PHA.

In addition, the PHA and any related entity must obtain clearance under HUD Previous Participation procedures (see Form HUD-2530) prior to execution of the ACC.

2.3 Instrumentality Entity Eligibility

An instrumentality entity may be an entity that already exists when the offeror submits a proposal to HUD under this RFP, or a legal entity specially formed subsequent to proposal submission, and prior to execution of the ACC between the entity and HUD, to carry out contract administration under the ACC.

To qualify as an "instrumentality entity", the relationship between an instrumentality entity and a governmental entity ("parent entity") must include all of the following characteristics:

- The parent entity must have the right to approve the corporate charter or other organic documents of the instrumentality entity, including the right to approve any amendments.
- The parent entity must have the right to control, direct and authorize the execution of the ACC between HUD and the instrumentality entity.

- The parent entity must have the right to directly or indirectly control operation of the instrumentality entity.

- The parent entity must have the right that upon dissolution or termination of the instrumentality entity, title to all real or personal property held by the instrumentality entity must be transferred to the parent entity or an entity designated by the parent entity.

Before execution of the ACC with an instrumentality entity, HUD will, upon submission of appropriate documentation as required by HUD, determine whether the private instrumentality entity has been properly established, possesses the required power and jurisdiction to carry out contract administration in the service area, and qualifies as an instrumentality entity as described above.

The charter or other organic documents of the instrumentality entity (e.g., certificate of incorporation, partnership agreement or certificate) must provide that the instrumentality entity is authorized to "engage in or assist in the development or operation of low-income housing."

Governmental parent entities may partner with private for-profit or non-profit entities that hold an interest, directly or indirectly, in an instrumentality entity so long as such instrumentality entity is otherwise in compliance with the above stated requirements for eligibility of an instrumentality entity. Private entities may contract directly with an instrumentality entity.

As stated in the evaluation criteria, a proposal for contract administration by an instrumentality entity under ACC between HUD and such entity shall specify any services or functions to be provided or performed by the parent entity, or by any other entity which holds a direct or indirect interest in such instrumentality, to carry out or support Section 8 contract administration in accordance with the ACC and this RFP. If the proposal is accepted, such parent or other entity shall enter into a contract with the instrumentality entity, prior to execution of the ACC, that specifies all such services or functions, and the contract shall obligate the parent entity to provide such services or functions. Such contract shall specify that HUD is a third-party beneficiary of such contract and shall be executed by the parent and instrumentality entities and be in the form and substance approved by HUD.

3. Statement of Work

3.1 Overview

3.1.1 Performance Based Contracting

For work performed under ACCs awarded in response to this RFP, HUD will use Performance-Based Service Contracting (PBSC). PBSC is based on the development of a performance work statement, which defines the work in measurable, mission-related terms with established performance standards and review methods to ensure quality assurance. PBSC assigns incentives to reward performance that exceeds the minimally acceptable and assesses penalties for unsatisfactory performance.

The CA must complete all tasks described in this section of the RFP, including both "Requirements" and "Incentive Based Performance Standards." Failure to complete the tasks will result in default of the terms and conditions of the ACC. HUD may terminate the ACC at any time in whole or in part if HUD determines that the CA has committed any default under the ACC.

The specified tasks outlined will provide the offeror with the necessary information to complete the Submission of Proposal Form (Attachment II).

3.1.2 Elements of Core Tasks Descriptions

The description of each core task contains the following elements:

Outcome: The required result of the task.

Requirements: A general description of specific tasks the CA must perform.

Note: CAs must perform each task in accordance with all relevant HUD regulations and requirements in effect during the term of the ACC. The RFP does not set forth the details of such regulations and requirements.

Reference: Current HUD regulations and other HUD requirements related to each task.

Incentive Based Performance Standards: A description of specific elements of each core task. HUD will measure the CA's performance of each such element as the performance standard to determine the CA's earned Administrative and Incentive Fees.

Quality Assurance: A listing of the methods and resources HUD will use to verify the accuracy of CA's reported performance and accomplishments. HUD may use other methods that it deems appropriate to assure quality.

3.1.3 HUD Regulations and Requirements

All references mentioned in the tasks may be obtained through HUD's website

(<http://www.hudclips.org/cgi/index.cgi>.) from which interested parties may obtain HUD handbooks and other directives or through the HUD Multifamily Clearinghouse at 1-800-685-8470. It should be noted that the regulations and directives listed are the current instructions and requirements and may be updated from time to time.

HUD does not represent that the references listed in the RFP or on the HUD website are a complete listing of current relevant HUD regulations and requirements. In addition, HUD regulations and other requirements may change from time to time during the term of the ACC.

HUD's codified regulations are issued as Title 24 of the Code of Federal Regulations (CFR). Revisions or additions to HUD regulations are initially published in the **Federal Register**. HUD may also publish Federal Register notices. In addition to publication in the Federal Register and the CFR, HUD issues additional program requirements as HUD "directives", including HUD notices, handbooks and forms.

The CA will be required to carry out the tasks described in this Section, as well as other responsibilities related to contract administration under the ACC, in accordance with all HUD regulations and requirements in effect from time to time, as well as other responsibilities related to contract administration under the ACC.

3.1.4 Core Tasks

The RFP describes eleven core tasks that the CA must perform:

1. Conduct management and occupancy reviews.
2. Adjust contract rents.
3. Process HAP contract terminations or expirations.
4. Pay monthly vouchers from Section 8 owners.
5. Respond to health and safety issues.
6. Submit Section 8 budgets, requisitions, revisions and year-end statements.
7. Submit audits of the CA's financial condition.
8. Monitor owners progress in addressing Annual Financial Statement deficiencies.
9. Renew HAP contracts.
10. Report on CA operating plans and progress.

11. Follow up on results of physical inspections of Section 8 projects. 3.2 Management and Occupancy Reviews

The CA must conduct an on-site management and occupancy review of each Section 8 property, no less than annually. (Some properties may have

multiple HAP contracts.) The review must be a comprehensive assessment of the owner's procedures for directing and overseeing project operations, and the adequacy of the procedures for carrying out day to day, front line activities. Some examples of the areas that the CA must audit are: maintenance, security, leasing, occupancy, certification and recertification of family income, and determination of the family payments, financial management, Management Improvement and Operating (MIO) Plans, and general maintenance practices. The results of the on-site review must provide adequate documentation to support any enforcement actions proposed against the owner by the CA or HUD.

Outcome: Identify and resolve areas of noncompliance with HUD regulations and other requirements.

Requirements

- Schedule and conduct annual reviews of each property, using form HUD-9834 or other appropriate documentation.
- Evaluate the owner's operating policies and procedures following guidance in the appropriate HUD directives.
- Verify compliance with HUD regulations and requirements regarding occupancy issues (e.g., resident eligibility and selection, examination and reexamination of family income and assets, household characteristics) and verify that correct documentation is contained in each resident file to support claims for payment under the HAP contract. Use the following resident file random sampling:

Number of units	Minimum file sample
100 or fewer.	5 files plus 1 for each 10 units over 50.
101-600	10 files plus 1 for each 50 units or part of 50 over 100.
601-2000.	20 files plus 1 for each 100 units or part of 100 over 600.
Over 2,000.	34 files plus 1 for each 200 units or part of 200 over 2,200.

• If the CA's review of the sample indicates a problem, the CA must require the owner/agent to conduct a 100% review of the files and report the results of the review to the CA. The CA will test the review done by the owner/agent to determine its reliability and accuracy.

• Verify owner compliance with civil rights regulations, including Title VI, Title VIII, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973.

- Notify the jurisdictional HUD office by close of next business day of any potential fraud or potential violations of law identified during the reviews.

- Prepare and submit to the owner/agent and jurisdictional HUD office a written report, on form HUD-9834, or other appropriate HUD-required documents, within 30 days of review, outlining any findings and recommendations for corrective action.

- Monitor implementation of corrective action. Notify jurisdictional HUD office within one business day when enforcement action is required.

- Enter required information into HUD data systems.

References

HUD Handbook 4350.1

HUD Handbook 4350.3

Incentive Based Performance Standards

1. The CA must conduct annual Management and Occupancy Reviews in accordance with the CA submitted and HUD approved workplan according to HUD requirements, document corrective actions taken against Section 8 owners or families, and monitor implementation of necessary corrective action.

2. CA's review must document on the appropriate form Section 8 owner compliance with civil rights regulations, including Title VI, Title VIII, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973 and forward to the owner and the appropriate jurisdictional HUD office within 30 days.

Quality Assurance

On-Site Reviews
Data Systems Reports

3.3 Rental Adjustments

Contract rent under each Section 8 HAP contract must be adjusted during the HAP contract term in accordance with the HAP contract and HUD requirements.

The CA must process rent adjustments correctly.

Outcome: Contract rent adjustments are timely and correct.

Requirements:

A. Budget Based Adjustments

Where applicable, the budget based rent adjustment method requires owners to submit an operating budget and supporting documentation for CA review.

The CA will determine budget based adjustments for contract rent by performing the following tasks:

- Analyze the property's operating budget and supporting documentation

for a rent adjustment to determine reasonableness according to guidance in HUD Handbook 4350.1.

- Document rent increases on a Rent Schedule (Form HUD-92458)

- Analyze adjustments of the owner utility allowance schedule if applicable.

- Analyze adjustment to the monthly Reserve for Replacement deposit as required and recommend action to HUD.

- Approve/disapprove rent adjustment and provide owners written notification.

- Verify accurate, timely completion and submission of adjusted rent schedule by owners.

- Enter data into the appropriate HUD data system within five business days from completion of action.

B. Annual Adjustment Factor (AAF)/ Operating Cost Adjustment Factor (OCAF)

This rent adjustment method requires the CA to apply the AAF/OCAF to current contract rents to determine which rents are eligible for an adjustment. AAF's are published annually in the **Federal Register** and OCAF's are published annually in a Housing Notice. Refer to the current Notice on the HUD Homepage.

The CA will perform the following tasks:

- Determine the amount annual adjustments in accordance with HUD requirements.

- Analyze adjustments of the owner utility allowance schedule if applicable.

- Analyze adjustment to the monthly Reserve for Replacement Account, if applicable pursuant to the HAP contract and recommend action to HUD.

- Approve/disapprove the amount of rent adjustment and provide owners written notification.

- Validate comparability study if submitted by owners to support rent adjustment request.

- Verify accurate, timely completion and submission of adjusted rent schedule by owners.

- Enter data into the appropriate HUD system within five business days from completion of action.

C. Special Adjustments

For those HAP Contracts with AAF adjusted rents, owners may request special increases in costs for generally applicable increases items such as insurance, taxes and utilities. The appropriate jurisdictional HUD office must approve or deny all special adjustments within 30 days of receipt of properly documented request from CA.

The CA will process the owner's request for a special rent adjustments to

determine if the special adjustment should be granted. To accomplish this the CA will perform the following tasks:

- Analyze owners' requests.
- Recommend action to the appropriate jurisdictional HUD office.

- Based on notification from HUD, notify the owner of rent adjustment approval or disapproval.

- Verify accurate, timely completion and submission of adjusted rent schedule by owners.

- Enter data into the appropriate HUD data system within 5 business days from completion of action.

D. Rent Appeals

Owners may appeal rent adjustment decisions. The first level of appeal is to the CA; the second level of appeal is to the appropriate jurisdictional HUD office. CA will review appeals.

The CA will perform the following tasks:

First Level Appeal

- Analyze owner's rent appeal requests.

- Provide owner with written notification of decision and justification within 30 days of receipt.

If appeal is approved:

- Verify accurate, timely completion and submission of adjusted rent schedule by owners.

- Enter data into the appropriate HUD data system within 5 business days from completion of action.

If appeal is denied:

- Notify owner of Second Appeal rights within 30 days of receipt.

Second Level Appeal

If appeal is approved by HUD:

- Receive approval from jurisdictional HUD office within 30 days after request for second level appeal.

- Verify accurate, timely completion and submission of adjusted rent schedule by owners.

- Enter data into the appropriate HUD data system.

References

HUD Handbook 4350.1

Notice: H-98-34

Notice: H-98-3

Notice: H-98-27

Incentive Based Performance Standards

3. CA completes processing of owner's request for rent adjustments and all CA approved rent adjustments are executed and finalized within 30 days of receipt of owner's request for a budget-based rent adjustment or on the anniversary date of the HAP contract for an AAF-based rent adjustment.

Quality Assurance

On-Site Reviews

Data Systems Reports

3.4 Opt-Out and Contract Termination

Section 8 Contracts may terminate because:

- An owner may choose not to renew an expiring Section 8 contract (opt-out); and
- The contract may be terminated by the CA (with HUD approval).

When Section 8 contracts will be terminated, the CA must work with HUD to obtain tenant-based rental assistance for eligible residents by notifying the appropriate HUD contact. The CA will coordinate efforts with the jurisdictional HUD office to identify a PHA to administer the tenant-based assistance.

Outcome: Provide ongoing rental assistance to eligible residents in occupancy at the time of the opt-out

Requirements**A. Notification Requirements**

- Inform jurisdictional HUD office by close of next business day of notice by owner, that the owner has elected to opt-out of the program.
- Inform jurisdictional HUD office of recommendation to terminate contracts for cause/default under HAP Contract provisions by the close of the next business day.
- Verify owner has complied with HAP and current law on Opt-outs.

B. CA Must Take the Following Actions When Contracts are Terminated

- Obtain resident payment/unit size data from owners of properties.
- Provide resident/unit data to jurisdictional HUD office within 3 business days of receipt from the owner for purpose of obtaining Section 8 vouchers for residents.
- Coordinate efforts with the jurisdictional HUD to identify a local PHA to administer tenant-based assistance and reserve funds to cover such vouchers.
- Assist residents who must be relocated.

References

Notice: H-98-34

Incentive Based Performance Standards

4. CA notifies jurisdictional HUD office, by close of next business day of notice by owner, that the owner has elected to opt-out.

5. CA provides complete resident data to jurisdictional HUD office 90 days prior to contract expiration.

Quality Assurance

On-Site Reviews
Data Systems Reports

3.5 Monthly Vouchers

In Section 108 of 24 CFR, Part 208-Electronic Transmission of Required Data for Certification and Recertification and Subsidy Billing Procedures for Multifamily Subsidized Projects (a/k/a the Automation Rule) requires property owners to request HAP payments monthly through the Tenant Rental Assistance Certification System (TRACS). Vouchers are due the 10th day of the month preceding the month for which the owner is requesting payment. CAs may not pay owners until vouchers are received and reviewed for accuracy. The Voucher and Recertification Review (Attachment 1) lists the tasks and tools associated with review of vouchers and certifications/ recertifications.

Outcome: Payments of Section 8 vouchers and claims are only authorized on eligible units. Payments are made to owners by the first day of every month.

Requirements:**A. Verify accuracy of monthly Section 8 vouchers (forms HUD-52670 & HUD-52670-A)**

The CA must verify and provide written documentation of the accuracy of payment requests by the last day of each month before the CA issues payments for the verified request. To accomplish this task, the CA must:

- Monitor owners follow-up efforts on discrepancies identified as a result of any income matching initiatives. HUD will provide discrepancy reports to the CAs.
- Monitor owner's compliance with entry of all resident certification and recertification data in TRACS.
- Verify voucher submissions by owner through TRACS system by the 10th day of the month preceding the month for which the owner is requesting payment.
- Verify through TRACS that the amount of HAP paid on behalf of each resident is accurate.
- Verify that all recertifications are completed by the owner agent in a timely manner and entered into TRACS.
- Verify that payment request does not include any units where Section 8 assistance has been abated.
- Analyze adjustments required to prior month's vouchers to determine accuracy and validity.
- Determine if authorized rent or utility allowance adjustments have been implemented timely and accurately.
- Verify pre-approval of Section 8 Special Claims (see item B).
- Notify the owner, in writing, of any corrections required and track corrections.

- Verify that project owners are complying with current HUD rules and regulations.

B. Verify and Authorize Payment Only on Valid Section 8 Special Claims for Unpaid Rent, Resident Damages and Vacancy Loss

Property owners may claim reimbursement from the CA for unpaid rent, resident damages, and vacancy losses on eligible units. The claims must be pre-approved by the CA before being submitted with the monthly voucher.

- Analyze, verify and approve/disapprove claims using information in handbooks, regulations, Notices, TRACS and information provided by the owner.
- Enter data into monitoring program using a HUD compatible spreadsheet program.
- Approve/disapprove claims, execute forms and return to owner for their submission with next voucher.

C. Disbursement of Section 8 Funds to Owners

Disburse payments to owners through electronic fund transfer (EFT) transaction no earlier than the first of the month or no later than the first business day of the month after approval of Section 8 voucher (see item A)

Reference:

HUD Handbook 4350.3

Incentive Based Performance Standards

6. CA must promptly review each monthly voucher submitted by an owner, and agree with or modify it, so the monthly payment to the owner is sent no earlier than the first of the month or no later than the first business day of the month.

7. On a monthly basis CAs will provide written formal notification of corrective actions including income verification that results in overpayment to owners within 10 days of CA's verifying and certifying of the vouchers, discrepancies to owners and monitor for adequate resolution. Resolution must be completed within 30 days.

Quality Assurance

On-Site Reviews
Data Systems Reports

3.6 Health and Safety Issues and Community/Resident Concerns

CA must accept resident complaints and follow-up with owners to ensure that owners take appropriate action.

Outcome: Resolved health and safety issues and positive outgoing community/resident relations and communications.

Requirements:

A. Respond to Life Threatening Health and Safety Issues

- Respond to all life threatening health and safety issues immediately.
- Maintain tracking system for inquiries, responses and corrective actions and submit log to jurisdictional HUD office with monthly invoices.
- Notify owner of all concerns and determine appropriate corrective action.
- Monitor owner's response to concerns and implementation of corrective actions.

B. Respond to All Non-Life Threatening Health and Safety and Community/Resident Concerns

- Respond to all non-life threatening health and safety issues within 2 business days of notification during normal business hours.
- Maintain tracking system for community/resident inquiries, responses and corrective actions and submit log to jurisdictional HUD office with monthly invoices.
- Notify owner of all concerns and determine appropriate corrective action.
- Monitor owner's response to concerns and implementation of corrective actions.

References:

HUD Handbook 4381.5 REV-2

Incentive Based Performance Standards

8. Respond, document and notify owner of life-threatening health and safety issues, inquiries/complaints immediately within an hour or prior to close of business day (whichever is sooner).

9. CA documents their initiatives and actions taken to notify the owner of non-life threatening health and safety issues inquiries/complaints and responds to residents within two business days of notification. CA continues to provide follow-up to residents on actions taken every two weeks until final resolution is reached. Documentation of all action is recorded.

Quality Assurance

On-Site Reviews
Monthly Invoice

3.7 Section 8 Budgets, Requisitions, Revisions and Year-end Statements

To receive monthly ACC payments, Section 8 budgets and requisitions (and revisions as required) must be submitted for each HAP contract at least 90 days before the beginning of the fiscal year. Also to receive monthly ACC payments, Year-end settlement statements must be prepared and submitted at least 45 days prior to the beginning of the CA fiscal year.

Outcome: CA submits financial documents to HUD accurately and timely.

Requirements:

- Prepare and submit annually to HUD (FMC) Section 8 budget (HUD Forms 52672 and 52673) at least 90 days prior to the beginning of the CA fiscal year.
- Prepare and submit annually to HUD (FMC) Annual Requisition for Partial Payment of Annual Contributions (HUD Form 52663) 90 days prior to the beginning of the CA fiscal year.
- Perform monthly comparison of HAP payments to owners and monthly ACC partial payments from HUD.
- Prepare and submit to HUD (FMC) revised Budget and Requisition (HUD Form 52663) when/if monthly comparison indicates ACC payments will exceed HAP payments by more than 5%. CAs must complete submissions by their Fiscal Year End date.
- Prepare and submit to the FMC Year-end Settlement Statement (HUD Form 52681) within 45 days of the year end.

Reference:

HUD Handbook 7420.7, Chapter 8

Incentive Based Performance Standards

10. CAs must submit to the FMC, acceptable and accurate Budget and Annual Requisition for each HAP contract 90 days prior to the beginning of CA's FY. Where monthly reviews of HAP payments to owners and ACC payments received from HUD indicate that the CA will be overpaid by more than 5%, the CA must submit a revised Budget and Annual Requisitions to reduce future payments accordingly. The Revisions (revised Budget and Requisition) must be submitted no later than the 1st day of the month following identification of overpayment.

11. CAs must submit to the FMC, the year-end statement within 45 days of the end of the CA's fiscal year.

Quality Assurance

Monthly Invoice
FMC Status Report

3.8 Contract Administrator's Audit

CA is required to maintain complete and accurate financial records covering the CA's contract administration of covered units under the ACC.

Outcome: Contract Administrator's records are complete and accurate.

Requirements:

- Records concerning contract administration under the ACC must be distinct and separate from all other business of the CA.

- Maintain complete and accurate records regarding activities relating to each HAP contract for covered units.

- CAs required to submit separate audited financial statements under OMB's Circular A-133 shall:

- Provide the FMC with annual financial audit of the CA's activities the earlier of 30 days after receipt of the auditors report or 9 months after the CA's fiscal year end (FYE) (in accordance with OMB Circular A-133). This audit must be performed by an independent public accountant (IPA).
- The Contract Administrator shall submit audited annual financial statements that fully comply with the requirements of OMB Circular A-133 within the earlier of 30 days after receipt of the auditor's report(s) or nine months after the end of the audit period. However, in cases where a Contract Administrator submits its audited financial statements more than 60 days after the end of its fiscal year, the CA shall submit all financial reports required by the HUD in unaudited form within 60 days after the end of its fiscal year.

- Submission of financial information shall also be in accordance with the requirements of HUD's Uniform Financial Reporting Standards (24 CFR, Part 5, Subpart H). The audit shall be performed by an independent auditor, procured using the standards set forth in Circular A-133 and other referenced documents in Circular A-133.

- In accordance with the ACC, CAs not required to submit separate audited financial statements under OMB's Circular A-133 shall: Submit annual unaudited financial statements within 60 days of the end of the CA's fiscal year. For-Profit instrumentality entities shall submit audited financial statements within 60 days of the end of the CAs fiscal year.

- In the event of audit findings that require corrective actions, the CA shall provide HUD with a proposed plan of corrective actions as part of the audit submission package. By the first day of each month, the CA shall provide HUD with a status report of corrective actions being implemented until all actions are completed. Corrective actions must proceed as rapidly as possible. Failure to provide the required audited financial information and/or timely implementation of corrective actions may result in default of the terms and conditions of the ACC.

Reference:

ACC contract
HUD Handbook 7420.7
OMB Circular A-133

Incentive Based Performance Standards

12. The CAs that are required to comply with OMB's Circular A-133 will provide HUD with unaudited financial statements, including supplemental data, within 60 days after the CA's FYE and audited financial statements no later than 9 months after the CA's FYE. CAs that are not required to comply with OMB's Circular A-133 will submit annual unaudited financial statements to HUD within 60 days of the end of the CA's fiscal year. For-Profit instrumentality entities shall submit audited financial statements to HUD within 60 days of the end of the CAs fiscal year.

Quality Assurance

100% Review of the Audit

3.9 Deficient Annual Financial Statements (AFS)

HUD regulations require owners of properties with project-based Section 8 contracts to submit Annual Financial Statements to the Real Estate Assessment Center (REAC) when required by the HAP contract.

Outcome: Financial condition of projects is verified.

Requirements: Where REAC's assessment of AFS reflects unacceptable performance and compliance indicators, owners must develop a plan outlining specific actions to correct deficiencies.

CAs must:

- Track the owners' deficiencies and their progress along their plan until resolved.
- Submit monthly reports by the first day of each month that indicate the owners' progress and activities in the previous month.
- Submit a final report to HUD within 30 days of owners' resolution of deficiencies.

Reference

HUD Handbook 2000.04 REV-1
OMB Circular A-133
Federal Register, September 1, 1998

Incentive Based Performance Standards

13. CA provides HUD with documentation by the first day of each month that indicates the owners' progress and activities in the previous month.

14. CA monitors the unacceptable performance and compliance indicators. CA provides documentation to HUD within 30 days of resolution.

Quality Assurance

On-Site Reviews
Data Systems Reviews

3.10 Renewals of Expiring Section 8 Contracts

As HAP contracts come to an end, owners must apply for contract renewals to have units remain with Section 8 project-based assistance. CAs must ensure that owners fulfill their obligations to residents and HUD that are commensurate with owner renewal decisions.

Outcome: Expiring Section 8 contracts are renewed

Requirements:

- Verify that owners provide the required one-year notice to residents of properties with expiring Section 8 contracts.
- Monitor owner actions with regard to providing a minimum of 90 days notice to CA of intent to renew or not renew the expiring contract, according to current Housing Notices.
- If the owner opts not to renew, take the actions described in Task 3.4.
- Maintain copies of owner's notification to residents of expiring contracts.
- If the owner chooses to renew, determine which option (form of renewal) the owner wishes to use and notify the jurisdictional HUD office.
- Prepare HAP renewal contracts.
- After receipt of confirmation of funding for renewal from HUD, ensure the HAP contract is executed (signed) by the owner and the CA.
- Execute and distribute copies of the HAP within one business week to the owner, jurisdictional HUD office, and CA files.

Reference

Notice: H-98-34

Incentive Based Performance Standards

15. Monitor, process and execute HAP contract documents.

Quality Assurance

On-Site Reviews
Data Systems Reports
Monthly Invoice

3.11 General Reporting Requirements

To track the performance of the Section 8 program, monitor and evaluate CA performance, and identify technical assistance needs, HUD requires the CA to regularly report its activities. Consequently, the CA shall provide to jurisdictional HUD offices Monthly, Quarterly, and Annual reports.

Outcome: HUD can monitor and evaluate program and CA performance from CAs accurate, timely reports.

A. Monthly Reports

CAs must submit reports and an invoice to the Government Technical

Representative, or Monitor (GTR/GTM) by the 10th business day of each month for the previous month's activities.

- Hot topics—Projects that required special attention due to such matters as, abatement actions, excessive resident complaints, inquiries from governmental officials or general public.
- Work Plan Status Report that details:

Number of areas reviewed and services performed, including date of review and services; name/s of CA staff performing the review and performing the services.

- Any significant administrative actions that could affect the contract.
- Quality control activities and results
- Major accomplishments, success stories, etc.
- Noteworthy meetings
- Pending issues

B. Quarterly Reports

CAs must submit Work Plan (updated) and status reports to the designated GTR/GTM.

C. Annual Reports

By the close of each contract year, CAs must submit to HUD a report that details its progress against the Work Plan for that year. The report should detail all of the CA actions and services with dates, locations, and employee name for that calendar year. Also at the close of the contract year, CAs must submit a Work Plan for the following year that details its plan to satisfy the ACC's servicing requirements.

Incentive Based Performance Standards

16. HUD receives CA's (a) Monthly Reports by the 10th business day following the end of the month; (b) Quarterly reports by the 10th business day following the end of the quarter; (c) Annual reports by the 20th business day following the end of the CA's contract year.

Quality Assurance

On-Site Reviews
Data Systems Reports
Review of submitted reports

3.12 Physical Inspection

The Department is conducting a baseline physical inspection for every Section 8 property with a HUD-administered HAP contract. The Real Estate Assessment Center's ("REAC") physical inspection software and protocol is being used for all inspections (See <http://www.hud.gov/react/reaphy.in.html>). Once this baseline is completed, HUD will determine frequency of future inspections. HUD

may issue a task order under the ACC to have the CA perform physical inspections. If such a task order is issued, HUD will negotiate with the CA a fixed-price fee for such services at that time.

Outcome: Verify completion of corrective actions based upon the analysis of the results of the physical inspections conducted on properties included in the ACC. Take legal actions as directed by HUD for enforcement of the HAP contract.

Requirements:

Post Inspection Activities

- Provide follow-up with owner on violations and corrective actions needed.
- Provide owner with time-frame to correct violations.
- Work with owner to eliminate the deficiencies.
- Abate payments when owner fails to correct violations within designated time period.
- Notify jurisdictional HUD office of abatement of payments and specific reasons for the action.
- Notify jurisdictional HUD office of the completion of required actions.
- Take legal action as directed by HUD for enforcement of the HAP contract.

Reference

HUD Handbook 4350.1

Federal Register, September 1, 1998

Incentive Based Performance Standards

17. CA monitors the unacceptable performance and compliance indicators. CA continues to provide follow-up to HUD on actions taken every 30 days until final resolution is reached.

4. Contract Administrator Fee

4.1 Terms

Administrative fee. The monthly fee HUD pays the PHA for each covered unit under HAP contract on the first day of the month. The administrative fee is the total of the basic fee plus the incentive fee. The fee amount is detailed in the ACC.

Basic fee. The basic fee is the agreed fee per unit per month. HUD pays the basic fee to the CA for each covered unit under HAP contract as of the first day of the month during the ACC term. There is a separate basic fee amount for each FMR area in the CA service area. The ACC will state the agreed basic fee amount for each FMR area.

HUD pays the basic fee for performance of tasks described in the Statement of Work and in accordance with the CA's annual workplan. Such performance is indicated by monthly

invoices (and validated through HUD's quality assurance). The total amount of the basic fee will vary each month depending on the total number of eligible units to which it will be applied each month. Of that total, HUD has allocated each task to be performed a certain percentage of the total fee available. The Performance Requirements Summary (PRS) (see Section 4.8) states the basic fee amounts for all portions of the CA service area.

Incentive fee. An additional fee beyond the basic fee that the CA may earn. As reflected in the PRS, HUD will pay an additional payment to the CA for performance on specified Statement of Work tasks that exceeds HUD acceptable quality level for the IBPS associated with that task (see PRS, Section 4.8). HUD will pay up to a maximum 25% of the total incentive fee pool at the end of each quarter. Each task which has an incentive applied to it also identified the percentage of the incentive fee pool that applies to that task. The amount of the incentive fee payable to the CA is determined by HUD, based on HUD's evaluation of the CA's performance in administration of covered units. The amount of the incentive fee per unit per month may not exceed the maximum incentive fee stated in the ACC.

Disincentive. Deductions levied against the basic fee for performance that falls below the acceptable quality level. The ACC states the disincentive for each Statement of Work task. The PRS (Section 4.8) specifies the penalty for each IBPS task as a percentage of the basic fee amount.

Earned basic fee. The basic fee amount per unit per month for each IBPS task minus all applicable disincentive fees for any such IBPS task.

4.2 Evaluation of CA Performance

During the ACC term, HUD will conduct a monthly evaluation and rating of the CA's performance in contract administration of the covered units, and shall issue a performance rating based on such performance. As described below, payment of the fees is based on the HUD rating of the CA's performance.

HUD determines the amount of the earned basic fee for each CA per unit month by review of data submitted in the monthly invoice. HUD determines the amount of the incentive fee earned by the CA per unit per month by quarterly scoring of the CA's contract administration performance during the ACC term. The monthly review and quarterly scoring is based on the CA's performance of the task categories used as incentive based performance standards (IBPS), as described in the

Statement of Work of this RFP. Monthly, HUD rates the CA's performance in completion of the IBPS to determine the earned basic fee by calculating a "percentage completed" for each IBPS task. In a similar manner, quarterly HUD rates the CA's performance in completing IBPS task to determine the earned incentive fee.

4.3 Basic Fee

In submitting their proposals, offerors are advised that, during the term of the ACC, the basic fee per unit month for each FMR area in the CA service area shall not exceed two (2) percent of the local two bedroom existing HUD Fair Market Rents (FMR) published in the **Federal Register** on October 1, 1998 (and effective the same date) and any revisions to such FMRs published in the **Federal Register** prior to award of the ACC. The entire national listing of the FMRs is located at <http://www.hud.gov/local/atl/atl42322.html>.

For your information, we have provided a table that lists by state, the total number of units by applicable FMRs. You may find this table with an explanation at <http://www.hud.gov/fha/mfh/rfp/sec8rfp.html>.

In responding to the RFP, the offeror's proposal must specify the proposed basic fee per unit per month (for the initial two year term and for each of three one year renewal terms. See Proposal Submission Form (Attachment II). If the offer is accepted, the ACC with the CA will specify the agreed basic fee amount during the ACC term. The fee will simply be stated as a percentage of the FMR as described above. The amount of fee proposed will be included in the evaluations for acceptability and to determine the price proposed reflects the proposed technical approach. The CA shall also submit supporting cost data as shown on the attachments.

As an example, if the FMR for a covered unit was \$400 and the CA had proposed a price of 1.7%, then the basic fee for each covered unit would be \$6.80. If the CA had an inventory of 10,000 covered units as of the 1st of the month, then the total basic fee available for that month would be \$68,000. Since the PRS indicates that 5% of the fee will be applied to IPBS # 1, then \$3,400 would be allocated to IPBS #1. The CA's performance of IPBS # 1 is evaluated as described to determine if the CA is due the full amount of the basic fee for the month.

4.4 Incentive Fee

In addition to the basic fee, the CA may earn an incentive fee awarded by HUD for CA performance of the contract administration services for designated

IBPS items that exceeds acceptable quality levels of performance. Determination of the amount of the incentive fee payment is specified in the PRS (Section 4.8).

The maximum incentive fee per covered unit per month HUD will evaluate the CA's performance in providing contract administration services for all covered units under the ACC for earned incentive fee quarterly. This evaluation will determine the portion of the incentive fee that the CA has earned for that quarter. As an example, if the FMR for a covered unit is \$400, then 1% would be \$4. If a CA had 10,000 covered units as of the 1st of the month, then the total incentive pool would be \$40,000 for that month. Due to changes in the number of covered units, the subsequent two months may have provided \$38,000 and \$41,000, which would result in a total of \$119,000 for the quarterly incentive pool. If one IPBS item was to cover 25% of the pool, then up to \$29,750 in incentive fees could be earned for that specific IBPS factor.

HUD may add or modify performance standards during the ACC term, may add or modify the factors used to measure performance, and may specify the amount of the incentive fee for a specified level of performance. However, HUD must notify the CA of any such changes before the rating period for which such changes are used to rate CA performance.

4.5 Fee Payment

Each month, the CA shall determine the number of eligible units that were being managed as of the 1st day of the month. The CA shall then apply the accepted basic fee percentage to the covered number of units to establish the total available basic fee and the 1% to determine the amount of the incentive fee pool for that month.

4.5.1 Payment of Basic Fee

For tasks that are indicated as being paid annually, the CA shall apply the

percentage of the IPBS factor to that monthly payment and deduct that from the total available fee. The CA shall then determine their compliance with the acceptable quality levels established in the ACC for tasks to be paid monthly and apply any appropriate reductions to the available fee. The CA must invoice HUD by the 5th day of each month for the amount of the basic fee earned for the month. For tasks for which annual payments of ongoing basic fees apply, the monthly amounts will be pooled into a total amount available for application of the AQL and the CA must invoice HUD by the 5th day of the 12th month of the ACC performance period. Each invoice shall be fully supported by documentation of the CA's achievements relating to the required AQL of each IPBS factor. In the event that subsequent HUD quality assurance reviews determine the CA did not meet the AQL established, HUD may adjust the payments of subsequent invoices to reflect the amounts that should have been withheld.

Notwithstanding the reductions in the fee for failing to meet the AQL, failure to complete the tasks may result in default of the CA for failing to comply with the terms and conditions of the ACC. HUD may terminate the ACC at any time in whole or in part if HUD determines that CA has committed any default under the ACC.

4.5.2 Payment of Incentive Fee

HUD will pay the incentive fee on a quarterly basis. HUD will base the amount of the incentive fee on the CA's performance against the Incentive Based Performance Standards listed in the Statement of Work.

HUD will review the CA's performance relative to its annual work plan and progress reported in the monthly invoices for the applicable quarter. The HUD findings will be compared to the CA invoice for the incentive fee and adjustments may be made to reflect the results of the HUD findings.

4.6 Availability of Funds

The award of the ACC and subsequent performance periods as well as all fee payments are subject to the availability of appropriated funds on an annual basis.

4.7 Use of Fee Income

The CA may use or distribute payments for the monthly on-going administrative fee that they earn under the ACC for any purpose apart from the use of these fees to reimburse, compensate or transfer any fees to the owners or management agents (or their affiliates) of the projects being serviced by the CA. HUD may reduce or request reimbursement of administrative fees paid if subsequent quality assurance indicates the performance indicated by the CA was not attained.

4.8 Performance Requirements Summary

Each task of the Statement of Work has at least one IBPS standard associated with it. These IBPS are central to the determination of earned basic and incentive fees.

The table below details for each performance standard:

- The IBPS number.
- The task and SOW requirement to which the IBPS applies.
- The acceptable quality level.
- The percentage of the basic fee that applies to the standard.
- Any applicable incentive fee and its method of calculation.
- Any applicable disincentive and its method of calculation.
- The method that HUD will use to assure the quality of the CA's reported performance.
- The frequency of payments for the basic fee.

The information in the table below will govern HUD's payment of CAs for all work performed under the ACC.

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IBPS Performance Requirements Summary

IBPS #	TASK and SOW Requirement	ACCEPTABLE QUALITY LEVEL (AQL)	% OF ADM FEE	INCENTIVE FEE (as % of incentive fee pool)	PENALTY FEE (as % of basic fee for IBPS)	QA Method	PAYMENT
1.	Management & Occupancy Reviews Section 3.2	Each month, average of 95% of required reports are provided to HUD, and data entry into HUD systems completed, within 30 days of scheduled completion of the review. AQL: 95%	5%	20% of the Incentive fee pool for achieving 100% on time submissions of acceptable reviews	2% reduction for every 1% that the monthly average falls below the AQL of 95%	On-Site Reviews Systems Data Reports	Monthly
2.	Document Section 8 Owner Compliance Section 3.2	Each month, average of 95% of acceptable reports are provided to HUD within 30 days of M&O Review completion AQL: 95%	5%	20% of the Incentive fee pool for achieving 100% on time submissions of acceptable reviews	2% reduction for every 1% the monthly average falls below AQL of 95%	On-Site Reviews Systems Data Reports	Monthly
3.	Processing Rental Adjustments Section 3.3	Each month, 100% of owner requests for rent adjustments and all approved rent adjustments are processed, executed and finalized within 30 days of receipt of owner's request or on the anniversary date of the HAP contract (for AAFs) AQL: 100%	5%	N/A	1% reduction for every 1% that performance falls below the AQL of 100%, except that if performance falls below 75%, a 50% reduction shall apply	On-Site Reviews Systems Data Reports	Monthly
4.	Opt-Out and Contract Termination Section 3.4	Each month, 100% of opt-out or termination notices are provided to HUD within one business day of notice by owner AQL: 1 business day	5%	N/A	1% reduction for every additional business day (partial days are rounded to the lowest whole day) the average notification time exceeds the AQL of 1 day	On-Site Reviews Systems Data Reports	Monthly
5.	Provide Resident Data to HUD Section 3.4	100% of complete resident data is provided to jurisdictional HUD office 90 days prior to contract expiration. AQL: 90 days	5%	30% of the Incentive fee pool for providing HUD data an average of 100 days or more prior to the contract expiration	50% reduction if average notification time is from 85-90 days (portions of days are rounded to the nearest whole day) 100% reduction if average notification time is less than 84 days	On-Site Reviews Systems Data Reports	Monthly
6.	Review, verify, and authorize monthly Sec 8 vouchers Section 3.5	100% of monthly vouchers are processed to ensure the monthly payment to the owner is sent no earlier than the first of the month or no later than the first business day of the month. AQL: 100%	15%	N/A	1% reduction for every 1% the processing of vouchers falls below the AQL of 100%, except that if performance falls below 75%, a 50% reduction shall apply	On-Site Reviews Systems Data Reports	Monthly

IBPS #	TASK and SOW Requirement	ACCEPTABLE QUALITY LEVEL (AQL)	% OF ADM FEE	INCENTIVE FEE (as % of incentive fee pool)	PENALTY FEE (as % of basic fee for IBPS)	QA Method	PAYMENT
7.	Notification of Corrective Actions Section 3.5	100% of all formal written notifications to HUD are completed within 10 calendar days of CA's verifying and certifying of the vouchers and resolution of overpayments is completed within 30 calendar days. AQL: 100%	3%	N/A	1% reduction for every 1% the of the notifications and resolutions combined falls below the AQL of 100%, except that if performance falls below 75%, a 50% reduction shall apply	On-Site Reviews Systems Data Reports	Monthly
8.	Life Threatening Health & Safety Issues Section 3.6A	100% of all responses and notifications to owner of life-threatening health and safety issues, inquiries or complaints are completed within one hour of receipt of knowledge of the issue. AQL: 100%	7%	N/A	1% reduction for every 1% of responses/notifications that exceed the AQL of 100% notifications within one hour, except that if performance falls below 75%, a 50% reduction shall apply	On-Site Reviews Monthly Invoices	Monthly
9.	Non-life Threatening Health & Safety Issues Section 3.6B	100% of all non-life threatening health and safety inquiries and/or complaints are responded to within two business days of notification and follow-up every two weeks until final resolution is reached. AQL: Responses performed within 2 business days.	5%	N/A	10% reduction of basic fee for every business day, or part thereof, that the average response time exceeds two business days.	On-Site Reviews Monthly Invoices	Monthly
10.	Section 8 Budgets, Requisitions, Revisions Section 3.7	100% of all Budget & Annual Requisitions for each HAP contract are submitted at least 90 days prior to the beginning of CA's FY. Revised Budget and Annual Requisitions to reduce future payments are submitted no later than the 1 st day of the month following identification of overpayments. AQL: 100% on time submissions	8%	N/A	2% reduction for every 1% below the AQL of 100%	Monthly Invoices FMC Status Reports	Monthly
11.	Year-End Statement Section 3.7	The year-end statement is submitted within 45 calendar days of the end of ensure this coincides with narrative description in SOW the CA's fiscal year. AQL: Submission within 45 days.	8%	N/A	4% reduction for every day the submission exceeds the AQL of 45 days.	FMC Status Report	Annually

IBPS #	TASK and SOW Requirement	ACCEPTABLE QUALITY LEVEL (AQL)	% OF ADM FEE	INCENTIVE FEE (as % of incentive fee pool)	PENALTY FEE (as % of basic fee for IBPS)	QA Method	PAYMENT
12.	Contract Administrator's Audit Section 3.8	For CAs that must comply with OMB's Circular A-133, unaudited financial statements are submitted within 60 days after CA's FYE. Audited financial statements are submitted no later than 9 months after CA's FYE. For CAs that are not required to comply with OMB's Circular A-133, annual unaudited financial statements are submitted to HUD within 60 days of the end of the CA's fiscal year. For-Profit instrumentality entities shall submit audited financial statements to HUD within 60 days of the end of the CAs fiscal year AQL: 100% on time submissions	3%	N/A	2% reduction for every day that any action exceeds the days allowed by the AQL.	100% Review of Audit	Annually
13.	Monitoring of Unacceptable Performance & Compliance Indicators Section 3.9	100% of projects with unacceptable performance and compliance indicators are monitored and reported by the first day of every month. AQL: Monitoring report by 1 st of every month	3%	N/A	3% reduction for every day the AQL is exceeded for any report or documentation submission	On-Site Reviews Systems Data Reports Monthly Invoices	Monthly
14.	Monitoring of Unacceptable Performance & Compliance Indicators Section 3.9	100% of projects with unacceptable performance and compliance indicators are reported on and documentation is provided to HUD within 30 days of resolution. AQL: Documentation provided within 30 days of resolution.	3%	N/A	3% reduction for every day the AQL is exceeded for any report or documentation submission.	On-Site Reviews Systems Data Reports	Annually
15.	Renewals of Expiring Sec 8 Contracts Section 3.10	90% of HAP contracts executed and provided to HUD at least 60 calendar days prior to expiration of the contract. AQL: 90%	12%	20% of the incentive fee pool to monitor, process, & execute 95% of HAP contract documents. An additional 10% of the incentive fee if 100% is attained.	3% reduction for every 1% below the AQL that the HAP contracts fail to be submitted at least 60 days prior to expiration.	On-Site Reviews Data Systems Reports Monthly Invoices	Monthly
16.	General Reporting Requirements Section 3.11	90% of reports (16 out of 17 total) submitted within required time frames. AQL: 90% of reports (16 of 17)	5%	N/A	10% reduction for every untimely report submitted below the AQL	On-Site Reviews; Data Systems Reports; Review of submitted reports	Monthly
17.	Monitoring of Physical Inspection Results Section 3.12	95% of projects with unacceptable performance and compliance indicators are notified within 30 days of receipt of report and monitoring follow-up reports to HUD by the 1 st day of every month until final resolution is reached. AQL: 95% of initial notifications and follow up reports completed within required time frames.	3%	N/A	2% reduction for every 1% below the AQL that initial notifications and follow up monitoring reports are untimely	On-Site Reviews Systems Data Reports Monthly Invoices	Monthly

5. Guidance for Submitting Proposals

5.1 Service Area Designation

Proposals in response to this solicitation must clearly designate the intended service area. Offerors must bid to provide contract administration services for areas no smaller than an individual State (or U.S. Territory). HUD will accept proposals covering the entire nation, multiple Multifamily Hubs, individual Multifamily Hubs, or any combination of states, but no smaller than an individual State (or U.S. Territory). All multi-state proposals must provide a separate cost proposal for each state within the proposed service area (see Attachment II.B). HUD will evaluate proposals for areas larger than an individual State on a state by state basis.

The information in this section governs the procedures Offerors must follow to submit proposals in response to this RFP. Failure to comply with the guidance of this section will disqualify an Offeror's proposal from consideration by HUD.

5.2 Proposal Organization

Offerors must submit one original and three (3) copies of their proposals. All proposals must contain two volumes: a technical proposal that explains the offeror's technical capacity to perform the tasks of the RFP and a cost proposal that indicates the offeror's price and supporting documents to provide CA services. Submit technical and cost proposals as separately bound volumes. Offerors must divide and tab technical proposal into three sections, limited by the specified number of pages:

1. Understanding and Technical Approach—20 pages
2. Management Capacity and Quality Control—20 pages
3. Past Performance—10 pages (Total)
 - (a) Key Personnel—5 pages
 - (b) Firm—5 pages

Proposals exceeding the allowable page limits will only have the number of pages specified evaluated (e.g. Factor 1 will only have the first 20 pages evaluated; remaining pages will not be reviewed). Page limits refer to one side of an 8½ x 11 piece of paper using standard 10 pitch font.

Offerors shall include with the technical proposal an appendix which includes the following:

- (1) Resumes of the project team.
- (2) A statement of possible conflict of interest in the appendix. This statement should identify properties in the proposed coverage area of the offeror in which the offeror has a financial interest.

(3) A copy of the offerors' (the PHA and all organizations that form the instrumentality entity) most recent audit of the offeror's financial records. The appendix does not count toward the page limitation.

Offerors are advised that different technical evaluation panel teams will review proposals. The Technical proposal shall be divided according to the stated evaluation factors and shall be submitted in physically distinct sections by each evaluation factor. Individual panel members may review only one evaluation factor; therefore, offerors should be careful to fully respond to each factor separately, and not rely on information in another factor to be a part of the response. Pages with each factor shall be numbered consecutively, including any appendices.

The cost proposal shall include the CA's proposed percentage of the FMR for covered units on the sheet provided herein. The cost proposal shall also provide supporting cost data to ensure the evaluation panel can determine the prices proposed are reasonable for the technical approach proposed. Failure to adequately explain the price proposed may result in a determination the CA is unable to perform at the stated price or that the price is unreasonable based upon the technical approach described. Sample forms for providing cost data are attached and should be supported by a narrative to the extent necessary. Offerors are not required to follow the samples completely, but shall provide the information requested to the extent possible.

5.3 Proposal Due Date

Offerors must submit proposals no later than 5:00 PM EDT, Friday, July 15, 1999. Offerors must submit proposals to: U.S. Department of Housing and Urban Development, 451 7th Street, SW, Office of the Deputy Assistant Secretary for Multifamily Housing Programs, Room 6106, Washington, DC 20410.

Offerors must clearly mark packages containing proposals "Proposal for Section 8 Contract Administration Services."

The Department will not accept proposals that arrive after the above date and time or at any other address. HUD will not be responsible for proposals lost or misdirected due to improper labeling.

5.4 Offeror Questions/Pre-Proposal Conference

HUD will conduct a Pre-Proposal Conference to discuss this request for proposals at length and answer questions. The agenda for the

conference will include time for those potential respondents' interested in forming partnerships with other entities to meet.

Date: June 3, 1999.

Time: 9:30 a.m. to 3:00 p.m. EDT.

Location: To Be Announced at <http://www.hud.gov/fha/mfh/rfp/sec8rfp.html>.

HUD encourages potential Offerors who plan to attend the Pre-Proposal Conference to submit questions in advance, by sending an e-mail to "Prebiddersconf_Sec8rfp@hud.gov". All questions and the responses will be posted at the RFP website, www.hud.gov/fha/mfh/rfp/sec8rfp.html. At the Pre-Proposal Conference HUD will be sure to discuss the questions that have generated the most interest.

If attendees raise additional questions as a result of the discussion at the pre-proposal conference, HUD will respond to the questions at the conference as time permits. However, if time has expired and/or if HUD must obtain additional information to provide an appropriate response, HUD will post a transcript of the conference and the answers to any unanswered questions at the RFP website.

In addition to a copy of the transcript, the RFP web site currently contains a database of current properties with Section 8 assisted units and a description of the Section 8 program. After the conference, the RFP website will provide a tool for offerors to pose and for HUD to answer any further questions.

5.5 Amendments and Additional Guidance

HUD may amend this RFP. All amendments or additional guidance will be posted on the website. Offerors should check the website regularly for any amendments to the RFP.

5.6 Contract Term

HUD will award an ACC pursuant to this RFP for an initial term of two (2) years. The CA is reminded however, that continued performance beyond the first year of the ACC is contingent upon the availability of appropriated funds.

HUD may unilaterally renew the ACC for up to three (3) additional one-year terms. Each such renewal shall be at HUD's sole discretion. The Department will use performance as a paramount factor in renewal determinations.

6. Equal Employment Opportunity Compliance

The CA shall not discriminate against any employee or applicant for employment because of race, color,

creed, religion, sex, handicap or national origin. The CA shall take affirmative action to ensure that applicants and employees are treated without regard to race, color, creed, religion, sex, handicap, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

The CA shall post in conspicuous places, available to employees and applicants for employment, notices to be provided by HUD setting forth the provisions of this nondiscrimination clause. The CA shall assure in all solicitations or advertisements for employees placed by or on behalf of the CA that all qualified applicants will receive consideration for employment without regard to race, color, creed, religion, sex, handicap or national origin. The CA will incorporate the foregoing requirements of this paragraph in all of its contracts for project work, except contracts for standard commercial supplies or raw materials, and will require all of its contractors for such work to incorporate such requirements in all subcontracts for project work.

7. Factors for Award

Proposals cannot merely offer to provide services in accordance with the requirements of the RFP, rather, they must provide a detailed and concrete description of how the offeror will perform these requirements in operation under the ACC.

HUD will evaluate proposals according to the following:

7.1 Understanding and Technical Approach—50 Points

Offeror's proposal must include a demonstrated understanding of the role of the CA and the full range of the work to be performed. The proposal also must describe the Offeror's plan and approach to perform the tasks of the statement of work. The proposal shall specify any services or functions to be provided or performed by the parent entity, or by any other entity which holds a direct or indirect interest in such instrumentality, to carry out or support Section 8 contract administration in accordance with the ACC. The proposal should detail the Offeror's automated systems that will support it in the performance of SOW tasks (including information technology (IT) support, accessibility, documentation, security, and

flexibility). In addition, the offeror must describe the automated system that it will use to provide contract administration services for project-based HAP contracts under Section 8.

The proposal must provide a proposed plan for the transfer of responsibility for contract administration from HUD to the CA that includes, but need not be limited to, how the offeror will be prepared to begin operations within 60 calendar days after award of the ACC.

7.1.1 Data Systems

Offerors must demonstrate their ability to comply with all processing and reporting requirements applicable to CA functions contained in this RFP, including requirements for contract administrators outlined in Section 108 of 24 CFR, Part 208)—Electronic Transmission of Required Data for Certification and Recertification and Subsidy Billing Procedures for Multifamily Subsidized Projects (a/k/a the Automation Rule). CAs are expected to have Internet Service Provider access for communication with HUD. (At this time, HUD plans for most data entry and data transfer with CAs to occur over the Internet).

CAs must be capable of implementing revisions in processing and reporting, as specified by HUD, to conform to changes in present or future policy and procedures pertaining to CA functions. With respect to data systems and automated reporting requirements, HUD will provide reasonable advance notice of the need for such change a minimum of 90 days before CA compliance will be required.

CAs must provide HUD with data on HAP contracts, rent adjustments, contract renewal processing, management and occupancy reviews, annual financial statements and other documents and information relevant to the tasks and responsibilities outlined in this RFP. Where automated reporting tools do not already exist, HUD intends to develop specifications for receiving a substantial portion of these data electronically. CAs must have the capability to transmit such data to HUD via the Internet as prescribed by HUD.

Offerors must demonstrate that they have the facilities to receive resident certification and recertification data (form HUD 50059) and voucher data (form HUD 52670) electronically from the owners or management agents in a form consistent with reporting requirements specified by HUD for the HUD TRACS System. Offerors must also demonstrate the ability to transmit HUD 50059 data to the HUD TRACS Tenant System and HUD 52670 data to the HUD

TRACS Voucher/Payment System, and to receive the messages transmitted in return from TRACS. As part of these requirements, the CA must have an ability, acceptable to HUD, for communicating errors in HUD 50059 and HUD 52670 submissions to the owners or management agents. CAs are expected to comply with requirements applicable to contract administrators in the Automation Rule (24 CFR 208).

HUD currently receives data submissions to the TRACS Tenant System and the TRACS Voucher/Payment System via SprintMail, but there are plans to accept these transmissions via the Internet. Internet access also provides the CA with the ability to review the resident and voucher data it has transmitted to HUD to ensure that it is correct and consistent with the data maintained in its own files.

CAs will be required to accept and forward to the owners or management agents the Benefit History Reports from HUD that provide confirmation of Social Security and Supplemental Security Income. Alternatively, the CAs may require the owners or management agents to obtain Internet access to retrieve their own Benefit History Reports from HUD.

Resident reporting requirements specified for HUD's TRACS Tenant System and voucher reporting requirements specified for the TRACS Voucher/Payment System are published on the TRACS Documents Page on the world wide web. The CAs are responsible for meeting the requirements specified in these documents. Offerors can access the TRACS Documents Page at <http://www.hud.gov/fha/mfh/trx/html/trxdocs.html>.

Offerors must demonstrate that they have an account with a federally insured financial institution capable of receiving and sending electronic fund transfer (EFT) transactions.

CAs must have facilities acceptable to HUD for making timely and accurate HAP subsidy payments to project owners with HAP contracts under an Annual Contributions Contract (ACC) contract. CAs also will be required to transmit budget, requisition, and year-end settlement data to HUD via the Internet, as specified by HUD.

7.2 Management Capacity and Quality Control Plan—50 points

The offeror shall fully demonstrate a superior detailed quality control program to (1) ensure the contract performance requirements are met, (2) provide specific internal control programs to provide accountability and

separation of duties to detect and prevent potential fraud, waste, and abuse of funds, and (3) identify processes/procedures to prevent, detect, and resolve actual, or appearances of, conflicts of interest of any staff working with the contract or associated with the entity. This QC Plan must include, but not be limited to

1. A Work Plan including all contract administrative services breaking down each task/sub-task. The Work Plan shall:

—Specify all areas and services that the CA will review.

—Include a timeline (duration, start, finish) the CA will review areas/services.

—Depict the resource name/s and task usage for each task/s.

—Include an example of the CA's Work Plan quarterly report. Identify the methodology CAs will use to conduct reviews.

2. The name(s) and qualifications of the individual(s) responsible for performing the quality control reviews and the specific areas/services these individuals will inspect.

3. A method to identify performance deficiencies and to take corrective action to ensure against unsatisfactory performance.

4. A means to document all quality control reviews and any required corrective action. The CA shall establish and maintain files for such documentation through the term of this contract. The filing method shall be such that all information relative to quality control inspections is logically grouped together and readily accessible. The files shall be the property of HUD and be made available to HUD upon demand during the CA's regular business hours. The files shall be turned over to HUD within 10 business days after completion or termination of the ACC.

5. Workflow and organizational charts that describe the processes and controls that the offeror will to implement and operate its technical approach and to execute the QC plan.

7.3 Past Performance—30 Points

Offerors' proposals must provide documented evidence that, during the last two years immediately prior to the deadline for receipt of proposals, the Offeror or related entity has successfully performed duties substantially similar

to the core functions that the CA will perform under this RFP. Offerors should give special emphasis to past performance with compliance with and reviews of Multifamily Housing's occupancy requirements, reviews of property physical condition, and problem resolution activities with property owners. ("Related entity" means any entity that will perform services or functions to carry out or support Section 8 contract administration under the ACC, including the PHA, a parent entity of the PHA, or partners who are affiliated with the PHA.)

HUD will give greater weight to proposals that cite recent experience (the past two years) that is most similar to the requirements of the RFP.

The proposal must include sufficient information on the relevant experience, special training and education of proposed personnel related to the tasks of the SOW.

HUD will allocate points based upon the demonstrated record. References of successful past performance of the same or similar work as described in the SOW and in the ACC shall confirm offerors' demonstrated record. HUD will consider available information, such as reviews of PHAs.

Offerors' proposals must provide at least five references (not letters of recommendations) that document past experience. These references must include:

Project name

Period of performance

Description of the work performed

Contact person information:

Name

Title

Address

Telephone numbers

The relationship of the contact person to the offeror.

Only information that is submitted directly to HUD in the offeror's proposal package will be considered unless HUD seeks additional information during the evaluation process.

HUD reserves the right to review and consider the past performance the offeror may have had with the Department.

8. Proposal Evaluation

HUD will establish one or more panels to review the proposals received.

HUD will only evaluate, rate and rank complete proposals submitted.

HUD will evaluate each proposal based on the factors for award and the proposed fees to determine which offerors represent the best overall value, including administrative efficiency, to the Department. While the cost or price factor has no numerical weight in the factors for award, it is always a criterion in the overall evaluation of proposals. HUD may ask any offeror considered to be among the highest rated technically acceptable for additional information to assist HUD in selecting among proposals submitted. HUD may also negotiate the fee with the highest technically acceptable offerors, one or all, to obtain high quality at a better value.

HUD shall have discretion to determine the process for evaluation, rating and ranking of proposals received and for selection of the contract administrator pursuant to the RFP and for award of ACCs.

Proposals to provide contract administration services for project-based HAP contracts will be accepted on an individual state, combination of states, individual Hubs, multiple Multifamily Hubs, and the entire nation, however, the Department will evaluate proposals state by state. Therefore, the offeror must complete and submit the "Proposal Submission Form" (Attachment II) for each state the CA is offering a bid.

If there are areas of the country for which HUD does not select a CA during the above process, either because there were no proposals covering that area, or none of the proposals were acceptable, HUD may negotiate with one or more selected offerors to expand the service area in which the selected offeror will provide contract administration services.

Before execution of the ACC, each selected PHA must submit a Previous Participation Certification, Form HUD-2530 and any additional documentation required by HUD within 10 calendar days of request by HUD. The PHA and related parties must be cleared through HUD's previous participation procedure.

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Attachment I Voucher and Recertification Review

The following lists the tasks and tools associated with voucher and certification/recertification reviews.

TASKS	TOOLS
Record voucher in project logs	Manual Process
Check voucher header information	Manual Process <ul style="list-style-type: none"> • Check the following data: * Project number * Total units * Dates/signed * Voucher month * Usage (declining balance/shortfall)
Check information against previous month's voucher	Manual Process <ul style="list-style-type: none"> • TRACS currently makes no comparisons between HAP requests from one month to the next • Continue to compare HAP amounts for all residents not "changed/added" this month
Check adjustments	Manual Process <ul style="list-style-type: none"> • TRACS is currently not editing or recording adjustments • Check adjustments • Check for unresolved problems from previous month • Make note to notify project of what has to be done
Check voucher calculations	Manual Process <ul style="list-style-type: none"> • TRACS only edits certification calculations • Continue to check the voucher totals (i.e., individual page totals against total subsidy requested on cover)
Review special claims	Manual Process <ul style="list-style-type: none"> • Special claims will not be incorporated until a future release of TRACS • Continue to manually check signatures and totals using current procedures

Attachment II Proposal Submission Form**Section A.** (attach this form to the technical and cost proposal)

I propose to provide the services required by this ACC within the geographic area described below. (See description of Multifamily Hubs on the next page).

Offeror	
Date	

_____ 1. The following area which is larger than a Hub:

_____ 2. Entire Hub for Area

_____ 3. The following group of states:

_____ 4. The following individual State (or U.S. Territory):

Multifamily Hubs

AREA #	HUB	GEOGRAPHIC AREA
1	Boston	Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut
2*	Buffalo	All New York State counties except those listed for the New York HUB
3*	New York	The counties of Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester
4	Philadelphia	Pennsylvania, New Jersey, Delaware, West Virginia
5	Baltimore	Maryland, District of Columbia, Virginia
6	Greensboro	North Carolina, South Carolina
7	Atlanta	Georgia, Tennessee, Kentucky, Caribbean
8	Columbus	Ohio
9	Jacksonville	Florida, Alabama, Mississippi
10	Chicago	Illinois, Indiana
11	Detroit	Michigan
12	Minneapolis	Minnesota, Wisconsin
13	Kansas City	Kansas, Missouri, Oklahoma, Nebraska, Iowa
14	Fort Worth	Texas, Arkansas, Louisiana, New Mexico
15	Denver	Colorado, Utah, Wyoming, Montana, North Dakota, South Dakota
16	Seattle	Washington, Oregon, Idaho, Alaska
17*	San Francisco	Nevada, Arizona, Hawaii and the 46 California counties of Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Fresno, Glenn, Humbolt, Kings, Lake, Lassen, Madera, Marin, Mariposa, Mendocino, Merced, Modoc, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, Yuba
18*	Los Angeles	California counties not covered by the San Francisco HUB

*For the purpose of this RFP, HUD has combined Hubs 2 & 3 and Hubs 17 & 18. This means that CA must offer a proposal for the entire state, not just the single Hub area.

Section B (attach this form to the cost proposal)

I propose to provide the services required by this ACC within _____
(Name of State or U.S. Territory) for the following fixed price:

Initial 2 Year Term	
Basic Fee	% of the FMR

1st Renewal Year 1 Year Term	
Basic Fee	% of the FMR

2nd Renewal Year 1 Year Term	
Basic Fee	% of the FMR

3rd Renewal Year 1 Year Term	
Basic Fee	% of the FMR

CONTRACT COST ESTIMATE FORM - INSTRUCTIONS**ITEM 1: Direct Labor**

Enter labor by category and skill level (e.g. Project Director, senior analyst, junior architect, statistician, clerical, etc.) in column (a). Enter the estimated total number of hours (i.e., for all tasks, etc. in which the labor will be required) in column (b). Enter the estimated hourly rate for each labor category in column (c). Multiply the amount in column (b) by the amount in column (c), and enter the product in column (d). [NOTE: If the contract is expected to extend beyond a twelve month period, inflation factors should be included for each additional period. This may require using additional sheets.] Add the amounts in column (d) and enter that total in the row labeled ATOTAL DIRECT LABOR.@

ITEM 2: Labor Overhead and Fringe Benefits

Enter the estimated rates (percentages) for fringe benefits and labor overhead in the blanks in column (c). Multiply these percentages by the amount for TOTAL DIRECT LABOR in 1(e) above and enter the results in column (d). Add the two totals and enter the sum in column (e) of the row labeled ATOTAL LABOR OVERHEAD.@

ITEM 3: Travel

Enter the total estimate and support on a separate worksheet.

ITEM 4: Subcontracts/Consultants

For each type of subcontract/consultant, enter the estimated number of hours/days in column(b). Enter the hourly/daily rate in column (c). Multiply each rate by the number of hours/days and enter the result in column (d). Add the totals in column (d) and enter the sum in column (e) of the row labeled ATOTAL CONSULTANT COSTS.@

ITEM 5: Other Direct Costs

Enter each type of cost in column (a) and its corresponding total cost in column (d). Add the totals in column (d) and enter the sum in column (e) of the row labeled ATOTAL OTHER DIRECT COSTS.@

ITEM 6: Total Direct Cost and Overhead

Add the amounts in 1(e) through 5(e) and enter the sum.

ITEM 7: General and Administrative (G&A)

Enter the estimated rate in column (c) and multiply it by the amount in 7(e) above. Enter the result in column (e).

ITEM 8: Total Estimated Costs

Add the amounts in 6(e) and 7(e) enter the sum in column (e).

ITEM 9: Fee or Profit

Enter the amount calculated or estimated for the fixed fee or profit.

ITEM 10: Total Estimated Cost and Fee/Profit

Add the amounts in 8(e) and 9(e). Enter the sum in column (e). This is the grand total.

Attachment III Annual Contributions Contract*Annual Contributions Contract*

Definitions

ACC. Annual Contributions Contract. This contract between HUD and the PHA.

Administrative Fee. The monthly fee HUD pays the PHA for each covered unit under HAP contract on the first day of the month. The fee amount is determined in accordance with Exhibit E. The administrative fee is the total of the basic fee plus the incentive fee.

Basic Fee. The amount of the basic fee per unit per month as specified in Exhibit E for each FMR area. HUD may reduce the basic fee if HUD determines that the PHA performance of contract tasks is below the minimum acceptable quality level. HUD determines the amount of such reduction. Earned basic fees are paid monthly.

Budget Authority. The maximum amount of funds available for payment to the PHA for each HAP contract. Budget authority is authorized and appropriated by the Congress. The amount of budget authority for each HAP contract is listed on Exhibit C.

Covered Units. Section 8 assisted units under HAP contracts assigned to the PHA for contract administration under the ACC. Covered units are listed on Exhibit B.

Fiscal Year. The PHA fiscal year. Exhibit C states the last month and day of the PHA fiscal year.

Funding Increment. Each commitment of funding (budget authority) by HUD to the PHA for a HAP contract under the ACC. The funding increments are listed on Exhibit C.

HAP Contract. A Section 8 Housing Assistance Payments Contract.

HUD. The United States Department of Housing and Urban Development.

Incentive Fee. A per unit per month administrative fee in addition to the basic fee. The incentive fee is paid if HUD determines that PHA performance of contract tasks is above the minimum acceptable quality level. HUD determines the amount of the incentive fee. The maximum incentive fee per unit per month is specified in Exhibit E for each FMR area. Earned incentive fees are paid quarterly.

PHA. Public Housing Agency.

Portfolio Reengineering. FHA-insured multifamily housing mortgage and housing assistance restructuring of an eligible multifamily project.

Program Expenditures. Amounts which may be charged against program receipts in accordance with the ACC and HUD requirements.

Program Property. Program receipts, including funds held by a depository, and PHA rights or interests under a HAP contract for covered units.

Program Receipts. Amounts paid by HUD to the PHA under the ACC, and any other amounts received by the PHA in connection with administration of the Section 8 program under the ACC.

Project Reserve. An unfunded account established by HUD for a HAP contract from amounts by which the amount of budget authority available for payment under the HAP contract during the owner's fiscal year exceeds the amount actually approved and paid by HUD. HUD may use this account as the source for additional payments under the program.

Public Housing Agency. The agency that has entered the ACC with HUD. Such agency is a "public housing agency" as defined in Section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)(6)).

Section 8. Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

Service Area. The area where the PHA provides contract administration services under the ACC. The PHA service area is described in Exhibit D of the ACC.

ACC

Purpose

This ACC is a contract between the PHA and HUD. The ACC was awarded by HUD pursuant to a proposal submitted in response to HUD's published Request for Proposals for PHAs to provide contract administration services for units receiving project-based Section 8 housing assistance. (The Request for Proposals was published on May 19, 1999. Under the ACC, the PHA will provide contract administration services for dwelling units in the service area receiving project based assistance under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

Exhibits. This ACC Includes the Following Exhibits

1. Exhibit A: Request for Proposal
2. Exhibit B: Covered Units
3. Exhibit C: Funding
4. Exhibit D: Service Area
5. Exhibit E: PHA Administrative Fees
6. Exhibit F: ACC Contract Term

HUD Revision of ACC Exhibits

1. HUD may amend Exhibit B:
 - To add covered units.
 - To withdraw covered units for which the HAP contract has expired or been terminated, or for which assistance payments are abated.

—To withdraw covered units in connection with portfolio reengineering.

2. HUD may amend Exhibit C:

- To add a funding increment, or
- To remove a funding increment for which the HAP contract has expired or been terminated, or for which assistance payments are abated.
- To remove a funding increment in connection with portfolio reengineering.

HUD may amend Exhibit B or Exhibit C of the ACC by giving the PHA written notice of the revised exhibit. The HUD notice constitutes an amendment of the ACC.

ACC Term

The ACC term is specified in Exhibit F of the ACC. The PHA shall provide contract administration services for the covered units during the ACC term.

PHA Contract Administration Services Coverage

1. The PHA shall enter into or assume HAP contracts with owners of covered units to make assistance payments to the owners of such units during the HAP contract term.

2. During the ACC term, the PHA shall provide contract administration services for covered units in the service area.

3. HUD will assign to the PHA existing HAP contracts for covered units. Upon such assignment, the PHA assumes all contractual rights and responsibilities of HUD pursuant to such HAP contracts.

PHA Services

1. The PHA shall comply, and shall require owners of covered units to comply, with the United States Housing Act of 1937, applicable Federal statutes and all HUD regulations and other requirements, including any amendments or changes in the law or HUD requirements.

2. The PHA shall perform all the core tasks specified in the Statement of Work contained in the Request for Proposals in accordance with the law and HUD requirements.

3. The PHA shall perform services under the ACC in accordance with the HUD-approved proposal submitted in response to the HUD Request for Proposals, and any HUD-approved modifications of the HUD-approved proposal.

4. The PHA shall require owners to comply with HUD requirements for occupancy of covered units, including requirements governing eligibility for assistance, resident contribution to rent,

and examinations and reexaminations of family income.

5. The PHA shall determine the amount of housing assistance payments to owners in accordance with the terms of the HAP contracts and HUD requirements, and shall pay owners the amounts due under such HAP contracts.

6. The PHA shall require owners to comply with the terms of HAP contracts for covered units, and shall take prompt and vigorous action to enforce the terms of such contracts.

7. The PHA shall take appropriate action, to HUD's satisfaction or as required or directed by HUD, for enforcement of the PHA's rights under a HAP contract. Such actions include requiring actions by the owner to cure a default, termination, or abatement or other reduction of housing assistance payments, termination of the HAP contract, or recovery of overpayments.

Fees and Payments

HUD Payments

1. HUD will make payments to the PHA for covered units in accordance with HUD requirements.

2. For each PHA fiscal year, HUD will pay the PHA the amount approved by HUD to cover:

- Housing assistance payments by the PHA for covered units.
- PHA fees for contract administration of covered units.

3. The amount approved for housing assistance payments shall be sufficient to pay owners the amount of housing assistance payments due to the owners under HAP contracts for covered units.

4. The amount of the HUD payment may be reduced, as determined by HUD, by the amount of program receipts (such as interest income) other than the HUD payment.

Fees

1. HUD may approve administrative fees for either of the following purposes:

- Basic fees.
- Incentive fees.

2. The monthly administrative fee is composed of the basic fee and the incentive fee. The administrative fee shall be paid (subject to availability of appropriated funds) for each covered unit under HAP contract on the first day of the month.

3. The amount of the administrative fee shall be determined in accordance with Exhibit E.

4. For covered units in each FMR area, Exhibit E states the amount of the basic fee and the amount of the maximum incentive fee. Basic fees earned by the PHA shall be paid on the first day of each month. Incentive fees

earned by the PHA shall be paid at the end of each quarter.

5. If HUD determines that the PHA has performed above the minimum acceptable quality level in a quarter, the PHA may award an incentive fee per unit per month in addition to the basic fee. If HUD determines that the PHA has performed below the minimum acceptable quality level in any month, HUD may charge a penalty against the basic fee per unit per month.

6. HUD will not pay an administrative fee for any covered units for which the HAP contract has expired or been terminated.

7. If HUD determines that the PHA has failed to comply with any obligations under the ACC, HUD may reduce the amount of any administrative fee.

Limit on Payments for Funding Increment

The total amount of payments for any funding increment over the increment term shall not exceed budget authority for the funding increment.

Reduction of Amount Payable by HUD

1. If HUD determines that the PHA has failed to comply with any obligations under the ACC, HUD may reduce to an amount determined by HUD:

- The amount of the HUD payment for any funding increment.
- The contract authority or budget authority for any funding increment.

2. HUD shall give the PHA written notice of the reduction.

3. The HUD notice may include a revision of the funding exhibit (Exhibit C) that reduces the amount of contract authority or budget authority for a funding increment. The notice of a revised funding exhibit, or of revisions to the funding exhibit constitutes an amendment of the ACC.

Project Reserve

HUD may establish and maintain a project reserve account for a HAP contract administered by the PHA under the ACC. The amount in the project reserve is determined by HUD. The project reserve may be used by HUD to pay any portion of the payment approved by HUD for a fiscal year.

Budget and Requisition for Payment

1. For each fiscal year, the PHA shall submit to HUD an estimate of the HUD payments for the program and any supporting data required by HUD. The budget estimate and supporting data shall be submitted at such time and in such form as HUD may require, and are subject to HUD approval and revision.

2. The PHA shall requisition periodic payments on account of each annual HUD payment. Each requisition shall be in the form prescribed by HUD. Each requisition shall include certification that:

- Housing assistance payments have only been paid in accordance with HAP contracts for covered units, and in accordance with HUD requirements; and
- Covered units have been inspected by the PHA in accordance with HUD requirements.

3. If HUD determines that payments by HUD to the PHA for a fiscal year exceed the amount of the annual payment approved by HUD in the budget for the fiscal year, the excess shall be applied as determined by HUD. Such applications determined by HUD may include, but are not limited to, application of the excess payment against the amount of the annual payment for a subsequent fiscal year. The PHA shall take any actions required by HUD respecting the excess payment, and shall, upon demand by HUD, promptly remit the excess payment to HUD.

Financial Management

Use of Program Receipts

1. The PHA shall use program receipts in compliance with the U.S. Housing Act of 1937 and all HUD regulations and other requirements.

2. Program receipts may only be used to pay program expenditures, including administrative fees payable to the PHA, and housing assistance payments for covered units. The PHA shall not make any program expenditures, except in accordance with the HUD-approved budget estimate and supporting data.

3. The PHA may use or distribute any earned administrative fee income, including basic fees and incentive fees, for any purpose. However, the PHA may not use or distribute administrative fee income to reimburse compensate or transfer any such income, directly or indirectly, to the owner of covered units, agents or affiliates.

4. If required by HUD, program receipts in excess of current needs shall be promptly remitted to HUD or shall be invested in accordance with HUD requirements.

5. Interest on the investment of program receipts constitutes program receipts.

Depository

1. Unless otherwise required or permitted by HUD, all program receipts shall be promptly deposited with a financial institution selected as

depository by the PHA in accordance with HUD requirements.

2. The PHA shall enter an agreement with the depository institution in the form required by HUD.

3. The PHA may only withdraw deposited program receipts for use in connection with the program in accordance with HUD requirements, including payment of housing assistance payments to owners and payment of ongoing administrative fees to the PHA.

4. The agreement with the depository institution shall provide that if required under a written notice from HUD to the depository:

—The depository shall not permit any withdrawal of deposited funds by the PHA unless withdrawals by the PHA are expressly authorized by written notice from HUD to the depository.

—The depository shall permit withdrawals of deposited funds by HUD.

5. If approved by HUD, the PHA may deposit under the depository agreement monies received or held by the PHA in connection with any contract between the PHA and HUD.

Fidelity Bond Coverage

The PHA shall carry adequate fidelity bond coverage, as required by HUD, to compensate the PHA and HUD for any theft, fraud or other loss of program property resulting from action or non-action by PHA officers or employees or other individuals with administrative functions or responsibility for contract administration under the ACC.

Management Requirements

1. The PHA shall (without any compensation or reimbursement in addition to ongoing administrative fees in accordance with § IV.B of the ACC) perform all PHA obligations under the ACC, and provide all services, materials, equipment, supplies, facilities and professional and technical personnel, needed to carry out all PHA obligations under the ACC, in accordance with sound management practices, Federal statutes, HUD regulations and requirements and the ACC.

2. The PHA shall:

—Maintain telephone service during normal and customary business hours;

—Design and implement procedures and systems sufficient to fulfill all PHA obligations under the ACC.

—Take necessary actions to maintain good relations with owners, residents and their representatives, neighborhood groups, and local government agencies.

—Respond fully and promptly to inquiries from assisted residents, and from Congress or other governmental entities.

Program Records

1. The PHA shall maintain complete and accurate accounts and other records related to operations under the ACC. The records shall be maintained in the form and manner required by HUD, including requirements governing computerized or electronic forms of record-keeping. The accounts and records shall be maintained in a form and manner that permits a speedy and effective audit.

2. The PHA shall maintain complete and accurate accounts and records for each HAP contract.

3. The PHA shall furnish HUD such accounts, records, reports, documents and information at such times, in such form and manner, and accompanied by such supporting data, as required by HUD, including electronic transmission of data as required by HUD.

4. The PHA shall furnish HUD with such reports and information as may be required by HUD to support HUD data systems.

5. HUD and the Comptroller General of the United States, or their duly authorized representatives, shall have full and free access to all PHA offices and facilities, and to all accounts and other records of the PHA that are relevant to PHA operations under the ACC, including the right to examine or audit the records and to make copies. The PHA shall provide any information or assistance needed to access the records.

6. The PHA shall keep accounts and other records for the period required by HUD.

7. The PHA shall comply with Federal audit requirements. The PHA shall engage an independent public accountant to conduct audits that are required by HUD. The PHA shall cooperate with HUD to promptly resolve all audit findings, including audit findings by the HUD Inspector General or the General Accounting Office.

Default by PHA

Occurrence of any of the following events will constitute a default by the PHA in performance of its obligations under the ACC:

1. The PHA has failed to comply with PHA obligations under the ACC, or

2. The PHA has failed to comply with PHA obligations under a HAP contract with an owner, or

3. The PHA has failed to take appropriate action, to HUD's satisfaction or as required or directed by HUD, for

enforcement of the PHA's rights under a HAP contract, or

4. The PHA has made any misrepresentation to HUD of any material fact.

5. HUD's exercise or non-exercise of any right or remedy for PHA default under the ACC is not a waiver of HUD's right to exercise that or any other right or remedy at any time.

6. HUD may terminate the ACC at any time in whole or in part if HUD determines that the PHA has committed any default under the ACC.

7. HUD shall terminate the ACC by written notice to the PHA, which shall state:

—The reason for termination.

—The date of termination.

8. HUD may take title or possession to any or all program property:

—Upon occurrence of a default by the PHA, or

—Upon termination of the ACC in whole or in part, or

—Upon expiration of the ACC term.

Conflict of Interest

1. Neither the PHA, nor any PHA contractor, subcontractor or agent for operations under the ACC, nor any other entity or individual with administrative functions or responsibility concerning contract administration under the ACC, may enter into any contract, subcontract, or other arrangement in connection with contract administration under the ACC in which any covered individual or entity has any direct or indirect interest (including the interest of any immediate family member), while such person is a covered individual or entity or during one year thereafter.

2. "Immediate family member" means the spouse, parent, child, grandparent, grandchild, sister, or brother of any covered individual.

3. "Covered individual or entity" means an individual or entity that is a member of any of the following classes:

—A present or former member, officer or director of the PHA, or other PHA official with administrative functions or responsibility concerning contract administration under the ACC.

—If the PHA is an instrumentality of a governmental body:

—A present or former member, officer or director of such governmental body.

—A present or former member, officer or director of any entity that holds a direct or indirect interest in the instrumentality entity.

—An employee of the PHA.

—A PHA contractor, subcontractor or agent with administrative functions or

responsibility concerning contract administration under the ACC, or any principal or other interested party of such contractor, subcontractor or agent.

—An individual who has administrative functions or responsibility concerning contract administration under the ACC, including an employee of a PHA contractor, subcontractor or agent.

—A public official, member of a governing body, or State or local legislator, who exercises functions or responsibilities concerning contract administration under the ACC.

4. The PHA shall require any covered individual or entity to disclose his, her or its interest or prospective interest to the PHA and HUD.

5. During the term of the ACC, the PHA shall not own or otherwise possess any direct or indirect interest in any covered unit (including a unit owned or possessed, in whole or in part, by an entity substantially controlled by the PHA), and shall not claim or receive any administrative fee for contract administration of a unit in which the PHA has any such interest.

6. HUD may waive the conflict of interest requirements for good cause. Any covered individual or entity for whom a waiver is granted may not execute any contract administration functions or responsibility concerning a HAP contract under which such individual is or may be assisted, or with respect to a HAP contract in which such individual or entity is a party or has any interest.

7. No member of or delegate to the Congress of the United States of

America or resident commissioner shall be admitted to any share or part of the ACC or to any benefits which may arise from it.

Equal Opportunity

1. The PHA shall comply with all equal opportunity requirements imposed by Federal law, including applicable requirements under:

—The Fair Housing Act, 42 U.S.C. 3610–3619 (implementing regulations at 24 CFR parts 100 *et seq.*).

—Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (implementing regulations at 24 CFR part 1).

—The Age Discrimination Act of 1975, 42 U.S.C. 6101–6107 (implementing regulations at 24 CFR part 146).

—Executive Order 11063, Equal Opportunity in Housing (1962), as amended, Executive Order 12259, 46 FR 1253 (1980), as amended, Executive Order 12892, 59 FR 2939 (1994) (implementing regulations at 24 CFR part 107).

—Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (implementing regulations at 24 CFR part 8).

—Title II of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*

2. The PHA must submit a signed certification to HUD of the PHA's intention to comply with the Fair Housing Act, Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, Executive Order 11063, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act.

3. The PHA shall cooperate with HUD in the conducting of compliance reviews and complaint investigations pursuant to applicable civil rights statutes, Executive Orders, and related rules and regulations.

Communication With HUD

The CA shall communicate with HUD through the official or officials designated by HUD.

Exclusion of Third Party Rights

1. A family that is eligible for housing assistance under the ACC is not a party to or a third party beneficiary of the ACC.

2. Nothing in the ACC shall be construed as creating any right of any third party to enforce any provision of the ACC, or to assert any claim against HUD or the PHA.

Public Housing Agency

Signature of authorized representative

Name and official title (print)

Date

Secretary of Housing and Urban Development

Signature of authorized representative

Name and official title (print)

Date

BILLING CODE 4210-27-P

EXHIBIT A
REQUEST FOR PROPOSALS

**EXHIBIT B
COVERED UNITS**

HAP NUMBER	LOCATION	NUMBER OF UNITS
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**EXHIBIT C
FUNDING**

LAST MONTH AND DAY OF PHA FISCAL YEAR:

HAP NUMBER

CONTRACT AUTHORITY

BUDGET AUTHORITY

EXHIBIT D
SERVICE AREA

EXHIBIT E
PHA ADMINISTRATIVE FEES

AMOUNTS

NAME OF FMR AREA:
BASIC FEE (PER UNIT PER MONTH);
MAXIMUM INCENTIVE FEE (PER UNIT PER MONTH):
[This information must be provided for each FMR area
in the service area.]

FEE CALCULATION

[Insert procedure for determination of administrative
fees in accordance with the RFP.]

EXHIBIT F
ACC CONTRACT TERM

BEGINNING OF TERM:

END OF TERM:

[FR Doc. 99-12502 Filed 5-18-99; 8:45 am]
BILLING CODE 4210-27-C



Issue Date
November 12, 2009

Audit Report Number
2010-LA-0001

TO: Carol J. Galante, Deputy Assistant Secretary for Multifamily Housing, HT
Joan S. Hobbs

FROM: Joan S. Hobbs, Regional Inspector General for Audit, Region IX, 9DGA

SUBJECT: HUD's Performance-Based Contract Administration Contract Was Not Cost Effective

HIGHLIGHTS

What We Audited and Why

We audited the U.S. Department of Housing and Urban Development's (HUD) annual contributions contract (contract) for performance-based Section 8 contract administrators (PBCA). We audited this contract because our prior audit of HUD payments to the PBCAs for certain performance standards indicated that HUD was not getting the best value for the dollars spent on the PBCA's services. Our audit objective was to determine whether the performance-based contract administration contract was cost effective.

What We Found

HUD did not always ensure accountability for results and include appropriate, cost-effective controls over its contracts. Consequently, HUD did not obtain the best value for the \$291 million spent in 2008 on contract administration services. In particular, HUD spent \$107 million of this amount on incentive fees. While we could not quantify how much of this amount was excessive, HUD continued to pay incentives for tasks that were included in the PBCAs' basic fees. In addition, at least \$7.6 million may be wasted each year because HUD continues to extend the existing contracts beyond the original contract term of five years.

What We Recommend

We recommend that the Deputy Assistant Secretary for Multifamily Housing perform a detailed analysis to determine the most cost-effective method of performing the contract administration tasks. After selecting the best method, we recommend that the Deputy Assistant Secretary for Multifamily Housing ensure accountability for results and include appropriate, cost-effective controls in its contracts.

For each recommendation without a management decision, please respond and provide status reports in accordance with HUD Handbook 2000.06, REV-3. Please furnish us copies of any correspondence or directives issued because of the audit.

Auditee's Response

We provided our discussion draft report to HUD on September 21, 2009, and it provided its written response on October 26, 2009. HUD officials generally agreed with our audit report but disagreed with portions of our findings and recommendations.

The complete text of the auditee's response, along with our evaluation of that response can be found in appendix B of this report.

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BACKGROUND AND OBJECTIVES

Performance-Based Section 8 Contract Administration

The U.S. Department of Housing and Urban Development (HUD) is authorized to enter into an annual contributions contract (contract) with public housing authorities. The contract provides contract administration services for units receiving project-based rental assistance under Section 8 of the United States Housing Act of 1937.

In May 1999, HUD issued a request for proposals for contract administration services for project-based Section 8 housing assistance payments contracts for each state. During the first year, HUD awarded contracts to only 37 performance-based contract administrators (PBCA) due to a lack of qualified applicants. HUD then issued a request for qualifications to ensure that applicants met the definition of a public housing authority, followed by a request for proposals, and awarded an additional seven contracts between 2001 and 2003. In 2003, HUD issued an invitation for submission of applications (invitation) rather than a request for proposals. HUD awarded the remaining nine contracts between 2003 and 2005 under this solicitation.

Under the request for proposals, the applicant was required to submit both a technical and cost proposal for evaluation. Once a PBCA was chosen, its cost proposal was reviewed to determine the contract rate of payment, sometimes resulting in a decrease in the rate. Under the invitation, the applicant was only required to submit a technical proposal and a proposed rate. No cost proposal was required.

Although not technically required to comply with the Federal Acquisition Regulation, HUD stated that it would use a best value trade-off source selection process for evaluating offers similar to the one defined in Federal Acquisition Regulation 15.101-1. This process is, in essence, a negotiated acquisition method that seeks to select the best technically qualified applicant and then negotiate the best price for the services to be acquired.

HUD entered into performance-based contracts because of a government-wide emphasis for service contracts to be performance based. Performance-based service contracting is based on the development of a performance work statement, which defines the work in measurable, mission-related terms with established performance standards and review methods to ensure quality. A performance-based contract allows for the assessment of disincentives for contractors that are not performing as required and incentives for value-added activities that are not part of the basic contract requirements.

Performance-Based Annual Contributions Contract Requirements

The contract includes 10 core tasks for which the PBCA is responsible:

1. Conduct management and occupancy reviews.
2. Adjust contract rents.
3. Process housing assistance payments contract terminations or expirations.
4. Pay monthly vouchers submitted by Section 8 owners.
5. Respond to health and safety issues.

6. Submit Section 8 budgets, requisitions, revisions, and year-end statements.
7. Submit audits of the PBCA's financial condition.
8. Renew housing assistance payments contracts.
9. Report on PBCA operating plans and progress.
10. Follow up on results of physical inspections of Section 8 projects.

Within the 10 core tasks, there are 16 incentive-based performance standards (performance standards). HUD measures the PBCA's performance for each standard against the acceptable quality level for that standard to determine the administrator's earned administrative fee. It also determines whether disincentive deductions or incentive fees apply.

Compliance with Annual Contributions Contract, HUD Regulations, and Directives

HUD requires the PBCAs to comply with Title 24 of the *Code of Federal Regulations*, including any revisions or additions to the regulations. HUD issues additional program requirements as HUD "directives," including HUD notices, handbooks, and forms. It requires the PBCAs to use program receipts in compliance with the U.S. Housing Act of 1937 and all HUD regulations and other requirements. However, according to the contract, "if required by HUD, program receipts in excess of current needs shall be promptly remitted to HUD or invested in accordance with HUD requirements."

Current Contract Administration Activity and Cost

During 2008, there were 53 PBCAs with contracts costing approximately \$291 million. They perform administration for 15,571 housing assistance payments contracts valued at more than \$6.8 billion. The annual contributions contracts were written for an initial three-year period with two one-year renewal options. On average, in 2008, each of the 15,571 project-based housing assistance payments contracts cost HUD \$18,706 to administer.

Our audit objective was to determine whether the performance-based contract administration contract was cost effective.

RESULTS OF AUDIT

Finding 1: HUD Did Not Always Ensure Accountability for Results and Include Appropriate, Cost-Effective Controls in Its Contracts

HUD did not always ensure accountability for results and include appropriate, cost-effective controls when it outsourced the Section 8 contracts with PBCAs. Specifically, HUD did not (1) adequately control costs, (2) protect resources from potential waste, (3) ensure compliance with laws and regulations, and (4) emphasize quality in performance standards. It also did not (5) require collection of information for decision making, (6) adequately develop the intended result, and (7) ensure that resources were used consistent with its mission. This issue occurred because HUD did not properly consider management accountability requirements when it developed, awarded, and continued to renew 53 annual contributions contracts. Therefore, HUD did not obtain the best value for the \$291 million spent in 2008 on contract administration services. In particular, HUD spent \$107 million of this amount on incentive fees. While we could not quantify how much of this amount was excessive, HUD continued to pay incentives for tasks that were included in the PBCAs' basic fees. In addition, at least \$7.6 million, may be wasted each year because HUD continues to extend the existing contract beyond the original contract term of five years.

HUD Did Not Adequately Control Costs

Office of Management and Budget (OMB) Circular A-123¹ states that federal employees must ensure that government resources are used efficiently and effectively to achieve the intended program results. OMB Circular A-123 also states that management accountability includes the expectation that federal managers are responsible for controlling the costs of federal programs.

HUD's objectives for the Section 8 PBCA initiative included getting the best value for dollars spent on contract administration using performance-based service contracting. However, HUD did not achieve this objective because it did not adequately control costs when it allowed the PBCAs to earn incentive fees for baseline tasks. It also allowed the PBCAs to earn profits in excess of 10 percent of contract price and did not provide for sharing in cost savings when a PBCA rebid its subcontract. Finally, it did not require and review certified cost proposals for all potential PBCAs and did not negotiate with the PBCAs to obtain the lowest price.

Incentive fee - Performance-based service contracting is based on the development of a performance work statement. The work statement defines the work in measurable,

¹We used OMB Circular A-123, dated June 21, 1995, because it was the version applicable at the time of contract development and award. The circular, dated December 21, 2004, strengthened the process for conducting management assessments of the effectiveness of internal controls over financial reporting based on widely recognized internal control standards. The changes have no effect on audit conclusions.

mission-related terms with established performance standards and review methods to ensure quality. Incentives should be used when they will induce better quality performance and may be either positive (incentive fee), negative (disincentive deduction), or a combination of both. They should be applied selectively to motivate contractor efforts that might not otherwise be emphasized and to discourage inefficiency. In a pre-proposal conference held in 1999, HUD stated that it would limit the basic fee to 2 percent of the fair market rent.² The annual contributions contracts between HUD and the PBCAs provided an incentive fee of 1 percent to the PBCA. This fee was included because HUD felt that the tasks were important enough for it to pay extra to obtain services at a level greater than that established as the acceptable quality level.

The contracts provided for incentive fee payments of almost \$107 million in 2008³ for completing work in a timely manner. This amount was almost 37 percent of the total contract fee for all 53 contracts. However, the incentives were actually for baseline tasks. This practice rewarded contract administrators for meeting contract requirements and complying with quantity and timeliness requirements rather than for inducing better quality performance. For fifteen of the sixteen contract requirements there was no requirement that the work performed be accurate, and disincentives could only be applied if the number of on-time submissions fell below the acceptable quality level. Incentive fees were paid for performance that exceeded the acceptable quality level for specific tasks as defined in the contract.

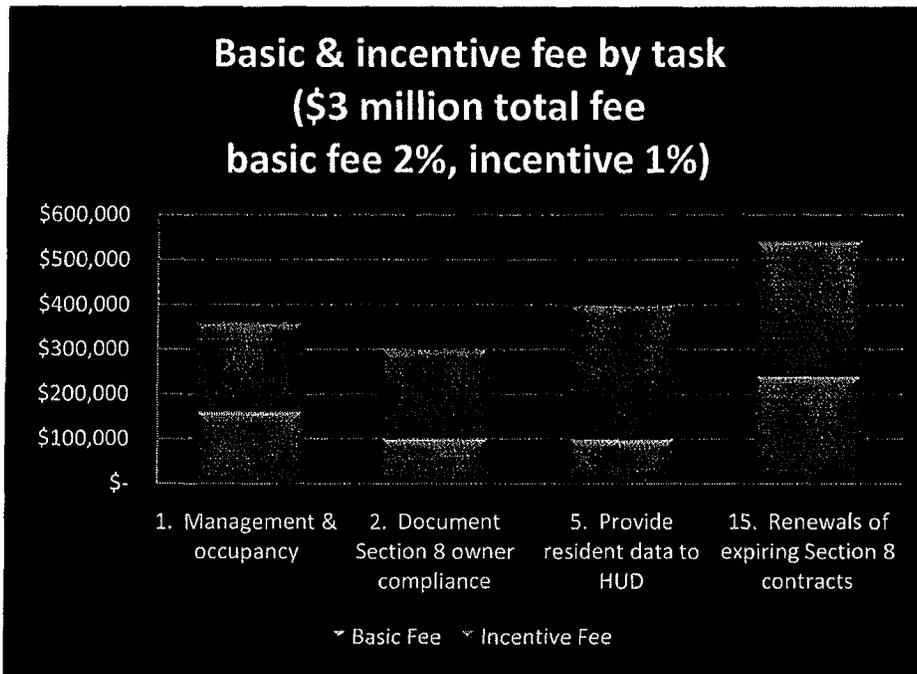
Incentive fees were paid to the PBCAs on 4 of the 16 contract performance standards for:

- Performing management and occupancy reviews,
- Documenting Section 8 owner compliance,
- Providing resident data to HUD, and
- Renewing expiring Section 8 contracts.

PBCAs were highly motivated to meet the contract requirement of these performance standards because the incentive fee was always more than the basic fee, as shown in the graph below.

² The basic fee is calculated based on the number of units under contract per month, multiplied by 2 percent of the fair market rent of a two-bedroom unit in the service area.

³ The total basic and incentives fees earned for all of the PBCAs were obtained from HUD's Line of Credit Control System, also referred to as LOCCS, for government fiscal year 2008.



In January of 2005, HUD informed the contract administrators that it was going to revise the incentive fee and described how the new basic and incentive fee tasks would be weighted. However, HUD did not follow through with its decision.

In early 2007, an independent assessment report stated that the contract contained incentives that were actually baseline tasks. It stated that HUD was rewarding contract administrators for meeting contract requirements and complying with expected outcomes. The assessment also stated that the incentive fee should move to a results-oriented outcome as opposed to a process-based program and should not exceed 15 percent of the total contract. In a later presentation to the PBCAs, HUD agreed and stated that when it revises the contract, the incentive fee would be limited to 15 percent of the total amount available. HUD also stated that the incentive fee would be paid for value-added activities rather than for meeting contract requirements. HUD paid more than \$90.9 million in incentive fees in 2008 in excess of the 15 percent considered reasonable by the independent assessment report. HUD had not revised the contract.

Profits - In the 1999 pre-proposal conference, HUD stated that it would not allow a straight 3 percent rate because it would result in many of the PBCAs receiving a large profit. In a 1999 memorandum requesting final proposals, HUD further stated, “in general, profit margins exceeding 10 percent are generally considered to be unacceptable and contracts of this type usually see rates below that amount.” However, HUD did not follow its own guidance and approved basic fees for one PBCA that included profit in excess of 21 percent. This action resulted in excessive profits of almost \$1.8 million in basic fees in 2008 for that PBCA (see appendix A). We estimate that the total excessive

profit received by this PBCA since the award of the contract was \$5 million.⁴ HUD could not tell us why the excessive profit was allowed.

Rebidding the contracts - HUD did not include a mechanism to rebid the contracts after a set period to make the most of the benefits of competition, lower cost subcontractors, or experience gained by the PBCAs. The initial contract was for a total of five years, yet more than eight years after the first contract was awarded, the contracts continue to be extended. As the result of a state requirement, one of the PBCAs rebid its subcontractor services at a lower cost, resulting in increased profit for the PBCA. As a result, in 2008, this PBCA received approximately \$5.8 million in additional unrestricted profit with no savings to HUD⁵ (see appendix A).

According to the minutes from an August 25, 2004, contract administrators' conference call, HUD received approval from its Office of General Counsel to extend the contracts for an additional 10 years. One of the primary reasons for extending the contracts was to provide for better economies of scale created by the experience gained over the period under contract. In return, HUD wanted the PBCAs to examine their fees to determine their level and whether they needed to stay at that level.

HUD requested information from the PBCAs on the costs necessary to accomplish the provisions of the contract. However, a new contract was never fully developed; therefore, HUD continues to extend the original contracts. As a result, it does not receive the cost/benefits of lower cost subcontractors or the lower cost due to experience gained by the PBCAs. The cost to administer the contracts is \$18,706 per contract. In addition, profits for some of the largest PBCAs ranged from 39 to 67 percent of the total expenses, with one PBCA receiving profits of 198 percent of its total expenses.⁶ This amount includes the incentive fees paid.

Cost proposals not required for all contract awards - The original request for proposals required applicants to provide a cost proposal that certified that the costs proposed were accurate and allowable. HUD also wanted to ensure that it was paying a fair and reasonable price for the work performed. In 2003, HUD published an invitation for submission of applications (invitation). The invitation did not require a cost proposal. As a result, nine contract awards were based solely on the technical submission. According to a HUD official, the decision not to require a cost proposal "...was made for two reasons: (1) based on the previous RFP [request for proposals] process, the majority of the PBCAs bid the full 2 percent and a majority of those PBCAs were selected and (2) both the Offices of Procurement and Multifamily Housing did not have adequate staff resources to review the cost proposals."

⁴ We computed the excessive profit using 2004 through 2008 LOCCS basic fee data and the profit percentage from the cost proposal submitted by the PBCA.

⁵ We computed the cost savings from rebidding the subcontract using the PBCA's 2008 audited financial statements, 2008 official budget request, and its original cost proposal (budgeted information was used when the financial statements were not of sufficient detail to provide the needed information). The cost proposal provided us with the costs of the original subcontractor for that activity level. We compared this amount with the revenues and expenses in the 2008 audited financial statements and official budget and calculated the difference.

⁶ Profits were determined using the PBCA's most current financial statements and official budgetary data.

In addition, since a cost proposal was not required for nine of the PBCAs, they were not required to certify that their proposed costs were accurate, complete, and current. They were also not required to certify that all costs and indirect rates included were allowable. Therefore, HUD did not have reasonable assurance that the rates for the fixed price service contracts were accurate and excluded unallowable costs.

Further, HUD did not have adequate procedures and metrics to evaluate the cost proposals it received. Although HUD had detailed procedures for evaluating the technical proposals, the procedures for evaluating the cost proposals were inadequate. HUD stated that it would review “the supporting pricing information for sufficiency to determine if the offeror has an adequate understanding of the contract requirements.” However, HUD did not develop benchmarks, such as the number of projects recommended per employee. This process would have allowed it to determine whether the costs appeared reasonable and adequate to meet all of the contract responsibilities.

Negotiation of price - HUD used a best value trade-off source selection process for evaluating offers similar to the one defined in Federal Acquisition Regulation 15.101-1. HUD determined that the technical approach, not cost, was the most important factor. Although the contract was not subject to the Federal Acquisition Regulation, HUD should have negotiated with the PBCAs to obtain the lowest price.

HUD placed a 2 percent limit on the basic fee. Contracts were awarded to 30 of the 53 PBCAs with the maximum 2 percent fee, 27 of which were awarded during the first two years of the program. Of the 27 contract awards, 17 had no competition.

HUD Did Not Protect Resources from Waste

OMB Circular A-123 states that resources must be used in such a way as to protect them from waste, fraud, and mismanagement. However, HUD did not protect the funds used under the PBCA initiative from waste when it did not

- Restrict the use of excess revenues,
- Ensure that the administrative fee distribution to the tasks was commensurate with associated workload,
- Require the PBCAs to adopt a risk-based approach to monitoring reviews on low-risk projects,
- Include a mechanism in the contract to change contract elements and associated fees to allow for changes in program requirements, and
- Have an equitable method for paying the PBCAs.

The use of excess unrestricted revenues - The annual contributions contract states, “the [PBCA] may use or distribute any such earned administrative fee income, including basic fees and incentive fees, for any purpose.” Because the incentive fee was significantly higher than the amount necessary to complete the administrative tasks, many PBCAs had profits in excess of the amount originally determined to be acceptable to HUD. These

profits were not restricted by the contract and were in addition to the profit that was included in the cost proposals.

We estimate that since the inception of the contract, almost \$558 million in incentive fees has been paid to the PBCAs.⁷ Our review of 8 of the 53 PBCAs' most recent financial statements disclosed that there was at least \$44.4 million in unrestricted funds on the PBCAs' books.⁸ In addition, although Congress appropriated these funds for contract administration services, since the excessive funds were unrestricted, they could be used for any purpose.

We observed many examples in which PBCA organizations used these excess revenues to fund other activities within the organization or returned them to the parent organization's general fund. One state earmarked the proceeds of this contract to fund community planning and development projects and improve handicapped accessibility in single-family and multifamily dwellings. Another state used the funds to purchase apartments and "leisure time condominiums." In addition, excess revenues were used to repay millions of dollars for violations cited in Office of Inspector General (OIG) audit findings in which HUD-restricted funds were misused. In this case, the unrestricted excess revenues from the PBCA were transferred to the parent organization, a housing agency, to resolve prior violations and close audit recommendations. Sometimes, the revenue from contract administration activities was not separately identified in the financial statements but was commingled so that excess revenues were not apparent.

The contracts produced significantly more profits than those included in the cost proposals. In turn, these profits provided funding for other activities that were not part of the contract's stated purpose.

Administrative fee distribution not commensurate with associated workload - The administrative fee distribution to the performance standards in the contract was not commensurate with the associated workload for each of the performance standards. As a result, the related disincentives were not commensurate with the cost of meeting the performance standard.

We asked the HUD official responsible for this program to explain the basis for the original fee distribution. She stated that "the breakdown of base and administrative fees was based on both anticipated workload and departmental priorities at the time the contract was developed by the drafters..."

In 2004, HUD realized that the basic fee percentages distributed to each performance standard in the contract were not equitable. The responsible HUD official provided us with a revised draft contract that was developed in 2005 but had not been completed. HUD instead hired an independent assessor to review the PBCA activities and the contract.

⁷ The total incentive fees earned for all PBCAs were obtained from LOCCS for government fiscal years 2000 through 2008.

⁸ Unrestricted funds were determined using the PBCAs' most current financial statements.

The independent assessment report received by HUD in February of 2007 discussed the distribution of the basic fee to the performance standards in depth. The contractor performing the assessment surveyed each of the PBCAs to determine whether the performance standards' distribution percentages were commensurate with the costs necessary to meet the performance standards. Several of the PBCAs provided HUD with distribution percentages based on their actual workload.

The independent assessment report stated that

- Four of the performance standards were the most time consuming and critical activities,
- Nine were administrative in nature,
- One was federally mandated, and
- Two were no longer required.

We compared the original contract performance standard distribution with the 2005 revised draft contract and the independent assessment. We determined that HUD's revised draft distribution percentages were similar to the independent contractor's assessment, while the current contract percentages were not, as shown below.

Performance standard	Type	Contract percentage	Assessment percentage
1. Management and occupancy reviews	Mission critical	8%	15%
2. Document Section 8 owner civil rights compliance	Administrative	5%	5%
3. Rental adjustments	Mission critical	5%	10%
4. Owner opt-out and Section 8 contract terminations	Administrative	5%	5%
5. Provide resident data to HUD	Administrative	5%	5%
6. Review, verify, and authorize monthly vouchers	Mission critical	15%	16%
7. Notice of corrective actions	Administrative	3%	5%
8. Income discrepancies	Not required ⁹	3%	0%
9. Life-threatening health and safety	Administrative	7%	5%
10. Non-life-threatening health and safety	Administrative	5%	5%
11. Budgets	Not required ⁹	8%	0%
12. Year-end statement	Administrative	8%	3%
13. PBCA audit report	Federally mandated	3%	3%

⁹ OIG Audit Report Number 2007 SE 0001, HUD Did Not Ensure That Payments to Contract Administrators Were for Work Performed or That Interest Was Earned on Advances and Recovered, dated June 7, 2007 (see follow-up on prior audits).

Performance standard	Type	Contract percentage	Assessment percentage
14. Renewal of expiring Section 8 contracts	Mission critical	12%	15%
15. General reporting	Administrative	5%	5%
16. Monitoring physical inspection results	Administrative	3%	3%

Risk-based approach - It is not cost effective to perform monitoring reviews every year on low-risk projects. We consider low-risk projects as those that have high physical and financial assessment scores, good internal controls, no changes in ownership or management, and low employee turnover. HUD did not obtain the best value for dollars spent when it did not require the PBCAs to use a risk-based approach in performing monitoring reviews.

Before the contract award, HUD was the contract administrator and was required to monitor the Section 8 housing assistance payments contracts. The schedule of management and occupancy reviews was based on yearly risk assessments of the projects, considering experience and physical and financial assessments. However, HUD decided that the PBCAs should perform a 100 percent review of the projects because it was the “right” way to do it. A 100 percent review of projects does not result in the best value for dollars spent on contract administration services.

Contract changes - HUD did not include a mechanism in the contract to change contract elements and associated fees to allow for changes in program requirements.¹⁰ Although the contract allowed for changes in the contract terms, there was nothing in the contract allowing for a change in contract price as a result of changes in terms. Consequently, when three tasks were no longer required, HUD could not reduce the contract price. When other tasks needed to be performed, HUD had no way of amending the contract or the administrative fee. This HUD decision resulted in more than \$35 million being paid in fiscal year 2008 for activities that were no longer required or performed.

In addition, the United States Government Accountability Office (GAO) issued a report on HUD’s “Challenges in Measuring and Reducing Improper Rent Subsidies.”¹¹ The report stated that HUD’s guidance for collecting data on the types and frequency of errors property owners made in determining subsidies was not widely followed. GAO determined that this deficiency occurred because the data collection effort was not mandatory and duplicated some of the PBCAs’ existing procedures. According to a GAO representative, the report did not include a recommendation to revise the contract since HUD stated that it was already rewriting it (see Follow-up on Prior Audits section).

¹⁰ OIG Audit Report Number 2007 SE 0001, HUD Did Not Ensure That Payments to Contract Administrators Were for Work Performed or That Interest Was Earned on Advances and Recovered, dated June 7, 2007 (see follow-up on prior audits).

¹¹ GAO-05-224 Report on HUD Rental Assistance, Progress and Challenges in Measuring and Reducing Improper Rent Subsidies, dated February 2005 (see Follow-up on Prior Audits section).

Method of payment - HUD did not develop an equitable method of paying the PBCAs. It paid the contractors on a per unit basis; however, the contractor was responsible for the housing assistance payments contracts, not individual units. HUD needs to determine a method of payment that considers both the number of housing assistance payments contracts and the number of assisted units so that payment is equitable across all of the PBCAs.

HUD Did Not Ensure Compliance with Laws and Regulations

HUD did not define what activities in the contract could not be contracted out. As a result, some of the PBCAs allowed their subcontractors to sign the housing assistance payments contracts with the owners. This practice made enforceability of the housing assistance payments contracts questionable since the PBCA's subcontractor is technically not an agent of HUD. Consequently, HUD should clarify which activities cannot be performed by subcontractors to ensure that these tasks are performed directly by the PBCA or HUD.

HUD Did Not Emphasize Quality in Performance Standards

The acceptable quality level was the required performance level for each of the 16 performance standards. The basic fee as well as the acceptable quality level for 15 of the 16 contract performance standards was based on timeliness and/or quantity with no consideration of quality. For example, the acceptable quality level for performance standard 1, management and occupancy reviews, was for the contract administrator to submit 95 percent of required reports and data to HUD within 30 days after scheduled completion of the management and occupancy review. The incentive fee would be earned if 100 percent of the required reports were submitted on time. Since the incentive fees are also based on timeliness and/or quantity, the PBCAs were motivated to perform the work in a timely manner without regard to the quality of the work performed. Additionally, since HUD can return the submissions but cannot assess disincentives for incomplete or inaccurate reporting, the risk of incomplete and/or inaccurate reporting increases.

HUD Did Not Require Collection of Information for Decision Making

HUD stated that the outsourcing of contract administration would save the government in excess of \$600 million per year. However, the contract did not include a measurement of results, such as voucher errors (number of errors and amount of error), abatements due to physical inspections, or income errors. Further, HUD did not perform studies to

determine whether outcomes were sufficient in relation to the cost of providing the service, more than \$291 million in 2008.

We asked the Director of Housing Assistance Contract Administration Oversight if there were any tangible benefits due to the PBCA contract activities. The director provided us with the Web site for the Rental Housing Integrity Improvement Project Newsletters from 2003 through 2008. The newsletters indicated that the PBCAs' use of the Enterprise Income Verification system (system) ensured the accuracy of tenant income. However, when we reviewed the newsletters, we determined that the system was not available for the project-based Section 8 program until the latter part of fiscal year 2006. Further, it was the owners' responsibility to certify that the tenants' income was accurate. It was the PBCAs' responsibility to examine tenant documentation when they performed the management and occupancy review. However, since the PBCAs do not have a contractual requirement to track income errors, HUD could not show what tangible benefits were provided.

**HUD Did Not Adequately
Develop the Intended Result**

OMB Circular A-123, states that federal employees must ensure that government resources are used efficiently and effectively to achieve intended program results. Not only were the incentive fees excessive, they should have been used to promote HUD's goals such as self-sufficiency and housing preservation rather than to promote work already included in the basic fee.

HUD had several clear objectives for subsidized housing including the promotion of economic self-sufficiency and independence for elderly and disabled populations. HUD had good specific goals for improving physical quality through the Real Estate Assessment Center but did not have good specific goals for improving the economic self-sufficiency of families receiving project-based assistance.

**HUD Did Not Ensure That
Resources Were Used
Consistent with Its Mission**

Management controls include organization, policies, and procedures used to reasonably ensure that resources are used consistent with the agency mission. As stated above, HUD did not restrict funds, and as a result, excess funds were spent on non-mission-related activities such as repaying OIG audit findings. At the same time, HUD did not adequately monitor the PBCAs. We performed a concurrent audit of HUD's monitoring of the PBCAs, which was issued September 1, 2009. This review indicated that HUD field offices were not able to perform all of the required reviews of PBCA activities due to a lack of available resources.

In addition, HUD's 2009 budget request asserts that the "PBCAs for project-based Section 8 contract administration 'are a vital tool' in the Department's efforts to

transform and improve program administration and monitoring.” In particular, HUD stated that it used PBCAs to

- (1) Reduce payment errors. HUD stated that in conjunction with its Rental Housing Integrity Improvement Project (RHIIP), PBCAs have helped make HUD a leader among federal agencies in reducing improper payments.
- (2) Improve the physical condition of units.
- (3) Ensure timely payment of rents to property owners. HUD stated that PBCAs help to ensure the timely payment of housing assistance to property owners.

However, in relation to the above activities, we determined the following:

- (1) HUD could not tell whether PBCAs were reducing payment errors because the contract did not contain a mechanism to quantify payment errors. Further, PBCAs were not required to participate in RHIIP.
- (2) The PBCAs assumed a follow-up role, but HUD’s Real Estate Assessment Center was the primary organization that helped improve the physical condition of units.
- (3) According to a GAO report, PBCA numbers may not be accurate because the funds are disbursed to the PBCA, rather than directly to the owner. Also, HUD’s data systems do not track the date owners receive payment under these contracts. PBCAs’ timeliness was based on the date the funds were disbursed to the PBCAs. It generally takes PBCAs anywhere from one to five days to pay owners.¹²

HUD Needs to Determine the Most Cost-Effective Method of Obtaining Contract Administration Services

While using PBCAs may have a positive impact on the overall program, it was not the most cost-effective method of delivering the contract administration services. In addition, HUD did not have adequate resources to monitor the PBCAs, and its field offices were not able to perform all of the required reviews of PBCA activities.

OMB Circular A-123 states that federal employees must ensure that government resources are used efficiently and effectively to achieve intended program results. Resources must be used consistent with agency mission and with minimal potential for waste and mismanagement.

Consequently, instead of continuing to renew the same contracts, HUD needs to look at all available options to ensure that it is using the most cost effective method of

¹² GAO-06-57, dated November 2005, Report to Congressional Requesters, Project-Based Rental Assistance, HUD Should Streamline Its Processes to Ensure Timely Housing Assistance Payments.

performing the contract administration tasks and that it complies with management accountability requirements. Depending on the method determined to be most cost effective, HUD needs to build certain management controls into the process for obtaining these services. Three possible options for consideration in determining the most cost-effective method and some courses of action HUD should consider are

Option 1 - HUD as contract administrator. HUD could increase its staffing levels and bring all of the contract administration functions back in house. This option eliminates layers of management and profit that are inherent in the other methods of obtaining these services. Currently, for most of the larger PBCAs, HUD monitors the PBCAs that monitor their subcontractors that monitor their lower tier subcontractors. There is also profit built into each layer.

Further, HUD established its Financial Management Center to handle some aspects of vouchers and housing assistance payments and its Real Estate Assessment Center to handle physical assessments. These centers could handle at least three of the tasks being performed by PBCAs.

In 2007, HUD employees submitted an issue paper, "Contracting Out at HUD."¹³ The paper asked OMB to (1) require that HUD subject current contracts, including the PBCA contracts, to a review in accordance with OMB Circular A-76 or (2) require a small pilot program of no more than 100 full-time-equivalent HUD employees to compare both the cost and quality of the services as provided by HUD employees versus PBCAs. At the employees' request, this paper was provided to a congressional appropriations subcommittee on February 9, 2009. At the time of this report, we are unaware of any decisions made on this issue paper. If HUD selects the option 1 method of contract administration, it needs to ensure that there are adequate resources. It will need sufficient staff and travel funds to adequately perform the contract administration activities.

Option 2 - HUD as contract administrator, contract out some administration activities. As stated above, the outsourcing of contract administration resulted in multiple layers of management and profit. To reduce the management layers and increase control, HUD could be the contract administrator and contract out some activities that could be performed by other entities. This change would allow for outsourcing of administration activities that could be performed by commercial for-profit entities, current PBCAs, other nonprofits, and HUD employees, which would increase competition and decrease overall costs.

If HUD decides that this option is the most cost-effective method for contract administration, it needs to

- Adequately control costs by awarding the contract to the lowest priced qualified applicant. In addition, if there is no competition for any specific geographic locality, it should obtain a cost proposal from the sole applicant and negotiate the rate.

¹³ American Federation of Government Employees, HUD Council 222, Issue Paper, Contracting Out at HUD.

- Include a clause in the new contract stating that any savings generated by the contract administrator as a result of rebidding/renegotiating its subcontracts should be shared with HUD.
- Protect resources from waste by rebidding the contract periodically to ensure that HUD continues to receive the best price for the work performed.
- Follow the Federal Acquisition Regulation in the solicitation process.
- Include quality performance standards in the annual contributions contract.
- Ensure that HUD promotes its goals and focuses on quality and/or other results-oriented outcomes if an incentive fee is made part of the new contract.
- Require collection of information for decision making in the annual contributions contract.
- Adequately develop the intended result.

Option 3 - PBCAs as contract administrator. Continue outsourcing contract administration using a revised annual contributions contract. HUD employees should also be allowed to submit a bid as a PBCA under this option.

If HUD determines that this option is the best course of action, it needs to

- Adequately control costs.
 - Consider using a budget-based system, paying the contractor only what is needed to accomplish the tasks plus a reasonable profit.
 - Require the applicants to submit cost proposals, including subcontract proposals, and negotiate the rates based on consistent requirements.
 - Rebid the contracts periodically to ensure that HUD continues to receive the best price for the work performed.
 - Include a clause in the new contract stating that any savings generated by the contract administrator as a result of rebidding/renegotiating its subcontracts should be shared with HUD.
- Protect resources from waste.
 - Restrict the use of administrative fees earned in excess of expenses to low- and moderate-income housing activities.
 - Ensure that the administration fee distribution to performance standards is commensurate with associated workload.
 - Use a risk-based approach so that HUD receives the best value for dollars spent.
 - Include a method in the new contract for adjusting administrative fees when HUD modifications change or eliminate work for which contract administrators are specifically paid.
 - Use an equitable method of payment that considers the number of projects and units.

- Ensure compliance with laws and regulations.
 - Follow grant requirements and regulations.
 - Clarify which activities cannot be performed by subcontractors to ensure that these tasks are performed directly by the PBCA or HUD.
- Include quality performance standards in the contract.
- Include an incentive fee that promotes HUD goals and focuses on quality and/or other results-oriented outcomes.
- Require collection of information for decision making in the contract.
- Adequately develop the intended result.
- Ensure that resources are used consistent with HUD's mission.

We realize that the above options may not work in all circumstances. Therefore, a combination of the three options could be considered, depending on items such as the geographic area serviced and market conditions. If these options are combined, the courses of action listed above should be similarly combined.

Conclusion

We estimate that HUD will annually pay more than \$90.9 million in incentive fees in excess of the 15 percent level recommended in a 2007 independent assessment report. Another \$7.6 million could be put to better use annually if HUD were to eliminate excessive profits for one PBCA and rebid contracts to take advantage of lower subcontractor costs. HUD knew in 2004 that the contracts cost more than necessary but did not finalize a revised contract. Further, these amounts do not reflect additional unreasonable and unnecessary costs incurred because of

- Lack of adequate competition,
- Inadequate review of cost proposals,
- Multiple layers of profit and monitoring,
- Costs spent on 100 percent management and occupancy reviews when a risk-based approach to these reviews would be more cost effective, and
- Costs incurred by HUD to monitor the PBCAs.

Recommendations

We recommend that the Deputy Assistant Secretary for Multifamily Housing

- 1A. Perform a detailed analysis to determine the most cost-effective option for performing the contract administration tasks and initiate that method.
- 1B. Ensure accountability for results and include appropriate, cost-effective controls so that at least \$7.6 million in funds is put to better use or eliminated.

SCOPE AND METHODOLOGY

Our audit testing included the preliminary analysis and drafting of the requests for proposals from 1997 through 1999. Also, we tested the awarding of contracts from 2000 through 2005 and contract performance from 2000 through 2008. We conducted our work from July 2008 through March of 2009.

To accomplish our audit objectives, we examined HUD records and interviewed officials from HUD's Office of Housing Assistance Contract Administration Oversight in Washington, DC; a HUD contracting official from Denver, Colorado; and individuals who worked on the contract to perform an independent assessment of the annual contributions contract. We obtained information from HUD officials, various HUD OIG audit assignments, a HUD independent consultant, GAO and OMB reports, the Internet, and staff of all 53 PBCAs.

The methodologies used included

- Compiling information to determine the history of the contract administration program.
- Reviewing PBCA technical and cost proposal files.
- Reviewing and compiling financial information obtained from the PBCAs.
- Reviewing and compiling information from the independent assessment.
- Reviewing and compiling information from files archived by the HUD contracting officer who worked on the request for proposals and contract award.
- Reviewing and compiling information from GAO and OMB reports.
- Obtaining and summarizing basic and incentive administrative fees paid to contract administrators for fiscal years 2000 through 2008 from HUD's Line of Credit Control System (LOCCS). Costs have steadily increased since 2000. Therefore, we used 2008 dollars for future projections of costs to be conservative. The actual amount will exceed these amounts based on the rate of increase from 2006 to 2008.
- Calculating the excessive profits for one of the PBCAs from its cost proposal and 2008 revenues from LOCCS.
- Calculating savings due to rebidding the subcontract based on the PBCA cost proposal, 2008 financial statements, and official budgetary information.
- Calculating fees paid for tasks no longer required using 19 percent of the basic fees earned for 2008.
- Calculating unrestricted profits currently reported in 8 of 53 PBCA financial statements.

We relied on computer-processed data contained in LOCCS to estimate our finding's impact. We relied on the HUD financial audit and quality management reviews of grant closeout procedures, which reconcile LOCCS cash drawdown balances to grants. However, we did not perform a detailed assessment of the reliability of the data. We found the data to be reliable for our purposes since the data are used primarily for the purposes of estimating our finding's impact. We included only those transactions that were paid to the PBCAs.

We conducted the audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit

objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

INTERNAL CONTROLS

Internal control is an integral component of an organization's management that provides reasonable assurance that the following objectives are achieved:

- Effectiveness and efficiency of operations,
- Reliability of financial reporting, and
- Compliance with applicable laws and regulations.

Internal controls relate to management's plans, methods, and procedures used to meet its mission, goals, and objectives. They include the processes and procedures for planning, organizing, directing, and controlling program operations as well as the systems for measuring, reporting, and monitoring program performance.

Relevant Internal Controls

We determined that the following internal control was relevant to our audit objective:

- Policies and procedures in place to ensure that the performance-based contract administration contract was cost effective.

We assessed the relevant control identified above.

A significant weakness exists if internal controls do not provide reasonable assurance that the process for planning, organizing, directing, and controlling program operations will meet the organization's objectives.

Significant Weaknesses

Based on our review, we believe that the following items are significant weaknesses:

HUD did not have adequate policies and procedures to ensure

- Compliance with management accountability requirements contained in OMB Circular A-123.
- That outsourcing of contract administration included accountability for results and appropriate cost-effective controls.

FOLLOW-UP ON PRIOR AUDITS

OIG Audit Reports

Audit Report Number 2007 SE 0001, HUD Did Not Ensure That Payments to Contract Administrators Were for Work Performed or That Interest Was Earned on Advances and Recovered

We issued audit report number 2007-SE-0001 on June 7, 2007. We reported that 3 of the 16 performance standards were no longer required or performed. However, HUD continued to pay PBCAs for these services. HUD paid PBCAs \$27.2 million during fiscal year 2006 for the eliminated work. In addition, HUD did not include a mechanism in the contract to change contract elements and associated fees to allow for changes in program requirements. Although the contract allowed for changes in the contract terms, there was nothing in the contract allowing for a change in contract price as a result of changes in terms. Consequently, when three tasks were no longer required, HUD could not reduce the contract price. When other tasks needed to be performed, HUD had no way of amending the contract or the administrative fee. This HUD decision resulted in more than \$35 million for fiscal year 2008 for activities that were no longer required or performed. The report contains two recommendations that are still open as follows:

- 1A. Revise the annual contributions contract when entering or renewing contracts so that it properly reflects the work required.
- 1B. Include in the revised annual contributions contract a method for adjusting administrative fees when HUD modifications change or eliminate work for which contract administrators are specifically paid. This revision would result in about \$27.2 million in annual savings from discontinuing payments for services that are no longer required.

On October 31, 2007, HUD and OIG entered into an agreed-upon management decision with a final action target date of October 31, 2008. The management decision for these recommendations stipulated that HUD would revise its performance-based annual contributions contract when entering or renewing contracts. The revised contract would properly reflect the work required and would include a method for adjusting the contract in the future if or when requirements changed.

On September 19, 2008, we followed up with the Acting Deputy Assistant Secretary for Multifamily Housing to determine whether HUD was still on target to meet the October 31, 2008, deadline. The Acting Deputy stated, "...based on limited staff and travel resources, a working group has not yet been established to revise the contract. We are anticipating forming a working group in the late first quarter of FY [fiscal year] 2009."

We followed up again on January 15, 2009. The Acting Deputy Assistant Secretary for Multifamily Housing stated, "...the Office that handles the PBCA program also handles the funding of the project-based Section 8 program. Over the last 24 months that Office's priority has been dealing with inadequate funding and poor management of that program."

Memorandum Report Number 2009-SE-0801, dated December 8, 2008, HUD's Recent Performance-Based Contract Administration Activity Was Inconsistent with Agreed-Upon Management Decisions between HUD and HUD OIG on Audit Report 2007-SE-0001, dated June 7, 2007

HUD's Office of Multifamily Housing decided not to renew the annual contributions contract for the PBCA for the Southern California geographic service area, which expired in July of 2009. On October 1, 2008, HUD issued an invitation for submission of applications to award a new annual contributions contract. However, HUD used the outdated invitation, which still included the tasks that were no longer required.

On December 8, 2008, we issued a memorandum recommending that HUD immediately rescind the invitation until it revises its contract. The revised contract should include only tasks that are required and a mechanism to adjust workload and commensurate fees as program needs change. It should also include a provision for making adjustments to the contracts in the future if or when requirements further change.

HUD has made initial changes to the contract for the Southern California geographic region to rearrange the fee percentages to reflect current program practices and related contract administration activities. In addition, HUD changed the contract to provide for a one-year term to ensure that HUD will be able to adjust the contract for future changes in contract requirements as contracts expire. Further, HUD will enter into this new contract with the newly selected contract administrator for the Southern California geographic region.

GAO Audit Reports

GAO-05-224 Report on HUD Rental Assistance, Progress and Challenges in Measuring and Reducing Improper Rent Subsidies, dated February 2005

In February of 2005, GAO issued a report on HUD's "Challenges in Measuring and Reducing Improper Rent Subsidies." The report stated that HUD's guidance for collecting data on the types and frequency of errors property owners made in determining subsidies was not widely followed. This deficiency occurred because the data collection effort was not mandatory and duplicated some PBCAs' existing procedures. Although HUD's monitoring guidance called for PBCAs to collect information on improper rent subsidies at each property, compliance with this guidance was limited. The report went on to say that implementing oversight measures could be challenging for HUD. Prior GAO reviews showed that HUD had not always provided adequate oversight of contractors.

HUD concurred with the findings, stating, "HUD is rewriting its PBCA contract requirements and will address GAO's issue that more consistent reporting of monitoring results is needed as a basis for measuring, analyzing, and resolving compliance and performance problems." According to a GAO representative, the report did not include a recommendation to revise the contract since HUD stated that it was already rewriting it.

APPENDICES

Appendix A

SCHEDULE OF FUNDS TO BE PUT TO BETTER USE

Recommendation number	Description	Funds to be put to better use <u>1/</u>
1B	Profits	\$1,780,306
1B	Rebidding the contract	5,820,449
Total		\$7,600,755

1/ Recommendations that funds be put to better use are estimates of amounts that could be used more efficiently if an OIG recommendation is implemented. These amounts include reductions in outlays, deobligation of funds, withdrawal of interest, costs not incurred by implementing recommended improvements, avoidance of unnecessary expenditures noted in pre-award reviews, and any other savings that are specifically identified. The amounts above represent our estimate of savings that could be achieved by eliminating excessive profits on one contract and instituting a mechanism to rebid the contracts after a set period to benefit from reduced subcontractor costs. These amounts reflect only one year of savings although the savings would incur indefinitely if HUD implements our recommendations.

- Profits - We computed the excessive profit using 2008 basic fee data and the profit percentage from the cost proposal submitted by the PBCA that exceeded the 10 percent that HUD determined to be appropriate. (Basic fee divided by one plus proposed profit percentage multiplied by the excessive profit percentage = $\$19,004,018/121.37 * 11.37 = \$1,780,306$)
- Rebidding the contract - We computed the cost savings for rebidding the subcontract using the PBCA's fiscal year 2008 basic fee earned, 2008 official budget request, and its original cost proposal. The cost proposal provided us with the costs of the original subcontractor for that activity level. We compared this amount with the 2008 projected revenues and expenditures from the official budget, adjusted to 2008 actual fees earned, and calculated the difference.

Proposed subcontract costs	Total proposed basic fee	Proposed subcontract percentage	Total 2008 basic fee earned	Estimated 2008 subcontract costs [^]
a	b	c=a/b	d	e=d*c
\$ 11,038,870	\$ 14,382,440	76.8%	\$ 22,405,367	\$ 17,196,660

Budgeted 2008 subcontract costs	Budgeted 2008 basic fee	Budgeted 2008 subcontract percentage	Budgeted subcontract costs [^]	Cost savings for rebidding the subcontract [^]
f	g	h=f/g	i=d*h	j=e-i
\$ 9,170,000	\$ 18,060,250	50.8%	\$ 11,376,211	\$ 5,820,449

[^]Differences are due to rounding.

These amounts do not include any additional savings HUD could achieve by restructuring the contracts and limiting the incentive fee to 15 percent as recommended in a 2007 independent contractor's assessment report. As noted in the finding, the assessment report stated that the contract contained incentives that were actually baseline tasks. This practice rewarded contract administrators for meeting contract requirements and complying with expected outcomes. HUD paid \$107 million in incentive fees, which was more than \$90.9 million in excess of the recommended 15 percent. However, we could not estimate the amount of savings that would accrue since restructuring the contracts could also affect the level of the basic fees. Any increases in the basic fee portion of the contract would offset the reduced incentive fee portion.

Appendix B

AUDITEE COMMENTS AND OIG'S EVALUATION

Ref to OIG Evaluation

Auditee Comments

	  <p>U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT WASHINGTON, DC 20410-8000</p> <p>OFFICE OF HOUSING</p> <p>OCT 26 2009</p> <p>MEMORANDUM FOR: Joan S. Hobbs, Regional Inspector General for Audit, OAGA</p> <p>FROM:  Carol J. Galante, Deputy Assistant Secretary for Multifamily Housing Programs, HT</p> <p>SUBJECT: Draft Audit Report – HUD's Performance-Based Contract Administration Contract was not cost effective</p> <p>This response is in follow-up to your memorandum dated September 21, 2009, transmitting the subject draft report and the subsequent exit conference addressing the same on October 8, 2009. We are providing formal written comments to the draft report for your consideration as provided and discussed at the exit conference.</p> <p>The Office of Multifamily Housing Programs (Office) has carefully reviewed the recommendations set forth in the draft Audit Report. As the Office of Inspector General's (OIG's) objective of this audit which was to determine whether the performance-based contract administration contract was cost effective, it is important to note that this was not the primary focus of this program when it was established. Approximately 10 years ago, the OIG issued an audit that stated that the Office of Multifamily Housing was not adequately monitoring the project-based Section 8 portfolio. To address those concerns, the Office acknowledged that we did not have the in-house resources to conduct the necessary monitoring and developed this program.</p> <p>However, as the program has been in existence over 10 years, the Office concurs with the OIG that there are programmatic changes that need to be made as well as changes to the Annual Contributions Contract to more accurately reflect the current program requirements. As you are aware, we have already initiated these efforts and look forward to receiving future feedback from the OIG as we proceed through this process.</p> <p>The Office does have specific comments on the findings for your review:</p> <p><u>HUD did not adequately control costs:</u></p> <p>The draft report should include the following clarifications of the Performance-Based Annual Contribution Contract (PB-ACC): (1) incentive fees were provided for completing work timely and (2) there was no requirement in the contract that the work performed is accurate and disincentives could only be applied if the number of on-time submissions fell below 95%. Incentive fees are paid for performance that exceeds the acceptable quality level for the specific tasks as defined in the PB-ACC which would require performance to reach 100% completion.</p> <p>www.hud.gov espanol.hud.gov</p>
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Comment 1

Comment 2

Comment 3

Comment 4

In terms of the work quality, the statement of work, Section 3 of Exhibit A, provides a complete description of the work to be performed for each task and the timeframes for submission which varies and impacts the disincentive component. Therefore, the Office believes that the PB-ACC contract provides for both a quantitative and qualitative performance component for each task.

Risk-Based Approach:

The draft report states it is not cost effective to perform monitoring reviews every year on low-risk projects.

Comment 5

The requirement that contractors conduct annual reviews seeks to achieve the same objective as the requirement of the owner to submit annual Financial Statements, to fairly represent the owner's performance to critical stakeholders and ensure that eligible families are receiving program benefits in the appropriate amount. These annual reviews provide the owner, management agent and HUD staff with information on the owner's performance of HUD Project-Based Section 8 program requirements. This is similar to the way that auditors rely on project specific primary and secondary sources of information to complete audits. This annual review is an essential source of information for HUD decision making because it captures information and reports knowledge that is not readily available in any other HUD system or program review.

Comment 6

In addition, the Department has seen a substantial improvement in the physical condition of this portfolio and increased financial performance that has resulted in a lower default rate, in part, due to these annual reviews. However, the Office will look at the potential to mirror the physical inspection protocol (which requires fewer inspections if certain scores are achieved) for the management and occupancy review process.

HUD did not ensure compliance with laws and regulations:

Comment 7

The draft report states HUD did not define nor had an opinion on what activities in the contract could not be contracted out to subcontractors.

An IG auditor requested this information from the Office of General Counsel on January 27, 2009, regarding contracting out inherently governmental activities and HUD's program counsel responded that there is no reason to have a legal opinion since it would assume that HUD's PB-ACC is a procurement contract. The attorney further stated the following:

"It is not procurement as that term is used under the FAR and under A-76. A procurement contract by its nature requires an analysis under section A-76, and this does not. The use of the phrase "inherently governmental" is misleading and mischaracterizes the contract. As I said below the statutory scheme specifically calls for the use of public housing authorities as contract administrators - similar to the use of PHAs under the public housing or other Section 8 programs - procurement is not required in order to make use of PBCAs. If this has not been helpful please further clarify your request in a request for an opinion."

HUD did not emphasize quality in performance standards:

Comment 8

Based on the practical experience now learned with the program being in existence a number of years, the Office agrees with the OIG that although the the incentive fees include quality, they favor timeliness and/or quantity. However, based on the improved performance of the entire portfolio and the actual on-site reviews conducted of the PBCAs, the Office believes that we have received a high degree of quality work.

HUD did not adequately develop the intended result:

Comment 9

The Office does agree that the Department should be promoting goals such as self-sufficiency, housing preservation and independence for elderly and disabled populations. However, unlike the Office of Public and Indian Housing's self-sufficiency program that is part of the public housing program, the project-based Section 8 Housing Assistance Payments (HAP) program does not have a specific program or goal for self-sufficiency for the tenants. Although we encourage owners to promote self-sufficiency at the properties in this portfolio, it has not been a specific goal for the Office of Multifamily Housing Programs. If it was to be considered a goal in the future, it would be a goal for the HUD staff to work with the owners to achieve, not the PBCAs.

HUD needs to determine the most cost effective method of obtaining contract administrative services:

There are three options provided to address cost effective delivery of contract services:

Option 1 recommends reversion of the function of contract administration back to the Department. This option requires significant resources for contract administration oversight and considerable time to implement which would require critical resources including but not limited to hiring authority, travel, internal and external training. It is the Department's view that it is a better use of time and money to build on the lessons of the PBCAs but not go back to a time when the Department was not providing the level of oversight needed.

Comment 10

In addition, the report states that the Department's Financial Management Center could handle some of the tasks performed by the PBCAs. Please be advised that the Financial Management Center no longer services this portfolio for voucher reviews and the Office would have to address the lack of in-house staff to complete these tasks with a very limited budget.

Comment 11

Lastly, in regards to the issue paper, "Contracting Out at HUD," the Department did hold an A-76 competition for a properties that were not included in the PBCA portfolio but that initiative was never funded. In regards to a small pilot program, this Office has no budgetary authority to hire 100 full-time equivalent HUD employees for such a program.

Option 2 recommends outsourcing as an open competition to commercial for-profit entities and follows the Federal Acquisition Requirements (FAR). This option would require a statutory change to the authority granted to PHAs to provide contract administration services for the HAP contracts entered under Section 8 of the United States Housing Act of 1937 42 U.S.C. 1437f, Section 8. Additionally, this option has similar impediments as in Option 1 including resources and

significant implementation delays.

Option 3 could address all of the issues identified by the audit without any structural changes in the manner in which the oversight of the HAP program is being administered through the outsourcing to PBCAs. The principal solution to resolve the audit issues is underway through the revision of the PB-ACC and conducting a new round of competition to administer HAP contracts. The revised PB-ACC scope will include the following:

1. Streamlined both in administration tasks and fee payment to reflect essential tasks and weight the fee structure to reflect commensurate fee payable to workload.
2. Cost proposals will be required of all applicants to assess reasonable fee and associated profit margin.
3. Provide contract language that provides for recompeting the contract periodically to ensure market competition.
4. Include quantity and quality performance standards.
5. Ensure resources are used consistent with HUD's mission.

Comment 12

At this time, the Office believes that pursuing Option 3 is the most beneficial and fruitful way to move forward on this program. Based on our programmatic experiences over the last 10 years, it is important and most cost effective and efficient to build from the foundation of the current program and make the necessary changes to realize cost savings through the recompeting of the PBCA program as follows:

1. Market driven as evidence by recent competitions.
2. Increase in potential applicants.
3. PBCAs operational in various geographical service areas can provide cost efficiencies with economies of scale.
4. Current and potential applicants have experienced personnel and readily available resources to perform the service.
5. Strengthen Departmental monitoring and oversight of the program through provision of revised comprehensive guidance and staff training.

Recommendations:

Page 20, recommendations:

- 1A. Perform a detailed analysis to determine the most cost effective option for performing the contract administration tasks and initiate that method.
- 1B. Ensure accountability for results and include appropriate, cost effective controls so that at least \$7.6 million in funds is put to better use or eliminated.

Comment 12

Option 3 provided above will address both recommendations and resolve the issue of the provision of cost effective outsourcing of contract administration services, cost efficiencies and controls realized through PB-ACC revisions.

We appreciate the thorough review of the program and look forward to a vastly improved and cost efficient system.

If you have any questions, please contact Deborah Lear, Director, Office of Housing Assistance Contract Administration Oversight at (202) 402-2768.

OIG Evaluation of Auditee Comments

- Comment 1 Although the initial intent of the contract was not focused on cost effectiveness, at this time, cost effectiveness is important to prevent waste.
- Comment 2 While we commend HUD for acknowledging changes are needed, HUD first discussed the fact that the contract needed to be revised in August of 2004. In February of 2005, the United States General Accountability Office (GAO) issued a report on HUD's "Challenges in Measuring and Reducing Improper Rent Subsidies." The report stated "HUD is rewriting its PBCA contract requirements and will address GAO's issue that more consistent reporting of monitoring results is needed as a basis for measuring, analyzing, and resolving compliance and performance problems."

More than a year later, HUD hired an independent contractor for an assessment of the program and the existing contract at a cost of about \$360,000. The assessment report stated that it would take approximately six to eight months to revise and finalize a new contract. While HUD received the assessment report February 9, 2007, it still has not drafted a revised contract.

On June 7, 2007, OIG issued an audit report that identified three tasks the PBCAs were no longer required to perform but for which they were paid. HUD stated that it had already begun the process of revising the annual contributions contract.

On September 19, 2008, we followed up with the Acting Deputy Assistant Secretary for Multifamily Housing to determine whether HUD was still on target to meet the October 31, 2008, final action target date for revision of the annual contributions contract. The Acting Deputy stated, "...based on limited staff and travel resources, a working group has not yet been established to revise the contract. We are anticipating forming a working group in the late first quarter of FY [fiscal year] 2009."

We followed up again on January 15, 2009. The Acting Deputy Assistant Secretary for Multifamily Housing stated, "...the Office that handles the PBCA program also handles the funding of the project-based Section 8 program and over the last 24 months that Office's priority has been dealing with inadequate funding and poor management for that program."

The original contract developed and awarded in the early 2000s was initially a three year contract with two renewal years. However, HUD did not begin to develop a new contract until early in 2009 and the contract is now not scheduled to be implemented until January of 2011. While HUD has significantly delayed developing and implementing a new contract the department has unnecessarily paid hundreds of millions of dollars in basic and incentive fees that will hopefully not be paid once the contract is revised.

- Comment 3 We clarified the sections of the report to better explain how quantity and timeliness of the performance standards relates to incentive fees and disincentive deductions.
- Comment 4 Qualitative components are included in the narrative section of Exhibit A to the contract. However, with the exception of task 3, the IBPS Performance Requirements Summary table, in which the calculations for disincentives are explained, does not include qualitative components. The defined acceptable quality level for each of the tasks, with the exception of task 3, is based on quantity or timeliness, not quality.
- Comment 5 We are encouraged by HUD's agreement to consider mirroring the physical inspection protocol implemented by REAC. However, since REAC plays a significant role in the review of physical and financial reviews, we are hesitant to agree that the annual management reviews are the reason for the improvement in the physical condition of the portfolio and increased financial performance. If the physical condition of the portfolio can increase with performing fewer inspections on low risk properties, it makes sense that it would work with management reviews as well.
- Comment 6 We agree that the Department should look at the potential for mirroring the physical inspection protocol which would require fewer management and occupancy reviews if certain scores are achieved.
- Comment 7 We received a formal legal opinion on what inherently governmental activities are contained in the contract from HUD's Office of General Counsel on March 31, 2009. The opinion stated that since executing the housing assistance payment contract is inherently governmental it must be performed by HUD or the PHA, not the subcontractor. Further, if HUD executed the housing assistance payment contract it could contract out all of the contract administrator functions that are not inherently governmental. If the PBCAs continue to act as the contract administrators and sign the housing assistance payment contracts they are ultimately responsible for overall contract administration.
- Comment 8 OIG disagrees. As discussed in comment 4, the defined acceptable quality level for each of the tasks, with the exception of task 3, is based on quantity or timeliness, not quality. In addition, our September 1, 2009 audit reported that HUD did not adequately monitor the PBCAs' performance with respect to the Section 8 Performance-Based Contract Administration initiative. Consequently, HUD lacked assurance that Section 8 rental subsidies were correctly calculated and paid; project-based Section 8 housing assistance payments contracts were administered consistently; and that it received quality work.¹⁴
- Comment 9 According to performance based contracting best practices the contract should include goals for performance and then develop performance objectives to obtain

¹⁴ OIG Report 2009 SE 0003, HUD's Monitoring of the Performance-Based Contract Administrators was inadequate, dated September 1, 2009.

those goals. The current goals in the contract emphasize the quantity and timeliness of PBCA submissions rather than encouraging quality performance. However, one of the goals of the PBCA is to earn one hundred percent of the basic and incentive fees. Consequently, HUD's determination of common goals and objectives across the entire PBCA Program would greatly benefit the program and every affected HUD field office.

- Comment 10 While HUD does not have current budgetary authority, the contracts will not expire until January of 2011. Therefore, HUD should determine what is the most cost effective and efficient method of performing these services and determine if funds could be reappropriated accordingly.

There are current initiatives within the Federal government to bring work previously contracted out back in house. For example in September of 2008 the Internal Revenue Service canceled a multimillion contract and brought 700 jobs back in house. The Department of Homeland Security recently made the decision to bring 3,200 jobs back in house. The Department of Defense comptroller recently stated that outsourced contractor jobs have ended up being more expensive than government workers.

When HUD decided to contract out the administrative of project-based contracts it had little or no choice due to mandatory downsizing within the Federal Government during the Clinton Administration. Further, HUD was just in the process of creating its Real Estate Assessment Center and the Financial Management Center. HUD needs to re-examine its current environment to determine the most efficient and cost effective method of providing the contract administration services.

- Comment 11 Option 2 would not require a statutory change because the tasks that cannot be contracted out would be performed by HUD as discussed in Comment 7 above. Most of the work being performed under the current contract for the largest PBCAs is not performed by the PHA but rather by the commercial subcontractor. In addition, the contract currently being developed could be used for Option 2. HUD would only need to do a minor modification to bring the inherently governmental activities back in house. Additional FTEs could be attained with cost savings on the contracts and HUD has until 2011 to negotiate the change.
- Comment 12 As stated in our report, since Option 3 has multiple layers of management and profit it may not result in the most cost effective and efficient contract. As recommended, HUD should perform a detailed analysis to determine what option is the most cost effective rather than selecting an option it wishes to perform without any analysis of the cost. This will ensure that the method selected is the most cost effective.

Appendix C

CRITERIA

- A. OMB Circular A-123, attachment I. Introduction. The proper stewardship of Federal resources is a fundamental responsibility of agency managers and staff. Federal employees must ensure that government resources are used efficiently and effectively to achieve intended program results. Resources must be used consistent with agency mission, in compliance with law and regulation, and with minimal potential for waste, fraud, and mismanagement.
- B. Federal Acquisition Regulation 15.000. This part prescribes policies and procedures governing competitive and noncompetitive negotiated acquisitions. A contract awarded using other than sealed bidding procedures is a negotiated contract.
- C. Federal Acquisition Regulation 15.101. Best value continuum. An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.
- D. Federal Acquisition Regulation 15.101-1. Tradeoff process. (a) A tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. (b) When using a tradeoff process, the following apply: (1) All evaluation factors and significant subfactors that will affect contract award and their relative importance shall be clearly stated in the solicitation; and (2) The solicitation shall state whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price. (c) This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal.

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May 22, 2012

By Electronic Delivery

**CICA STAY AND EXTENSION OF
THE CLOSING DATE REQUESTED**

Lynn Gibson
General Counsel
United States Government Accountability Office
Office of the General Counsel
441 G Street, N.W.
Washington, D.C. 20548

Attn: Procurement Law Control Group
Room 1103

**Re: Protest of National Housing Compliance
of the U.S. Department of Housing And Urban Development's
Notice of Funding Availability (NOFA), Docket No. FR-5600-N-33¹**

Dear Ms. Gibson:

In accordance with the Bid Protest Procedures of the United States Government Accountability Office ("GAO"), 4 C.F.R § 21 *et seq.*, National Housing Compliance, 1975 Lakeside Parkway, Suite 310, Tucker, GA 30084-5860 ("NHC"), hereby protests the terms of the United States Department of Housing and Urban Development's ("HUD" or "Agency") Notice of Funding Availability ("NOFA"), Docket No. FR-5600-N-33. With this NOFA, HUD is soliciting to award what it characterizes as cooperative agreements for Performance-Based

¹ Assisted Housing Services Corporation, North Tampa Housing Development Corporation, and Jefferson County Assisted Housing Corporation have filed protests challenging HUD's NOFA, which have been docketed as B-406738, B-406783.2, and B-406738.3, respectively. National Housing Compliance asks that its protest be consolidated with these protests and assigned to the same GAO attorney.

Lynn Gibson
May 22, 2012
Page 23

8. The Source Selection Evaluation Plan or any other documents or records relating to the approach to be used by the HUD to evaluate proposals and/or to select a proposal for award pursuant to the instant procurement.

9. All evaluation handbooks, manuals, guidebooks, or similar documents utilized by any HUD employee or consultant with respect to the instant procurement.

The above listed documents are relevant to the protest issues set forth above.

Specifically, the documents requested are necessary to demonstrate that HUD is in violation of procurement law through its use of a non-competitive cooperative agreement.

The above listed documents should be furnished to GAO with the administrative report required by 4 CFR § 21.3. Also, pursuant to 4 CFR § 21.3, such documents should be furnished to protester's counsel.

VI. CONCLUSION AND REQUESTED RELIEF

The record shows that HUD is procuring a contract for performance-based contract administrator services for HUD's direct benefit. The history of the program and the statutory and regulatory overlay support this conclusion. HUD has made little or no attempt to meaningfully explain or defend its position that it has authority to award these services under a cooperative agreement. Equally troublesome, HUD is issuing the NOFA with restrictive provisions which are anti-competitive and promote sole source awards in contravention of the applicable federal procurement rules mandating full and open competition. HUD's approach simply circumvents meaningful competition.

On behalf of NHC, we respectfully request a ruling by the Comptroller General in this matter. The specific relief requested is for GAO to recommend that HUD cancel the NOFA,

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Invitation for Submission of Applications: Contract Administrators for
Project-Based Section 8 Housing Assistance Payments (HAP) Contracts

United States Department of Housing and Urban Development

Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts

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1. INTRODUCTION

The U.S. Department of Housing and Urban Development (HUD), Office of Housing Assistance Contract Administration Oversight (HACAO), is issuing this “Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts” (Invitation) for the purpose of receiving applications from Public Housing Agencies (PHA) to administer the Project Based Section 8 Housing Assistance Payments (HAP) Contracts as Performance-Based Contract Administrators (PBCA). The Invitation is issued pursuant to section 8 of the United States Housing Act of 1937 (1937 Act), 42 U.S.C. 1437f (Section 8). HUD will select one PBCA for each of the fifty United States, the District of Columbia, the United States Virgin Islands, and the Commonwealth of Puerto Rico (State). The successful applicant for each State, except for the State of California, will enter into a single Performance-Based Annual Contributions Contract (ACC) with HUD effective October 1, 2011, to administer HAP Contracts with owners of Section 8 projects in the State. The successful applicant for the State of California will enter into two ACCs: one for Northern California, which will be under the jurisdiction of the HUD San Francisco Hub Office, and one for Southern California, which will be under the jurisdiction of the HUD Los Angeles Hub Office. HUD will consider Applications submitted by joint ventures and other public/private partnerships between PHAs and other public or private for-profit or non-profit entities.

After execution of the ACC, HUD will assign existing HAP Contracts, as defined in the ACC, to the PBCA. Throughout the ACC term, HUD may make further assignments of HAP Contracts to the PBCA and may withdraw HAP Contracts as necessary.

HUD seeks through this Invitation to achieve three (3) programmatic and three (3) administrative objectives.

Programmatic objectives:

- Calculate and pay Section 8 rental subsidies correctly;
- Administer project-based Section 8 HAP Contracts consistently; and
- Take actions to ensure owners fulfill their obligations to provide decent, safe, and sanitary housing for eligible families.

Administrative objectives:

- Execute an ACC only with a PHA that has the qualifications and expertise to oversee and manage affordable housing, and that has the capacity and the necessary personnel and other resources to perform the required contract administration services;
- Obtain the best value for dollars spent for contract administration services; and

- Encourage the development of joint ventures and/or partnerships for contract administration services to obtain the benefit of the best practices of both public and private sectors.

2. OVERVIEW OF CONTRACT ADMINISTRATOR'S RESPONSIBILITIES

The PBCA will administer the HAP Contracts that HUD assigns during the ACC term. In the case of HAP Contracts that expire during the ACC term, the PBCA will enter into a renewal contract with Section 8 owners, as appropriate, in accordance with the Multifamily Assisted Housing Reform and Affordability Act of 1997 (“MAHRA”), HUD’s implementing regulations, and the provisions of the Section 8 Renewal Guide. The PBCA will monitor each property owner and ensure compliance with the terms of the HAP Contract. In discharging these and all other responsibilities under the ACC, the PBCA will comply, and will ensure compliance by owners, with Federal law, HUD’s implementing regulations, the Section 8 Renewal Guide, and all other requirements and guidance that HUD deems applicable, as they exist at the time of ACC execution and as amended from time to time during the ACC term.

The ACC will identify the State in which the PBCA is required to provide HAP Contract administration services. Exhibit B of the ACC will identify the HAP Contracts that HUD assigns to the PHA for servicing. HUD has the authority under the ACC unilaterally to amend Exhibit B of the ACC to add or withdraw HAP contracts from time to time that the PBCA is responsible for administering and, upon exercising this authority, will provide the PBCA with written notice of the revised Exhibit B.

Exhibit A of the ACC contains the Performance Based Tasks (PBTs) that the PHA must perform.

The principal tasks of the PHA under the ACC include, but are not limited to, the following:

- Monitoring compliance by project owners with their obligation to provide decent, safe, and sanitary housing to assisted residents;
- Paying property owners accurately and timely;
- Accurately and timely submitting required documents to HUD (or a HUD designated agent); and
- Complying with applicable Federal law and HUD regulations and requirements, as they exist at the time of ACC execution and as amended from time to time.

2.1 Reasoned Legal Opinion

HUD requires the submission of a Reasoned Legal Opinion (RLO) to determine whether an applicant is legally qualified under this Invitation to serve as PBCA. The RLO must state the full legal name of the applicant (i.e., the entity that, if selected, would enter into an ACC with HUD) and the type of PHA (see Section 2.3, “PHA Type”) that the entity purports to be. If an entity applies to serve as PBCA for more than one State, a separate RLO must be submitted in support

of each application. The RLO must state that the signatory is licensed to practice law in the State under the laws of which the PHA was formed. It should be succinct but must contain a reasoned (i.e., non-conclusory) analysis establishing that each of the applicable requirements in Section 2.1 through 2.6 of this Invitation is satisfied. It must include proper citation to any codified provisions on which the analysis relies. A legible copy of each such provision, other than any provision of the 1937 Act, must be included with the RLO.

HUD will respond in writing by indicating that it has determined that the applicant is legally qualified or, if not, by identifying any legal deficiencies in the RLO. The attorney representing the applicant will be permitted to submit a single Follow-Up Letter (FUL) to cure any such deficiencies. The attorney who signs the FUL may be a different attorney from the one who signs the RLO as long as he or she is licensed to practice law in the State under the laws of which the PHA was formed and the FUL states so. HUD must receive the FUL no later than seven (7) calendar days of the date of HUD's response. If HUD does not receive a FUL that cures all deficiencies by 5:00 p.m. Eastern Standard Time by the date on which it is due, the application will be disqualified.

If the applicant proposes to serve as PBCA in a State other than the State under the laws of which it was formed, a Supplemental Letter (SL) must be enclosed with the RLO. The SL must state that the signatory is licensed to practice law in the State in which the applicant proposes to serve as PBCA. It should be succinct but must contain a reasoned (i.e., non-conclusory) analysis establishing that the laws of the State in which the applicant proposes to serve as PBCA do not prohibit the applicant from acting as a PHA throughout the entire State. The SL must contain a clear statement that such laws neither explicitly nor implicitly prohibit the applicant from acting as a PHA throughout the entire State. See Section 2.6.

The RLO, any FUL, and any SL must conclude with a statement explicitly certifying that all representations that they contain are true and correct. If, at any time after execution of any ACC with the applicant, HUD determines that any material representation in the RLO, any FUL, and/or any SL on which HUD relied in evaluating the applicant's legal qualifications is false, such determination shall constitute a basis for HUD to rescind the ACC. It is therefore crucial that the RLO, any FUL, and any SL accurately and clearly represent the facts and the governing law and that the legal conclusions that they contain be sound.

All determinations regarding legal eligibility rest solely with HUD and are final.

2.2. Statutory Definition of "Public Housing Agency" and Related Statutory Definitions

A public housing agency is a creature of State law. Its authority and power to act derive from the State law(s) under which it was created. "Public housing agency" is also a defined term in the 1937 Act, which authorizes HUD to enter into ACCs with "public housing agencies," as "public housing agency" (PHA) is defined in section 3(b)(6)(A) of the 1937 Act, for the administration of Section 8 HAP Contracts. Before entering into an ACC for this purpose, HUD must ascertain that the entity satisfies the 1937 Act's definition of PHA. Section 3(b)(6)(A) of the 1937 Act, which applies to the project-based section 8 program, provides in relevant part, "the term 'public

housing agency' means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." The 1937 Act further defines terms that appear within the foregoing definition.

For example, section 3(b)(1) provides, "The term 'public housing' means low-income housing, and all necessary appurtenances thereto, assisted under this Act other than under section 8. The term 'public housing' includes dwelling units in a mixed finance project that are assisted by a public housing agency with capital or operating assistance." Section 3(b)(1) further provides, "The term 'low-income housing' means decent, safe, and sanitary dwellings assisted under this Act."

Section 3(c) provides as follows:

When used in reference to public housing:

(1) The term "development" means any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-income housing project . . . [and]

(2) The term "operation" means any or all undertakings appropriate for management, operation, services, maintenance, security (including the cost of security personnel), or financing in connection with a low-income housing project. The term also means the financing of tenant programs and services for families residing in low-income housing projects, particularly where there is maximum feasible participation of the tenants in the development and operation of such tenant programs and services.

2.3. PHA Type

To qualify as a PHA that may enter into an ACC with HUD, the RLO must identify the entity as one of the following:

A general or special purpose governmental entity: Such governmental entities include a State, municipality, housing authority, or governmental public benefit corporation;

A multi-state, interstate or regional governmental entity; or

An instrumentality entity: An instrumentality entity must be created directly by "any State, county, municipality, or other governmental entity or public body." Submission of an RLO on behalf of an entity that itself was created by one or more instrumentalities of a governmental entity or public body will result in the disqualification of the Application. The instrumentality entity may be a for-profit or a not-for-profit entity. An instrumentality entity must be fully formed and in legal existence under applicable laws

on the date on which the RLO is signed. A copy of the corporate charter and all other organizational documents in final form (e.g., duly executed and filed with all appropriate State and/or other authorities, as may be required by law) that meet all requirements of this Invitation must be enclosed with the RLO.

In concept, the required elements of the RLO are very similar whether the applicant is a governmental entity or an instrumentality entity. In practice, however, more steps are required to establish the legal eligibility of an instrumentality entity (see Section 2.5).

2.4 Required Elements of Reasoned Legal Opinion for a Governmental Entity

In the case of a governmental entity, the RLO must establish that the entity:

- (1) Was created under a statute that confers powers that qualify the entity as a PHA, as defined in the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and state that such power is within the scope of powers explicitly conferred;
- (2) Was created under a statute that confers powers that include the power to administer project-based section 8 HAP Contracts, including the power to perform each of the eight PBTs identified in Exhibit A, Section 3, of the ACC. Although the statute may not explicitly enumerate such powers, the attorney signing the RLO must conclude and state that all such powers are within the scope of those explicitly conferred;
- (3) Was created under a statute that explicitly authorizes the entity to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences a legislative intent for such entity to have such authority; and
- (4) Has registered to do business in the State in which the entity proposes to serve as PBCA to the extent that the laws of such State require it to do so. If such laws do not require it to do so, the RLO must state this.

2.5 Required Elements of Reasoned Legal Opinion for an Instrumentality Entity

In the case of an instrumentality entity, the RLO must establish that:

- (1) The parent entity (or, in the case of multiple parent entities, each such entity) and the instrumentality entity were created under laws that confer powers that qualify the parent entity (or each such entity) and the instrumentality entity as a PHA, as defined in the 1937 Act. Specifically, the RLO must establish that:
 - (a) The parent entity (or each such entity) was created under a statute that confers powers that qualify the parent entity (or each such entity) as a PHA, as defined in the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of

section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and state that such power is within the scope of powers explicitly conferred; and

(b) The instrumentality entity was created under a statute (e.g., a State non-profit corporation law) that confers powers that qualify the instrumentality entity as a PHA, as defined in the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and state that such power is within the scope of powers explicitly conferred;

(2) The corporate charter or other organizational documents of the instrumentality entity explicitly provide that it is authorized “to engage in or assist in the development or operation of public housing,” within the meaning of the definition of PHA in the 1937 Act, with citation to such specific provision(s);

(3) The corporate charter or other organizational documents of the instrumentality entity explicitly confer the right on the parent entity (or on each such entity) to:

(a) approve the corporate charter or other organizational documents of the instrumentality, including the right to approve any amendments, with citation to such specific provision(s);

(b) authorize the instrumentality entity to execute the ACC with HUD; with citation to such specific provision(s);

(c) control the operation of the instrumentality, with specific identification of the means by which the corporate charter or other organizational documents authorize the parent entity (or entities) to exert such control (e.g., by requiring that the Parent Entity hold a majority of the shares of the instrumentality entity, have a majority vote on the Board of Directors of the instrumentality entity, etc.), with citation to the specific provision(s) that confer such authority; and

(d) take title to all property, real and/or personal, held by the instrumentality entity upon dissolution or termination of the instrumentality entity, with citation to such specific provision(s);

(4) The instrumentality entity was created under a statute that confers powers that include the power to administer project-based section 8 HAP Contracts, including the power to perform each of the eight PBTs identified in Exhibit A, Section 3, of the ACC. Although the statute may not explicitly enumerate such powers, the attorney signing the RLO must conclude and state that all such powers are within the scope of those explicitly conferred;

(5) The corporate charter or other organizational documents explicitly authorize the instrumentality to administer project-based section 8 HAP Contracts, with citation to such specific provision(s);

(6) The instrumentality entity was created under a statute that explicitly authorizes entities created there under to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences a legislative intent for such entities to have such authority;

(7) The corporate charter or other organizational documents explicitly authorize the instrumentality entity to operate throughout the entire State in which the entity proposes to serve as PBCA, with citation to such specific provision(s); and

(8) The instrumentality entity has registered to do business in the State in which the entity proposes to serve as PBCA to the extent that the laws of such State require it to do so. If such laws do not require it to do so, the RLO must state this.

2.6 Entities Proposing to Serve as PBCA in a State Other than the State under the Laws of Which the Entity was Formed

As stated in Section 2.1, if an applicant proposes to serve as PBCA in a State other than the State under the laws of which it was formed, an SL must be enclosed with the RLO. The SL must state that the signatory is licensed to practice law in the State in which the applicant proposes to serve as PBCA. It should be succinct but must contain a reasoned (i.e., non-conclusory) analysis establishing that the laws of the State in which the applicant proposes to serve as PBCA do not prohibit it from acting as a PHA throughout the entire State. The SL must contain a clear statement that such laws neither explicitly nor implicitly prohibit the applicant from acting as a PHA throughout the entire State. A legible copy of any codified provision(s) on which the analysis in the SL relies, other than any provision of the 1937 Act, must be enclosed.

As noted in Section 2.1, any SL, like the RLO and any FUL, must conclude with a statement explicitly certifying that the representations that it contains are true and correct. If, at any time after execution of any ACC with the applicant, HUD determines that any material representation on which HUD relied in evaluating the legal qualifications of the applicant, including the representations that the SL contains, is false, such determination shall be the basis for HUD to rescind the ACC.

3. GUIDANCE FOR SUBMITTING APPLICATIONS

3.1. Service Area Designation

HUD will accept Applications to provide contract administration services by "State," which is defined in the ACC as one of the fifty United States, the District of Columbia, the United States Virgin Islands, or the Commonwealth of Puerto Rico. Entities applying to serve as PBCA in more than one State must submit a separate Application for each State for which it applies.

3.2. Limitation on the Total Number of Covered Units Administered by the PHA and Serviced by Certain Subcontractors

A PHA may submit Applications for multiple States under this Invitation. The total number of Covered Units for all Applications submitted by a PHA shall not exceed thirty-three (33) percent

of the total number of units in the Portfolio of All Active Project-Based Section 8 Contracts as published by HUD at the following Uniform Record Locator (URL): <http://www.hud.gov/offices/hsg/mfh/rfp/sec8rfp.cfm>. If the sum of the total number of Covered Units for all Applications exceeds thirty-three (33) percent, all Applications submitted by the PHA will be rejected.

Certain sub-contractors may be engaged by PHAs to perform services under separate Applications to this Invitation where the sub-contractor provides fifty (50) percent or more of the full-time equivalent (FTE) employees required to perform PBT numbers one (1) through six (6) as specified in Exhibit A, Section 3, of the ACC. The total number of Covered Units for Applications for which such a sub-contractor is engaged shall not exceed thirty-three (33) percent of the total number of units in the Portfolio of All Active Project-Based Section 8 Contracts. If the sum of the total number of Covered Units for such a sub-contractor exceeds this unit limitation, the Applications for all PHAs engaging that sub-contractor will be rejected.

3.3. Application Contents, Organization, and Digital File Requirements

This section sets forth the contents of the application and the procedures applicants must follow to submit applications in response to this Invitation. Failure to comply with these procedures may result in the applicant being disqualified from award consideration.

Each application submitted in response to this Invitation shall include the following documents, each of which is described below.

1. Application Certifications, including Full-Time Equivalent Certification and, if applicable, Sub-Contractor Certification
2. Capability Statement
3. Technical Approach
4. Quality Control Plan
5. Reasoned Legal Opinion, including Supplemental Letter, if applicable
6. Disaster Plan, including Disaster Plan Certification

3.3.1. Application Certifications

The Application Certifications portion of the Application shall contain the information set forth in Section 3.3.1.1, PHA Certification; Section 3.3.1.2, Full-Time Equivalent (FTE) Certification; and 3.3.1.3, Sub-Contractor Certification, if the PHA has entered into an agreement with a sub-contractor for services that provide fifty (50) percent or more of the FTE employees required to perform PBTs one (1) through six (6) as detailed in the FTE Certification.

The Application Certifications portion of the Application shall be submitted as a Portable Document Format (PDF) file using this file name format: Two Letter State Postal Code_PHA Complete Name_APPCERT.

3.3.1.1. PHA Certification

The Executive Director of the PHA must certify that the information provided in the Application is true and correct. The PHA Certification portion shall be on PHA letterhead. Each page must be printed on a single side of an 8 1/2 x 11 sheet of paper using a standard 12-point font.

The PHA Certification shall include:

1. Name of Entity:
2. Street Address:
3. City, State, Zip Code:
4. Contact Name and Title:
5. Contact Telephone Number:
6. Contact E-mail Address:
7. This Application is for the State of:
8. The proposed Basic Administrative Fee Percentage for this State is (not to exceed 2.5%):
9. List all States, beginning with the State for which this Application is submitted, for which the PHA is submitting an Application under this Invitation. For each State, specify the number of units for active Section 8 Project-Based Contracts in each State, and the total number of units for active Section 8 Project Based Contracts for all listed States.
10. The percentage of total number of units from item nine (9) above divided by the total number of units for active Section 8 Project-Based Contracts in the Portfolio of Section 8 Project-Based Contracts (not to exceed 33%) is:

11. PHA Certification

I declare that the information in this Application is true and correct.

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

3.3.1.2. Full-Time Equivalent (FTE) Certification

The PHA shall submit a FTE Certification that identifies the FTEs required to perform PBTs numbers one (1) through six (6) as specified in Exhibit A of the ACC for the first twelve (12) month period of the ACC Term. For each PBT, identify the positions by title responsible for managing, supervision, and performing each PBT. Include the FTEs for PHA and sub-contractor employees. Only include sub-contractors that contract directly with the PHA. Do not include sub-contractors of sub-contractors. One (1.00) FTE is defined as 2,080 work hours per year. The FTE Certification shall be in the following format with the actual number of Sub-contractors, if any, included in the table:

Identify the Sub-contractor(s) enumerated in the columns:

Sub-contractor #1: Name of Sub-contractor

Sub-contractor #2: Name of Sub-contractor

Sub-contractor #3: Name of Sub-contractor

Sub-contractor #4: Name of Sub-contractor

Add additional Sub-contractors to list and add additional columns to the table as required.

Positions and Full-Time Equivalents (FTEs)	Total FTEs	PHA FTEs	Sub-contractor #1 FTEs	Sub-contractor #2 FTEs	Sub-contractor #3 FTEs	Sub-contractor #4 FTEs
PBT #1						
Management and Occupancy Reviews						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #1 Total	0.00	0.00	0.00	0.00	0.00	0.00
PBT #2 Adjust Contract Rents						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #2 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #3 Review and
Pay Monthly
Vouchers

Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #3 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #4 Renew
HAP Contracts and
Process
Terminations or
Expirations

Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #4 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #5 Tenant
Health, Safety, and
Maintenance Issues

Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #5 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #6
Administration -
Monthly and
Quarterly Reports

Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #6 Total	0.00	0.00	0.00	0.00	0.00	0.00

GRAND TOTAL

FTEs 00.00 0.00 0.00 0.00 0.00 0.00

**PERCENTAGE OF
GRAND TOTAL**

FTEs 100.0% 0.0% 0.0% 0.0% 0.0% 0.0%

3.3.1.3. Sub-Contractor Certification

If the PHA is contracting with a sub-contractor for services that provide fifty (50) percent or more of the FTEs employees required to perform PBTs Numbers one (1) through six (6) as detailed in the FTE Certification, an authorized officer of the sub-contractor must complete a Sub-Contractor Certification and certify that the information provided in this Application relative to its services and performance is true and correct. The Sub-Contractor Certification shall be on sub-contractor letterhead. Each page must be printed on a single side of an 8 1/2 x 11 sheet of paper using a standard 12-point font. The Sub-contractor Certification shall be enclosed in the

PHA's Application Certifications in one PDF file using the file name format specified in Section 3.3.1.

The Sub-Contractor Certification shall include:

1. Subcontractor Name:
2. Street Address:
3. City, State, Zip Code:
4. Contact Name and Title:
5. Contact Telephone Number:
6. Contact E-mail Address:
7. List all States, beginning with the State and PHA for which this Application is submitted, that the sub-contractor has entered into an agreement with a PHA submitting an Application to this Invitation to provide fifty (50) percent or more of the FTE employees required to perform Performance-Based Tasks one (1) through six (6) as specified in Exhibit A, Section 3, of the ACC. The list shall include the Name of the State, Name of PHA, number of active Section 8 Project-Based Contracts for each State and the total number units for all active Section 8 Project-Based Contracts for all listed States:
8. The percentage of total number of units for all States from item seven (7) above divided by the total number of units for active Section 8 Project-Based Contracts in the Portfolio of Section 8 Project-Based Contracts (not to exceed 33%) is:
9. Sub-Contractor Certification

I declare that the information in this Application related to sub-contractor services and performance is true and correct.

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

3.3.2. Capability Statement

The Capability Statement portion of the Application should exhibit the applicant's capability to perform the ACC and the PBTs described in Exhibit A, Section 3, of the ACC. The Capability Statement is a factor for award. Section 4, Factors for Award, details the six (6) "Elements" that the applicant must address in the Capability Statement.

The applicant is to provide a narrative response for each of the elements. The applicant's responses must be in the same order and numbered as the elements appear. Only information submitted for a specific element will be considered for the corresponding element for which it was written.

The Capability Statement portion of the application may not exceed ten (10) pages, excluding the cover sheet and contact information for the references identified in Element 2 and Element 3. Applicants exceeding the allowable page limits will only have the number of pages specified evaluated. The cover sheet shall specify the title of the document, identify the PHA submitting the document, and identify the State for which the document is being submitted. Each page must be printed on a single side of an 8 1/2 x 11 sheet of paper using a standard 12-point font.

One copy of the Capability Statement of the Application shall be submitted as aPDF file using this file name format: Two Letter State Postal Code_PHA Complete Name_CAPABILITY.

3.3.3. Technical Approach

The Technical Approach portion of the Application should exhibit the applicant's technical ability to perform the ACC and the PBTs described in Exhibit A of the ACC. The Technical Approach is a factor for award. Section 4, Factors for Award, details the five (5) "Elements" that the applicant must address in the Technical Approach.

The applicant is to provide a narrative response for each of the elements. The applicant's responses must be in the same order and numbered as the elements appear. Only information submitted for a specific element will be considered for the corresponding element for which it was written

The Technical Approach portion of the Application may not exceed thirty (30) pages, excluding a cover sheet and table of contents. Applicants exceeding the allowable page limits will only have the number of pages specified evaluated. The cover sheet shall specify the title of the document, identify the PHA submitting the document, and identify the State for which the document is being submitted. Each page must be printed on a single side of an 8 1/2 x 11 sheet of paper using a standard 12-point font.

One copy of the Technical Approach portion of the Application shall be submitted as a PDF file using this file name format: Two Letter State Postal Code_PHA Complete Name_TECHNICAL.

3.3.4. Quality Control Plan

The Quality Control Plan portion of the application should exhibit the applicant's ability to design, manage, and monitor the internal controls required to ensure quality performance of the ACC and the PBTs described in Exhibit A, Section 3, of the ACC. The Quality Control Plan is a factor for award. Section 4, Factors for Award, details the seven (7) "Elements" that the applicant must address in the Quality Control Plan.

The applicant is to provide a narrative response for each of the elements. The applicant's responses must be in the same order and numbered as the elements appear. Only information submitted for a specific element will be considered for the corresponding element for which it was written.

The Quality Control Plan portion of the application may not exceed twenty (20) pages, excluding a cover page and table of contents. Applicants exceeding the allowable page limits will only have the number of pages specified evaluated. The cover sheet shall specify the title of the document, identify the PHA submitting the document, and identify the State for which the document is being submitted. Each page must be printed on a single side of an 8 1/2 x 11 sheet of paper using a standard 12-point font.

One copy of the Quality Control Plan portion of the Application shall be submitted as a PDF file using this file name format: Two Letter State Postal Code_PHA Complete Name_QCP.

3.3.5. Reasoned Legal Opinion

The Reasoned Legal Opinion (RLO) portion of the application must establish the applicant's legal eligibility to perform as a contract administrator by submission of an RLO, any FUL that HUD requires after reviewing the RLO, and, if applicable, a SL, as provided in Sections 2.1 through 2.6. Applicants will not be ranked or rated based on submission of these documents. However, only those applicants that, in HUD's sole determination, meet the requirements of Section 2.1 through 2.6 will be eligible.

While not subject to any page limitation, the RLO, any FUL, and any SL should be succinct. The RLO shall have a cover sheet that specifies the title of the document, identifies the PHA submitting the document, and identifies the State for which the document is being submitted. Each page must be printed on a single side of an 8 1/2 x 11 sheet of paper using a standard 12-point font. One copy of the RLO, any FUL, and any SL shall be submitted as a PDF file using this file name format: Two Letter State Postal Code_PHA Complete Name_RLO.

3.3.6. Disaster Plan

The PHA shall provide HUD a PHA Disaster Plan that details how the PHA and, if applicable, subcontractors that perform services that provide fifty (50) percent or more of the full time equivalent (FTE) employees required to perform PBTs Numbers one (1) through six (6) as specified in Exhibit A, Section 3, of the ACC, in the event of a natural or human caused disaster.

The Disaster Plan portion of the Application is not subject to a page limitation but should be written in a concise manner. It must include a cover sheet specifying the title of the document and identifying the PHA submitting the document and the State for which the document is being submitted. Each page must be printed on a single side of an 8 1/2 x 11 sheet of paper using a standard 12-point font. One copy of the Disaster Plan portion of the Application shall be submitted as a PDF file using this file name format: Two Letter State Postal Code_PHA Complete Name_DISASTER.

The PHA Disaster Plan portion shall include:

- a. Incident Response Staff: The names, titles, incident response authority and responsibilities, and contact information for assigned staff.
- b. Communication Back-up Plans and Systems:
 - o Procedures and methods of notifying and updating owners, and residents regarding changes in service procedures and the resumption of routine operations.
 - o Procedures and methods of notifying in the event of an incident, updating HUD regarding changes in service procedures until the resumption of routine operations, the performance status of each PBT or, if any PBT is not being fully performed, actions being taken to restore full performance of each PBT.
- c. Operating and Management Back-Up Plans and Systems: Procedures to relocate functions and staff to alternative office locations and/or telework sites; ensure access to IT systems; maintain internal and external communication systems (telephone, fax, email); and maintain supervisory, accounting, financial, and human resource functions.
- d. Information Technology (IT) Back-up Plans and Systems: Procedures to maintain IT staff support and ensure operability, data protection and system security.
- e. Preparedness: Plan to provide annual training for employees and, if applicable, subcontractor employees, and annual testing of back-up plans and systems.

The PHA shall provide HUD a PHA Disaster Plan Certification, on PHA letterhead, executed by a Disaster Plan Coordinator who has the education and experience to develop, manage, and test disaster, continuity of operations, or emergency management plans. The Disaster Plan Coordinator must attach a qualifications statement or resume to the certification.

The Disaster Plan Certification shall include:

This is to certify that I have reviewed the disaster plan for this organization and, if applicable, subcontractors that perform services that provide fifty (50) percent or more of the full time equivalent (FTE) employees required to perform PBTs Numbers one (1) through six (6) as specified in Exhibit A, Section 3, of the ACC and to best of my knowledge and belief:

- (1) The disaster plan addresses each of the following topics:
 - a. Incident Response Staff
 - b. Communication Back-up Plans and Systems
 - c. Operating and Management Back-Up Plans and Systems
 - d. Information Technology (IT) Back-up Plans and Systems
 - e. Preparedness
- (2) All employees and, if applicable, sub-contractor employees will participate in disaster plan training within the next twelve (12) months.
- (3) All backup plans and systems identified in the disaster plan will be tested within in the next twelve (12) months.

3.4. Application Submission and Due Date

The Application PDF files must be submitted by email to PBCA_Invitation@hud.gov. The "Subject" of the email message must be the "Two Letter State Postal Code, PHA Complete Name, Application PBCA." If more than one (1) email message is required to transmit the Application PDF files, the "Subject" of each email must indicate the number of each transmittal and the total number of transmittals, e.g., "Two Letter State Postal Code, PHA Complete Name, Application, Transmittal 1 of 2." The complete Application must be submitted not later than 5:00 P.M. EDT, Friday, April 28, 2011.

The Department will not accept Applications that arrive after the due date and time.

4. FACTORS FOR AWARD AND FACTOR WEIGHTS

The Factors for Award and Factor Weights are:

1. Capability Statement 30%
2. Technical Approach 35%
3. Quality Control Plan 35%

Applicants will be rated and ranked based upon their response to the elements associated with each Factor. The point value associated with each element is the maximum value that it can be assigned.

4.1. Capability Statement

The applicant must submit a detailed Capability Statement that addresses each of the following Elements.

- Element 1: Describe the PHA's experience, within the last five (5) years, providing contract administration services for multifamily housing projects with project based Section 8 Housing Assistance Payments (HAP) contracts. Or, briefly describe the PHA's experience, within the last five (5) years, administering functions and processes strongly related to providing contract administration services for multifamily housing projects and rent subsidy programs. (10 Points)
- Element 2: Describe the PHA's experience, within the last five (5) years, working with three (3) private sector multifamily owners or management agents that have properties with project-based Section 8 HAP contracts. Or, describe the PHA's experience, within the last five (5) years, working with three (3) private sector multifamily owners or management agents that have properties with rental assistance for low- or moderate-income tenants. On a separate sheet of paper, not included in the page limitation, provide the project name and personal contact information for the three (3) owners or management agents described. It is the PHA's responsibility to notify each owner or management agent that HUD will make two (2) attempts to contact them for a brief telephone interview. (30 Points)
- Element 3: Describe the PHA's experience, within the last five (5) years, working with the Office of Multifamily Housing or other HUD Program Offices if the PHA has not worked with the Office of Multifamily Housing. On a separate sheet of paper, not included in the page limitation, provide contact information for two (2) front-line HUD staff persons at the State or Regional level with whom the PHA has worked on routine programmatic matters. For each HUD staff person, identify the HUD program and/or project names. HUD will contact them for a brief telephone interview. (20 Points)
- Element 4: Describe the PHA's experience, within the past five (5) years, managing and performing each of the PBTs described in Exhibit A, Section 3 of the ACC. Or,

briefly describe the PHA's experience managing and performing tasks that are strongly related to each of the PBTs. (20 Points)

- a. PBT #1 – Management and Occupancy Reviews.
- b. PBT #2 – Adjust Contract Rents
- c. PBT #3 – Review and Pay Monthly Vouchers
- d. PBT #4 – Renew HAP Contracts
- e. PBT #5 – Tenant Health, Safety, and Maintenance Issues
- f. PBT #6 – Administration – Monthly and Quarterly Reports
- g. PBT #7 – Administration – Annual Reports and Certifications
- h. PBT #8 – Annual Financial Reports – PHA Fiscal Year End

Element 5: Describe the PHA's experience, within the last five (5) years, recruiting, hiring, training, and evaluating personnel to ensure effective management and performance of the PBTs or tasks that are strongly related to the PBTs. (10 Points)

Element 6: Describe the PHA's experience, within the last five (5) years, monitoring federal statues, regulations, and program requirements, identifying and interpreting changes or additions, and implementing policies and procedures that ensured efficient, effective, and consistent compliance. (10 Points)

4.2. Technical Approach

The applicant must submit a detailed Technical Approach plan that addresses each of the following Elements.

Element 1: Applicant must demonstrate a sound technical approach to managing, performing, and measuring the AQL of each of the PBTs specified in Exhibit A, Section 3 of the ACC. The applicant's response shall begin with an Annual Work Plan that details the month-by-month activities required to fully perform all PBTs during the first twelve (12) month period of the ACC Term. (30 Points)

Element 2: Applicant must demonstrate their ability to administer the general administrative and operating requirements of the ACC. The description should include, but is not limited to: executive leadership and oversight; legal; financial; accounting; record keeping; reporting; equal opportunity; communication with HUD, owners, management agents, and tenants, especially those that are disabled. (10 Points)

- Element 3: Applicant must demonstrate a clear understanding of the processes required to ensure that property owners receive Section 8 HAP payments in a timely fashion. (30 Points)
- Element 4: Applicant must demonstrate a sound technical approach to information and information system access, management, and security for HUD Systems (i.e., Tenant Rental Assistance Certification System (TRACS), Integrated Real Estate Management System (iREMS), Enterprise Income Verification (EIV) system), non-HUD Information Technology Systems that contain program related data, and print-based program documents. (10 Points)
- Element 5: Applicant must demonstrate a sound technical approach to preparing to assume responsibility for administration of the ACC and performance of the PBTs beginning ninety (90) calendar days prior to the effective date of the ACC. The applicant's technical approach must include: (20 Points)
- a. A description of office facilities, communication systems, information technology systems and a time line from initiation to full readiness.
 - b. A description of financial and accounting systems; banking, insurance and fidelity bonding arrangements; and timeline from initiation to full readiness.
 - c. A description of recruiting, hiring, staffing, and training and a timeline from initiation to full readiness.

4.3. Quality Control Plan

The applicant must submit a detailed Quality Control Plan (QCP) that addresses each of the following Elements.

- Element 1: For each PBT specified in Exhibit A, Section 3 of the ACC, describe the internal control procedures that will be implemented to ensure that performance is maintained at the AQL specified in the PRS, Exhibit A, Section 5 of the ACC. (35 Points)
- Element 2: Describe the internal control procedures that will be implemented to ensure accountability and separation of duties to detect and prevent potential fraud, waste, and abuse of funds. (10 Points)
- Element 3: Identify internal control procedures to prevent, detect, and resolve actual or appearances of conflicts of interest as stipulated in Section 10, "Conflict of Interest," of the ACC. (10 Points)
- Element 4: Identify the internal control procedures to prevent, detect, record, and report information privacy breaches. (10 Points)

- Element 5: Describe the internal control procedures for information and information system access, management, and security for HUD systems; non-HUD systems that contain program related data, and print-based program documents. (15 Points)
- Element 6: Describe the internal control procedures for the initial and continuous training and cross training of staff to perform PBTs and comply with the requirements of the ACC and HUD. (10 Points)
- Element 7: Describe the methodology that will be used to review, analyze, and evaluate the effectiveness of QCP; and the date(s) scheduled for each QCP review. (10 Points)

5. APPLICATION EVALUATION

Successful applications are those that demonstrate an applicant's capability to comply with the requirements of the ACC and perform the PBTs. HUD will establish one or more technical evaluation panels to review the applications received. HUD will only evaluate, rate and rank applications that are:

- a. Submitted on or before the due date and time.
- b. Complete.
- c. PDF file format.
- d. PDF file names conform to requirements.
- e. PDF files are free of viruses or other corruptions and open normally.
- f. Comply with the Basic Administrative Fee limitation requirement.
- g. Comply with the unit limitation requirement for the PHA and/or the sub-contractor.

Each application will be evaluated and rated on its own merit by a team of evaluators. Upon completion of individual team member evaluations, the team will arrive at final rating for the Application. The final rating for the Application will be ranked against the final rating for all Applications for the State.

6. AMENDMENTS AND ADDITIONAL GUIDANCE

HUD may issue amendments to this Invitation. All amendments, or additional guidance and will be posted on HUD's website at <http://www.hud.gov/offices/hsg/mfh/rfp/sec8rfp.cfm>

Applicants should regularly check the website for any amendments to the Invitation.

EXHIBIT B

From: Allen, Gary R [<mailto:AllenG@gao.gov>]

Sent: Thursday, August 04, 2011 3:02 PM

To: Golden, Michael R.

Cc: 'mmilito@rhodeislandhousing.org'; 'amohr@cohenmohr.com'; 'SHommer@Venable.com'; 'nodonnell@rjo.com'; 'skinner@mdhousing.org'; 'susan.mauch@cosgrovelaw.com'; 'GConnor@nyshcr.org'; 'MVictor@CalHFA.ca.gov'; 'kag@SheehanSheehan.com'; 'Joseph.schoell@dbr.com'; 'knucci@thompsoncoburn.com'; 'carol.ditmore@azhousing.gov'; 'KJacobs@cohenlaw.com'; 'dmesa@kshousingcorp.org'; 'pbwright@thecha.org'; 'amarchetta@njhmfa.state.nj.us'; 'heidalg@michigan.gov'; 'msyme@cohenlaw.com'; 'MICHAELC@hacanet.org'; 'rgilmore@saxongilmore.com'; 'smolseed@renocavanaugh.com'; 'jim@ewbankharris.com'; 'jacobson@stlouislaw.com'

Subject: RE: ACC Protests

Mr. Golden,

Yes.

Gary R. Allen
Senior Attorney
Procurement Law Division
Office of the General Counsel
U.S. Government Accountability Office
Washington, D.C. 20548
Tel: 202 512 8176
Fax: 202 512 9749

From: Golden, Michael R. [<mailto:goldenm@pepperlaw.com>]

Sent: Thursday, August 04, 2011 1:51 PM

To: Allen, Gary R

Cc: 'mmilito@rhodeislandhousing.org'; 'amohr@cohenmohr.com'; 'SHommer@Venable.com'; 'nodonnell@rjo.com'; 'skinner@mdhousing.org'; 'susan.mauch@cosgrovelaw.com'; 'GConnor@nyshcr.org'; 'MVictor@CalHFA.ca.gov'; 'kag@SheehanSheehan.com'; 'Joseph.schoell@dbr.com'; 'knucci@thompsoncoburn.com'; 'carol.ditmore@azhousing.gov'; 'KJacobs@cohenlaw.com'; 'dmesa@kshousingcorp.org'; 'pbwright@thecha.org'; 'amarchetta@njhmfa.state.nj.us'; 'heidalg@michigan.gov'; 'msyme@cohenlaw.com'; 'MICHAELC@hacanet.org'; 'rgilmore@saxongilmore.com'; 'smolseed@renocavanaugh.com'; 'jim@ewbankharris.com'; 'jacobson@stlouislaw.com'

Subject: RE: ACC Protests

Mr. Allen,

Can we share this email with our clients?

Michael R Golden
Attorney at Law
Pepper Hamilton LLP
Hamilton Square
600 Fourteenth Street, N.W.
Washington, DC 20005-2004
202.220.1244- Direct
800-616-5742- Fax
goldenm@pepperlaw.com
www.pepperlaw.com

Follow our Blog at <http://GovernmentContractsConnection.com>

From: Allen, Gary R [mailto:AllenG@gao.gov]

Sent: Thursday, August 04, 2011 10:46 AM

To: 'mmilito@rhodeislandhousing.org'; 'amohr@cohenmohr.com'; Golden, Michael R.; 'SHommer@Venable.com'; 'nodonnell@rjo.com'; 'Joseph.schoell@dbr.com'; 'knucci@thompsoncoburn.com'; 'carol.ditmore@azhousing.gov'; 'KJacobs@cohenlaw.com'; 'dmesa@kshousingcorp.org'; 'pbwright@thecha.org'; 'amarchetta@njhmfa.state.nj.us'; 'GConnor@nyshcr.org'; 'skinner@mdhousing.org'; 'susan.mauch@cosgrovelaw.com'; 'MVictor@CalHFA.ca.gov'; 'heidalg@michigan.gov'; 'kag@SheehanSheehan.com'; 'msyme@cohenlaw.com'; 'MICHAELC@hacanet.org'; 'rgilmore@saxongilmore.com'; 'smolseed@renocavanaugh.com'; 'jacobson@stlouislaw.com'; 'jim@ewbankharris.com'

Subject: FW: ACC Protests

From: Allen, Gary R

Sent: Thursday, August 04, 2011 10:27 AM

To: 'tara.j.kilfoyle@hud.gov'

Cc: 'Patrick.W.Simien@hud.gov'; 'Kasey.M.Podzius@hud.gov'; 'Blythe.I.Rodgers@hud.gov'; Formica, John L; Spangenberg, James A; Kang, Jonathan

Subject: ACC Protests

HUD should address the following two questions in the reports on the protests:

- (1) What is the statutory authority for HUD to make a grant to performance-based contract administrators (PBCAs)? 42 U.S.C. § 1437f(b) authorizes HUD to enter into contracts, but it does not appear to mention grant authority.
- (2) The annual contribution contracts (ACCs) do not appear to be subject to HUD's Administrative Requirements for Grants and Cooperative Agreements (24 CFR Part 85), which contain specific requirements concerning applications for grants and how grant funds may be spent (i.e. allowable costs). Are the ACCs subject to Part 85; if not, what is the basis for the exception?

Thank you.

Gary R. Allen
Senior Attorney
Procurement Law Division
Office of the General Counsel
U.S. Government Accountability Office
Washington, D.C. 20548
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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**[Docket No. FR-5600-N-33]****HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts****AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.**ACTION:** Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2012 Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.**SUMMARY:** HUD announces this NOFA for the Performance-Based Contract Administrator Program for the Administration of Project-Based Section 8 Housing Assistance Payments (HAP) Contracts. Specifically, this NOFA provides applicant information, submission deadlines, funding criteria and other requirements for this Program including the availability of an annual contributions contract (ACC) with a public housing agency (PHA) for each of the 42 States for which an ACC has not previously been awarded, to provide for the administration of project-based Section 8 HAP contracts for Section 8 projects located in the 42 States identified in Appendix A to this NOFA.

There are 53 "States," as defined in the ACC, as each of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. After publication on its website of an Invitation for Submission of Applications on February 25, 2011, HUD awarded an ACC to a PHA for each of the following 11 states: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming and the United States Virgin Islands. HUD now seeks to award an ACC to a PHA for each of the remaining 42 states through this program NOFA. See Appendix A of this NOFA for the list of remaining 42 states.

In addition to the application requirements set forth in this NOFA, applicants must also comply with all terms and conditions contained in the Notice of HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA), Policy Requirements, and **General Section** to HUD's FY2012 NOFAs for Discretionary Programs (**General Section**), posted to www.Grants.gov (Grants.gov) on September 19, 2011.

APPLICATION DEADLINE DATE: The application deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date.**FOR FURTHER INFORMATION CONTACT:** Questions regarding specific program requirements should be directed to the agency contact identified in this NOFA. Questions regarding the FY2012 **General Section** should be directed to the Grants Management Office; at 202-708-0667 (this is not a toll-free number). Persons with hearing or speech impairments may access the number via TTY by calling the Federal Relay Service at 800-877-8339.

OVERVIEW INFORMATION:

A. Federal Agency Name: U.S. Department of Housing and Urban Development.

B. Funding Opportunity Title: Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.

C. Announcement Type: Initial announcement.

D. Funding Opportunity Number: The Federal Register number for this NOFA is FR-5600-N-33. The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control number 2577-0157, 2502-0582, 2502-0587, 2577-0169, 2577-0229, 2510-0011, 2577-0259, 2502-0542, 2535-0116, and 2577-0270. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

E. Catalog of Federal Domestic Assistance (CFDA) Number(s): 14.327

F. Application Deadline Date: The deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date. Applications must meet the timely receipt requirements of the **General Section**. See Section IV of the **General Section** regarding application submission procedures and timely filing requirements. Applicants need to be aware that following receipt, applications go through a validation process in which the application may be accepted or rejected. Please allow time for the process to ensure that you meet the timely receipt requirements.

Please see the FY2012 **General Section** for instructions for timely receipt, including actions to take if the application is rejected. Applicants should carefully read the section titled “INSTRUCTIONS ON HOW TO DOWNLOAD AN APPLICATION PACKAGE AND APPLICATION INSTRUCTIONS” in the **General Section**. This section contains information on using Adobe Reader, HUD’s timely receipt and grace period policies, and other application information. The latest version of Adobe Reader used by Grants.gov is Adobe Reader 9.4 which is compatible with PCs and MAC computers.

G. Additional Information:

1. Purpose of the Program. The purpose of HUD’s PBCA program is to implement the policy of the United States, as established in section 2 of the United States Housing Act of 1937 (1937 Act), of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the maximum amount of responsibility and flexibility in program administration in PHAs that perform well. The PBCA program furthers these policies by effectuating the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based programs authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the funding

mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. See the ACC at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

2. Available Funds. Funding for this NOFA is subject to the availability of appropriations.

3. Type of Funds. Administrative fees to PBCAs.

4. Award Information. Funding for this NOFA is subject to the availability of appropriations.

5. Matching Funds. There is no matching requirement for applications under this program NOFA.

6. Eligible Applicants. PHAs as described in further detail in this NOFA.

7. Eligible Activities. PHAs selected must complete PBTs and meet the performance and compliance requirements in the ACC. The tasks that successful PHAs must perform include but are not limited to the following: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring that payments to property owners are calculated accurately and paid in a timely manner; and submitting required documents to HUD (or a HUD-designated agent).

FULL TEXT OF ANNOUNCEMENT

I. FUNDING OPPORTUNITY DESCRIPTION.

A. Program Description. HUD announces this NOFA for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments (HAP) Contracts. Specifically, this NOFA provides applicant information, submission deadlines, funding criteria and other requirements for this Program, including the availability of an annual contributions contract (ACC) with a public housing agency (PHA) for each of the 42 States for which an ACC has not yet been awarded (as identified in Appendix A to this NOFA) to provide for the administration of project-based Section 8 HAP contracts for Section 8 projects located in each of those States.

There are 53 "States," as defined in the ACC as each of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. After publication on its website of an Invitation for Submission of Applications on February 25, 2011, HUD awarded an ACC to a PHA for each of the following 11 states: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming and the United States Virgin Islands. HUD now seeks to award an ACC to a PHA for each of the remaining 42 States through this program NOFA.

B. Purpose of the Program. The purpose of HUD's PBCA program is to implement the policy of the United States, as established in section 2 of the 1937 Act, of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the

maximum amount of responsibility and flexibility in program administration in PHAs that perform well. The PBCA program furthers these policies by effectuating the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based programs authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the funding mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. The ACC includes Exhibit A, section 4 of which includes a detailed treatment of the Administrative Fee. Section 5, "Performance Requirements Summary" (PRS), includes a table that specifies the Acceptable Quality Level (AQL) for performance of each of the 8 Performance-Based Tasks (PBTs), the Performance-Based Allocation Percentage, the method used to evaluate performance, and the frequency with which HUD will assess and pay the Basic Administrative Fee Earned. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

C. Authority. The NOFA is issued pursuant to section 102 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101-235; 103 Stat. 1987 (Dec. 15, 1989); and section 8 of the United States Housing Act of 1937 (1937 Act), 42 U.S.C. § 1437f, Pub. L. 93-383; 88 Stat. 662 (Aug. 22, 1974) (Section 8). Funding for this NOFA is subject to the availability of appropriations.

D. Crossing State Lines. HUD believes that nothing in the 1937 Act prohibits an instrumentality PHA that is "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act from acting as a PHA in a foreign State. However, HUD will consider applications from out-of-State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.

Based on past experience, HUD expects to receive at least one application from a legally qualified in-State applicant for the majority of the 42 States identified in Appendix A of this NOFA. However, HUD advises that, in connection with the February 25, 2011 Invitation, HUD received no application from an in-State applicant for Alaska, Hawaii, Mississippi, Nebraska, or Utah.

All opinions recently issued by states' Attorneys General relevant to the administration of the Section 8 PBCA program will be posted at time of publication of this NOFA on http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

E. Terms and Definitions.

1. In-State Applicant. An in-State Applicant is an applicant formed under the laws of the same State for which it proposes to serve as PBCA. An in-State applicant may be a governmental entity or an instrumentality of a governmental entity. However, in either case, the entity must demonstrate that it (a) satisfies the definition of PHA in section 3(b)(6)(A) of the 1937 Act and (b) has the legal authority to operate throughout the entire State.

2. Out-of-State Applicant. An out-of-State Applicant is an applicant formed under the laws of a State other than the State for which it proposes to serve as PBCA. An out-of-State applicant is typically an instrumentality of a governmental entity. An out-of-State applicant must demonstrate that it (a) satisfies the definition of PHA in section 3(b)(6)(A) of the 1937 Act; and (b) has the legal authority, both under the law of the State of its creation and under the law of the State for which it is applying to act as PBCA, to operate throughout the entire State for which it is applying.

Out-of-State entities are typically limited in their area of operation under the law of the State of their creation to the locality or to the State that they were established to serve. To overcome this obstacle, such entities typically create an instrumentality under the law of its own State (e.g., the State's nonprofit corporation statute), which typically authorizes the nonprofit corporation to operate anywhere inside or outside the State of its creation. Under such a scenario, the resulting nonprofit corporation, rather than the parent entity that created it, becomes the out-of-State applicant.

HUD requires that an out-of-State applicant establish not only that the law of the State under which it was created (e.g., State A) authorizes it to operate throughout the entire State in which it proposes to serve as PBCA (e.g., State B) but also that the law of such State (e.g., State B) does not prohibit such an arrangement. HUD also requires that each out-of-State applicant supplement its Reasoned Legal Opinion (RLO) (see definition below) with a Supplemental Letter (SL) (see definition below) signed by an attorney authorized to practice law in the State for which it applies (e.g., State B) certifying that nothing in the laws of such State in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying.

3. Instrumentality. Whether an in-State applicant or an out-of-State applicant, an instrumentality must be created *directly* by “any State, county, municipality, or other governmental entity or public body” within the meaning of section 3(b)(6)(A) of the 1937 Act. Submission of an RLO on behalf of an instrumentality that itself was created by one or more instrumentalities will result in the disqualification of the application.

An instrumentality entity must be fully formed and in legal existence under applicable laws on the date on which the RLO is signed. A copy of the corporate charter and all other organizational documents in final form (e.g., duly executed and filed with all appropriate State and/or other authorities, as may be required by law) that meet all requirements of this NOFA must be attached to and labeled as an exhibit to the RLO. An instrumentality of a governmental entity or public body satisfies the 1937 Act's definition of PHA provided that the instrumentality is “authorized to engage in or assisted in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act.

4. Statutory Definition of “Public Housing Agency” and Related Statutory Definitions. A PHA is a creature of State law. Its authority and power to act derive from the State law(s) under which it was created. “Public housing agency” is also a defined term in the 1937 Act, which authorizes HUD to enter into ACCs with a “public housing agency” as defined in section 3(b)(6)(A) of the 1937 Act, for the administration of Section 8 HAP Contracts. Before entering into an ACC, HUD must ascertain that the entity satisfies the 1937 Act's definition of PHA.

Section 3(b)(6)(A) of the 1937 Act, which applies to the project-based Section 8 program, provides in relevant part: “the term ‘public housing agency’ means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing.” Applicants are advised that section 3 of the 1937 Act, 42 U.S.C. § 1437a, contains definitions of terms that appear within the foregoing definition (e.g., “public housing,” “development,” “operation”). Section III. D. 2.b. below sets forth the specific elements of an RLO required for applicants other than an instrumentality (generally referred to as a “governmental entity”). Section III. D.2.c. below sets forth the specific elements of an RLO required for instrumentality applicants.

5. Performance-Based Tasks (PBTs). PBTs are described in Exhibit A, Section 3 of the ACC and listed below for reference. There are eight of these tasks for which the PHA, as contract administrator, is responsible. The principal tasks of the PHA in accordance with the ACC include, but are not limited to: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring payments to property owners are calculated accurately and paid in a timely manner; submitting required documents to HUD (or a HUD-designated agent); and complying with applicable Federal law and regulations, including 24 C.F.R. parts 880, 881, 883, 884, 886 subpart A, 886 subpart C and/or 891 subpart E, as applicable, and other program requirements, as they exist at the time of ACC execution and as amended or otherwise issued. In this NOFA PBTs are listed in the rating factors as:

- PBT #1 – Management and Occupancy Reviews;
- PBT #2 – Adjust Contract Rents;
- PBT #3 – Review and Pay Monthly Vouchers;
- PBT #4 – Renew HAP Contracts;
- PBT #5 – Tenant Health, Safety, and Maintenance Issues;
- PBT #6 – Administration – Monthly and Quarterly Reports;
- PBT #7 – Administration – Annual Reports and Certifications; and
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End.

6. Reasoned Legal Opinion (RLO). HUD requires that each applicant, whether an in-State or an out-of-State applicant, establish through an RLO that the State statute under which it was created authorizes it to operate throughout the entire State in which the entity proposes to serve as PBCA. HUD requires that out-of-State applicants supplement their RLO with an SL that establishes that nothing in the laws of the State for which the applicant is applying in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying. If an RLO or an SL fails to satisfy any criterion or any part of any criterion required to establish legal eligibility under this NOFA, the applicant will not be provided an opportunity to cure such failure, and the application will be rejected without further review.

7. Full Time Equivalent (FTE). One FTE is defined as 280 hours per work year.

8. Supplemental Letter (SL). In addition to an RLO, HUD requires that each out-of-State applicant submit a Supplemental Letter (SL) signed by an attorney authorized to practice law in

the State for which it applies (e.g., State B) certifying that nothing in the laws of such State in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying.

II. AWARD INFORMATION

A. Funding Availability. Funding for this NOFA is subject to the availability of appropriations.

B. Type of Awards. The ACCs that HUD seeks to award via this NOFA are cooperative agreements. Pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (FGCA) (31 U.S.C. § 6304 *et seq.*), a cooperative agreement is the appropriate vehicle for making such an award when the principal purpose of the relationship between the Federal government and a State, or the political subdivision of a State (e.g., a PHA), is the transfer of money and services in order to accomplish a public purpose of support authorized by Federal statute, and substantial involvement is anticipated between HUD and the PHA during performance of the ACC. 31 U.S.C. § 6305. A principal purpose of the ACC between HUD and the PHA is to transfer funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by sections 2(a) and 8(b)(1) of the 1937 Act. HUD will notify all applicants as to whether or not they have been selected for an award. If selected, HUD's notice will constitute HUD's approval, subject to the execution of a cooperative agreement. HUD intends to have substantial and ongoing involvement in the review, development, and operation of the PBCA Program. The cooperative agreement will state the expected substantial involvement of HUD during the period of performance. Note that the ACC is not subject to A-102 (Grants and Cooperative Agreements With State and Local Governments) which is codified for HUD at 24 CFR Part 85 based on the Department's determination that the Section 8 programs are not appropriate for management under the uniform requirements of Part 85. However, the Department has determined that the PBCA program is subject to A-87 (Cost Principles for State, Local, and Indian Tribal Governments).

C. Number of Awards. Only one applicant per state may be awarded an ACC. HUD expects to provide 42 awards.

D. Period of Performance. The PBCA will administer the HAP Contracts that HUD assigns during the ACC term. The ACC shall have a term of twenty-four (24) months unless extended at the sole election of HUD. HUD anticipates that ACCs awarded under this NOFA will become effective on October 1, 2012. The full text of the ACC may be found at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or in Appendix C of this NOFA.

III. ELIGIBILITY INFORMATION

A. Eligible Applicants. Eligible applicants are qualified PHAs. The applicant's RLO must identify the applicant entity as one of the following:

- 1. A general or special purpose governmental entity.** A general or special purpose governmental entity includes:
 - a. A State, municipality, housing authority, or governmental public benefit corporation;
 - b. A multi-state, interstate or regional governmental entity; or
 - c. An instrumentality entity.

Any and all determinations concerning an applicant's legal eligibility rest solely with HUD.

B. Cost Sharing or Matching. There is no matching requirement for applications under this program NOFA.

C. Eligible Activities. PHAs selected must complete PBTs and comply with the performance and compliance requirements in the ACC.

HUD will enter into an ACC which will identify the State in which the PBCA is required to be the contract administrator. Exhibit B of the ACC will identify the HAP Contracts that HUD assigns to the PHA. HUD has the authority under the ACC to unilaterally amend Exhibit B of the ACC in order to add or withdraw HAP contracts that the PBCA is responsible for administering, and, upon exercising this authority, HUD will provide the PBCA with written notice of the revised Exhibit B.

Exhibit A of the ACC contains the PBTs for which the PHA, as contract administrator, is responsible. The principal tasks of the PHA in accordance with the ACC include, but are not limited to: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring payments to property owners are calculated accurately and paid in a timely manner; submitting required documents to HUD (or a HUD designated agent); and complying with applicable Federal law and regulations, including 24 C.F.R. parts 880, 881, 883, 884, 886 subpart A, 886 subpart C and/or 891 subpart E, as applicable, and other program requirements, as they exist at the time of ACC execution and as amended or otherwise issued.

D. Threshold Requirements.

1. General HUD Threshold Nondiscrimination and Other Requirements. See Section III.C.2 through Section C.5 of the **General Section** for threshold requirements applicable to all programs. Applicants should review those provisions that could result in the failure to receive funding, including the Dun and Bradstreet Universal Numbering System (DUNS) Number Requirement, Resolution of Outstanding Civil Rights Matters, provisions relating to Delinquent Federal Debts, and the Name Check Review. HUD will not make awards to entities that are debarred, suspended, or are on the HUD Limited Denial of Participation List. **Non-compliance with a threshold requirement will result in disqualification.** See Section V.B.1. below for more detail regarding threshold compliance.

2. Reasoned Legal Opinion Requirement. HUD requires the submission of a RLO demonstrating that the applicant is legally eligible to serve as PBCA in the State for which it applies.

NOTE: This is the first threshold requirement which must be satisfied before HUD will review the remainder of an application.

a. General RLO Requirements. The following information must be enumerated at the top of the first page of the RLO:

- (1) The full legal name of the applicant (i.e., the entity that, if selected, would enter into an ACC with HUD);
- (2) The State under the laws of which the applicant was formed; and
- (3) The State for which the applicant proposes to serve as PBCA.

If an entity applies to serve as PBCA for more than one State, a separate RLO must be submitted in support of each application. The RLO must be signed by an attorney. It may not be signed by or in the name of a law firm or other business entity. The RLO must state that the signatory is licensed to practice law in the State under the laws of which the applicant was formed. It must contain a succinct but reasoned (i.e., non-conclusory) analysis establishing that each of the requirements in Section III. D.2.b.(Governmental Entities) or Section III. D.2.c (Instrumentality Entities), as applicable, is satisfied.

It must include proper citation to each provision of Federal, State, and/or local law on which the analysis relies. A legible copy of each such provision, other than any provision of the 1937 Act, must be attached to and labeled as an exhibit to the RLO. Any RLO that does not satisfy any of these requirements will be rejected without any further review.

While not subject to any page limitation, the RLO should be succinct. The RLO shall have a cover sheet that specifies the title of the document, identifies the PHA submitting the document, and identifies the State for which the document is being submitted. Each page must be printed on a single side of an 8.5" by 11" sheet of paper using a standard 12-point font. One copy of the RLO shall be submitted as a Portable Document Format (PDF) file using this file name format: Two-Letter State Postal Abbreviation of the State for which the applicant is applying_Two-Letter State Postal Abbreviation of the State under the laws of which the applicant was formed_Complete Legal Name of the Applicant_RLO.pdf. The name of the RLO file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the RLO file.

b. Required Elements of Reasoned Legal Opinion for a Governmental Entity. In the case of a governmental entity, the RLO must establish that the entity:

- (1) Was created under a statute that confers powers that qualify the entity as a PHA, as defined in the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred;

(2) Was created under a statute that confers powers that include the power to administer project-based Section 8 HAP Contracts, including the power to perform each of the eight PBTs identified in Exhibit A, Section 3, of the ACC. Although the statute may not explicitly enumerate such powers, the attorney signing the RLO must conclude and unequivocally state that all such powers are within the scope of those explicitly conferred;

(3) Was created under a statute that explicitly authorizes the entity to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences an unequivocal legislative intent for such entity to have such authority; and

(4) Has properly registered to do business in the State in which the entity proposes to serve as PBCA to the extent that the laws of such State require it to do so. If the laws of such State do not require it to do so, the RLO must contain an affirmative statement to this effect.

c. Required Elements of Reasoned Legal Opinion for an Instrumentality Entity. In the case of an instrumentality entity, the RLO must establish that:

(1) The parent entity (or, in the case of multiple parent entities, each such entity) and the instrumentality entity were created under laws that confer powers that qualify the parent entity (or each such entity) and the instrumentality entity as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Specifically, the RLO must establish that:

(a) The parent entity (or each such entity) was created under a statute that confers powers that qualify the parent entity (or each such entity) as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred; and

(b) The instrumentality entity was created under a statute (e.g., a State non-profit corporation law) that confers powers that qualify the instrumentality entity as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred;

(2) The corporate charter or other organizational documents of the instrumentality entity explicitly provide that it is authorized “to engage in or assist in the development or operation of public housing,” within the meaning of section 3(b)(6)(A) of the 1937 Act, with citation to such specific provision(s);

(3) The corporate charter or other organizational documents of the instrumentality entity explicitly confer the right on the parent entity (or on each such entity) to:

(a) Approve the corporate charter or other organizational documents of the instrumentality, including the right to approve any amendments, with citation to such specific provision(s);

(b) Authorize the instrumentality entity to execute the ACC with HUD, with citation to such specific provision(s);

(c) Control the operation of the instrumentality, with specific identification of the means by which the corporate charter or other organizational documents authorize the parent entity (or entities) to exert such control (e.g., by requiring that the Parent Entity hold a majority of the shares of the instrumentality entity, have a majority vote on the Board of Directors of the instrumentality entity), with citation to the specific provision(s) that confer such authority; and

(d) Take title to all property, real and/or personal, held by the instrumentality entity upon dissolution or termination of the instrumentality entity, with citation to such specific provision(s);

(4) The instrumentality entity was created under a statute that confers powers that include the power to administer project-based Section 8 HAP Contracts, including the power to perform each of the eight PBTs identified in Exhibit A, Section 3, of the ACC. Although the statute may not explicitly enumerate such powers, the attorney signing the RLO must conclude and unequivocally state that all such powers are within the scope of those explicitly conferred;

(5) The corporate charter or other organizational documents explicitly authorize the instrumentality to administer project-based Section 8 HAP Contracts, with citation to such specific provision(s);

(6) The instrumentality entity was created under a statute that explicitly authorizes entities created there under to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences an unequivocal legislative intent for such entities to have such authority;

(7) The corporate charter or other organizational documents explicitly authorize the instrumentality entity to operate throughout the entire State in which the entity proposes to serve as PBCA, with citation to such specific provision(s); and

(8) The entity has properly registered to do business in the State in which the entity proposes to serve as PBCA to the extent that the laws of such State require it to do so. If the laws of such State do not require it to do so, the RLO must contain an affirmative statement to this effect.

d. General Supplemental Letter (SL) Requirements. If an applicant proposes to serve as PBCA in a State other than the State under the laws of which it was formed, an SL must be enclosed with the RLO. The following information must be enumerated at the top of the first page of the SL:

(1) The full legal name of the applicant (i.e., the entity that, if selected, would enter into an ACC with HUD);

(2) The State under the laws of which the applicant was formed; and

(3) The State for which the applicant proposes to serve as PBCA.

The SL must be signed by an attorney. It may not be signed by or in the name of a law firm or other business entity. The SL must state that the signatory is licensed to practice law in the

State in which the applicant proposes to serve as PBCA. The substantive content of the SL must meet the standard of Section III. D.2.e. It must include proper citation to each provision of Federal, State, and/or local law on which the analysis relies. A legible copy of each such provision, other than any provision of the 1937 Act, must be attached to and labeled as an exhibit to the SL. Any SL that does not satisfy any of these requirements will be rejected without any further review.

e. Standard for Entities Proposing to Serve as PBCA in a State Other than the State under the Laws of Which the Entity was Formed. HUD will consider the substantive content of the SL requirement satisfied so long as it meets the requirements of this section.

(1) The SL must contain an unequivocal statement that the signatory has examined all the laws of the State governing the creation and operation of PHAs, including any provision of State law that defines that term or comparable term, and that nothing in such laws in any manner prohibits or precludes the applicant, having been formed under the laws of a sister State, from acting as a PHA in and throughout the State for which it is applying to serve as PBCA.

(2) The SL must state that the applicant has registered to do business in the State. Conclusive documentary proof of such registration must be attached to and labeled as an exhibit to the SL. If the law of the State in which the applicant proposes to act as PBCA does not require such registration, the SL must contain an affirmative statement to this effect.

(3) The SL must contain an unequivocal statement as to whether the laws of the State or any other applicable laws impose any requirements or conditions that must be satisfied before the applicant may act throughout the State as a PHA. To the extent that they do, the SL must identify each such requirement, with citation to the state law provision imposing each such requirement. A legible copy of each such statutory provision must be attached to and labeled as an exhibit to the SL. Conclusive documentary proof that all such requirements or conditions have been satisfied must be attached to and labeled as an exhibit to the SL. For example, if the laws of such State or any other applicable laws require the existence of any cooperative agreements, contracts, or any other legally binding agreements between the applicant and any other party, including any PHA(s) established under the laws of the State, in order for the applicant to have the authority to operate throughout the entire State, the SL must clearly identify such law(s), and a copy of any and all such cooperative agreements, contracts, or other legally binding agreements, duly executed for a term through the anticipated term of the ACC (i.e., September 30, 2014), must be attached to and labeled as an exhibit to the SL.

f. Required by All Applicants. The RLO and any SL must conclude with a definitive, *unqualified* statement explicitly certifying that all representations therein are true and correct. Any RLO and any SL that does not contain such a statement will be rejected without any further review.

3. Basic Administrative Fee Percentage. The proposed Basic Administrative Fee Percentage for a State is not to exceed 2.0%. Applications proposing a fee that exceeds 2.0% will be rejected.

IMPORTANT NOTES RELATED TO THE BASIC ADMINISTRATIVE FEE PERCENTAGE:

NOTE 1: The Basic Administrative Fee Percentage is calculated as follows:

The Grand Total (All Years) amount from the Grant Application Detailed Budget (form HUD-424-CB) is divided by two (2) to arrive at the annualized grand total. Then, the annualized grand total is divided by the sum of the annual per-unit per-month 2-bedroom FMRs for the State as published in the portfolio of Active PBCA Assigned Section 8 Contracts for this NOFA at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

NOTE 2: Exhibit A, Section 3.1, PBT #1 – Management and Occupancy Reviews has been revised to include a risk-based requirement and a separate requirement for Mark-to-Market projects. Two Exhibits have been added to the ACC:

Exhibit G: MOR Ratings for Projects with PBCA Administered HAP Contracts

Exhibit H: Mark-to-Market Projects with PBCA Administered HAP Contracts

The information for each State is available at

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp in two documents titled “MOR Ratings for Projects” and “Mark-to-Market Projects”.

NOTE 3: The ACC defines the Basic Administrative Fee Percentage as “The percentage of the applicable annual per unit per month 2-bedroom Fair Market Rent within the State, which is used to calculate the monthly Basic Fee.” The Basic Administrative Fee Amount is “The amount that results when the Administrative Fee Percentage, approved by the United States Department of Housing and Urban Development, is multiplied by the current applicable 2-Bedroom Fair Market Rent for each Covered Unit under a Housing Assistance Payments Contract on the first day of the month during the Performance-Based Annual Contributions Contract Term.”

The annual per unit per month 2-bedroom Fair Market Rent for each Covered Unit for the Assigned Active HAP Contracts in each State is titled “Active PBCA Assigned Section 8 Contracts for NOFA” and is available at

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

NOTE 4: To view basic administrative fee percentages proposed by applicants in the prior competition, please see

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

E. Program Requirements. Successful applicants will not be awarded until Program Requirements are met.

1. Disaster Plan. The applicant shall provide a Disaster Plan that details how the PHA and, if applicable, contractors that perform services that provide fifty (50) percent or more of the full time equivalent (FTE) employees required to perform PBTs Numbers one (1) through six (6) as specified in Exhibit A, Section 3, of the ACC will ensure continued operations in the event of a natural or human-caused disaster. The Disaster Plan portion of the application is not subject to a page limitation but should be written in a concise manner. The Disaster Plan is not a Factor for

Award but will be reviewed to ensure that each of the topics described below is addressed. It must include a cover sheet specifying the title of the document and identifying the PHA submitting the document and the State for which the document is being submitted. Each page must be printed on a single side of an 8.5" by 11" sheet of paper using a standard 12-point font. One copy of the Disaster Plan portion of the application shall be submitted as a PDF file using this file name format: Two Letter State Postal Code_PHA Complete Name_DISASTER. File names cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

a. Elements of the Disaster Plan. The PHA Disaster Plan portion shall include:

(1) Incident Response Staff; including the names, titles, incident response authority and responsibilities, and contact information for assigned staff and any contractors or sub recipients.

(2) Communication Back-up Plans and Systems, including:

(a) Procedures and methods of notifying and updating owners, and residents regarding changes in service procedures and the resumption of routine operation; and

(b) Procedures and methods of notifying HUD in the event of an incident, including updating HUD regarding changes in service procedures until the resumption of routine operations, the performance status of each PBT or, if any PBT is not being fully performed, actions being taken to restore full performance of each PBT.

(3) Operating and Management Back-Up Plans and Systems. Procedures to relocate functions and staff to alternative office locations and/or telework sites; ensure access to IT systems; maintain internal and external communication systems (telephone, fax, email); and maintain supervisory, accounting, financial, and human resource functions.

(4) Information Technology (IT) Back-up Plans and Systems. Procedures to maintain IT staff support and ensure operability, data protection and system security.

(5) Preparedness. Plan to provide annual training for employees and, if applicable, contractor employees, and annual testing of back-up plans and systems.

b. The Disaster Plan Coordinator. The PHA shall have a Disaster Plan Coordinator who has the education and experience to develop, manage, and test disaster, continuity of operations, or emergency management plans. The Disaster Plan Coordinator shall be considered "qualified" if he/she has education (e.g., professional degree and/or professional certification or training) and experience as a practitioner in emergency management and response, emergency operations, continuity of operations (COOP), disaster planning and response, or risk management. The Disaster Plan Coordinator must attach a qualifications statement or resume to the application. The Disaster Plan Coordinator shall review and approve the disaster plan for the organization. The Disaster Plan must address required elements of the disaster plan. The Disaster Plan Coordinator must ensure that all employees and, if applicable, contractor employees, will

participate in disaster plan training within the next twelve (12) months and that all backup plans and systems identified in the disaster plan will be tested within in the next twelve (12) months. A signed copy of the plan must be submitted to the designated HUD CAOM (Contract Administration Oversight Monitor).

2. FTE Chart. See Appendix B of this NOFA for template and Rating Factor 2 for more information. The PHA shall submit a FTE Statement that identifies the FTEs required to perform PBTs numbers one (1) through six (6) as specified in Exhibit A of the ACC for the first twelve (12) month period of the ACC Term. For each PBT, identify the positions by title responsible for managing, supervision, and performing each PBT. Include the FTEs for PHA and contractor employees. Only include contractors that contract directly with the PHA. Do not include sub-contractors of contractors. One (1.00) FTE is defined as 2,080 work hours per year.

The FTE Statement shall be in the following format with the actual number of contractors, if any, included in the table below:

Identify the Contractor(s) by name and DUNS Number enumerated in the columns.

Contractor #1: Name of Contractor/ DUNS #

Contractor #2: Name of Contractor/ DUNS #

Contractor #3: Name of Contractor/ DUNS #

Contractor #4: Name of Contractor/ DUNS #

Add additional Contractors or position titles to list and add additional columns to the table as required.

3. HUD's Electronic Line of Credit Control System. Applicants must be eligible to acquire rights and access under HUD's Electronic Line of Credit Control System (eLOCCS).

4. Prohibition Against Lobbying Activities. Unless excluded from this requirement by other provisions of law, applicants are subject to the provisions of Section 319 of Public Law 101-121 (approved October 23, 1989) (31 U.S.C. § 1352) (the Byrd Amendment), which prohibits recipients of Federal contracts, grants, or loans from using appropriated funds for lobbying the executive or legislative branches of the Federal government in connection with a specific contract, grant, or loan. In addition, applicants must disclose, using Standard Form SFLLL "Disclosure of Lobbying Activities," any funds, other than federally appropriated funds, that will be or have been used to influence Federal employees, members of Congress, or congressional staff regarding specific grants or contracts. Federally recognized Indian tribes and tribally designated housing entities (TDHEs) established by federally recognized Indian tribes as a result of the exercise of the tribe's sovereign power are excluded from coverage of the Byrd Amendment, but state-recognized Indian tribes and TDHEs established only under state law must comply with this requirement.

5. Compliance with Fair Housing and Civil Rights Laws. Applicants who are selected for award must comply with the fair housing and civil rights requirements specified in Section III.C.5.a of the **General Section**. In addition, successful applicants must certify that they will comply with the requirements of the Fair Housing Act (42 U.S.C. §§ 3601-19), Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), Section 504 of the Rehabilitation Act of 1973 (29

U.S.C. § 794), the Age Discrimination Act of 1975 (42 U.S.C. § 6101), and title II of the Americans with Disabilities Act of 1990 (42 USC §§ 12131-12134).

6. Affirmatively Furthering Fair Housing. Under Section 808(e)(5) of the Fair Housing Act, HUD has a statutory duty to affirmatively further fair housing. HUD requires the same of its funded recipients. Successful applicants will have a duty to affirmatively further fair housing. In addition, successful applicants will be required to certify that they will affirmatively further fair housing. Successful applicants must comply with certain requirements regarding affirmatively furthering fair housing, including affirmative fair housing marketing, rather than the **General Section**. Specifically, successful applicants must: (1) adopt actions and procedures and maintain records of the implementation of the actions and procedures taken to affirmatively further fair housing; (2) make information available on the existence and location of housing, facilities, and services that are accessible to persons with disabilities; and (3) ensure that reasonable steps are taken to perform affirmative fair housing marketing. The purpose of the affirmative fair housing marketing plan is to provide equal opportunity to those individuals least likely to apply for the housing regardless of race, color, national origin, sex, religion, familial status, or disability. Please see Rating Factor 3 for more information on submitting the Affirmatively Furthering Fair Housing narrative.

7. Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency (LEP). Executive Order 13166 seeks to improve access to federally assisted programs and activities for individuals who, as a result of national origin, are limited in their English proficiency. Applicants obtaining Federal financial assistance from HUD shall take reasonable steps to ensure meaningful access to their programs and activities to LEP individuals. As an aid to recipients, HUD published *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* in the Federal Register on January 22, 2007 (72 FR 2732), found at http://www.lep.gov/guidance/HUD_guidance_Jan07.pdf Also see Section III.C.5.c of the **General Section** for more information.

8. Effective Communication. Successful applicants must ensure that all communications shall be provided in a manner that is effective for persons with hearing, visual, and other communications-related disabilities consistent with Section 504 of the Rehabilitation Act of 1973. (This includes ensuring that training materials are in appropriate alternative formats as needed, e.g., Braille, audio, large type, sign language interpreters, and assistive listening devices). See 24 CFR § 8.6.

9. Monitoring. The PBCA will monitor each property owner and ensure compliance with the terms of the HAP Contract. In discharging these and all other responsibilities under the ACC, the PBCA will comply, and will ensure compliance by owners, with Federal law, HUD’s implementing regulations, the Section 8 Renewal Guide, and all other requirements and guidance that HUD deems applicable, as they exist at the time of ACC execution and as amended or otherwise issued from time to time during the ACC term. In the case of HAP Contracts that expire during the ACC term, the PBCA will enter into a renewal contract with Section 8 owners, as appropriate, in accordance with the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) (42 U.S.C. § 1437f note), HUD’s implementing regulations, and the

provisions of the Section 8 Renewal Guide, which may be found at:
http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14528.pdf.

10. Page Specifications. Each page must be printed on a single side of an 8.5" by 11" sheet of paper using a standard 12-point font.

11. Compliance with Standards in the ACC. Applicants must meet all performance, reporting and task standards listed in the ACC.

12. Point Threshold. Applicants must receive at least 45 points of 70 available in Rating Factors for Capability, Soundness of Approach and Policy Priorities to qualify for award.

IV. APPLICATION AND SUBMISSION INFORMATION

A. Address to Request an Application Package. See the **General Section** for specific procedures concerning the electronic application submission and timely receipt requirements. Copies of the published NOFAs and application forms for HUD programs announced through NOFAs may be downloaded from the Grants.gov website at <http://www.Grants.gov>. Applicants need to download the application and the instructions for this NOFA from Grants.gov.

B. Grants.gov Customer Support. If applicants have difficulty accessing the information, customer support is available from Grants.gov by calling its Support Desk at 800-518-GRANTS (toll-free), or by sending an email to www.support@Grants.gov. Grants.gov now also provides a toll number for those that have difficulty accessing a toll-free number. The number is 606-545-5035 (toll charge). The Grants.gov help desk is open 7 days a week, 24 hours a day, except Federal holidays.

C. Content and Form of Application Submission.

1. Electronic Submission. Applications must be submitted electronically, as prescribed in the **General Section** using the Grants.gov website. To submit via Grants.gov, applicants must have a DUNS number which is registered in the Central Contractor Registration (CCR); have a User ID and password for the Grants.gov system; and be authorized by the eBusiness Point of Contact for the applicant identified in box 8a of the SF424, to be the authorized agency representative to submit the application. Failure to meet these registration steps or to not properly enter the registered DUNS number and User ID and password associated to the applicant DUNS number in the Grants.gov system, can result in the application being rejected by Grants.gov. Please carefully read the registration requirements. Registration can take 2-4 weeks to complete.

2. Page Limitation, Font Size and Format for Naming of Files. Narrative statements cannot exceed the number of single-sided standard 8.5" by 11" pages specified in the application document descriptions. Application documents must be in 12 point font. File names must conform to the requirements specified in the application document descriptions and cannot contain spaces, special characters (!, @, #, #, \$, %, ^, &, *, (,),) or exceed 50 characters in length including any underscores. Files names that do not adhere to these directions will result in the application receiving a virus detect message and being rejected from the Grants.gov system. Spaces and underscores count to the 50 characters. Please see the **General Section** for details regarding submission to grants.gov and file naming requirements. All files must be in

Microsoft® Word® except the FTE Statement document which must be in Microsoft Excel format to preserve its integrity as executed by the PHA and, if applicable, the contractor.

3. Application Submission Requirements.

- a. Applicants must read and follow the application submission requirements carefully.
- b. Applications must be filed following the instructions for this opportunity as specified in the **General Section** and this NOFA posted to the Grants.gov website.
- c. Applications must be formatted for 8.5" by 11" viewing and printing.
- d. All pages of each document must be numbered sequentially.
- e. All application document files are assigned required file names that begin with the two letter State postal code of the State for which the applicant is applying.
- f. Zip files contained within zip files cannot be accommodated; documents in such files will not be reviewed.
- g. Zip files must use this file name format: Two Letter State Postal Code_PHA Complete Name_APPLICATION. The name of the file cannot exceed 50 characters , including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

h. By submitting an application on Grants.gov, you are certifying that:

- The Executive Director of the PHA certifies that information provided in the Application is true and correct;
- If the PHA is contracting with an entity that provides services equal to fifty (50) percent or more of the FTE employees required to perform PBTs Numbers one (1) through six (6) as detailed in the FTE Statement, the information provided in this Application relative to its services and performance is true and correct.

4. Application Requirements.

a. Content of Application. This section sets forth the contents of the application and the procedures applicants must follow to submit applications in response to this NOFA. Failure to comply with these procedures may result in the applicant being disqualified from award consideration. Each application submitted in response to this NOFA shall include the following documents:

(1) Abstract. Consisting of up to four-pages, it is a summary of the proposed project, which will not be scored and does not count toward the narrative page limit. The abstract must contain the following:

- (a) Name of PHA Entity**

- (b) **Street Address**
- (c) **City, State, Zip Code**
- (d) **Contact Name and Title**
- (e) **Contact Telephone Number**
- (f) **Contact E-mail Address**
- (g) **Name of State of Application**
- (h) **Proposed Basic Administrative Fee Percentage (not to exceed 2.0%)**

(2) **Supporting Documents.** A list of supporting documents and forms in the following order found in the application and instruction download. **A list of documents for each zip file.**

(3) **SF424 Application for Federal Assistance.** Applicants must include the nine digit ZIP code (ZIP code plus four digits) associated with the applicant address in box 8d of the SF424. Applicants must also provide a project name in Line 11 of the SF424 and use the same project name in all references to the application as the information will pre-populate the other forms contained in the application download package.

(4) **SF424 Supplement Survey on Equal Opportunity for Applicants.** Titled “Faith Based EEO Survey” (SF424SUPP) on Grants.gov (optional submission).

(5) **SFLLL_Disclosure_of_Lobbying_Activities.** Note that federally recognized Indian tribes are not required to submit this form (see the **General Section**).

(6) **HUD2880 Applicant Recipient Disclosure Update Report.** Titled “HUD Applicant Recipient Disclosure Report” on application download on Grants.gov.

(7) **HUD 2993 Acknowledgement of Application Receipt.** For applicants submitting paper applications only. This is not applicable to those using Grants.gov.

(8) **Narrative Response to Factors for Award.** The total narrative response cannot exceed the equivalent of 60 single-sided standard 8-1/2” x 11” pages total in 12 point font, not including attachments for each narrative. There are no page limits for Rating Factors 3 and 4.

(a) **Capability Statement, see Rating Factor 1.** (10 page limit). Includes General Experience, Experience with PBTs, Experience Training Personnel to Ensure Performance of PBTs and Ensuring Compliance.

The Capability Statement portion of the Application must describe the applicant’s experience actually performing the ACC and the PBTs described in Exhibit A, Section 3, of the ACC or experience performing tasks which are strongly related to the PBTs, such as: managing a portfolio of affordable multifamily housing units, managing public housing projects, managing a housing choice voucher program, managing a project-based voucher program, serving as a Traditional Contract Administrator, completing health and safety work order requests submitted by tenants, tracking and resolving tenant complaints and submitting reports to state or federal regulatory agencies. The applicant may describe the experience of the PHA, the PHA’s instrumentality, or one or more contractors with whom the PHA has contracted, or proposes to contract with, to provide services related to the Capability Statement. The Capability Statement is a Factor for Award.

The applicant is to provide a narrative response for each of the subfactors in the rating factor. The applicant's responses must be in the same order and numbered as the subfactors appear. Only information submitted for a specific subfactor will be considered for the corresponding subfactor for which it was written.

One copy of the Capability Statement of the Application shall be submitted as a Microsoft® Word® file using this file name format: Two Letter State Postal Code_PHA Complete Name_CAPABILITY. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

(b) Technical Approach narrative (30 page limit). See Rating Factor 2. The Technical Approach portion of the Application must describe the applicant's technical approach to performing the ACC and the PBTs described in Exhibit A of the ACC. The applicant may describe the technical approach of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted or proposes to contract with, to provide services related in the Technical Approach. Rating Factor 2 includes descriptions of five (5) subfactors that the applicant must address in the Technical Approach and the points for each section.

The applicant is to provide a narrative response for each of the subfactors and the FTE Chart (Not a Factor for Award). The applicant's response may include tables and graphs. The applicant's responses must be in the same order and numbered as the subfactors appear. Only information submitted for a specific subfactor will be considered for the corresponding subfactor for which it was written

One copy of the Technical Approach portion of the Application shall be submitted as a Microsoft® Word® file using this file name format: Two Letter State Postal Code_PHA Complete Name_TECHNICAL. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

NOTE: The Two Letter State Postal Code is for the State for which the application is submitted.

The FTE chart shall be submitted as an Microsoft Excel file using this file name format: Two Letter State Postal Code_PHA Complete Name_APPCERT. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

(c) Quality Control Plan narrative (20 page limit). See Rating Factor 2. The Quality Control Plan portion of the application must describe the internal control procedures that the

applicant will implement to ensure quality performance of the ACC and the PBTs described in Exhibit A, Section 3, of the ACC. The applicant may describe the internal control procedures of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted or proposes to contract with, to provide services related to each Subfactor in the Quality Control Plan. Rating Factor 2, includes descriptions of seven (7) "Subfactors" that the applicant must address in the Quality Control Plan and the points for each Subfactor.

The applicant is to provide a narrative response for each of the subfactors. The applicant's responses must be in the same order and numbered as the subfactors appear. Only information submitted for a specific subfactor will be considered for the corresponding subfactor for which it was written.

One copy of the Quality Control Plan portion of the Application shall be submitted as a Microsoft® Word® file using this file name format: Two Letter State Postal Code_PHA Complete Name_QCP. The name of the file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the file.

Note: the Two Letter State Postal Code is for the State for which the application is submitted.

(d) Narrative on Affirmatively Furthering Fair Housing. Applicants must submit a narrative describing how they intend to fulfill the Affirmatively Furthering Fair Housing requirement, including describing how they will address impediments to fair housing as described in Section III.E.6. above. See Rating Factor 3.

(e) Policy Priority Narrative on Job Creation, See Rating Factor 4.

(f) Proposed Fee, See Rating Factor 5. Include fee percentage in Abstract, described above in part **(1)**.

(9) Reasoned Legal Opinion (RLO), including charter and other required organizational documents, and Supplemental Letter, if applicable. The RLO file must use the following file name format :the two letter State postal code of the State for which the applicant is applying, _ the two letter State postal code of the State under the laws of which the applicant was formed, _ the complete legal name of the applicant. Refer to Section III.D.2.a above for General RLO Requirements. The name of the RLO file cannot exceed 50 characters, if it does, it will be rejected; and rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters in the naming of the RLO file.

(10) Disaster Plan. See Program Requirements at Section III.E.1

(11) Fair Housing Requirements. Applicants must describe how they will address impediments to fair housing.

(12) HUD_424_CB_Detailed_Budget. A budget for all funds (Federal and non-Federal). The HUD 424 CB is a standard form budget template, and includes budget lines that are not allowable items under the Program, e.g., land and building acquisition costs. When completing

the HUD 424 CB, applicants should please ensure that only budget items allowed under the PBCA Program are populated.(in the application download)

(13) HUD96011_Facsimile_Transmittal (“Facsimile Transmittal Form” on Grants.gov). The form must be submitted with each application and be used as the coversheet for any facsimile sent for the application, if the applicant is not faxing any documents, the applicant must still complete the facsimile transmittal form. In the section of the form titled “Name of Document Transmitting,” the applicant should enter the words “Nothing Faxed with this Application.” Complete the remaining highlighted fields and enter the number “1” in the section of the form titled “How many pages (including cover) are being faxed?” The applicant must move the form to the right side of the Grants.gov application to open and complete the form. Forms on the right side of the application get uploaded as part of the application submission with the forms getting embedded ID numbers. The embedded ID numbers allow HUD to match the faxes to each application submission. **Please refer to the General Section for a detailed discussion.**

NOTE: HUD will not accept entire applications submitted by fax, unless a waiver has been obtained pursuant to Section IV.C.5, below (Waiver of Electronic Application Requirement), or applicant is responding to a curable deficiency pursuant to Section V.B.4 (Corrections to Deficient Applicants). If an applicant submits an application by fax or in paper copy and has not received a waiver to the electronic application submittal, the entire application will be disqualified.

5. Receipt Dates and Times. The deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date. Applications must meet the timely receipt requirements of the **General Section**. See Section IV of the **General Section** regarding application timely filing requirements.

6. Other Submission Requirements.

a. Waiver of Electronic Application Requirement. Applicants must follow the electronic application instructions included in the **General Section**, unless granted a waiver for cause of the required electronic application requirement. The request for a waiver must provide a justification for cause in accordance with HUD’s waiver policy at 24 CFR 5.1005. Applicants requesting a waiver must submit the request in writing no later than fifteen (15) days prior to the application deadline date. The letter must be addressed to Carol J. Galante, Acting Assistant Secretary for Housing, Federal Housing Commissioner at the address below. The waiver can be submitted via email or fax to:

U.S. Department of Housing and Urban Development
 451 Seventh Street SW, Room 6151
 Washington, DC 20410
 ATTN: Mr. Kerry E. Hickman, Acting Director, Office of Housing Assistance Contract
 Administration Oversight (HACAO)
 Telephone Number: (202) 402-3885
 Email: Kerry.E.Hickman@hud.gov
 FAX: 202-708-1010

Paper applications will not be accepted from applicants that have not been granted a waiver. If an applicant is granted a waiver, the approval notice will provide instructions for application submission and receipt requirements. All applications in paper format must have received a waiver to the electronic application requirement and must be received no later than 3:59:59 p.m. Eastern Time close of business on the application deadline date to allow scanning of any packages in accordance with HUD Security procedures.

V. APPLICATION REVIEW INFORMATION

A. Rating Criteria. Applications will be scored based upon their response to the subfactors associated with each rating factor, or “Factor for Award.” The technical point value associated with each subfactor is the maximum value that can be assigned. The points awarded for the rating factors will be up to 100 points. Points will be assigned to each of the rating factors identified below. Applicants should review the rating factors carefully and respond specifically to each factor. This NOFA does not include bonus points under the EZ/EC/RC-II or the Preferred Sustainable Status Bonus Points. Applicants must receive a total score of 45 of 70 points available in the Rating Factors 1 through 4 for Capability, Soundness of Approach and Policy Priorities to qualify for an award.

1. Rating Factor 1: Capability of the Applicant and Relevant Organizational Experience (Up to 20 Points). The applicant must submit a detailed Capability Statement that describes the applicant’s relevant organizational and past experience performing each of the following subfactors. The applicant may describe the experience of the PHA, the PHA’s instrumentality, and contractors with which the PHA has contracted to provide services in each subfactor a. through d.

a. General Experience (up to 8 points). The applicant should describe the nature and length of its experience serving as contract administrator for multifamily housing projects with project-based Section 8 HAP contracts (actual experience). The applicant may also describe the nature and length of its experience administering functions and processes strongly related to serving as contract administrator or providing strongly related contract administration activities for multifamily housing projects and rent subsidy programs (strongly related experience). Examples of strongly related experience include, but are not limited to the following: managing a portfolio of affordable multifamily housing units, managing public housing projects, managing a Housing Choice Voucher program, managing a project-based voucher program, serving as a Traditional Contract Administrator, completing health and safety work order requests submitted by tenants, tracking and resolving tenant complaints, and submitting reports to state or federal regulatory agencies. To receive the maximum points, the applicant’s response must be comprehensive (i.e. whether its experience addresses all of the required components described in each subfactor) and include specific examples of its experience. The applicant’s response must include the number of years of its general experience.

Nature of Experience (up to 5 points)

Up to 5 points will be awarded based on the comprehensiveness of the response, demonstrated knowledge of contract administration and clarity of response. The same points will be assigned for actual and/or strongly related experience.

Duration of Experience (up to 3 points)

Up to 3 points will be awarded for length of experience indicated in the response.

- If the applicant has five (5) or more years of actual or strongly related experience, three (3) points will be assigned.
- If the applicant has three (3) to four (4) years of actual or strongly related experience, two (2) points will be assigned.
- If the applicant has one (1) to two (2) years of actual or strongly related experience, one (1) point will be assigned.
- If the applicant has less than one (1) year of actual or strongly related experience, zero (0) points will be assigned.

b. Experience with Performance-Based Tasks (PBTs) (up to 6 points). The applicant should describe, for each PBT in Exhibit A, Section 3 of the ACC (and listed below for reference), its experience performing the PBT or performing tasks that are strongly related to the PBT. The same points will be assigned for actual and/or strongly related experience. Up to six (6) points may be assigned. To receive the maximum points, the applicant's response must be comprehensive (i.e. experience addresses all of the required components described in each subfactor) and include specific examples of its experience performing a wide range of PBTs. The applicant's response must include the number of years of its general experience. No additional points are assigned to the years of experience but applicants with less than one year of experience will be assigned zero (0) points. The applicant's experience performing each of the following PBTs will be evaluated and assigned points as follows:

Experience with PBTs #1 through #5 (up to 4 points);

Experience with PBTs #6 through #8 (up to 2 points). The list of PBTs is provided for your reference below:

- PBT #1 – Management and Occupancy Reviews
- PBT #2 – Adjust Contract Rents
- PBT #3 – Review and Pay Monthly Vouchers
- PBT #4 – Renew HAP Contracts
- PBT #5 – Tenant Health, Safety, and Maintenance Issues
- PBT #6 – Administration – Monthly and Quarterly Reports
- PBT #7 – Administration – Annual Reports and Certifications
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End

c. Experience Training Personnel to Ensure Performance of PBTs (up to 4 points). Each applicant should describe its experience training personnel to ensure performance of each of PBTs #1 through #6 or tasks that are strongly related to PBTs #1 through #6. The number of years of experience is not applicable to the descriptions. The same points will be assigned for actual and/or strongly related experience. To receive the maximum points the applicant's response must be comprehensive and include specific examples of training sessions and successful results.

The applicant's experience training personnel to perform each of the PBTs will be evaluated and assigned points as follows:

- Experience with all of PBTs #1 through #6 will be assigned four (4) points.
- Experience with three (3) to five (5) of PBTs #1 through #6, must include PBT#1, will be assigned three (3) points.
- Experience with three (3) to five (5) of PBTs #1 through #6, not including PBT#1, will be assigned two (2) points.
- Experience with one (1) or two (2) of PBTs #1 through #6 will be assigned one (1) point.
- No experience with any of PBTs #1 through #6 will be assigned zero (0) points.

d. Experience Ensuring Compliance (up to 2 points). Each applicant should describe its experience monitoring Federal statutes, regulations, and program requirements, identifying and interpreting changes or additions, and implementing policies and procedures that ensured efficient, effective and consistent compliance. This includes experience complying with fair housing and equal opportunity statutes, regulations, and program requirements. This may be demonstrated, for example, by describing relevant policies and procedures (reasonable accommodations, effective communication), affirmative outreach requirements, efforts to ensure program accessibility for persons with disabilities, etc. To receive the maximum points the applicant's response must be comprehensive and include specific, successful examples that relate to the program and ACC.

2. Rating Factor 2: Soundness of Approach (up to 48 Points) including: Technical Approach (up to 24 Points), and Quality Control Plan (up to 24 Points).

a. Technical Approach (up to 24 Points). Each applicant should submit a description of its technical approach, including relevant organizational staff, to performing each of the following subfactors as they relate to the ACC (in addition to the FTE Chart if working on elements required by the ACC not a PBT listed in the subfactors below). The applicant may describe the technical approach of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted to provide services in each subfactor. Up to 24 points may be assigned to the Technical Approach.

b. Technical Approach: Annual Work Plan (up to 2 points). Each applicant should describe a sound technical approach to planning the performance of all PBTs during the first twelve (12) month period of the ACC term as required in the ACC under PBT #7, Annual Work Plan. Up to

two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response (i.e. approach addresses all of the required components described in each subfactor) and the reasonableness of the proposed approach to ensure performance of all PBTs. See example of point allocation in Section V.A.2.e, above.

c. Technical Approach: PBTs (up to 12 points). Each applicant should describe a sound technical approach to performing each of the PBTs specified in Exhibit A, Section 3 of the ACC and listed below for reference. Up to twelve (12) points may be assigned. To receive the maximum points, the applicant must describe an effective approach that includes specific steps to ensure performance of all eight (8) PBTs. If contractor entities are used or proposed to be used for more than 50% of FTEs for PBTs 1-6 in multiple states (as noted in the FTE statement) applicant must describe how they will balance the workload for the PBTs 1-6. Points will be assigned based on the comprehensiveness of the response (i.e. whether the approach addresses all of the required components described in each subfactor) and the proposed approach to ensure performance of all required PBTs.

The technical approach for each of the following components will be evaluated and assigned points as follows:

- PBT #1 – Management and Occupancy (up to 2 points).
- PBT #2 – Adjust Contract Rents (up to 2 points).
- PBT #3 – Review and Pay Monthly Vouchers (up to 2 points).
- PBT #4 – Renew HAP Contracts (up to 2 points).
- PBT #5 – Tenant Health, Safety, and Maintenance Issues (1 point or zero point).
- PBT #6 – Administration – Monthly and Quarterly Reports (1 point or zero point).
- PBT #7 – Administration – Annual Reports and Certifications (1 point or zero point).
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End (1 point or zero point).

Applicants must complete and submit **the FTE statement** (see Appendix B of this NOFA) showing all staff and contractors who will be performing PBTs 1-6.

d. Technical Approach: General ACC Requirements (up to 2 points). Each applicant should describe a sound technical approach to administering the general requirements of the ACC. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the reasonableness of the proposed approach to ensure performance of all required components of the ACC. For example, a response that addresses each of the below components and relates directly to performance requirements in the ACC will receive 2 points. One point may be given for less complete responses. Responses that are nonresponsive to the ACC or don't address the above components will receive 0 points. The technical approach should include the following components.

- Executive leadership and oversight (if applicable, include a detailed description of planned oversight of all contractors with whom the applicant PHA intends to contract directly);
- Legal representation;
- Equal opportunity management with staff, tenants, and applicants;
- Plan for communication with HUD;
- Plan for communication/engagement with owners and management agents;
- Plan for communication/engagement with tenants; and
- Plan for communication/engagement with tenants and applicants with disabilities.

e. Technical Approach: Information Systems and Security (up to 2 points). Each applicant should describe a sound technical approach to information and information system security and privacy for data entered into or pulled from HUD Systems. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the reasonableness of the proposed approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above. The technical approach should include the following components:

- Security for HUD Systems—TRACS;
- Security for HUD Systems—EIV System;
- Security for HUD Systems—iREMS;
- Security for Non-HUD Information Technology Systems that contain program related data; and
- Security for print-based program documents.

f. Technical Approach: Preparing to Assume ACC Responsibilities (up to 6 points). Each applicant should describe a sound technical approach to preparing to assume responsibility for administration of the ACC and performance of the PBTs upon the effective date of the ACC in each of the three (3) components that follow. If specific items do not need to be acquired or added, the applicant must describe what is in place (i.e. surplus office space within the PHA's facility) or why it is not required. Up to six (6) points may be assigned. Points will be assigned based on the comprehensiveness of the response (i.e. approach addresses all of the required components described in each subfactor) and the proposed impact of the approach to ensure performance of all required components. To receive the maximum points, the applicant must describe a sound approach that explains specific steps to ensure performance of all three (3) components listed below. The technical approach for each of the following components will be evaluated and assigned points as follows:

- A description of office facilities, communication systems, information technology systems to be acquired or added to existing operations and a timeline from award to full readiness (up to 2 points);
- A description of accounting systems; banking, insurance and fidelity bonding arrangements to be acquired or added to existing operations and timeline from award to full readiness (up to 2 points); and
- A description of hiring and training of personnel to be added and a timeline from initiation to full readiness (up to 2 points).

g. Quality Control Plan (up to 24 Points). Each applicant should submit a detailed Quality Control Plan (QCP) that describes internal control procedures for each of the following subfactors (1) through (7). The applicant may describe the internal control procedures of the PHA, the PHA's instrumentality, or one or more contractors with whom the PHA has contracted to provide services in each subfactor. Up to 24 points may be assigned to the QCP. Points will be assigned based on the comprehensiveness of its internal control procedures, as they relate to the ACC, to ensure the applicant's organizational expertise and capacity to ensure the steps and procedures described meet the objectives of the subfactors.

(1) Internal Control Procedures: PBTs (up to 8 points). For each PBT specified in Exhibit A, Section 3 of the ACC (and listed below for reference), describe how they will achieve Acceptable Quality Level (AQL) performance of the specified PBT in the Performance Requirements Summary (PRS) Table, Exhibit A, Section 5 of the ACC. Up to eight (8) points may be assigned. To receive the maximum points, the applicant must describe an effective plan that includes specific steps to measure and evaluate the performance of all eight (8) PBTs listed below at the specified AQL. Points will be assigned based on the comprehensiveness of the response (i.e. approach addresses all of the required components described in each subfactor) and the proposed approach to ensure performance of all required components.

The QCP for each of the PBTs will be evaluated and points assigned as follows:

- PBT #1 - Management and Occupancy (1 point or zero points).
- PBT #2 – Adjust Contract Rents (1 point or zero points).
- PBT #3 – Review and Pay Monthly Vouchers (1 point or zero points).
- PBT #4 – Renew HAP Contracts (1 point or zero points).
- PBT #5 – Tenant Health, Safety, and Maintenance Issues (1 point or zero points).
- PBT #6 – Administration – Monthly and Quarterly Reports (1 point or zero points).
- PBT #7 – Administration – Annual Reports and Certifications (1 point or zero points).
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End (1 point or zero points).

(2) Internal Control Procedures: Conflicts of Interest (up to 2 points). Each applicant should describe the internal control procedures that will be implemented to ensure that the conflicts of interest stipulated in Section 10, "Conflicts of Interest," of the ACC are prevented, detected and resolved. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response (i.e. whether the approach addresses all of the required components described in each subfactor) and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above. See ACC for outcomes.

(3) Internal Control Procedures: Accountability (up to 2 points). Each applicant should describe the internal control procedures that will be implemented to ensure accountability and separation of duties to detect and prevent fraud, waste, and abuse of funds. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above.

(4) Internal Control Procedures: Privacy (up to 2 points). Each applicant should identify the internal control procedures that will be implemented to prevent, detect, record, and report privacy breaches. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above.

(5) Internal Control Procedures: Information Systems (up to 2 points). Each applicant should describe the internal control procedures for information and information system access, management, and security for HUD systems, non-HUD systems that contain program related data, and print-base program documents. Up to two (2) points may be assigned. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components. See example of point allocation in Section V.A.2.e, above.

(6) Internal Control Procedures: Training (up to 2 points). Each applicant should describe how they will provide initial and continuous training and cross training of staff to perform PBTs and comply with the requirements of the ACC and HUD. Up to two (2) points may be assigned. Points will be assigned based on how clear the plan is, how staff is identified to be trained and frequency of training.

(7) Internal Control Procedures: QCP Elements 1 through 6 (up to 6 points). Each applicant should describe the internal control procedures that will be implemented to review the effectiveness of each element of the QCP and the date(s) scheduled for each QCP element review. Up to six (6) points may be assigned. To receive the maximum points, the applicant must describe a plan that includes specific steps to ensure the six (6) internal control descriptions in the QCP. Points will be assigned based on the comprehensiveness of the response and the proposed impact of the approach to ensure performance of all required components.

- PBTs (1 point or zero point);
- Conflicts of Interest (1 point or zero point);
- Accountability (1 point or zero point);
- Privacy (1 point or zero point);
- Information Systems (1 point or zero point); and
- Training (1 point or zero point).

3. Rating Factor 3: Policy Priority: Affirmatively Furthering Fair Housing (up to 1 Point).

Applicants will be awarded one (1) point for demonstrating how their application affirmatively furthers Fair Housing. Each applicant should identify specific activities, outputs and outcomes that further these policy priorities over the period of performance.

HUD is interested in funding housing and community development activities that afford residents an opportunity to live in a variety of neighborhoods and not be confined to affordable housing choices in areas of high poverty or areas that are not racially or ethnically diverse. Recognizing that housing and community development efforts must address a complex network of social and economic factors in order to promote more diverse, inclusive communities, HUD seeks to encourage applicants to undertake comprehensive and effective strategies to affirmatively further fair housing. Each applicant should describe how it will take affirmative steps to achieve the following outcome: **Address impediments to fair housing and promote fair housing rights and choice.** The applicant must describe the methods that will be used to achieve these outcomes. Examples include review of HUD-assisted projects to ensure compliance with federal civil rights and equal opportunity regulations, implement actions and procedures to affirmatively further fair housing, perform affirmative fair housing marketing, and make information available on the existence and location of housing, facilities, and services that are accessible to persons with disabilities, and maintain records of the actions, goals, and outcomes. The applicant should also present a timetable for achieving the identified outcomes.

4. Rating Factor 4: Policy Priority: Job Creation (1 Point).

Applicants will be awarded one (1) point for demonstrating how their application creates jobs and promotes economic development in the community. Each applicant should identify specific activities, outputs and outcomes that further these policy priorities over the period of performance.

Under the Job Creation/Employment policy priority, HUD seeks to fund applicants that undertake activities that sustain economic development and create jobs in low-income communities. Each applicant should describe the number and type of activities that will improve access to job opportunities in the community through information sharing, coordination with Federal, state, and local entities, and other means. To receive one policy priority point, applicants are expected to describe how they will achieve the following outcome: **Expand job creation and other economic opportunities in the community.** The applicant must describe the methods that will be used to achieve these outcomes. Examples include specifying the number of jobs created and specifying the number of other activities that expand job creation and other economic opportunities. According to the proposed methods, the applicant should identify the anticipated outputs (i.e. number of jobs created, number of activities planned) during the period of performance.

5. Rating Factor 5: Scaled Fee Score. Basic Administrative Fee (up to 30 Points)

In addition to technical points, applicants will receive up to 30 points for the basic administrative fee percentage proposed in the application. All proposed fees will be rounded to the nearest .01%. The proposed Basic Administrative Fee Percentage for a State is not to exceed 2.0%.

Points will be assigned as follows:

- 1.0% or below 30 points
- 1.01-1.1% 28 points
- 1.11-1.2% 25 points
- 1.21-1.3% 22 points
- 1.31-1.4% 19 points
- 1.41-1.5% 16 points
- 1.51-1.6% 13 points
- 1.61-1.7% 10 points
- 1.71-1.8% 7 points
- 1.81-1.9% 4 points
- 1.91-2.0% 1 point

The proposed fee points are added to the technical points to obtain the total score. The application with the highest total score in the state will be awarded the ACC.

In circumstances where the highest total scores for a state are equal, the applicants with tied scores will have a tie-breaker based on highest point score for Rating Factor 5. If there is still a tie, HUD will select the applicant with the highest point score for Rating Factor 1.

B. Certifications. By signing the electronic application on Grants.gov, the applicant certifies that the Disaster Plan will be complete and correct before awards are made. The applicant is also certifying that all the statements and information contained in the application is true and correct and upon which HUD can rely.

C. Reviews and Selection Process.

a. Application Screening. Applicants requesting funds will be screened for completeness. Applications from ineligible entities will not be reviewed. Applicants that do not include the Reasoned Legal Opinion in their application will not be reviewed. If an applicant proposes an administrative fee over 2%, the application will not be reviewed. Applications that do not meet the timely receipt requirements or provide file formats that do not meet HUD requirements as specified in the FY2012 **General Section** cannot be read by HUD and therefore will not be reviewed.

b. Technical Evaluation Panel. Applications that pass the initial screening review will be forwarded to the Technical Evaluation Panel (TEP). The TEP is composed of teams of Multifamily Housing staff who will review and evaluate the applications forwarded to them. HUD will conduct the substantive review of the application in accordance with the rating criteria described in this NOFA. As part of the review process, HUD may contact the applicant by telephone, email, or mail for the sole purpose of clarifying or confirming application

information, but not to improve the substance of the application. Detailed rules regarding corrections to deficient applications appear in Section V. B. 4. below. If contacted for clarifying or confirming information, the applicant must respond within the time parameters as provided in Section V. B. 4. Rating factors and subfactors are not curable deficiencies.

Each application will be evaluated and scored on its own merit by a TEP Team.

c. Corrections to Deficient Applications. After the application deadline, and in accordance with the electronic submission grace period, HUD may not, consistent with its regulations in 24 CFR part 4, subpart B, consider any unsolicited information provided by an applicant. After HUD receives an application, HUD may contact an applicant to clarify an item in its application or to correct curable (correctable) technical deficiencies. HUD may not seek clarification of items or responses that improve the substantive quality of an applicant's response to any rating factors or which correct deficiencies which are in whole or part of a rating factor. In order not to unreasonably exclude applications from being rated and ranked, HUD may contact applicants to ensure proper completion of the application, and will do so on a uniform basis for all applicants.

Curable (correctable) technical deficiencies are limited to: inconsistencies in the funding request, failure to submit certifications or statements that are not threshold requirements and do not impact the score of an applicant, and failure to submit an application that contains a signature by an official able to make a legally binding commitment on behalf of the applicant (e.g. Disaster Plan or FTE Chart). In the case of an applicant that received a waiver of the regulatory requirement to submit an electronic application, the technical deficiency may include failure to submit an application that contains an original signature. If HUD finds a curable deficiency in the application, HUD will notify the applicant by electronic mail describing the clarification or technical deficiency. Clarifications or corrections of technical deficiencies in accordance with the information provided by HUD must be received by HUD within 14 calendar days of the date of receipt of the HUD notification and be sent by electronic mail to the address provided in the notice. (If the deadline date falls on a Saturday, Sunday, or Federal holiday, then the applicant's correction must be received by HUD on the next day that is not a Saturday, Sunday, or Federal holiday).

In the case of electronic submissions to Grants.gov, any clarifications or cure items must be submitted electronically using the facsimile telephone number 800-HUD-1010 and form HUD96011, Facsimile Transmittal, contained in the last application package submitted to HUD. The additional information provided by facsimile will be matched to the electronic application in HUD's files. When submitting technical deficiency cure items, please place the following information in the box labeled "Name of Document Submitting" on form HUD96011: Technical Cure plus the name of the document. If the name of the document is long and you need space to fit the document name, simply label the Technical Cure as TC followed by the document name. When submitting a facsimile, applicants must follow the facsimile requirements found elsewhere in this notice. If the deficiency is not corrected within the above time frame, HUD will reject the application as incomplete, and it will not be considered for funding.

For paper applications the applicant must be registered in CCR with an active registration on the deadline date and have a DUNS number. An application with the wrong DUNS number entered in the SF424 will be treated as a technical deficiency and the applicant will be permitted to

provide a corrected SF424 to the location indicated in the waiver approval within the specified cure period and in accordance with the notification of the need to cure the application. Failure to correct the deficiency and meet the requirement to have a DUNS number and active registration in the CCR will render the application ineligible for funding. All applicants are advised to check and maintain their DUNS numbers and CCR registrations with the posting of this NOFA so any updates or changes are completed well in advance of application deadline dates.

d. Ranking and Selection.

(1) Threshold Requirements. Applicants that do not meet the threshold requirements of the **General Section** or this NOFA will not receive an award of funds from HUD regardless of score or ranking.

(2) Minimum Score. HUD will make awards to applicants meeting the threshold and minimum score requirements.

(3) HUD reserves the right to not fund an application if information comes to the attention of HUD that adversely affects an applicant's eligibility or integrity in managing an award, adversely affects HUD's evaluation or scoring of an application, or indicates evidence of fraud or mismanagement on the part of an applicant.

(4) HUD will rank applications in order by score and select the highest rated application by State. If there are multiple applications covering a state, HUD will select the highest rated application for that State and then skip all others within that State. If there is a tie score for a given State, HUD will use the tie breaker methodology identified in this NOFA.

(5) Limitations on Award Amounts. HUD reserves the right to reduce or adjust the funding amount based upon:

- (a)** The reasonableness of the overall program relative to the number of units covered;
- (b)** The level of funds available for award under the program; and
- (c)** Workload reduction.

(6) If there are funds remaining that are less than the requested level of an applicant deemed eligible for funding, HUD may offer the remaining funds to the applicant at a reduced funding amount. If an applicant turns down an award offer, HUD will make an offer of funding to the next highest-ranking eligible application.

VI. AWARD ADMINISTRATION.

A. Selection and Notification. HUD will notify all applicants as to the outcome of the selection process. If an applicant is selected, HUD's notice concerning the amount of the award (based on the approved application) will constitute HUD's selection, subject to execution of the award documents by HUD. Successful PBCA Program applicants will be notified of the selection and will receive instructions for proceeding. The selection does not become final until the cooperative agreement and other award documents are signed and executed.

B. LOCCS Access. Applicants must be eligible to acquire rights and access under HUD's Electronic Line of Credit Control System (eLOCCS). The award notice will provide directions for obtaining LOCCS access.

C. Debriefing. For a period of 120 days, beginning not more than 30 days after the final awards for assistance are publicly announced, HUD will provide a debriefing to a requesting unsuccessful applicant related to that application. A debriefing request must be made in writing or by email by the applicant's authorized official whose signature appears on the SF424, or by his or her successor in the office and submitted to Kerry.E.Hickman@hud.gov or to:

Mr. Kerry E. Hickman, Acting Director
Office of Housing Assistance and Contract Administration Oversight
Multifamily Housing Programs
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 6151
Washington, DC 20410

Information provided during a debriefing will include, at a minimum, the final score received for each rating factor, final evaluation comments for each rating factor, and the final assessment indicating the basis upon which the award was provided or denied.

D. Administrative and National Policy Requirements. In addition to the requirements listed below, please review all requirements in the **General Section**.

E. Reporting Requirements.

1. Monthly and Quarterly Reporting Requirements. All Awardees must report to HUD monthly and quarterly as specified under PBT #6, Exhibit A of the ACC.

2. Annual Reporting Requirement. All awardees must report to HUD annually as specified under PBT #7 and PBT #8, Exhibit A of the ACC.

3. General Requirements. Generally Federal funds maintain their Federal character with regard to program eligible uses in perpetuity, and continue to remain subject to all annual reporting requirements. Specifically, after the close of the award period, Awardees with funds remaining in financing programs will prospectively be required to report basic information on the Program on an annual basis until the funds are either: (1) rolled into another eligible activity; or (2) fully disbursed through default. HUD reserves the right to require the grantee to report on real property managed by the applicant during the award period and for uses in perpetuity.

4. Racial and Ethnic Data. If you are collecting client-level data, HUD requires that funded recipients collect racial and ethnic beneficiary data. HUD has adopted the Office of Management and Budget's Standards for the Collection of Racial and Ethnic Data. In view of these requirements, the applicant should use HUD27061, Racial and Ethnic Data Reporting Form found on www.hudclips.org or a comparable electronic data system for this purpose.

5. Transparency Act Reporting. Recipient Reporting is required under the Federal Financial Assistance Accountability and Transparency Act of 2006, as amended.

a. Prime Awardee Reporting. Prime recipients of HUD financial assistance are required to report sub-awards made either as pass-through awards, sub-recipient awards, or vendor awards in the Federal government-wide website www.fsrs.gov or its successor system. Starting with awards made October 1, 2010, prime financial assistance awardees receiving funds directly from

HUD are required to report sub-awards and executive compensation information both for the prime award and sub-awards, including awards made as pass-through awards or awards to vendors, where the initial award is \$25,000 or greater or the cumulative award will be \$25,000 or greater if funding incrementally as directed by HUD in accordance with OMB guidance.

The reporting of award and sub-award information is in accordance with the requirements of Federal Financial Assistance Accountability and Transparency Act of 2006, as amended by section 6202 of Public Law 110-252, hereafter referred to as the “Transparency Act” and OMB Guidance issued to the Federal agencies on September 14, 2010 (75 FR 55669) and in OMB Policy guidance. The prime awardee will have until the end of the month plus one additional month after a sub-award or pass-through award is obligated to fulfill the reporting requirement.

The Transparency Act requires the creation of a public government-wide website in which the following sub-award data will be displayed:

- (1) Name of entity receiving award;
- (2) Amount of award;
- (3) Funding agency;
- (4) North American Industry Classification System (NAICS) code for contracts/CFDA program for financial assistance awards;
- (5) Program source;
- (6) Award title descriptive of the purpose of the funding action;
- (7) Location of the entity (including Congressional district);
- (8) Place of Performance (including Congressional district);
- (9) Unique identifier of the entity and its parent; and
- (10) Total compensation and names of top five executives.

For the purposes of reporting into the Federal Funding Accountability and Transparency Act (FFATA) Sub-award Reporting System (FSRS) reporting site, the unique identifier is the DUNS number the entity has obtained from Dun and Bradstreet, and for Prime awardees the DUNS number registered in the Central Contractor Registration as required by HUD regulation 24 CFR 5.1004.

b. Prime Awardee Executive Compensation Reporting. Prime awardees must also report in the government-wide website the total compensation and names of the top five executives in the prime awardee organization if:

- (1) More than 80 percent of the annual gross revenues are from the Federal government, and those revenues are greater than \$25 million annually; and
- (2) Compensation information is not readily available through reporting to the Securities and Exchange Commission (SEC).

c. Sub-award Executive Compensation Reporting. Prime awardees must also report in the government-wide website the total compensation and names of the top five executives in the sub-awardees, pass-through or vendor organization if:

- (1) More than 80 percent of the annual gross revenues are from the Federal government, and those revenues are greater than \$25 million annually; and

(2) Compensation information is not readily available through reporting to the SEC.

d. Transparency Act Reporting Exemptions. The Transparency Act exempts any sub-awards less than \$25,000 made to individuals and any sub-awards less than \$25,000 made to an entity with annual expenditures less than \$300,000. Sub-awards with a cumulative total of \$25,000 or greater are subject to sub-award reporting beginning the date the sub-award total award amount reaches \$25,000. Any other exemptions to the requirements must be approved by the Office of Management and Budget.

6. Compliance with Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), hereafter referred to as “Section 872”. Section 872 requires the establishment of a government-wide data system – the Federal Awardee Performance and Integrity Information System (FAPIIS) - to contain information related to the integrity and performance of entities awarded Federal financial assistance and making use of the information by Federal officials in making awards. OMB is in the process of issuing regulations regarding Federal agency implementation of Section 872 requirements. A technical correction to this **General Section** may be issued when such regulations are promulgated.

HUD anticipates that the terms and conditions to its FY2012 awards will contain requirements related to meeting FFATA and Section 872 requirements.

F. Funding Restrictions.

1. Pre-award Costs. Awards under this NOFA are not allowed for reimbursement of pre-award costs (i.e., applicants may not use funding received under this NOFA for the cost of preparing their application).

2. Rescission of Award or Termination of ACC Based on False Certification. If, at any time after making an award to or executing an ACC with an applicant, HUD determines that any material representation in the RLO or any SL is false, such determination shall constitute a basis for HUD to rescind the award or terminate the ACC.

VII. AGENCY CONTACTS.

Further Information and Technical Assistance. Before the application deadline date, HUD staff may provide general guidance and technical assistance about this NOFA. However, staff is not permitted to assist in preparing the application. Also, following selection of applicants, but before awards are announced, staff may assist in clarifying or confirming information that is a prerequisite to the offer of an award. An applicant may contact Mr. Kerry E. Hickman, Acting Director, Office of Housing Assistance and Contract Administration Oversight, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 6151, Washington, DC 20410, by email to Kerry.E.Hickman@hud.gov or telephone 202-402- 3885 (this is not a toll-free number). This number can be accessed via TTY by calling the toll-free Federal Relay Service Operator at 800-877-8339.

For technical support for downloading an application or electronically submitting an application, please call Grants.gov help desk at 800-518-GRANTS (this is a toll-free number) or send an email to www.support@Grants.gov.

VIII. OTHER INFORMATION

A. Paperwork Reduction Act Statement. If it is determined that the Paperwork Reduction Act of 1995 (44 U.S.C. §§ 3501-3520) is applicable to the information collection requirements in this Notice, using OMB control numbers 2577-0157, 2502-0582, 2502-0587, 2577-0169, 2577-0229, 2510-0011, 2577-0259, 2502-0542, 2535-0116, and 2577-0270. In accordance with the Paperwork Reduction Act, HUD may not consider or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid OMB control number. HUD expects to hold an information webcast via satellite for potential applicants to learn more about the Program and preparation of an application. For more information about the date and time of this webcast, consult the HUD website at www.hud.gov.

B. Environmental Impact. This NOFA does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 C.F.R. 50.19(c)(1), this NOFA is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 USC 4321).

Dated: FEB 29 2012



Carol J. Galante,
Acting Assistant Secretary for Housing – Federal Housing
Commissioner

[FR-5600- N-33]

Appendix A. List of Available States for Applications by PHAs for PBCAs

1. Alabama
2. Alaska
3. Arizona
4. Arkansas
5. California
6. Colorado
7. Connecticut
8. Delaware
9. Florida
10. Georgia
11. Hawaii
12. Idaho
13. Illinois
14. Indiana
15. Kansas
16. Kentucky
17. Louisiana
18. Maryland
19. Massachusetts
20. Michigan
21. Mississippi
22. Missouri
23. Nebraska
24. Nevada
25. New Jersey
26. New Mexico
27. New York
28. North Carolina
29. Ohio
30. Oklahoma
31. Oregon
32. Pennsylvania
33. Rhode Island
34. South Carolina
35. Tennessee
36. Texas
37. Utah
38. Virginia
39. Washington
40. West Virginia
41. Wisconsin
42. The District of Columbia

Appendix B. FTE Chart Found in the Instructinos Download

Appendix C. Performance-Based Annual Contributions Contract (ACC) found in the Instructions Download

NOFA for PBCAs and ACC for NOFA Q&A

(Update as of 05/11/2012)

Questions about the grants.gov system should be directed to Grants.gov Contact Center:

- 24 hours a day, 7 days a week. Closed on [federal holidays](#).
- Phone: 1-800-518-4726 (local toll free). For International callers, please dial 606-545-5035 to speak with a Contact Center representative.
- Email: support@grants.gov
- **iPortal**: Top 10 requested help topics (FAQs), Searchable knowledge base, self service ticketing and ticket status, and live web chat (available 7:00 A.M. - 9:00 P.M. ET).
- **Please have the following information available when contacting us, to help expedite your inquiry:** *Funding Opportunity Number (FON), Name of Agency, Specific Area of Concern.*

Questions about the General Section requirements should now be addressed to

Dacia.A.Rogers@hud.gov. Claire Brolin has been assigned to another project and is not available to respond to questions about this NOFA.

Questions were received asking for guidance on how to answer the narrative descriptions for the subfactors in Rating Factors 1 and 2. For example, how much detail should be provided or should some specific requirement of the ACC be included. Answers to these types of questions have not been provided. The applicant's narrative descriptions will be evaluated to determine whether it understands requirements of the ACC and is prepared to perform those requirements.

Questions were received about issues that were not related to the preparation or submission of an application under the NOFA. Answers to these types of questions have not been provided either to the requestor or in this Q&A for NOFA.

New NOFA Q & A begins at number 204. New ACC for NOFA Q & A begins at number 17. An answer has been provided for number 67.

1. Why did HUD decide to re-compete the program?
 - A large number of protests to the Government Accountability Office (GAO) were filed by unsuccessful applicants after HUD announced the ACC awards pursuant to the February 2011 Invitation for Submission of Applications. Faced with these challenges, HUD was concerned that litigation delays would interrupt program assistance to lower income tenants and project owners. In an effort to avoid any program interruptions and to clarify any confusion caused by the February 2011 Invitation, HUD decided not to award ACCs for any jurisdictions under protest at GAO, to re-evaluate its competitive procedures, and complete the awarding of ACCs through the NOFA.
2. What will the NOFA cover?
 - Through the NOFA competition, HUD will award annual contribution contracts (ACCs) to selected qualified public housing agencies (PHAs) to implement Section 8 rental assistance in 42 states and territories.
3. Why is HUD pursuing a NOFA for the PBCA program?

- The costs entered in the Detailed Budget (form HUD-424-CB) must conform to the instructions (form HUD-424-CBW-I) and the requirements of OMB Circular A-84.
112. If applying with a partner, does the partnership have to be set up prior to application?
- The NOFA does not require that entities establish partnerships in order to submit an application. As described in the NOFA, an applicant is permitted to list and describe its contractor's experience, technical approach, and internal control procedures in addition to the applicant's own experience, technical approach, and internal control procedures. For example, instructions for Rating Factor 1 state, "The applicant may describe the experience of the PHA, the PHA's instrumentality, and contractors with which the PHA has contracted to provide services in each sub factor a. through d." The NOFA does not require that the applicant submit the executed agreements entered into with its contractors as a part of the application. Parties may choose to execute letters of intent, memoranda of understanding, or other such agreements prior to executing full service contracts, and depending on their substance, such executed contractual agreements may allow an applicant to certify in good faith as to the veracity of its application. Any applicant must meet the requirements of NOFA Section III.D.2.b or Section III.D.2.c.
113. If there is only one applicant and he does not meet the 45 point technical minimum on scoring, or there is no applicant, will HUD solicit other contract administrators?
- No, HUD will not solicit other contract administrators. If there is no qualified applicant for any jurisdiction, HUD will administer the HAP contracts for that state internally, in accordance with past practice and the United States Housing Act of 1937.
114. What legally constitutes an in-state applicant?
- An in-state applicant is an entity organized pursuant to the laws of the state in which it is proposing to act as a PBCA. An in-state applicant may be a governmental entity or the instrumentality of a governmental entity. Successful applicants must be able, under the laws of that state, to perform the functions identified in the ACC and the United States Housing Act of 1937 (specifically be "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b) (6) (A) of the United States Housing Act of 1937 Act). Whether or not an in-state applicant has the legal authority to operate throughout the state is determined by that state's laws.
115. SF-424 #19 Is Application Subject to review by Order 12372. From my research, we need to submit SF 424 for review to our State Clearinghouse Office of Planning and Research. Is this required?
- For the PBCA program, state coordination is not necessary. Order 12372 does not apply to the PBCA program.
116. #5 State name and location of project or activity: What do we input? Our agency information?
- State where work is proposed. Agency information should be entered in #1.
117. Which projects will require an annual MOR?

- Yes.
134. Several forms SF-424, HUD-2880 and SF-LLL have a Signature box. In a conversion with the point of contact listed in the Q&A, Claire Brolin, she indicated that the forms have to be signed (wet signature). Is this correct because it make the “Save, Check Package for Errors and Submit” obsolete? If so, do we scan all the completed forms and it will become one of the attachments? HUD-424-CB does not allow user to Indicate/Mark Year 2 and ALL Years on the form. Year 1 is prefilled and cannot be changed.
- Signed documents may be scanned or faxed using the instructions in the General Section section IV.B.5.
135. With regard to the General Threshold Requirements referenced in III. D.1 need to be affirmatively addressed in the response to this NOFA, do we only need to respond in this application to those requirements that are specifically listed starting on Page 18 of the Program NOFA, as stated by Grants Management personnel? If we respond to other threshold requirements stated in the General Section in the Abstract, will we be penalized? Is it necessary to respond to the other threshold requirements stated in the General Section, other than those that appear starting on page 18, or will that information not be reviewed?
- All applicants must comply with threshold requirements in the Program NOFA. Submissions should only include the application requirements listed in section IV.C.4 of the NOFA starting on page 18.
136. The General Section regarding Threshold Requirements refers to a Consolidated Plan. Are applicants required to have a HUD approved Consolidated Plan? A keyword search of the full NOFA does not mention consolidated plan.
- See number 60.
137. A large number of questions have been sent to HUD regarding General Section requirements, which HUD has stated must be referred to Grants.Gov. The questions and the answers pertain directly to the NOFA for PBCAs. Will HUD collect the Q&A on these questions and make them available to all on HUD’s PBCA NOFA Q&A list?
- Yes.
138. Page 16 number 6 of the Program NOFA states that "Successful applicants must comply with certain requirements regarding affirmatively furthering fair housing, including affirmative fair housing marketing, rather than the General Section. It then goes to list three actions and/or procedures that the applicant must perform. Are applicants to only respond to these three requirements, rather than anything else in General Section pertaining to affirmatively furthering fair housing, in its Response to Rating Factor 3?
- See numbers 26 and 85.
139. Page 19 of the NOFA states the total narrative response cannot exceed 60 pages, not including attachments for each narrative. Does this mean that the Capability Section, Technical Section and

168. HUD stated in response to question 96 that “HUD is not relying solely on State Attorneys’ General opinions as a basis for its decision to not permit the crossing of state lines, except in limited circumstances” and that the Attorney General opinions that HUD has received that are posted on HUD’s website “have been a factor in HUD’s decision.” What were the other factors in HUD’s decision for adding the Crossing State Lines provision to the NOFA? Has HUD received other written communications that were a factor in its decision to add the Crossing State Lines provision? If so, will HUD post those documents on its website?

- A number of policy and logistical concerns were weighed. No other documents will be posted to the HUD website.

169. HUD stated in response to question 81 that State Attorney General Opinions may be submitted to Kerry Hickman, and that, “once received, they will be reviewed by the Office of General Counsel and a determination will be made about posting them to the NOFA Web page.” What will be the basis for posting or not posting an Attorney General Opinion? Will HUD be conducting a legal analysis of the Attorney General Opinions?

- Unless presented with a reason to do so, HUD will not be questioning the legal conclusions regarding state law by a state’s Attorney General. If HUD receives a conclusive and relevant opinion by a state Attorney General relating to the eligibility of and relevant to potential applicants in its state, HUD will publish such opinion on its website.

170. The Crossing State Lines provision has resulted in the ability of state entities to obtain a sole source position. For example, the Attorney General Opinion for New Mexico concludes that the New Mexico Mortgage Finance Authority (NMMFA) has the exclusive authority to operate as a public housing authority in the state. Without regard to whether the Opinion, which notes that federal law “could confer the requisite authority” for an out-of-state housing authority to operate as a PBCA, HUD apparently will award the PBCA contract to NMMFA provided it submits an RLO that establishes it is legally qualified and an application that meets the 45 point technical minimum score. There is no competitive force to constrain the applicant in such case from bidding the highest allowed price with the lowest acceptable performance standards. Does HUD intend to make an award to an applicant in a state with an Attorney General Opinion that states the applicant has the sole authority to perform the work, regardless of the overall competitive score of other applications received from qualified in-state applicants?

- Yes, but only if the Attorney General’s opinion is on-point and has considered all the relevant facts about any other potential in-state applicants (e.g., instrumentalities),. The minimum threshold score reflects the minimum score that HUD believes is necessary to demonstrate competency in contract administration in that state. If a state’s sole in-state applicant meets all eligibility criteria and attains the minimum required threshold score, HUD will award the ACC to that applicant.

171. The Supplemental Letter that must be provided by an out-of-state applicant includes the requirement that the attorney signing the letter must certify “that nothing in the laws of such State in any manner prohibits the applicant . . . from acting as a PHA in the State for which it is applying.” It further requires that the SL must contain “an unequivocal statement that the signatory has examined all the laws of the State governing the creation and operations of PHAs, including any provision of State law that defines that term or comparable term.” The

- (c) City, State, Zip Code
- (d) Contact Name and Title
- (e) Contact Telephone Number
- (f) Contact E-mail Address
- (g) Name of State of Application
- (h) Proposed Basic Administrative Fee Percentage (not to exceed 2.0%)

If you include more than that information, such as a summary of the General Threshold requirements that are listed in the General Section but not specifically in the Program NOFA starting on page 18, will you be penalized?

- The information to be provided in the Abstract is specified in the NOFA. No additional information is to be included in the Abstract.

189. There is conflicting information with the published NOFA and Q&A #33 regarding how the Disaster Plan must be submitted (Word vs. PDF). The NOFA page 14 requires the Disaster Plan be submitted in PDF format. However, Q&A #33 states all files must be submitted in Word except the FTE Chart (Excel), RLO (PDF), and SL (PDF); the Disaster Plan was not mentioned in HUD's answer with regards to its required file format. Please clarify how the Disaster Plan must be submitted (Word or PDF).

- Please see the answer to question number 150.

190. The Docket Number printed on the NOFA states: FR-5600-N-33. However, the Grants.gov system references Docket Number: FR-5600-NJ-33 and auto-fills this number on the application forms. Please clarify.

- The docket number is FR-5600-NJ-33 but there was a typo at posting. The typo will not have an impact on your application.

191. How will HUD evaluate in-state applications in states where an AG opinion reasons that the state HFA is the only entity qualified to operate a state-wide program? If an in-state applicant's RLO disagrees with the conclusion reached by the AG and refutes this within the RLO, how will HUD review this information?

- Please see the answer to question number 163: Second only to the supreme court of the state, the Attorney General is top legal authority on its states laws. To the extent that the Attorney General's opinion is on-point and has considered all the relevant facts about any potential in-state applicants (e.g., instrumentalities), HUD will rely on a state's Attorney General's opinions.

192. Please clarify there is a discrepancy between page 5 of "Highlights of PBCA NOFA & ACC for NOFA" and the Grants Application Package as downloaded from grants.gov. Which document is correct? The Grants Application Package indicates that the Application for Federal Assistance (SF-424) and HUD Facsimile Transmittal forms are mandatory, while the HUD Detailed Budget Form, Disclosure of Lobbying Activities (SF-LLL), HUD Applicant-Recipient Disclosure Report, and Faith Based EEO Survey are optional. HUD's Highlights of PBCA NOFA & ACC for NOFA (updated 4/6/2012) indicates that all documents are required, with the exception of the Faith Based EEO Survey (SF424SUPP) as an optional submission.

BACKGROUND AND OBJECTIVES

Performance-Based Section 8 Contract Administration

The U.S. Department of Housing and Urban Development (HUD) is authorized to enter into an annual contributions contract (contract) with public housing authorities. The contract provides contract administration services for units receiving project-based rental assistance under Section 8 of the United States Housing Act of 1937.

In May 1999, HUD issued a request for proposals for contract administration services for project-based Section 8 housing assistance payments contracts for each state. During the first year, HUD awarded contracts to only 37 performance-based contract administrators (PBCA) due to a lack of qualified applicants. HUD then issued a request for qualifications to ensure that applicants met the definition of a public housing authority, followed by a request for proposals, and awarded an additional seven contracts between 2001 and 2003. In 2003, HUD issued an invitation for submission of applications (invitation) rather than a request for proposals. HUD awarded the remaining nine contracts between 2003 and 2005 under this solicitation.

Under the request for proposals, the applicant was required to submit both a technical and cost proposal for evaluation. Once a PBCA was chosen, its cost proposal was reviewed to determine the contract rate of payment, sometimes resulting in a decrease in the rate. Under the invitation, the applicant was only required to submit a technical proposal and a proposed rate. No cost proposal was required.

Although not technically required to comply with the Federal Acquisition Regulation, HUD stated that it would use a best value trade-off source selection process for evaluating offers similar to the one defined in Federal Acquisition Regulation 15.101-1. This process is, in essence, a negotiated acquisition method that seeks to select the best technically qualified applicant and then negotiate the best price for the services to be acquired.

HUD entered into performance-based contracts because of a government-wide emphasis for service contracts to be performance based. Performance-based service contracting is based on the development of a performance work statement, which defines the work in measurable, mission-related terms with established performance standards and review methods to ensure quality. A performance-based contract allows for the assessment of disincentives for contractors that are not performing as required and incentives for value-added activities that are not part of the basic contract requirements.

Performance-Based Annual Contributions Contract Requirements

The contract includes 10 core tasks for which the PBCA is responsible:

1. Conduct management and occupancy reviews.
2. Adjust contract rents.
3. Process housing assistance payments contract terminations or expirations.
4. Pay monthly vouchers submitted by Section 8 owners.
5. Respond to health and safety issues.



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

OFFICE OF HOUSING

December 29, 2009

Ms. Barbara Thompson
Executive Director
444 North Capitol Street, NW, Suite 438
Washington, D.C. 20001

Dear Ms. Thompson:

Thank you for your letter of November 16, 2009, requesting reconsideration of the Department's decision to re-compete all of the Performance Based Annual Contributions Contracts nationwide and consideration of preferences of state housing finance agencies if the Department pursues contract recompetition.

The major reason for the establishment of the Performance Based Contract Administration program was to increase the effectiveness and efficiency of HUD's oversight of its Section 8 Project- Based Rental Assistance program. Thereby insuring that decent, safe and sanitary housing is being provided to our residents. Sound business and auditing practices would look to periodically re-compete contracts to ensure that the Government is getting the best value for the taxpayer and more importantly, that the goods and services provided to owners and residents are of the highest quality.

The Department will retain the requirement that any eligible applicant by definition will have to be a Public Housing Agency as currently required under the existing program. In order to provide the Department with the full benefit of a competitive action there will be no priority or preference status per se for currently performing Performance Based Contractors. However, there will be an opportunity under the application process in the Capability Statement Section to identify previous performance for competitive consideration. Lastly additional details will be provided regarding the revised Annual Contributions Contract and the Invitation for Application process.

Thank you for your interest in the Department's programs.

Sincerely,

A handwritten signature in cursive script that reads "Deborah Lear".

Deborah Lear
Director
Office of Housing Assistance Contract
Administration Oversight

May 29, 2012

Writer's Direct Contact
703.760.7764
RVacura@mofocom

**** STAY OF AWARD REQUESTED ****

By Electronic Mail

Office of General Counsel
Procurement Law Group
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Re: Protest of Southwest Housing Compliance Corporation
U.S. Department of Housing and Urban Development Notice of Funding Availability,
Docket No. FR-5600-N-33¹

Dear Sir or Madam:

Pursuant to 4 C.F.R. §§ 21.0 *et seq.*, Southwest Housing Compliance Corporation ("SHCC"), through undersigned counsel, hereby protests the terms of the U.S. Department of Housing and Urban Development's ("HUD" or the "Agency") Notice of Funding Availability, Docket No. FR-5600-N-33 (the "NOFA").² The NOFA states that the Agency will award "cooperative agreements" to selected contractors in 42 states for the procurement

¹ Assisted Housing Services Corporation, North Tampa Housing Development Corporation, Jefferson County Assisted Housing Corporation, and National Housing Compliance have filed protests challenging HUD's NOFA, which have been docketed as B-406738, B-406783.2, B-406738.3, and B-406738.4, respectively. Southwest Housing Compliance Corporation requests that its protest be consolidated with these protests.

² The NOFA and all associated documents are available from the home page of HUD's NOFA website. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/grants/fundsavail/nofa12/pbcaSec8.

May 29, 2012
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most cases, the PBCA program was not in existence when the statutes of state laws on the activities of the PHAs were enacted. Nor has the Agency ever indicated that it believes a PHA, operating in accordance with the authority delegated to the Agency under the United States Housing Act of 1937, to be a matter of state law. In fact, the PHAs are governed by federal laws and regulations, and the Agency is merely relying once again upon the opinion of certain Attorneys General that their state laws prohibits out-of-state PHAs. Holding out-of-state applicants to this higher standard is just another indefensible restriction on competition and results in disparate treatment.

By giving great deference to the Attorneys General's opinions, eliminating out-of-state applicants, and requiring any remaining out-of-state applicant to meet additional requirements, the Agency has ensured that, in most cases, the state housing finance agency will be the sole source eligible under the NOFA's requirements. There is no legal basis to justify these requirements and in levying these anticompetitive requirements, the Agency is unduly restricting competition for PBCA services and improperly treating offerors unequally. Consequently, the Agency is violating CICA, and thus, GAO should sustain this protest.

C. The Government's Improper Issuance of the NOFA Will Prejudice SHCC.

Prejudice is an essential element of a viable protest and GAO will only sustain a protest where a reasonable possibility of prejudice is evident from the record. *Wadsworth Builders, Inc.*, B-291633, Jan. 24, 2003, 2003 CPD ¶ 43 at 4. In this case, the prejudice to SHCC is self-evident. The improper and unlawful issuance of the NOFA will exclude SHCC

III. Ground for Protest: The NOFA's Anti-Competitive Provisions Violate Mandatory Procurement Regulations.

1. HUD failed to comply with strict regulatory requirements under CICA and FAR that require full and open competition.

By improperly labeling the ACCs as “cooperative agreements,” HUD seeks to avoid compliance with the Competition in Contracting Act and its implementing regulations, the FAR.

CICA and FAR govern procurement contracts for government acquisition of property and services. 41 U.S.C. § 3301 et seq. CICA mandates that federal agencies “obtain full and open competition through the use of competitive procedures.” *Id.* at § 3301(a)(1). The underlying purpose of CICA is clear – federal agencies must acquire the best products and services at the best prices. As CICA’s legislative history states, “Clearly, economy and efficiency must be the cornerstone of the Federal procurement system.” H.R. Rep. No. 98-1157, at 18 (1984).

Under CICA, it is a statutory violation to contract “without providing for full and open competition,” unless a specifically-delineated justification applies. 48 C.F.R. § 6.301; *see also* §§ 6.302-1 – 6.302-7 (providing allowable justifications). If a contracting agency officer believes that a justification exists, the agency must *first* (1) “certif[y] the accuracy and completeness of the justification;” *and* (2) obtain approval as outlined in § 6.304. *Id.* at § 6.302. The contracting agency officer is *not* permitted to proceed under one of these exceptions, unless and until he obtains approval. *Id.*

The ACC provision prohibiting out-of-state applicants is anti-competitive. *See* Ex. 1, NOFA, p. 4, ¶D (“HUD will consider applications from out-of-State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant.”) Under no circumstances can this restriction be characterized as promoting “full and open competition.” HUD has, nevertheless, proceeded with the contract process for the ACCs.

HUD has not provided a certification that one of the justifications in § 6.302 applies (none do apply). HUD has not received approval for any alleged justification under § 6.302 and § 6.304. HUD’s failure to do so is a serious violation of CICA requiring this office to suspend all awards under the NOFA.

In response to this protest, HUD will likely rely upon the published letters from several AGs claiming that their state laws prohibit out-of-state PHAs from administering the Program. **Your office need not determine whether the protectionist policies advocated for by the AGs are binding on HUD for purposes of this protest.** (They are not binding.) The issues raised by the AGs are entirely irrelevant to a determination of whether the ACCs are procurement contracts or competitive agreements. Under § 6.303, HUD was responsible for providing a justification for the anti-competitive provision, including the AG opinions, if applicable, or any other legal basis. HUD failed to do so and has, therefore, violated CICA and the FARs.

mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. See the ACC at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

2. Available Funds. Funding for this NOFA is subject to the availability of appropriations.

3. Type of Funds. Administrative fees to PBCAs.

4. Award Information. Funding for this NOFA is subject to the availability of appropriations.

5. Matching Funds. There is no matching requirement for applications under this program NOFA.

6. Eligible Applicants. PHAs as described in further detail in this NOFA.

7. Eligible Activities. PHAs selected must complete PBTs and meet the performance and compliance requirements in the ACC. The tasks that successful PHAs must perform include but are not limited to the following: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring that payments to property owners are calculated accurately and paid in a timely manner; and submitting required documents to HUD (or a HUD-designated agent).

FULL TEXT OF ANNOUNCEMENT

I. FUNDING OPPORTUNITY DESCRIPTION.

A. Program Description. HUD announces this NOFA for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments (HAP) Contracts. Specifically, this NOFA provides applicant information, submission deadlines, funding criteria and other requirements for this Program, including the availability of an annual contributions contract (ACC) with a public housing agency (PHA) for each of the 42 States for which an ACC has not yet been awarded (as identified in Appendix A to this NOFA) to provide for the administration of project-based Section 8 HAP contracts for Section 8 projects located in each of those States.

There are 53 "States," as defined in the ACC as each of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. After publication on its website of an Invitation for Submission of Applications on February 25, 2011, HUD awarded an ACC to a PHA for each of the following 11 states: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming and the United States Virgin Islands. HUD now seeks to award an ACC to a PHA for each of the remaining 42 States through this program NOFA.

B. Purpose of the Program. The purpose of HUD's PBCA program is to implement the policy of the United States, as established in section 2 of the 1937 Act, of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the

maximum amount of responsibility and flexibility in program administration in PHAs that perform well. The PBCA program furthers these policies by effectuating the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based programs authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the funding mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. The ACC includes Exhibit A, section 4 of which includes a detailed treatment of the Administrative Fee. Section 5, "Performance Requirements Summary" (PRS), includes a table that specifies the Acceptable Quality Level (AQL) for performance of each of the 8 Performance-Based Tasks (PBTs), the Performance-Based Allocation Percentage, the method used to evaluate performance, and the frequency with which HUD will assess and pay the Basic Administrative Fee Earned. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

C. Authority. The NOFA is issued pursuant to section 102 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101-235; 103 Stat. 1987 (Dec. 15, 1989); and section 8 of the United States Housing Act of 1937 (1937 Act), 42 U.S.C. § 1437f, Pub. L. 93-383; 88 Stat. 662 (Aug. 22, 1974) (Section 8). Funding for this NOFA is subject to the availability of appropriations.

D. Crossing State Lines. HUD believes that nothing in the 1937 Act prohibits an instrumentality PHA that is "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act from acting as a PHA in a foreign State. However, HUD will consider applications from out-of-State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.

Based on past experience, HUD expects to receive at least one application from a legally qualified in-State applicant for the majority of the 42 States identified in Appendix A of this NOFA. However, HUD advises that, in connection with the February 25, 2011 Invitation, HUD received no application from an in-State applicant for Alaska, Hawaii, Mississippi, Nebraska, or Utah.

All opinions recently issued by states' Attorneys General relevant to the administration of the Section 8 PBCA program will be posted at time of publication of this NOFA on http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

E. Terms and Definitions.

1. In-State Applicant. An in-State Applicant is an applicant formed under the laws of the same State for which it proposes to serve as PBCA. An in-State applicant may be a governmental entity or an instrumentality of a governmental entity. However, in either case, the entity must demonstrate that it (a) satisfies the definition of PHA in section 3(b)(6)(A) of the 1937 Act and (b) has the legal authority to operate throughout the entire State.

corrective actions, HUD may determine that such failure is a default by the PHA under the ACC.

Annual Interest Earned Certification

The PHA must submit an annual interest earned certification certifying the amount of interest earned on HAP funds for the reporting period. Submissions will also be required for a negative report when the PHA does not have any interest to remit to the Department.

Reference:

ACC

HUD Handbook 7420.7

OMB Circular A-133

Performance Standards
<ul style="list-style-type: none">• PHA Audit – PHAs that must comply with OMB’s Circular A-133. The unaudited annual financial statements are submitted to HUD within sixty (60) calendar days after the PHA FYE and the audited annual financial statements are submitted to HUD within nine (9) calendar months after the PHA FYE. For PHAs that are not required to comply with OMB Circular A-133, unaudited annual financial statements are submitted to HUD within sixty (60) calendar days after the PHA FYE.
<ul style="list-style-type: none">• Annual Interest Certification – Submitted to HUD within forty-five (45) calendar days after the end of the PHA FYE.

Quality Assurance:

Review of the audit

Unqualified audit opinion

4. ADMINISTRATIVE FEES

This section describes the types of Administrative Fees that may be earned by the PHA and the Disincentive Deductions that will be applied if the PHA does not attain the AQL specified for each PBT.

4.1. Basic Administrative Fee

The PHA earns a monthly Basic Administrative Fee based on the Basic Administrative Fee Percentage approved by HUD (Exhibit F) multiplied by the current 2-Bedroom FMR for each Covered Unit under on the first day of the month. A portion of the

monthly Basic Administrative Fee is accrued for annual payment to the PHA when PBT number seven (7) and eight (8) are performed. The amount accrued is based on the Performance-Based Task Allocation Percentage specified in the PRS (Exhibit A, Section 6).

4.2. Disincentive Deductions

- (1) The Basic Administrative Fee is subject to Disincentive Deductions if HUD determines that the acceptable quality standards for the PBTs specified in the PRS (Exhibit A, Section 5) have not been attained.
- (2) If HUD determines that the PHA has performed below the AQL in any month, HUD will reduce the amount of the monthly Basic Administrative Fee by subtracting the amount of the Disincentive Deduction determined by HUD in accordance with the PRS. The Basic Administrative Fee less Disincentive Deductions is the Basic Administrative Fee Earned.
- (3) The Basic Administrative Fee amount allocated to each PBT is determined by multiplying the Basic Administrative Fee by the Performance-Based Task Allocation Percentage as specified in the PRS.
- (4) The Disincentive Deduction Percentage for each PBT is applied to the Basic Administrative Fee amount applicable to the PBT.

4.3. Annual Incentive Fees

- (1) The PHA may earn an annual Incentive Fee for Customer Service that is equal to five (5) percent of the sum of the Basic Administrative Fee Earned during each twelve (12) month period of the ACC Term. Incentive Fee for Customer Service will be based on a survey of owners, management agents, and residents. The results of the survey will be evaluated to determine whether any Incentive Fee for Customer Service has been earned, based on established criteria.
- (2) The PHA may earn annual Incentive Fees for Performance for twelve (12) months of one-hundred (100) percent AQL performance of PBT numbers one (1) through five (5) (Exhibit A, Section 5). The incentive for each PBT is one (1) percent of the total Basic Administrative Fee Earned for each twelve (12) month period of the ACC Term.

4.4. Monthly, Quarterly, and Annual Evaluation of PHA Performance

During the ACC Term, HUD will conduct monthly, quarterly, and annual evaluations of the PHA's performance in contract administration of the Covered Units. Calculation of the amount of the Administrative Fee Amount Earned by the PHA is based on HUD's rating of the PHA's performance of the PBTs as specified in the PRS.

Each month, HUD evaluates the PHA's performance in completion of PBTs to determine the amount of the Basic Administrative Fee Earned for performance of each PBT. If performance is less than the AQL, Disincentive Deductions are applied to the monthly Basic Administrative Amount. This scoring is based on HUD's review of data submitted and certified in the monthly invoice by the PHA and Annual Compliance Reviews.

4.5. Basic Administrative Fee Earned Payment

Each month, the PHA calculates the Basic Administrative Fee based upon the number of Covered Units under contract administration by the PHA on the first (1st) day of the month.

Column G of the PRS specifies whether the Basic Administrative Fee for a particular PBT is paid monthly or annually.

Each invoice for the Basic Administrative Fee Earned must be fully supported by documentation, as required by HUD, of the PHA's level of performance of each PBT. Such documentation shall be sufficient to show:

1. Whether the PHA has met the AQL for the performance standard (column C of the PRS).
2. The amount of any Disincentive Deductions (as calculated in accordance with column E of the PRS).

The PHA's determination of the Basic Administrative Fee Earned is subject to modification and adjustment as a result of HUD's quality assurance reviews. HUD may recover any overpayments, and may adjust amounts of payments against subsequent invoices to correct or adjust any overpayment or error in determination of any Basic Administrative Fee Earned.

5. PRS

The PRS specifies the AQL for performance of each PBT, the Performance-Based Allocation Percentage, the method used to evaluate performance, and the frequency with HUD will access and pay the Basic Administrative Fee Earned. The information in the PRS Table governs HUD's payment of Basic Administrative Fees Earned by the PHA for all work performed under the ACC. The PRS table is organized as follows:

1. Column A: PBT #;
2. Column B: PBT title and reference to Section Number in Exhibit A to the ACC;
3. Column C: AQL;

4. Column D: ALLOCATION PERCENTAGE: The percentage of the monthly Basic Administrative Fee amount allocated to each PBT;
5. Column E: DISINCENTIVE DEDUCTION: The percentage by which the monthly Basic Administrative Fee amount allocated to the PBT is reduced for performance at less than the AQL;
6. Column F: QA: (Quality Assurance) Method is how HUD will assure the quality of the PHA's reported performance; and
7. Column G: ASSESSMENT AND PAYMENT FREQUENCY: Frequency (monthly or annually) with which HUD will access and pay the Basic Administrative Fee Earned for each PBT.

PRS TABLE						
A	B	C	D	E	F	G
PBT #	PBT TITLE & SECTION NO. IN EXHIBIT A TO THE ACC	AQL	ALLOCATION PERCENTAGE	DISINCENTIVE DEDUCTION	QA METHOD	ASSESSMENT & PAYMENT FREQUENCY
1	Management & Occupancy Reviews (MOR) ACC Section 3.1.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly
2	Adjust Contract Rents ACC Section 3.2.	95% Performance	10%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly
3	Review & Pay Monthly Vouchers. ACC Section 3.3.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly

-
-
- In 1999, because of staffing constraints (primarily in HUD's field offices) and the workload involved in renewing the increasing numbers of rental assistance contracts reaching the end of their initial terms, HUD began an initiative to contract out the oversight and administration of most of its project-based contracts. The entities that HUD hired—typically public housing authorities or state housing finance agencies—are responsible for conducting on-site management reviews of assisted properties; adjusting contract rents; reviewing, processing, and paying monthly vouchers submitted by owners; renewing contracts with property owners; and responding to health and safety issues at the properties. These performance-based contract administrators (PBCA) now administer the majority of project-based Section 8 contracts.

In the late 1980s, initial Section 8 contracts began expiring; by 2003, all of the original 20-year contracts had expired. Forty-year contracts will expire between 2014 and 2023. Section 8 owners are offered six options upon contract expiration. According to the HUD Section 8 Renewal Guide, Section 8 owners may⁹

- renew without any modifications, with rents capped at HUD's market levels;
- renew with rents that are elevated to market rents through the Mark-up-to-Market program;
- renew with rents that are reduced to market rents through the Mark-to-Market program;
- renew as a Section 8 "exception project;"¹⁰

⁹The Section 8 Renewal Guide provides comprehensive guidance for renewing expiring project-based Section 8 contracts.

¹⁰In general, Section 8 exception projects are those projects with project-based Section 8 rental assistance, but without FHA mortgage insurance. Owners of exception projects may maintain above-market rents if justified on a cost basis.

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June 7, 2012

Robert K. Tompkins
202-457-6168
rtompkins@pattonboggs.com

Via Electronic Delivery (protests@gao.gov)

Mr. John Formica, Esq.
U.S. Government Accountability Office
Procurement Law Control Group
441 G. Street, N.W.
Washington, DC 20548

Re: Supplemental Protest of The Jefferson County Assisted Housing Corporation
United States Department of Housing and Urban Development
Notice of Funding Availability Docket No. FR-5600-NJ-33

Dear Mr. Formica:

We submit this supplemental protest on behalf of our client, The Jefferson County Assisted Housing Corporation ("JeffCo"). JeffCo protests the terms and conditions of a solicitation issued by the U.S. Department of Housing and Urban Development ("HUD") on March 8, 2012. HUD has characterized the solicitation as a "Notice of Funding Availability" and assigned it Docket No. FR-5600-NJ-33 ("NOFA" or "Solicitation"). As set forth herein, HUD has also failed to follow its stated policies and procedures and is treating potential applicants disparately.

Preliminary Matters

1. The Protest is Timely.

This protest is timely filed prior to the June 11, 2012, due date for responses to the NOFA.

2. JeffCo is an Interested Party.

JeffCo currently performs the same services for HUD as sought through this Solicitation under four separate PBCA-ACC contracts with HUD. JeffCo intends to submit proposals to HUD in response to a proper and lawfully issued solicitation. JeffCo therefore has a direct economic interest in the procurement and is an interested party for purposes of bringing this protest.

John Formica, Esq.
Government Accountability Office
June 7, 2012
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3. Contracting Officer's Contact Information.

The Contracting Officer for this procurement is Mr. Kerry Hickman, Office of Housing Administration, Contract Administration Oversight ("HACAO"), 451 7th Street, SW, Washington D.C. 20410. Mr. Hickman's email address is kerry.e.hickman@hud.gov and his phone number is (202) 402-3885.

4. JeffCo's Contact Information.

JeffCo's address is: 500 Office Park Drive, Suite 300, Birmingham, Alabama, (888) 466-5572 (telephone), (888) 723-8932 (facsimile). JeffCo's website can be found at: www.JeffCohousing.com JeffCo is represented by undersigned counsel.

Supplemental Ground of Protest:
Failure to Follow the Solicitation Requirements

On March 12, 2012, HUD issued the Notice of Funding Availability ("NOFA") solicitation. The initial due date for applications in response to the NOFA was April 10, 2012. HUD subsequently extended this deadline until June 11, 2012.

Through the NOFA, HUD provided a mechanism for interested parties to submit questions to be answered by HUD. The NOFA stated that "[q]uestions regarding specific program requirements should be directed to the agency contact identified in this NOFA. Questions regarding the FY2012 General Section should be directed to the Grants Management Office; at 202-708-0667 (this is not a toll-free number)." NOFA, p. 1. All questions were to be submitted by April 30, 2012 and HUD stated that it would **post responses to all inquiries no later than May 31 2012**. *See* Ex. 1, Q&A No. 64 ("HUD will accept Q&As until 5pm Eastern, 04/30/2012. HUD will post responses to all Q&As received no later than 05/31/2012."). (emphasis added).

HUD began answering these questions on a rolling basis in the NOFA for PBCAs and ACC for NOFA Q&A ("Q & A") (last updated as of May 25, 2012) posted to HUD's dedicated NOFA website. JeffCo submitted a total of twenty-six (26) questions to HUD on March 16, 2012, March 27, 2012 and April 30, 2012. *See* Ex. 2.

HUD's May 31, 2012 deadline for providing answers to all questions has now passed; however, as of June 1, 2012, HUD has answered only 16 of the 26 questions submitted by JeffCo leaving 10 of JeffCo's properly and timely submitted questions unanswered. HUD's failure to follow its own stated policies and procedures is arbitrary and capricious and has had a materially adverse impact on JeffCo's ability to prepare its proposal, to address its status as an eligible bidder,

John Formica, Esq.
Government Accountability Office
June 7, 2012
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and to understand the criteria by which HUD will evaluate an offeror's eligibility and their proposals.

HUD's failure to answer all questions in accordance with its own procedures suggests HUD selectively chose which questions to answer. Aside from improperly following stated policies and procedures, HUD's selective response of questions also results in disparate treatment of offerors. By responding to questions of some applicants and not those of others, such as JeffCo, HUD has provided certain offerors with information for use in the preparation of their proposal to the disadvantage of those who did not have specific questions answered.

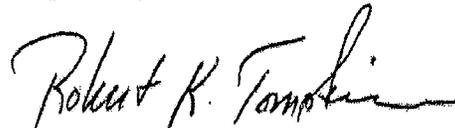
HUD failed to answer all questions properly and timely submitted by the deadline. HUD's failure to provide responses to JeffCo's questions, aside from revealing its unequal treatment of potential offerors, has also deprived JeffCo of the opportunity to compete on a level playing field and materially prejudiced JeffCo's ability to prepare its proposals in response to the NOFA. By its failure to abide by its own stated policy HUD casts significant doubt on the evenhandedness of the entire NOFA process and GAO should sustain JeffCo's supplemental ground of protest.

Request for Relief

For the reasons set forth above, JeffCo respectfully requests that the Comptroller General:

- a. Rule that HUD has failed to abide by the requirements of the Solicitation, that HUD has treated offerors disparately, and that HUD failed to abide by the requirements for federal procurements;
- b. Provide the relief requested in JeffCo's initial protest of May 15, 2012; and
- c. Award such other relief as GAO deems appropriate and proper.

Respectfully submitted,



Robert K. Tompkins
Elizabeth M. Gill
Trevor J. Tullius
Patton Boggs, LLP
Counsel for The Jefferson County
Assisted Housing Corporation

PATTON BOGGS LLP
ATTORNEYS AT LAW

John Formica, Esq.
Government Accountability Office
June 7, 2012
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cc: Kasey Podzius, Esq.
Richard Vacura, Esq.
Michael Golden, Esq.
Neil O'Donnell, Esq.
Colm Nelson, Esq.

Exhibit 1

Subject: FW: PBCA NOFA Questions

From: Lisa McCarroll
Sent: Friday, March 16, 2012 3:34 PM
To: 'Kerry.E.Hickman@hud.gov'
Cc: Eric Strong; Julie Reynolds
Subject: PBCA NOFA Questions

Good Afternoon: As outlined in the PBCA NOFA (CFDA 14.327) we are requesting guidance on the below listed items.

Overall Questions

- Is there a deadline for submitting questions that would be added to the Q & A list on the PBCA website?
- What is the expected turn-around on responses to questions submitted to the Multifamily DAS email address?
- Will HUD extend the deadline to permit applicants to take responses into account in their proposals?

General Section to HUD's FY2012 NOFAs for Discretionary Programs

1. Should a statement or certification for the following items listed in the General Section of the NOFA, be included as part of the PBCA NOFA (CFDA 14.327) response and if so, under which section, Rating Factor and/or subfactor?
 - Consolidated Plan certification – page 23, item f
 - Delinquent Federal Debts – page 23, item g
 - Executive Order 13166 – Limited English Proficiency (LEP) – page 27, item c
2. Is the PBCA NOFA (CFDA 14.327) eligible to receive bonus points? If so, under which section, Rating Factor and/or subfactor should the response be documented? Page 69, item 1
3. Will awards made under the PBCA NOFA (CFDA 14.327) be expected to use the HUD Logic Model to monitor and evaluate progress and effectiveness in meeting the goals of the program?
4. Are applicants responding to the PBCA NOFA (CFDA 14.327) required to add any certifications, statements or documents for the following items? If so, under which section, Rating Factor and/or subfactor should each be documented?
 - Economic Opportunities for Low - and Very Low –income Person (24 CFR 135.9(a) of the Department's Section 3 rules (page 27, item d)
 - Ensuring Participation of Small and Disadvantaged Business, and Women-Owned Businesses (page 28, item e)
 - Accessible Technology (page 28, item f)
 - Real Property Acquisition and Relocation (page 29, item h)
 - Conducting Business in Accordance with Core Values and Ethical Standards/Codes of Conduct (page 30, item i)
 - Procurement of Recovered Materials (page 31, item k)

- Participation in HUD –Sponsored Program Evaluation (page 31, item l)
- OMB Circulars and Government Wide Regulations Applicable to Financial Assistance Programs (page 31, item n)
- Environmental Requirements (page 32, item o)
- Drug-Free Workplace (page 32, item p)
- Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282)(Transparency Act) as amended (page 34, item t)
- Race and Ethnic Data Reporting Form – form HUD 27061 (page 81, item 7)

PBCA Notice of Funding Availability (CFDA 14.327)

1. Please clarify how awards will be made if the funds remaining are less than the requested level of an applicant deemed eligible for funding as referenced on page 33, item d6 of the NOFA?
2. Should the proposed basic administrative fee be listed in any section other than the abstract (page 19, item 1h), and if so under which section, Rating Factor and/or subfactor?

Annual Contributions Contract (ACC) Dated 02.24.2012

1. PBT 7 and PBT 8 explain in detail how fees are accrued. On what schedule are these fees paid? (page 43-46 and page 51)

Thank you in advance for your assistance.

Lisa M. McCarroll
Director, Contract Administration
JeffCo
888.466.5572, extension 2723

From: Lisa McCarroll [lmccarroll@jeffcohousing.com]
Sent: Tuesday, March 27, 2012 11:38 AM
To: 'PBCA_ACC_Revisions@hud.gov'
Cc: Eric Strong; Julie Reynolds
Subject: PBCA NOFA Questions

Good Morning: Please provide clarification on the below listed questions.

Questions related to Notice/Release of NOFA:

1. Please confirm that the NOFA represents the Agency's final determination as to the anticipated terms and conditions of the NOFA and it is not a mere draft or proposed document subject to public notice and comment.
2. Does HUD intend to publish or announce the NOFA in the Federal Register, as required by HUD's General Policy concerning NOFAs ?
3. Please explain why the NOFA was signed on Feb. 29 but not released until March 9.
4. Aside from grants.gov and the PBCA NOFA page on the HUD website at [http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA NOFA](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA_NOFA), please identify the other means by which the NOFA or any draft of the NOFA was released outside of HUD or OMB prior to March 10, 2012.
5. The Q&A directs applicants to address questions concerning the General Section to the Grant Management Office. Does HUD intend to publish a Q&A document for those questions addressed to the Department's Grants Management Office so that all applicants have an equal opportunity to make any necessary revisions to their applications upon consideration of HUD's responses?

General Questions:

1. Please confirm that the NOFA does not place any limitation on the amount of work which may be subcontracted to another entity.
2. NOFA III.D.2.a requires certain information to be enumerated at the top of the first page of the RLO and certain information to be on a cover page, suggesting that the first page is not the cover page. Is that a correct reading? And if so, typically, that page would be the letterhead of the lawyer rendering the opinion, which may make placement of the required information at the top of the page difficult if not impossible. Will HUD accept reasonably prominent display of the required information not at the top of the page?

Questions regarding attorneys general letters:

1. Given that HUD has supplied attorneys general letters from only six states, but the NOFA contemplates separate contracts in 42 jurisdictions, please confirm that the six attorneys

general letters are of no effect for the 36 jurisdictions for which there is no attorney general letter.

2. Does HUD believe that state attorneys general have the authority to interpret and determine requirements of federal law?
3. The November 4, 2011 letter from the Oregon Attorney General states that HUD had communications with the Oregon Attorney General office concerning a prior version of the opinion letter. Does HUD intend to make available the complete record on this matter, including but not limited to those communications or any other communications with the state attorneys general or with their clients on the HUD website?

Thank You,

Lisa M. McCarroll
Director, Contract Administration
JeffCo
888.466.5572, extension 2723

From: "Julie Reynolds" <jreynolds@jeffcohousing.com<mailto:jreynolds@jeffcohousing.com>>
Date: April 30, 2012 3:08:01 PM CDT
To: "'PBCA_ACC_Revisions@hud.gov<mailto:PBCA_ACC_Revisions@hud.gov>'"
<PBCA_ACC_Revisions@hud.gov<mailto:PBCA_ACC_Revisions@hud.gov>>
Cc: Eric Strong <estrong@jeffcohousing.com<mailto:estrong@jeffcohousing.com>>, Lisa
McCarroll <lmccarroll@jeffcohousing.com<mailto:lmccarroll@jeffcohousing.com>>, Rob
McLaughlin <rmclaughlin@jeffcohousing.com<mailto:rmclaughlin@jeffcohousing.com>>, LaShunda
Cameron <lcameron@jeffcohousing.com<mailto:lcameron@jeffcohousing.com>>
Subject: PBCA NOFA Questions

Good Afternoon: Please provide clarification on the below listed questions.

JeffCo submits the following additional questions regarding the PBCA NOFA. JeffCo notes HUD has yet to answer a number of its previous questions. Jeffco respectfully requests that substantive answers to all its questions be provided and posted on the PBCA website as soon as possible. JeffCo also requests that all aspects of the agency administrative record, including all correspondence from JeffCo to HUD regarding the NOFA, all documents related to the crossing-state-lines limitation, and all documents related to the Attorneys General opinions be posted on the NOFA website as soon as possible and by not later than the deadline for answering of questions (May 30).

Additional questions:

1. In response to question 168 and with respect to HUD's Crossing State Lines provision, HUD states that "a number of policy and logistical concerns were weighed."

* What are the policy and logistical "concerns" and what evidence did HUD consider in examining these concerns?

* How do these concerns outweigh the \$100million savings HUD identified in the 2011 competitive invitation process?

* How do they outweigh the legal and policy dictates for competition in the PBCA contracting program?

* Confirm that other than the Attorneys General opinions, HUD has not identified any other legal basis for the Crossing State Lines provision? If HUD has please identify those legal bases in detail.

2. In response to question 169, HUD states that it will not be questioning the conclusions regarding state law by a state's Attorney General, "unless presented with a reason to do so."

* What "reason(s)" would be sufficient to cause HUD to question an Attorney General?

* How should such reasons or potential reasons be presented to HUD?

* What will HUD do if presented with such potential reasons?

* As HUD noted in response to question 171, HUD has "received many acceptable RLO's in previous competitions" for out-of-state PHAs. These RLOs specifically cover the ability of those out-of-state PHA's ability to perform the PBCA services in the state in question. Why aren't these RLO+s alone sufficient reason to question the Attorney General letters?

* In addition to the RLOs, HUD has received numerous written submissions from interested parties, including from JeffCo, specifically challenging the Crossing State Lines provision and the validity and effect of the Attorney General letters.

i. When will HUD respond to these letters?

ii. Do they provide a sufficient reason for HUD to question the Attorney General letters? If not, why not?

1. In the revised responses to Questions 163 and 170 HUD now states that it will rely on "a state's Attorney General's opinions" "only if the Attorney General opinion is on-point and has considered all relevant facts about any other potential in-state applicants (e.g. instrumentalities)."

* How has HUD determined that each of the letters is "on point?"

* How has HUD determined that the Attorney General considered "all relevant facts"?

* Confirm that HUD also requires the Attorney General letter to have considered "all relevant facts" about potential out-of-state entities that meet the federal definition of a "public housing agency"? If not, why not?

* HUD has acknowledged in these and other responses that in HUD's view a state Attorney General opinion is only relevant for its particular state and that a state Attorney General is not vested with the power to opine on federal law (question 127). Given that HUD lacks any Attorney General letter for 35 of the 42 jurisdictions that are subject to the NOFA, and the Attorney General letters HUD has received are admittedly of no effect in these 35 jurisdictions, please identify with particularity any and all bases for extending the Crossing State Line limitations in each of these 35 jurisdictions.

2. Has HUD or any PBCA contractor ever been subjected to litigation or any other legal or administrative proceeding based on the PBCA contractor's status as an out-of-state PHA? If so, please identify the proceeding.

3. Have the services under any PBCA contract ever been interrupted on the basis that the contractor is an out-of-state PHA and therefore legally not qualified to provide the PBCA services? If so, please identify the state and contractor in question.

4. In response to question 100, HUD stated that it would not even consider eliminating the restrictive Crossing State Lines language. However, as discussed above and with respect to questions 163, 170, etc. HUD has made clear that it will only rely on the Attorney General letters only if they are "on point" and considered "all the relevant facts" and that it may question these letters if given "reason" to do so. HUD's adamant and unyielding response to question 100 and its absolute proclamation that it will not permit out-of-state PHAs to compete on equal footing is clearly arbitrary and capricious.

* Will HUD withdraw and revise its response to question 100?

* Will HUD re-consider the Crossing State Lines prohibition and eliminate it?

Julie L. Reynolds
Chief Operating Officer
JeffCo
500 Office Park Drive, Suite 300
Birmingham, AL 35223
205.445.2721 direct
888.466.5572 ext. 2721
205.492.6570 cell
888.723.8932 facsimile

Exhibit 2

NOFA for PBCAs and ACC for NOFA Q&A

(Update as of 05/25/2012)

Questions about the grants.gov system should be directed to Grants.gov Contact Center:

- 24 hours a day, 7 days a week. Closed on federal holidays.
- Phone: 1-800-518-4726 (local toll free). For International callers, please dial 606-545-5035 to speak with a Contact Center representative.
- Email: support@grants.gov
- iPortal: Top 10 requested help topics (FAQs), Searchable knowledge base, self service ticketing and ticket status, and live web chat (available 7:00 A.M. - 9:00 P.M. ET).
- ***Please have the following information available when contacting us, to help expedite your inquiry: Funding Opportunity Number (FON), Name of Agency, Specific Area of Concern.***

Questions about the General Section requirements should now be addressed to

Dacia.A.Rogers@hud.gov. Claire Brolin has been assigned to another project and is not available to respond to questions about this NOFA.

NOTICE: Protests of the PBCA NOFA have been filed with the Government Accountability Office (GAO). The protestors have requested that the Department suspend the NOFA application process pending a decision by GAO. The Department has determined that the NOFA application process will not be suspended. Applications are due not later than June 11, 2012, as specified in the first technical correction to the NOFA.

New NOFA Q & A begins at number 254. New ACC for NOFA Q & A begins at number 21. The answer has been revised for number 12 in the ACC Section.

NOFA

1. Why did HUD decide to re-compete the program?
 - A large number of protests to the Government Accountability Office (GAO) were filed by unsuccessful applicants after HUD announced the ACC awards pursuant to the February 2011 Invitation for Submission of Applications. Faced with these challenges, HUD was concerned that litigation delays would interrupt program assistance to lower income tenants and project owners. In an effort to avoid any program interruptions and to clarify any confusion caused by the February 2011 Invitation, HUD decided not to award ACCs for any jurisdictions under protest at GAO, to re-evaluate its competitive procedures, and complete the awarding of ACCs through the NOFA.
2. What will the NOFA cover?
 - Through the NOFA competition, HUD will award annual contribution contracts (ACCs) to selected qualified public housing agencies (PHAs) to implement Section 8 rental assistance in 42 states and territories.
3. Why is HUD pursuing a NOFA for the PBCA program?

- The United States Housing Act of 1937 directs HUD to enter in ACCs in order to implement Section 8 assistance, and a NOFA is the proper vehicle to award the ACCs, which are cooperative agreements. It is the Department's objective, through the PBCA NOFA, to offer a competitive process that ensures the continued delivery of high quality, cost effective, products and services to residents of project based Section 8 assisted housing and to building owners; and to ensure the continued exceptional oversight and administration of the PBCA portfolio.
4. Why is HUD pursuing a NOFA verses a Procurement process?
 - The ACCs that HUD seeks to award via this NOFA are cooperative agreements. Cooperative Agreements are awarded via NOFAs rather than through a procurement process. A principal purpose of the ACC between HUD and the PHA is to transfer funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by sections 2(a) and 8(b)(1) of the United States Housing Act of 1937. HUD has been entering into ACCs with PHAs since the inception of the Section 8 program in 1974. In that time, HUD has never awarded an ACC through the means of a procurement contract or applied the Federal Acquisition Regulation (FAR). Instead, HUD has followed OMB requirements for assistance agreements, including OMB Circular A-133.
 5. How much time will HUD provide for application submission?
 - The NOFA was published on March 9th. Applications are due on June 11th.
 6. When will successful applicants be required to begin work?
 - It is the Department's expectation that successful applicants will begin work as described in their executed ACC's on December 1, 2012.
 7. Will HUD provide a Q&A after the NOFA is published?
 - It is the Department's expectation to provide a Q&A session after the NOFA is published to ensure potential applicants understand the NOFA.
 8. How will NOFA applications be scored?
 - Applications will be evaluated and allocated points, based on their technical capacity as well as their proposed fee. A detailed description of the criteria upon which HUD will score the applicants is set forth in the NOFA.
 9. What specific scoring methodology will the NOFA utilize?
 - The HUD Reform Act prohibits HUD from releasing any information related to the NOFA that may advantage one applicant over another applicant. Accordingly, the scoring methodology cannot be disclosed prior to publication of the NOFA, but will be detailed in the NOFA.
 10. Why has the maximum basic administrative fee percentage been reduced to 2% from 2.5%?

- The Department's new "risk based" approach to conducting on-site management and occupancy reviews at assisted multifamily projects will significantly reduce the PBCA's workload.

11. Under section 7, page 6, shouldn't the number of hours for 1 FTE be 2,080 instead of 280?

- There is a typographical error in section 7. One (1) FTE is 2,080 work hours per year.

12. When completing the Grant Application Detailed Budget (form HUD-424-CB), does the dollar amount for Personnel (Direct Costs) include profit. Specifically, is the applicant required to provide the dollar amount for payroll (the amount actually paid to employees) or is the applicant permitted to provide a "fully loaded cost" for the employees (i.e., the amount actually paid to employees plus a profit which is the approach normally utilized by consultants and private contractors)?

- Profit is not to be included when entering the dollar amount for Personnel (Direct Costs) on form HUD-424-CB. To the extent contractors or consultants are utilized, the applicant shall report the amount the contractor or consultant charges the applicant; however, if an individual is employed by a contractor or consultant, such individual's labor costs should not be shown here.

OMB Circular A-87 (now 2 CFR 225) provides at 2 CFR 225.20 that "Provision for profit or other increment above cost is outside the scope of this part." Also, Appendix A to Part 225 – General Principles for Determining Allowable Costs, Section A. Purpose and Scope, similarly states "Provision for profit or other increment above cost is outside the scope of 2 CFR part 225." Later in Section E of Appendix A, Direct Costs in Section E, Paragraph 2.a. provides that typical direct costs include "Compensation of employees for the time devoted and identified specifically to the performance of those awards." Accordingly, the Instructions for Completing the Grant Application Detailed Budget Worksheet (form HUD-424-CBW-1 (1/2004) indicate the following for Personnel (Direct Labor):

"This section should show the labor costs for all individuals supporting the grant program effort (regardless of the source of their salaries). The hours and costs are for the full life of the grant. If an individual is employed by a contractor or sub grantee, their labor costs should not be shown here. Please include all labor costs that are associated with the proposed grant program, including those costs that will be paid for with in-kind or matching funds. Do not show fringe or other indirect costs in this section. Please use the hourly labor cost for salaried employees (use 2080 hours per year or the value your organization uses to perform this calculation). An employee working less than full time on the grant should show the numbers of hours they will work on the grant."

13. If an in-applicant does not meet the 45 point threshold on the technical documents, would the award go to an out-of-state applicant?

- HUD will make an award to an out-of-state applicant if such an award is consistent with all applicable law, including the law of the state in which the award would be made.

14. Is there a page limitation for Rating Factors 3 and 4?

- There is no page limitation for Rating Factors 3 and 4:
15. Is there a file name requirement for Rating Factors 3 and 4?
- The file name for Rating Factor 3 and 4 should follow the same convention and limitations as Rating Factors 1 and 2:
 - Two Letter State Postal Code_PHA Complete Name_HOUSING
 - Two Letter State Postal Code_PHA Complete Name_JOBS
16. Are Technical Approach paragraphs b. through f. are sub-factors of paragraph a?
- Yes.
17. How many points will be assigned to a proposed Basic Administrative Fee Percentage of less than 1%?
- 30 points.
18. Will the points assigned to the proposed Basic Administrative Fee Percentage be a factor for award?
- Yes. The points assigned to the proposed Basic Administrative Fee Percentage are added to the points assigned to Rating Factors one through four to arrive at the total score assigned to the application.
19. How many Multifamily staff will serve on each Technical Evaluation Panel?
- Three.
20. Can a Technical Evaluation Panel member serve on more than one team?
- No.
21. Will applications be reviewed by multiple Technical Evaluation Panels?
- No. Members of each Technical Evaluation Panel team will evaluate the application individually and assign points. Then, the team members will compare individual evaluations and point assignments, reconcile differences, and arrive at the final evaluation and final points for the application.
22. How or who will assign the applications to the Technical Evaluation Panel teams?
- The applications are assigned by the Office of Housing Assistance Contract Administration Oversight.
23. Section III D. 1 General Threshold Requirements: Which of those requirements apply and how/we address the required threshold in the application? Do the thresholds also apply to contractors/subcontractors?

- See Section III.C.2 through Section C.5 of the General Section for threshold requirements applicable to all programs. Although these thresholds apply, applicants don't have to submit any additional certification to these things for the application. These thresholds don't apply to contractors.
24. Page 15, #5, Compliance with Fair Housing and Civil Rights Laws, requires a certification. Where should this be included in the submission?
- No certification is required in the application. When you electronically submit through grants.gov you are making this certification. Certification may be required after award if necessary.
25. Page 16, #7, discusses "improving access to services for persons with Limited English Proficiency." What type of information is HUD looking for and where should it be included in the submission?
- None. No additional information is necessary in the application submission for LEP.
26. Page 21, Section IV.C.4.a.11 discusses Fair Housing requirements. How is this different from Rating Factor 3, Narrative on Affirmatively Furthering Fair Housing?
- The narrative submitted for Rating Factor 3 is sufficient. No additional narrative is required to address number 11.
27. On page 21, HUD 424 CB, Detailed Budget, is not listed as an optional supporting document but is listed as optional on SF424. Is the budget required?
- HUD-424-CB, Grant Application Detailed Budget, is required. The budget is not scored.
 - The Office of Grants Management informed our office that documents listed on the SF-424 under "Optional Documents" are all required except the Faith Based EEO Survey. Questions about grants.gov should be directed to the Office of Grants Management, 202-708-0667.
28. Section VA 2b and VA 2e in the NOFA contain a sentence that reads "see example of point allocation in Section V.A.2.e above." Section VA 2b is Technical Approach—Information Systems. Where is the example of point allocation?
- These references were associated with a draft NOFA. The final NOFA does not contain an example of point allocation because the points for the application are added to arrive at the final score.
29. On page 19, Section C.4., Application Requirements, #2, Supporting Documents: Are these the same documents found in the application and instruction download?
- The application must include all of the documents listed in Section C.4. The SF 424 at www.grants.gov provides fillable forms for HUD Detailed Budget, Disclosure of Lobbying Activities, HUD Applicant-Recipient Disclosure Report, and Faith Based EEO Survey.
 - These documents must be attached to the application in www.grants.gov: Abstract, Narrative Responses to Factors for Award (also referred to as "Rating Factors in the NOFA)," Reasoned Legal Opinion, Disaster Plan and Disaster Plan Coordinator resume, Attachment B FTE Chart.

30. Does Section 872 of the Duncan Hunter National Defense Authorization Act apply to contractors or subcontractors?
- OMB is in the process of issuing regulations regarding Federal agency implementation of Section 872 requirements. A technical correction to the General Section may be required when such regulations are promulgated.
31. Can the narrative responses to the Rating Factors include charts and graphs?
- Yes.
32. Can 8 ½ X 11 pages be in both portrait and landscape formats?
- Yes.
33. Should the files for Rating Factors 3 and 4 be submitted as Word or PDF?
- All files must be in Microsoft® Word® except the FTE Chart which must be an Excel® file and the Reasoned Legal Opinion (RLO) must be a PDF file (NOFA page 9).
 - The Supplemental Letter (SL) must be a PDF file and the file name convention should be the same as the RLO except that RLO should be changed to SL.
34. Page 15 states that the applicant must certify that they will comply with Fair Housing. Are we required to submit a certification with the application?
- See the answer at number 24 above.
35. Page 8 refers to “General HUD Threshold Nondiscrimination and Other Requirements.” Do we have to discuss the thresholds listed in the General Section in our submission? If so, where in the submission should it be located?
- No.
36. Page 8 refers to “General HUD Threshold Nondiscrimination and Other Requirements.” The last sentence indicates that more detailed information is provided in Section V.B.1. Section V.B. (no number 1) is related to the certification in grants.gov. Where is more detailed information provided?
- The citation is incorrect and should be deleted. The Department is working on a correction for this citation.
37. The “Name Check” review talks about integrity check: shouldn’t this apply to all contractors and subcontractors?
- HUD only does a name review for applicant organizations.
38. Section III D.1. General Threshold Requirements say to see Section III.C.2 through C.5 of the General Section for threshold requirements. Which of those requirements apply? How and where do we address the required thresholds in the submission?
- See number 23 above.

39. Do we need to submit a signed Code of Conduct with application according to page 30 of the General Section?
- No, this code of conduct must just be current and available for HUD to post after award. No submission is required at time of application.
40. Are cover and index sheets counted in the page totals?
- No.
41. Do threshold requirements apply to contractors or subcontractors?
- No.
42. How should the applicant present the excess of Administrative Fee over costs or costs of Administrative fee in the Grant Application Detailed Budget?
- There is no provision for excess administrative fees in either the budget submitted with the application. OMB Circular A-87 (now 2 CFR 225) provides at 2 CFR 225.20 that "Provision for profit or other increment above cost is outside the scope of this part." The Office of Management and Budget (OMB) allows HUD to design and implement a recovery process to allow a PHA to use fee-for-service in lieu of cost allocation to claim its overhead and administrative costs. This process is permitted under Section A(2)(b) of Circular A-87 as an alternative method that reduces the administrative burden regarding the establishment of overhead rates. A fee-for-service system has a number of advantages, which results in reduced administrative requirements for both PHAs and Federal oversight agencies. The fee income under the alternative method is considered non-program income. The fee-for-service amounts are considered non-program income for purposes of A-87, and are not subject to any HUD restrictions although other state and local restrictions may still apply. Consequently, any reasonable fees earned by the PHA will be treated as local revenue subject only to the controls and limitations imposed by the PHA's management, Board or other authorized governing body
43. Section D. 4. Racial and Ethnic Data requires the collection of data for clients. Who are the clients?
- PBCAs are not required to collect racial and ethnic data from owner and management agents. Owners and management agents collect racial and ethnic data from tenants. The PBCAs verify that the data is being collected when they conduct Management and Occupancy Reviews and submit a report to the Department's Office of Fair Housing and Equal Opportunity.
44. Is a separate certification required for the Disaster Plan?
- No. Only the Disaster Plan and the Disaster Plan Coordinator resume or qualifications statement are included with the application.
45. On page 15, the last sentence of the first paragraph states that "A signed copy of the [Disaster] plan must be submitted to the designated HUD CAOM (Contract Administration Oversight Monitor). Is this in addition to the Disaster Plan submitted with the application?"

- The Disaster Plan does not need to be signed. The Disaster Plan is submitted only with the application in grants.gov.
46. Rating Factor 1, Capability Statement, indicates that the experience of the PHA, the PHA's Instrumentality, and contractors may be described in each of the sub-factors. Does this mean that all types of experience will be treated equally?
- The experience of the PHA, the PHA's Instrumentality, and the PHA's contractors will be evaluated without regard for which entity performed the sub-factors. Points will be assigned to the narrative equally for all three entities.
47. Is Rating Factor 2, Quality Control Plan, sub-factor 7 looking for the effectiveness of each of the elements QCP and the date(s) scheduled for each QCP element review. Are "elements" of the QCP the same as "sub-factors" 1 through 6 under g. Quality Control Plan? Instead of the date(s), can we say annually, or quarterly, or monthly?
- Yes, elements and sub-factors are the same. The word element is used in the ACC.
 - Both actual date(s) and periods (e.g. monthly) can be included in the narrative response.
48. Page 29, Internal Control Procedures Conflict of Interest say see ACC for outcomes. What does this mean?
- Section 10 of the ACC specifies the types of conflicts of interest that the applicant's internal control procedures are expected to prevent, detect, and resolve.
49. With regard to the Grant Application Detailed Budget, should an applicant complete two budget forms, one for each year, or include a two-year budget on one form?
- Three Grand Application Detailed Budget forms must be completed.
 - Year 1
 - Year 2
 - All Years (Grand Total)
50. Will HUD examine the legal sufficiency of RLOs and Supplemental Letters, or just accept them as legally sufficient?
- HUD will examine the legal sufficiency of these documents.
51. If an instrumentality entity will be grantee, may the application be filed by the parent entity on grants.gov or must it be filed by the instrumental entity?
- The application must be filed by the entity that would enter into an ACC with HUD.
 - Page 5 of the NOFA states "An instrumentality entity must be fully formed and in legal existence under applicable laws on the date on which the RLO is signed."
52. Does the Disaster Plan Certification that is in the ACC (Exhibit D) need to be submitted as a part of the NOFA application? If not, when will the certification be due?

- No, the Disaster Plan Certification is not included in the application. Only the Disaster Plan and the Disaster Plan Coordinator qualifications statement or resume are submitted as part of the application.
 - The ACC PHA Disaster Plan Certification (Exhibit D) is submitted to HUD sixty (60) calendar days prior to the ACC year end (see ACC, Exhibit A, PBT #7, page 43)..
53. On page 33, the NOFA indicates that HUD reserves the right to reduce or adjust the award amounts. Is HUD intending to unilaterally not honor the fee award?
- No. HUD will not negotiate the bid fee with applicants. As stated in the NOFA, HUD reserves the right to reduce or adjust the funding amount based upon:
 - (a) The reasonableness of the overall program relative to the number of units covered ((this accounts for changes that may be necessary if there is a drastic decline in the number of units in a PBCA portfolio or the services offered by that PBCA);
 - (b) The level of funds available for award under the program; (for example, if there is a failure of sufficient appropriations); and
 - (c) Workload reduction (this deals with risk-based MORs or other similar items).
54. What is the relevancy of the Basic Administrative Fee Percentage as calculated in NOTE1 of the NOFA? Is the applicant's bid capped at the Basic Administrative Fee Percentage that is calculated by the formula in NOTE 1?
- The Basic Administrative Fee Percentage is used to calculate the actual monthly fee paid to the PBCA based on the number units and the 2-bedroom Fair Market Rents (FMRs). The number of units and the amount of the 2-bedroom FMRs change periodically. If more units are assigned to the PBCA, the actual monthly fee will increase. If the FMRs increase, the actual monthly fee will increase. Conversely, if units are withdrawn or FMRs decrease, the actual monthly fee will decrease.
55. Is the applicant's bid capped at the Basic Administrative Fee Percentage that is calculated in NOTE 1?
- The Basic Administrative Fee Percentage does not change during the ACC Term.
56. Is there a format and file name structure for the Abstract?
- The format is the same as specified for the narratives (Page 17, C. 2).
 - The file name format should be the same as the Rating Factors: The Two Letter State Postal Code_PHA Complete Name_ABSTRACT.
 - File name length and name limitations (Page 17, C. 2).
57. Can the Instrumentality Entity use their Parent Entity's DUNS number or must they use a separate DUNS number.
- The DUNS number for the applicant must be used.
 - Instrumentality entities must be fully formed and in legal existence under applicable laws on the date on which the RLO is signed (page 5, 3.).

58. Attempts to contact HUD's Office of Grants Management for responses have been unsuccessful. We cannot leave a message because the voice mail box is full. Can we submit questions to your office and have you obtain the answers for this Q&A report?
- The problem is being addressed. Please call ~~Claire Brolin~~ in the meantime 202-402-6634 email Dacia.A.Rogers@hud.gov
59. Is a specific dollar amount to be entered into the SF424, Box 18 and form HUD-2880, line 4? Are HAP payments included in the response to Question 2, form HUD-2880, Part I Threshold Determinations?
- Yes, this is the dollar amount of funds (fee) that the applicant anticipates over the 2 year performance period. It does not include HAP payment amounts.
60. Should a statement or certification for the following items listed in the General Section of the NOFA be included as part of the PBCA NOFA (CFDA 14.327) response and, if so, under which section, Rating Factor and or sub factor?
- Consolidated Plan Certification – page 23, item c.
 - Delinquent Federal Debts – page 23, item g.
 - Executive Order 13166 – Limited English Proficiency (LEP) – page 27, item c.
 - No. The only required submissions are listed in part IV.C.4.a on page 18 of the Program NOFA.
61. Is the PBCA NOFA (CFDA 14.327) eligible to receive bonus points? If so, under which section, Rating Factor and/or sub factor should the response be documented?
- No
62. Will awards made under the PBCA NOFA (CFDA 14.327) be expected to use the HUD Logic Model to monitor and evaluate progress and effectiveness in meeting the goals of the program?
- No
63. Are applicants responding to the PBCA NOFA (CFDA 14.327) required to add any certifications, statements or documents for the following items? If so, under which section, Rating Factor and or sub factor should each be documented?
- No.
64. Is there a deadline for submitting questions that would be added to this Q & A list?
- HUD will accept Q&As until 5pm Eastern, 04/30/2012. HUD will post responses to all Q&As received no later than 05/31/2012.
65. What is the expected turn-around on responses to questions submitted to the Multifamily DAS email address?
- Please direct all NOFA-related questions to: PBCA_ACC_Revisions@hud.gov, rather than to the Multifamily DAS. We expect to turn-around answers within a week of receiving

questions, but cannot guarantee turn-around time, as different questions require different levels of review.

66. Should the proposed basic administrative fee percentage be listed in any other section other than the abstract?

- No

67. In Grants.gov, HUD Form 424 is pre-populated to provide separate budgets for year one and year two. The NOFA indicates that HUD will take the costs for the two years and divide them by two in determining the bid percentage. How will this be accomplished if each year is budgeted separately?

- See Technical Correction 2 at grants.gov:
<http://www.grants.gov/search/search.do;jsessionid=5Q71PvxCsnBv52hWbpVJGs1G37YvBDTQ2G2LgqfytTbvts5WTrt!9894490?oppId=150973&mode=VIEW>

68. On application form – how do we identify organizational “type” of KHRC (applicant)? Closest choice from drop-down is Public/Indian Housing Authority; or OTHER and note “independent instrumentality” as description.

- You may choose either description that best fits the applicant organization.

69. Can an out-of-state PHA form a non-profit corporation in another state and bid on that state as an in-state entity? For example, a Utah housing authority creates a corporation in Alaska. Then it bids on the Alaska contract using the new formed corporation in Alaska.

- HUD believes that the answer to this question is a matter of state rather than federal law (i.e., in the example cited, it is a matter of state law whether the Alaska nonprofit created by the Utah housing authority is an Alaska PHA).

70. What is the proper CFDA number for this NOFA?

- The CFDA number for this NOFA is 14.327.

71. When will the Mark-to-Market project report be corrected?

- It should be posted on March 26, 2012.

72. May we lock the Narrative documents prior to submission so that no edits can be made to the files?

- Yes.

73. The Grants Applications Detailed Budget form appears to reflect only program costs and has a number of columns that do not appear relevant to the PBCA initiative. Which columns does HUD want the applicant to complete?

- Only the columns that apply to the applicant organization should be filled. The total fields will automatically populate if you fill in all “subtotal” fields

74. Please clarify what HUD is looking for in the Affirmatively Furthing Fair Housing and Job Creation sections.

- All instructions are in the NOFA for policy priority points.

75. Please clarify whether the HUD PBCA NOFA requires a specific order for the attachments that require upload to the Attachment Form.

- No order of attachment is specified.

76. Is a Table of Contents required for the Capability Statement, Technical Approach, and Quality Control Plan narrative responses to sub-factors?

- No.

77. The Detailed Budget form includes costs **only** and is irrespective of any excess fee or profit that would be included in the actual fee percentage proposed in a response to the PBCA NOFA. Accordingly, Note 1 implies that the fee percentage used by a PBCA would be cap fees at an amount necessary to only cover costs. Is it HUD's intent to not allow any excess fee or profit in awards made?

- OMB Circular A-87 (now 2 CFR 225) provides at 2 CFR 225.20 that "Provision for profit or other increment above cost is outside the scope of this part." Also, Appendix A to Part 225 – General Principles for Determining Allowable Costs, Section A. Purpose and Scope, similarly states "Provision for profit or other increment above cost is outside the scope of 2 CFR part 225." However, as noted above in response to question 13, so called "excess administrative fees" are considered non-program income, and are not subject to any HUD restrictions although other state and local restrictions may still apply. Consequently, any reasonable fees earned by the PHA will be treated as local revenue subject only to the controls and limitations imposed by the PHA's management, Board or other authorized governing body

78. Why is the HUD_424_CB_Detailed_Budget an application requirement? Is this intended to be a cost plus contract? Is this a cost based program with the only provision for profit the annual incentive fees provided in the ACC?

- A cost plus contract is a term of art used generally in a procurement situation. The award of the ACC is not a procurement action. This program uses a cooperative agreement and is subject to OMB Circular A-87 and other requirements applicable to grants and cooperative agreements. The allocation system used is a fee-based allocation system pursuant to section A(2)(b) of Circular A-87.. ..

79. OMB A-87 states: "when an accumulation of indirect costs will ultimately result in charges to a Federal award, a cost allocation plan will be required." Not all governmental units or agencies have a cost allocation plan or indirect cost rate approved by the federal government. Could the applicant maintain a file documenting the cost allocation plan and/or indirect cost rate established from the applicant's most recent audited financial statements and maintain a certificate signed on behalf of the governmental unit or agency applicant submitting the proposal, by an individual at a level no lower than Chief Financial Officer? If an approved cost allocation plan or indirect rate is required, could the plan be submitted for approval prior to submission of the application? If submission of such a plan is required, to whom should the plan be submitted?

- The applicant does not need to maintain a cost allocation plan as would be traditionally maintained under a cost reimbursement recovery plan under OMB Circular A-87. Rather, the administrative fee-for-service charges to the PBCA program are used to reimburse the PHAs for its claim of the overhead costs related to its administration of the program.
80. On the budget – if you are utilizing a subcontractor for over 50% of the tasks, do you list one expense as subcontract or does the subcontractor need to break out their expenses in detail.
- To the extent contractors or consultants are utilized, the applicant shall report the amount the contractor or consultant charges the applicant.
81. Currently, there are eight State Attorney General Opinions shown on the NOFA Web page. If other State Attorney General Opinions have been written, should those be sent to HUD?
- They may be submitted to Kerry.E.Hickman@hud.gov. Once received, they will be reviewed by the Office of General Counsel and a determination will be made about posting them to the NOFA Web page.
82. The General Section of the Notice HUD's FY 2012 NOFA (Notice of 2012 NOFA) provides extensive criteria HUD may consider in evaluating past performance, including the paragraphs quoted below from page 73.e. This criteria is not contained in the PBCA NOFA. However, the PBCA NOFA does refer to all terms and conditions of Notice of HUD's FY 2012 NOFA and specifically to the General Section. Does the criteria for past performance quoted below apply to the PBCA NOFA? If not, why was this criteria removed?
- e. Additional Criteria: Past Performance.** In evaluating applications for funding, HUD will take into account an applicant's past performance in managing funds, including, but not limited to, the ability to account for funds appropriately; timely use of funds received either from HUD or other federal, state, or local programs; timely submission and quality of reports to HUD; meeting program requirements; meeting performance targets as established in Logic Models approved as part of the grant agreement; timelines for completion of activities and receipt of promised matching or leveraged funds; and the number of persons to be served or targeted for assistance. HUD may consider information available from HUD's records, the name check review, public sources such as newspapers, Inspector General or Government Accountability Office reports or findings, or hotline or other complaints that have been proven to have merit. In evaluating past performance, HUD may elect to deduct points from the rating score or establish threshold levels as specified under the Factors for Award in the individual program NOFAs. Each program NOFA will specify how past performance will be rated.
- The General Section carries with all NOFAs unless specifically negated in the program NOFA.
83. Under the terms of the NOFA, is subcontracting permitted?
- Yes.
84. Is there a particular layout that HUD wants for the response to the NOFA? Since applicants are required to respond in the exact order, it is not clear where applicants should begin.
- No, however it is easier to read applications that follow the order of the NOFA. Application requirements are listed starting on page 18 of the Program NOFA Section IV.C.4.

85. Where does HUD want applicants to respond to the Compliance with Fair Housing and Civil Rights and Affirmatively Furthering Fair Housing? These items are mentioned in the Program Requirements and again in Rating Factor 3.
- Narratives on Affirmatively Furthering Fair Housing would be in response to Rating Factor 3. The topic is described more in program requirements.
86. How should the Disaster Plan Coordinator's qualifications statement or resume be submitted—as an appendix to the Disaster Plan or as a separate file attachment?
- It should be submitted as an appendix to the Disaster Plan.
87. How will applications be assigned to the Technical Evaluation Panel teams?
- Applications will be assigned to the Technical Evaluation Panel teams based on the existing geographic location of the applicants. To the extent possible, teams on the west coast will review applications from applicants on the east coast and teams in the north will review applications from the south. A multistate applicant will have all of its applications reviewed by the same team.
88. What roles do the members of the Technical Evaluation Panel teams currently perform at HUD?
- The members of the Technical Evaluation Panel teams are all Multifamily Housing employees. They include Supervisory Project Managers, Project Managers, and Contract Administration Oversight Monitors.
89. Is there a particular layout that HUD wants for the response to the NOFA? Since applicants are required to respond in the exact order, it is not clear where applicants should begin.
- There is no prescribed order. There are the forms in grants.gov. The separate files identified for the RLO, SL, Rating Factors, Disaster Plan, FTE Chart, etc. that are consolidated in a zip file and attached to the application in grants.gov. All files have specific naming requirements.
90. What is HUD looking for as a response to the Program Requirements section of the NOFA?
- No narrative responses are required for the Program Requirements. This section provides information, which is related to the content and form of the application submission and reporting requirements if the applicant is selected to administer HAP contracts.
91. Program Requirements, item 10, Page Specifications – Is this for HUD review teams or applicants to address?
- This requirement applies to the application documents specified in the Section IV. C.3 Content and Form of Application Submissions.
92. Program Requirement, item 12, Point Threshold – Is this for HUD review teams or applicants to address?

- This requirement informs the applicant that a minimum of 45 total points must be assigned by the Technical Evaluation Panel team to its responses to Rating Factors #1, #2, #3 and #4 for the applicant to qualify for an award.
93. It appears that HUD would like the total for both years to be shown, but instructions and form in grants.gov does not allow this, even though the form provides for an All Years presentation. The input does not allow this to be changed to that presentation. Please clarify how HUD form 424CB should be completed.
- The form automatically fills the total for the first year and both years in if the subtotal lines at the bottom left of the form are completed.
94. Will HUD allow Joint Ventures or Partnerships as long as an in-state PHA is part of the Joint Venture or Partnership?
- HUD will consider joint ventures or partnerships as long as the joint venture or partnership meets all the applicant requirements in the NOFA. Any joint venture must itself constitute a PHA, as defined in section 3(b)(6)(A) of the 1937 Act, and meet all other legal requirements identified in the NOFA. For example, if the joint venture purports to be an instrumentality PHA, the Reasoned Legal Opinion submitted on its behalf must establish that the entity meets all requirements in section III. D. 2. c. of the NOFA.
95. Are there State Attorney General Opinions for all 42 states?
- No.
96. If HUD is relying on the State Attorney Generals opinions as a basis for its foreign state restriction, why does the foreign state restriction in the application extend to states where an opinion has not been issued?
- HUD is not relying solely on State Attorneys' General opinions as a basis for its decision to not permit the crossing of state lines, except in limited circumstances. However, the State Attorney General opinions that HUD has received, which are posted on the Office of Multifamily Housing's website, have been a factor in HUD's decision. HUD notes that nothing would prohibit a State Attorney General who has not yet written to HUD from submitting an opinion to HUD during the selection process or even after an award has been made, concluding that its State law does not permit the crossing of State lines. HUD has determined that such a possibility poses an unacceptable risk of interruption to its administration of the PBCA program.
97. Under Terms and Definitions, paragraph 3, Instrumentality, the last sentence states that "Submission of an RLO on behalf of an instrumentality that itself was created by one or more instrumentalities will result in disqualification of the application." What types of arrangements is HUD intending to prohibit by this language?
- An applicant that is the instrumentality of an instrumentality.
98. What is the basis for the prohibition if such an entity would otherwise be eligible to compete?

- The basis is that such an entity is not a “public housing agency” within the meaning of section 3(b)(6)(A) of the United States Housing Act of 1937. HUD interprets this provision to require that any instrumentality be created *directly* by a governmental entity that is “authorized to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A), not an entity that is created by an instrumentality or other subsidiary of such entity.

99. In paragraph D of the Funding Description, HUD states that it “believes that nothing in the 1937 Act prohibits an instrumentality PHA that is ‘authorized . . .’ from acting as a PHA in a foreign state.” In the next sentence, HUD states that it will consider applications from out-of-State applicants “only for States for which HUD does not receive an application from a legally qualified in-State applicant and that receipt by HUD of an application from a legally qualified in-State applicant will result in rejection of any application received from an out-of-state applicant for that state.” HUD’s position appears contradictory. If the 1937 Act does not prohibit PHA’s from providing services in a foreign state, what is the basis for HUD’s decision to effectively prohibit PHA’s from bidding in other States?

- The statements are not contradictory. The 1937 neither requires nor prohibits a PHA from crossing state lines. PHAs are organized pursuant to the laws of their states. Some States have made their position known to HUD that their State laws prohibit an out-of-state PHA from acting as a PHA to the extent necessary to comply with the 1937 Act and the ACC within their State. As stated in the NOFA, HUD has made the decision to consider applications from out-of-state applicants *only* for States for which HUD does not receive an application from a qualified in-state applicant.

100. Will HUD consider eliminating the restrictive language?

- No.

101. Do the responses in the Q&A amend or revise the requirements contained in the NOFA for PBCA? If there are answers in the Q&A that contradict the information included in the NOFA. Which should applicants follow?

- The answers that HUD posts on its website in response to questions supplement the NOFA. HUD does not believe that any of the answers it posts contradict the information provided in the NOFA. To the extent the applicant perceives any contradictions; they are urged to alert HUD to the potential contradiction and prepare applications based on the answers that HUD posts.

102. Item #4 of the Technical Correction states: “HUD anticipates that ACCs awarded under this NOFA will become effective on December 1, 2012.” For the current 42 incumbents, HUD issued an ACC amendment for a 6 month base period plus three 3 month optional extensions.

- ✓ Based period: Oct 1, 2011 – March 31, 2012
- ✓ 1st 3-mo. extension: April 1, 2012 – June 30, 2012
- ✓ 2nd 3-mo. extension: July 1, 2012 – September 30, 2012
- ✓ 3rd 3-mo. extension: October 1, 2012 – December 31, 2012

Does HUD intend to change the 3rd extension to a two-month extension?

To the extent that the actual effective date for ACCs awarded under the NOFA is December 1, 2012, HUD intends to request that PHAs that are party to the ACC amendment to agree to a 3rd extension, which would run from October 1, 2012 through November 30, 2012.

103. On October 1, 2011, HUD executed PBCA contracts in the following 11 states and territories, where there was no competition under the 2011 bidding process: Iowa, Maine, Minnesota, Montana, New Hampshire, North Dakota, South Dakota, Vermont, Wyoming, Puerto Rico, and the Virgin Islands. Will these 11 PBCAs be subject to HUD's new policies related to the frequency of Management and Occupancy Reviews (MORs), as outlined in the NOFA?
- No.
104. Will these 11 PBCAs be subject to HUD's new two percent cap on administrative fees?
- No.
105. Will these 11 PBCAs have to participate in competitive bidding, utilizing a NOFA, when their current contracts expires on September 30, 2013?
- HUD has not yet made any determinations regarding future NOFAs for the PBCA program. However, none of the 11 PBCAs in question will be *required* to participate in future competitions.
106. Alternatively, will HUD extend the contracts for these 11 PBCAs with amendments?
- See response to previous question.
107. If HUD extends the contracts for these 11 PBCAs, will this contract renewal take place at renewal or sooner?
- See response to previous question.
108. Will subcontractors performing less than 50% of the work be required to be in the CCR database?
- Yes, all entities doing business with the PHA in the performance of the ACC are required to register in the CCR and obtain a DUNS number. Note that the NOFA use the term "contractor," not "subcontractor".
109. To what regard are budgeted costs subject to HUD review or audit, either pre- or post-award?
- Budgeted costs will not be reviewed or audited pre-award. PHAs that are awarded ACCs are required to submit an Annual Financial Operations Report that presents actual direct and indirect costs. HUD will compare the budgeted costs to the actual costs.
110. To what regard is the Basic Administrative Fee Percentage subject to change following award?
- The Basic Administrative Fee Percentage remains the same throughout the ACC Term. As stated in the NOFA, however, HUD reserves the right to adjust the amount of assistance a PHA receives for extraordinary circumstances; please review Question #53.
111. In order to reduce the Basic Administrative Fee Percentage, may the applicant specify certain costs to be covered by the applicant as matched funds?

- The costs entered in the Detailed Budget (form HUD-424-CB) must conform to the instructions (form HUD-424-CBW-I) and the requirements of OMB Circular A-84.
112. If applying with a partner, does the partnership have to be set up prior to application?
- The NOFA does not require that entities establish partnerships in order to submit an application. As described in the NOFA, an applicant is permitted to list and describe its contractor's experience, technical approach, and internal control procedures in addition to the applicant's own experience, technical approach, and internal control procedures. For example, instructions for Rating Factor 1 state, "The applicant may describe the experience of the PHA, the PHA's instrumentality, and contractors with which the PHA has contracted to provide services in each sub factor a. through d." The NOFA does not require that the applicant submit the executed agreements entered into with its contractors as a part of the application. Parties may choose to execute letters of intent, memoranda of understanding, or other such agreements prior to executing full service contracts, and depending on their substance, such executed contractual agreements may allow an applicant to certify in good faith as to the veracity of its application. Any applicant must meet the requirements of NOFA Section III.D.2.b or Section III.D.2.c.
113. If there is only one applicant and he does not meet the 45 point technical minimum on scoring, or there is no applicant, will HUD solicit other contract administrators?
- No, HUD will not solicit other contract administrators. If there is no qualified applicant for any jurisdiction, HUD will administer the HAP contracts for that state internally, in accordance with past practice and the United States Housing Act of 1937.
114. What legally constitutes an in-state applicant?
- An in-state applicant is an entity organized pursuant to the laws of the state in which it is proposing to act as a PBCA. An in-state applicant may be a governmental entity or the instrumentality of a governmental entity. Successful applicants must be able, under the laws of that state, to perform the functions identified in the ACC and the United States Housing Act of 1937 (specifically be "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b) (6) (A) of the United States Housing Act of 1937 Act). Whether or not an in-state applicant has the legal authority to operate throughout the state is determined by that state's laws.
115. SF-424 #19 Is Application Subject to review by Order 12372. From my research, we need to submit SF 424 for review to our State Clearinghouse Office of Planning and Research. Is this required?
- For the PBCA program, state coordination is not necessary. Order 12372 does not apply to the PBCA program.
116. #5 State name and location of project or activity: What do we input? Our agency information?
- State where work is proposed. Agency information should be entered in #1.
117. Which projects will require an annual MOR?

- The contracts that will require an annual MOR are the **Mark-to-Market Projects**. This report posted on the NOFA web page has been revised and is currently being review by a few states for a final update. If you have any questions regarding the accuracy of the contracts on this report. Please contact your HUD Representative with any contract corrections.
118. If a PHA does not have statewide jurisdiction in the state for which they seek to be PBCA, may they partner with, or hire as subcontractor, an entity which does not meet the definition of PHA but is authorized/licensed to do business in said state for the purpose of being considered as having an ability to operate statewide? For example, may a local housing authority in State A apply to be the PBCA for State A by partnering with a private company even though local housing authority cannot otherwise operate statewide? In the alternative, may a local housing authority in State A apply to be the PBCA for State B by partnering with a private company that is licensed to do business in State B?
- Each applicant must fully meet all the eligibility requirements set forth in the NOFA. However, HUD notes that the premise of the question is faulty: if a PHA lacks statewide jurisdiction, hiring a contractor or other entity that does not meet the definition of PHA will not give the applicant the legal power to operate throughout the state. Whether or not the entity that the PHA hires is licensed to do business in the state is irrelevant to the legal question of whether the PHA is authorized to operate throughout the entire state.
119. There is a conflict in Note 1 of the NOFA which states the budget (which does not include profit) will be used to calculate the fee amount, and then elsewhere in our submission we provide our actual proposed fee (which includes profit), which is the actual fee amount our agency would be willing to do the work for. The two fee percentages will not be the same because of the profit element. The question then becomes which is the fee percentage HUD will be using as the proposed fee and basis of compensation upon award of an ACC? The answers to date indicate HUD is mindful of and expects a margin for profit to be in the fee, but also desires a cost only budget be presented. If this is correct, then the language in Note 1 about calculating the fee percentage from the budget (which does not have profits) should be removed.
- A Technical Correction deleting Note 1 will be issued. Please note that in accordance with OMB Circular A-87, no funds are designated as “profit.” In accordance with A-87 (*see also* 2 CFR 225, Appendix A §2(a)(3)(b)), HUD finds any proposed Administrative Fee within the 2% cap set forth in the NOFA to be a reasonable fee for service, and any portion of the Administrative Fee in excess of the PBCA’s costs incurred will be considered non-program income.
120. Can you provide a completed example of how the Form HUD 424-CB budgets should be completed for situations where there is (a) costs/expenditures in excess of administrative fee revenue and (b) administrative fee revenue in excess of costs/expenditures and (c) the calculation of the Basic Administrative Fee bid based on these examples.
- A Technical Correction deleting Note 1 will be issued. The Administrative Fee need not be tied to costs/expenditures or shown on the budget. Please see Question #42.

121. Please confirm that the NOFA represents the Agency's final determination as to the anticipated terms and conditions of the NOFA and it is not a mere draft or proposed document subject to public notice and comment.
- Correct, the NOFA is not a draft.
122. Does HUD intend to publish or announce the NOFA in the Federal Register, as required by HUD's General Policy concerning NOFAs?
- No. As a cost-saving tool in recent Appropriations Acts, Congress waived the requirement to publish NOFAs in the Federal Register for HUD. Section 228 of the FY 2012 Appropriations Act states, "Notwithstanding any other provision of law, for fiscal year 2012 and subsequent fiscal years, the Secretary may make the NOFA available only on the Internet at the appropriate Government Web site or through other electronic media, as determined by the Secretary.
123. Please explain why the NOFA was signed on Feb. 29 but not released until March 9.
- HUD has acted as expeditiously as possible to complete all proper clearance and publication procedures.
124. Please confirm that the NOFA does not place any limitation on the amount of work which may be subcontracted to another entity.
- Correct.
125. NOFA III.D.2.a requires certain information to be enumerated at the top of the first page of the RLO and certain information to be on a cover page, suggesting that the first page is not the cover page. Is that a correct reading? And if so, typically, that page would be the letterhead of the lawyer rendering the opinion, which may make placement of the required information at the top of the page difficult if not impossible. Will HUD accept reasonably prominent display of the required information not at the top of the page?
- Yes. The cover sheet of the RLO and the first page of the RLO are not the same page: the cover sheet should immediately precede the first page of the RLO. If the first page of the RLO is on the letterhead of the lawyer rendering the opinion, items (1) through (3), which are identified at the beginning of section III. D. 2. a. of the NOFA, should be placed immediately beneath the letterhead.
126. Given that HUD has supplied attorneys general letters from only six states, but the NOFA contemplates separate contracts in 42 jurisdictions, please confirm that the six attorneys general letters are of no effect for the 36 jurisdictions for which there is no attorney general letter.
- HUD believes that the State Attorney General letters posted on the Office of Multifamily Housing's website speak for themselves with respect to the jurisdictions (i.e., States) to which they pertain.
127. Does HUD believe that state attorneys general have the authority to interpret and determine requirements of federal law?

- Please see Question #99. The 1937 Act neither requires nor prohibits a PHA from crossing state lines. PHAs are organized pursuant to the laws of their states. Some States have made their position known to HUD that their State laws prohibit an out-of-state PHA from acting as a PHA to the extent necessary to comply with the 1937 Act and the ACC within their State. HUD does not believe that the attorney general opinions constitute interpretations of federal law.
128. Previously, I asked if an out-of-state PHA form a non-profit corporation in another state and bid on that state as an in-state entity? For example, a Utah housing authority creates a corporation in Alaska. Then it bids on the Alaska contract using the new formed corporation in Alaska. HUD replied: “HUD believes that the answer to this question is a matter of state rather than federal law (i.e., in the example cited, it is a matter of state law whether the Alaska nonprofit created by the Utah housing authority is an Alaska PHA).” Does this apply to an instrumentality as well as a nonprofit?
- Yes: an instrumentality is typically a nonprofit corporation created under State law.
129. When trying to complete form HUD 424-CB in the Grants.gov application only one form can be entered which states year 1, since year 2 and the grand total (all years) cannot be entered, how are the applicants to present the required data?
- See number 93.
130. Aside from grants.gov and the PBCA NOFA page on the HUD website at [http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA NOFA](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA_NOFA), please identify the other means by which the NOFA or any draft of the NOFA was released outside of HUD or OMB prior to March 10, 2012.
- The NOFA is final as published on grants.gov. All technical corrections will also be published through grants.gov. To receive program updates, please signup using a current email address on grants.gov.
131. The Q&A directs applicants to address questions concerning the General Section to the Grant Management Office. Does HUD intend to publish a Q&A document for those questions addressed to the Department’s Grants Management Office so that all applicants have an equal opportunity to make any necessary revisions to their applications upon consideration of HUD’s responses?
- Yes.
132. What is the required file name format for the list of Supporting Documents, Section IV.C.4.a(2), on page 19 of the NOFA?
- The file is already named in the grants.gov. package.
133. Pages 34-35 of the PBCA NOFA, specifically item 5, Transparency Act Reporting, state that prime recipients of HUD financial assistance are required to report sub-awards made either as pass-through awards, sub-recipient awards or vendor awards in the Federal government-wide website www.fhrs.gov or its successor system. Are the Housing Assistance Payments to Section 8 Owners considered pass-through awards or sub-recipient awards under this requirement?

- Yes.
134. Several forms SF-424, HUD-2880 and SF-LLL have a Signature box. In a conversion with the point of contact listed in the Q&A, Claire Brolin, she indicated that the forms have to be signed (wet signature). Is this correct because it make the "Save, Check Package for Errors and Submit" obsolete? If so, do we scan all the completed forms and it will become one of the attachments? HUD-424-CB does not allow user to Indicate/Mark Year 2 and ALL Years on the form. Year 1 is prefilled and cannot be changed.
- Signed documents may be scanned or faxed using the instructions in the General Section section IV.B.5.
135. With regard to the General Threshold Requirements referenced in III. D.1 need to be affirmatively addressed in the response to this NOFA, do we only need to respond in this application to those requirements that are specifically listed starting on Page 18 of the Program NOFA, as stated by Grants Management personnel? If we respond to other threshold requirements stated in the General Section in the Abstract, will we be penalized? Is it necessary to respond to the other threshold requirements stated in the General Section, other than those that appear starting on page 18, or will that information not be reviewed?
- All applicants must comply with threshold requirements in the Program NOFA. Submissions should only include the application requirements listed in section IV.C.4 of the NOFA starting on page 18.
136. The General Section regarding Threshold Requirements refers to a Consolidated Plan. Are applicants required to have a HUD approved Consolidated Plan? A keyword search of the full NOFA does not mention consolidated plan.
- See number 60.
137. A large number of questions have been sent to HUD regarding General Section requirements, which HUD has stated must be referred to Grants.Gov. The questions and the answers pertain directly to the NOFA for PBCAs. Will HUD collect the Q&A on these questions and make them available to all on HUD's PBCA NOFA Q&A list?
- Yes.
138. Page 16 number 6 of the Program NOFA states that "Successful applicants must comply with certain requirements regarding affirmatively furthering fair housing, including affirmative fair housing marketing, rather than the General Section. It then goes to list three actions and/or procedures that the applicant must perform. Are applicants to only respond to these three requirements, rather than anything else in General Section pertaining to affirmatively furthering fair housing, in its Response to Rating Factor 3?
- See numbers 26 and 85.
139. Page 19 of the NOFA states the total narrative response cannot exceed 60 pages, not including attachments for each narrative. Does this mean that the Capability Section, Technical Section and

QCP Section cannot exceed 60 pages together? Is the FTE Appendix and other attachments included in this 60 page limit?

- The 60 page limit applies only to the Capability, Technical and Quality Control Plan sections of the Rating Factors. There is no page limitation on RLO, SL, Rating Factors 3 or 4 or the FTE chart.
140. Page 21, (f) requires Proposed Fee, See Rating Factor 5. This fee is included in the Abstract. Does it need to be included again, in order described in the NOFA?
- The proposed Basic Administrative Fee Percentage is stated in the Abstract. It is not included elsewhere in the application.
141. In addition to the information described on Page 18 and 19, what other type of information should be included in the Abstract. There is a four page limit, and it does not appear that the information requested will take more than 1/2 page to a page.
- No other information is required for the Abstract. One-page may be sufficient but not more than four pages are permitted.
142. On page 23, Section V.A.1.a. states applicants must be comprehensive (whether experience addresses all of required components described in each subfactor). What are the subfactors referred to in the description?
- The sub-factors are listed under each Rating Factor. There are 4 sub-factors under Rating Factor 1, Capability of Applicant and Relevant Organizational Experience. There are 5 sub-factors under Rating Factor 2a, Technical Approach. There are 7 sub-factors under Rating Factor 2g, Quality Control Plan. There are no sub-factors under Rating Factors 3, 4, or 5.
143. Page 19, 4a(8) states that the total narrative response is to be in 12 point font. HUD has also indicated that tables and figures could be included with the narrative. Can text contained in organizational charts and other figures be in a smaller size font?
- Text cannot be smaller than 12 point font in tables or figures.
144. The revised Performance-based ACC, issued 02/24/13 changed the requirements for MORs and HUD now requires PBCAs schedule and conduct a Risk-Based MOR of projects in the assigned portfolio during the term of the ACC, using Form HUD 9834, based on the following risk-based criteria for the projects: (1) Projects for which the last MOR resulted in a rating of Below Average or Unsatisfactory: One (1) MOR shall be conducted during each 12-month period during the ACC Term; (2) Projects for which the last MOR resulted in a rating of Satisfactory: One (1) MOR shall be conducted for fifty-percent (50%) of the projects during the first 12-month period of the ACC Term and one (1) MOR shall be conducted for the remaining fifty-percent (50%) of the projects during the second 12-month period of the ACC Term; and (3) Projects for which the last MOR resulted in a rating of Above Average or Superior will not be reviewed during each 12-month period during the ACC Term. This schedule will result in the PBCA conducting a large number MORs in Year Three when the Above Average and Superior rating properties will require an MOR.

- The ACC for NOFA is for a two-year period. HUD will address the issue raised in your question before awarding the next ACC.
145. We spoke with the Grants Management Office regarding the question about dollar amounts to be entered into the SF424, Box 18 and form HUD-2880 line 4. The amount is estimated base payment. HAP payments are not included because they are “pass-through” payments. Our question is do we operate in a best case scenario and include incentive payments as well?
- Only the estimated dollar amount for Basic Administrative Fees should be entered.
146. Page 21 of the NOFA states “include a fee percentage in Abstract”, how is this done if Form HUD 424-CB is utilized to calculate the fee as noted on Page 13, Note 1
- The proposed percentage is written in the Abstract. For example: “The proposed Basic Administrative Fee Percentage is one percent (1.00%).
147. Should an annual MOR be scheduled during the Short Term Renewal Phase if a Full Mark-to-Market is requested or after the Full Mark-to-Market contract has been executed?
- After the Full Mark-to-Market contract has been executed.
148. HUD’s response to Question 89 seems to indicate that all documents/attachments to the application “are to be consolidated into a single zip file and attached to the application in grants.gov.” However, the “Attachment Form” for the application seems to indicate that documents should be individually identified and each attached separately. Please clarify whether HUD is requiring: that each attachment be separately identified and zipped or that all supporting attachments be zipped into one file.
- See the General Section, section IV.B.6 and IV.B.6.(2), for information on how to complete the application package and use zip files.
149. The applicant is required to complete the Disclosure of Lobbying Activities. Are subcontractors also required to complete the form upon application?
- Only the application entity is required to complete the standard form LLL.
150. On page 14, Section E.1. Disaster Plan, the requirements states, “One copy of the Disaster Plan portion of the application shall be submitted as a PDF file...” Please clarify that the required format is PDF format and that the Disaster Plan document is an exception to the general requirements on page 17 C.2. General Section, which states, “all files must be in Microsoft Word except the FTE Statement document...”. Please clarify that HUD only requires one copy of the disaster plan.
- Only one copy is required. The Disaster Plan is submitted as a Word document.
151. On page 9, Section D.2 Reasoned Legal Opinion Requirement HUD states: “One copy of the RLO shall be submitted as a Portable Document Format (PDF) file...” Please clarify that the required format is PDF format and that the RLO document is an exception to the general requirements on page 17 C.2. General Section, which states, “all files must be in Microsoft Word except the FTE Statement document...”.

- All files must be in Microsoft® Word® except the FTE Chart which must be an Excel® file and the Reasoned Legal Opinion (RLO) must be a PDF file (NOFA page 9).
 - The Supplemental Letter (SL) must be a PDF file and the file name convention should be the same as the RLO except that RLO should be changed to SL.
152. Please clarify that HUD only requires one copy of the RLO.
- Only one copy is required.
153. Neither the NOFA nor the ACC define the threshold amount of required Fidelity Bond coverage. Please provide information that details the Fidelity Bond threshold amount.
- The amount of the Fidelity Bond should be sufficient to cover the maximum possible monthly Housing Assistance Payments (HAPs) that can be received by the PBCA once the PBCA starts making HAPs to the owners. Debt service offsets are not received by the PBCA and therefore need not be covered by the Fidelity Bond. Payments for a given month may significantly exceed the normally vouchered amounts. This can be caused by factors such as special rent adjustments and retroactive vouchers for several months resulting from the owners' failure to submit past vouchers or delayed contract increases or renewals resulting from a lack of HUD funding or other processing delays. PBCA should increase the "normal" coverage of one month's "net" payments by an amount that gives them comfort in discharging their fiduciary responsibilities. Also, as additional Housing Assistance Payments Contracts (HAPCs) are assigned, the Fidelity Bond must be increased before the PBCA begins making HAPs for the added contracts.
154. The language of the NOFA seems to allude to "*attachments for each narrative*" – but it is not clear if applicants can include attachments to each narrative section, such as resumes to the Capability Section – which do not count toward the 10 page maximum, **OR** if the attachments are only referring to attachments as specifically required by the NOFA, e.g. FTE Charts. Please clarify.
- Attachments are those documents specifically required by the NOFA that are attached with the application in grants.gov. With regard to the Rating Factor documents, appendices such as resumes or charts or lists will count to the specified page limitations.
155. What is the file name format for the "Abstract" required at Section IV, Paragraph 4.a.(1) on page 18 of the NOFA?
- Two Letter State Postal Code_PHA Complete Name_ABSTRACT
156. Will the selected PBCA be required to follow-up and close open MORs currently under HUD's responsibility? If so, to help applicants better plan/staff offices, can you provide the industry with the number of open MORs that will be rolled into the PBCA portfolios?
- HUD staff will be responsible for closing MORs conducted by HUD staff.
157. We have read the Q&A responses to questions about zip files and are still unclear. Although the NOFA states how a zip file must be named, the way the NOFA is written it sounds as though

submitting the Application documents via zip files is an option, not necessarily a requirement. Please clarify whether zip files are an option or a requirement.

- Please see section IV.B.6.d of the General Section on specifications for attaching Zip files and naming of the files and see section IV.B.6.d.(2). for more information on acceptable programs to use for compressing files.

158. May the cover pages to each component of the application include photographs, graphics, and/or letters larger than 12 point font?

- Yes.

159. The instructions regarding a list of supporting documents is confusing. What do we name the list of supporting documents?

- This form is found in the application package download and it is a printed copy of the form after attachments are uploaded by the applicant into grants.gov. Name the file using naming convention guidelines in the General Section,

160. The Grants Mgmt Division contact's response regarding "wet signatures" seems to contradict the information contained on the forms themselves (See screen print below (signature line of SF424)). The text within the signature field "completed by Grants.gov upon submission" would seem to indicate that an electronic signature, similar to the NOFA Section V.B Certification requirement (see below) is sufficient. Please explain why an electronic signature on the forms is not acceptable.

•

* Title			
* Telephone Number		* Fax Number	
* Email			
* Signature of Authorized Representative	Completed by Grants.gov upon submission	* Date Signed	Completed by Grants.gov upon submission

V.B. Certifications. By signing the electronic application on Grants.gov, the applicant certifies that the Disaster Plan will be complete and correct before awards are made. The applicant is also certifying that all the statements and information contained in the application is true and correct and upon which HUD can rely.

- Electronic signature is acceptable for the SF424 because that form cannot be scanned and attached to the application or faxed to HUD. All other Third-Party Letters, Certifications Requiring Signatures, and Other Documentation that needs to be signed may be scanned and attached or faxed to HUD.

161. The answer to question 134 states that the Application needs actual signatures on some of the forms. However, it has been our experience that actual signatures are not necessary, just the "electronic" signatures that occur when the application is submitted through Grants.gov. Is this a change to the previous way to submit? Do we need to have the forms signed and scanned?

- Please see above.
162. Is it correct that a PHA Instrumentality may be a profit or a non-profit entity? The definition of Instrumentality in the Invitation for Submission of Applications expressly stated that an Instrumentality may be a for-profit or a not-for-profit. (Section 2.3 at page 6).
- Yes.
163. How will HUD fairly adjudicate the relative strengths of arguments between an Attorney General (or some other state entity with parochial interests in the matter) and other Reasoned Legal Opinions that meet all of HUD's stated requirements regarding statewide jurisdiction?
- Second only to the Supreme Court of the state, the Attorney General is top legal authority on its states laws. To the extent that the Attorney General's opinion is on-point and has considered all the relevant facts about any potential in-state applicants (e.g., instrumentalities), HUD will rely on a state's Attorney General's opinions.
164. To whom does HUD want Reasoned Legal Opinion (RLO) letters addressed?
- RLOs should be addressed to:
"United States Department of Housing and Urban Development, and its
Office of Housing Assistance Contract Oversight."
165. In Section III.D.2.e(3) of the NOFA, the SL is required to "contain an unequivocal statement as to whether the laws of the State *or any other applicable laws* impose any requirements or conditions that must be satisfied before the applicant may act throughout the State as a PHA. Since the signatory of the SL is only required to be admitted to practice in the state being applied for, they will only be able to speak to the laws of that state, not the laws of any other state (e.g., the state under the laws of which the applicant was formed). Accordingly, should "any other applicable laws" be interpreted to mean "any other applicable laws enacted by a municipality, county, or other locality of the State"?
- We assume that attorneys will limit their legal opinions to federal laws and the laws of the relevant states, inclusive of any municipality, county, or other local laws within such states, in which they are licensed to practice, and this is acceptable.
166. If a subcontractor that will perform PBTs 1-7 in their entirety currently has a Disaster Plan that meets HUD's requirements, will HUD accept it on behalf of the PHA?
- Yes.
167. If a subcontractor will be responsible for performance of PBTs 1-7, which entity, PHA or subcontractor, is responsible for carrying the fidelity bond?
- The PHA is required to have a fidelity bond. The PHA may require its contractor to have a fidelity bond.

168. HUD stated in response to question 96 that “HUD is not relying solely on State Attorneys’ General opinions as a basis for its decision to not permit the crossing of state lines, except in limited circumstances” and that the Attorney General opinions that HUD has received that are posted on HUD’s website “have been a factor in HUD’s decision.” What were the other factors in HUD’s decision for adding the Crossing State Lines provision to the NOFA? Has HUD received other written communications that were a factor in its decision to add the Crossing State Lines provision? If so, will HUD post those documents on its website?
- A number of policy and logistical concerns were weighed. No other documents will be posted to the HUD website.
169. HUD stated in response to question 81 that State Attorney General Opinions may be submitted to Kerry Hickman, and that, “once received, they will be reviewed by the Office of General Counsel and a determination will be made about posting them to the NOFA Web page.” What will be the basis for posting or not posting an Attorney General Opinion? Will HUD be conducting a legal analysis of the Attorney General Opinions?
- Unless presented with a reason to do so, HUD will not be questioning the legal conclusions regarding state law by a state’s Attorney General. If HUD receives a conclusive and relevant opinion by a state Attorney General relating to the eligibility of and relevant to potential applicants in its state, HUD will publish such opinion on its website.
170. The Crossing State Lines provision has resulted in the ability of state entities to obtain a sole source position. For example, the Attorney General Opinion for New Mexico concludes that the New Mexico Mortgage Finance Authority (NMMFA) has the exclusive authority to operate as a public housing authority in the state. Without regard to whether the Opinion, which notes that federal law “could confer the requisite authority” for an out-of-state housing authority to operate as a PBCA, HUD apparently will award the PBCA contract to NMMFA provided it submits an RLO that establishes it is legally qualified and an application that meets the 45 point technical minimum score. There is no competitive force to constrain the applicant in such case from bidding the highest allowed price with the lowest acceptable performance standards. Does HUD intend to make an award to an applicant in a state with an Attorney General Opinion that states the applicant has the sole authority to perform the work, regardless of the overall competitive score of other applications received from qualified in-state applicants?
- Yes, but only if the Attorney General’s opinion is on-point and has considered all the relevant facts about any other potential in-state applicants (e.g., instrumentalities),. The minimum threshold score reflects the minimum score that HUD believes is necessary to demonstrate competency in contract administration in that state. If a state’s sole in-state applicant meets all eligibility criteria and attains the minimum required threshold score, HUD will award the ACC to that applicant.
171. The Supplemental Letter that must be provided by an out-of-state applicant includes the requirement that the attorney signing the letter must certify “that nothing in the laws of such State in any manner prohibits the applicant . . . from acting as a PHA in the State for which it is applying.” It further requires that the SL must contain “an unequivocal statement that the signatory has examined all the laws of the State governing the creation and operations of PHAs, including any provision of State law that defines that term or comparable term.” The

requirements for an SL that contains a certification for the broad and indefinite phrases “nothing . . . in any manner” and that all laws have been examined including those that define a “comparable term” are unreasonable and place an even greater restriction on out-of-state applicants. What is the basis for HUD invoking a legal requirement that is so stringent as to be unobtainable?

- HUD has received many acceptable RLOs in previous competitions.

172. Can a subcontractor accept and make the initial decisions on appeals on MORs and Rent Adjustments or does the decision letter have to be signed by the PHA?

- The PHA’s contractor can accept and “recommend” decisions on appeals on MORs and Rent Adjustments. Decisions and decision letters must be executed by the PHA.

173. Can a PHA delegate signature authority to its subcontractor to sign Contract Renewals and Rent Schedules?

- Contract Renewals and Rent Schedules must be executed by an authorized employee of the PHA not a contractor.

174. Will HUD give a subcontractor access to HUD funds via eLOCCS and allow the subcontractor to make HAP payments to owners/agents?

- No, because the request for HAP funds comes thru TRACS not eLOCCS. Please refer to the Section 8 Contract Administration LOCCS Web Guide at http://portal.hud.gov/hudportal/HUD?src=/program_offices/cfo/finsys for information on how eLOCCS is utilized in the PBCA program and user access rights.

175. The NOFA information for completing the FTE Chart states: “Only include contractors that contract directly with the PHA. Do not include sub-contractors of contractors.” When completing the FTE information under each PBT, if a contractor will be using subcontractors should the subcontractors be included in the number of FTEs and corresponding position titles reported for the contractor on the FTE Chart? Or should it be limited to only FTEs employed by the contractor?

- The FTE Chart should identify the level of effort, i.e., FTEs, required to perform the PBTs. The contractor should include all FTEs required to perform its services for the PHA. If the contractor engages subcontractors to perform its services, the FTEs of the subcontractors must be included in the contractor’s FTE calculation. The position titles must be reported for the FTEs. The identity of the subcontractor(s) engaged by the contractor is not required.

176. If the contractor is using subcontractors to do 50% or more of the FTEs required to perform PBTs number 1-6 and the amount performed by the subcontractor to the contractor is 50% or more of the FTEs required to perform PBTs number 1-6, do we also need to report the states in which the subcontractor is engaged or proposes to be engaged in performing 50% or more of the FTEs required to perform PBTs number 1-6 as a separate line item for the subcontractor?

- No.

177. In the NOFA, there is a reference in the discussion of the reasoned legal opinion to the notion that multiple entities might be the "parent entity" of an instrumentality. If two entities that meet the definition of a "public housing agency" and that were established in the same state partner together to directly form an instrumentality that submits an application pursuant to the PBCA NOFA, will HUD consider that instrumentality to be an acceptable applicant for the services under the NOFA (assuming the application otherwise meets the requirements of the NOFA)?
- Provided such applicant meets all other relevant eligibility criteria set forth in the NOFA, yes, HUD will consider such an instrumentality to be an acceptable applicant.
178. Q & A number 116 asks "#5 State name and location of project or activity; What do we input? Our agency information?" The answer provided states the following: "State where work is proposed. Agency information should be entered in #1." Our state has multiple contracts/properties assigned. Which street address (REQUIRED FIELDS) is the correct one?
- Enter the state where the applicant entity is located. The applicant organization's information can be inserted again.
179. The applicant is required to complete the Disclosure of Lobbying Activities. Are subcontractors also required to complete the form upon application?
- No
180. Are you still anticipating a 90 day transition period starting September 1, 2012?
- Yes.
181. Section f. of the Technical Approach states that a timeline needs to be provided for each subfactor. Can the timeline for all subfactors be combined into one timeline, and presented at the end of Section f?
- Separate timelines are required for each of the three components.
182. Will HUD confirm the ratings of the MORS and the number of properties and their latest MOR ratings with the HUD Field Office and/or CAOMs and publish a listing for each state that reflects the number of MORs by each rating type? This would assure that all the bidders are all bidding the same portfolio based on the same number of future MOR requirements and eliminate the possibility of protest of award and/ or administrative actions or complaints that would jeopardize the award process.
- Yes, HUD staff will confirm the ratings. On or before April 30, 2012, the final lists of MORs (non-Mark-to-Market and Mark-to-Market projects) that the PHA will conduct will be posted to the NOFA Web page. Projects with no ratings will require MORs to be conducted within six (6) months of the effective date of the ACC.
183. The NOFA states in several places that an ACC will be awarded for each of the 42 States for which an ACC has not yet been awarded (as identified in Appendix A of the NOFA). The State of California is number 5 on the list. However, question number 6 on the Q&A: ACC for NOFA states that HUD

expects to execute two ACCs for California – one for Southern California with the Los Angeles HUB and one for Northern California with the San Francisco HUB with the same Contract Administrator. Doesn't this response contradict what is repeatedly stated in the NOFA?

- There is no conflict: HUD anticipates selecting 1 PBCA for California and awarding 2 ACCs.

184. Within the Application Requirements (Part IV, Application Information #4a2, NOFA p. 19), Item #2 calls for "Supporting Documents". The brief description that follows references the application and instructions, then "A list of documents for each zip file." Where, specifically, can we find clarification of this requirement? Is this a separate page listing each of the supporting documents and if so, what should it be named?

- Please see question 160 above, and call ~~Claire Brolin~~ 202-402-6634 if you have further questions. Email Dacia.A.Rogers@hud.gov

185. On page 47 of the POLICY REQUIREMENTS and GENERAL SECTION (#6d) notes that "...many of the NOFAs require the submission of other documentation...". Section (1) then states "Applicants should develop files, then zip the files together, and then place them as an attachment to the application"...and be attached using the "Attachments" form included in the application package downloaded from Grants.gov." Where should the list of the documents attached within the zip file appear?

- The list of files within the zip file will be included in the zip file, so no additional list is required. The zip file itself needs to be listed on the attachments form (list of attachments).

186. Please clarify the definition of a "Mark-to-Market" project. Does this only include full Mark-to-Market, Option 3, or does it also include Options 1-3? If the definition is only Option 3 and the report is run from iREMS, this information would be inaccurate. Prior to upgrades in iREMS in 2010, PBCAs were unable to enter Option 3s, but were instructed to enter them under Option 2. According to the ACC, the "Mark to Market" properties are Section 515(a) or Section 515 (b) under section 4.b. of the renewal contract. This would indicate that the only project requiring an annual MOR would have renewed under Option 3 full Mark-to-Market.

- Correct, the only projects requiring an annual MOR would have renewed under Option 3 full Mark-to-Market.

187. Rating Factor 4: Job Creation states that "Each applicant should describe the number and type of activities that will improve access to job opportunities in the community through information sharing, coordination with Federal, state, and local entities, and other means". What is meant by information sharing and what is HUD looking for in the response?

- Please see section I.B.1. of the General Section for more information on Job Creation.

188. The NOFA indicates the following information should be in the Abstract: Consisting of up to four-pages, it is a summary of the proposed project, which will not be scored and does not count toward the narrative page limit. The abstract must contain the following:

- (a) Name of PHA Entity
- (b) Street Address

- (c) City, State, Zip Code
- (d) Contact Name and Title
- (e) Contact Telephone Number
- (f) Contact E-mail Address
- (g) Name of State of Application
- (h) Proposed Basic Administrative Fee Percentage (not to exceed 2.0%)

If you include more than that information, such as a summary of the General Threshold requirements that are listed in the General Section but not specifically in the Program NOFA starting on page 18, will you be penalized?

- The information to be provided in the Abstract is specified in the NOFA. No additional information is to be included in the Abstract.

189. There is conflicting information with the published NOFA and Q&A #33 regarding how the Disaster Plan must be submitted (Word vs. PDF). The NOFA page 14 requires the Disaster Plan be submitted in PDF format. However, Q&A #33 states all files must be submitted in Word except the FTE Chart (Excel), RLO (PDF), and SL (PDF); the Disaster Plan was not mentioned in HUD's answer with regards to its required file format. Please clarify how the Disaster Plan must be submitted (Word or PDF).

- Please see the answer to question number 150.

190. The Docket Number printed on the NOFA states: FR-5600-N-33. However, the Grants.gov system references Docket Number: FR-5600-NJ-33 and auto-fills this number on the application forms. Please clarify.

- The docket number is FR-5600-NJ-33 but there was a typo at posting. The typo will not have an impact on your application.

191. How will HUD evaluate in-state applications in states where an AG opinion reasons that the state HFA is the only entity qualified to operate a state-wide program? If an in-state applicant's RLO disagrees with the conclusion reached by the AG and refutes this within the RLO, how will HUD review this information?

- Please see the answer to question number 163: Second only to the supreme court of the state, the Attorney General is top legal authority on its states laws. To the extent that the Attorney General's opinion is on-point and has considered all the relevant facts about any potential in-state applicants (e.g., instrumentalities), HUD will rely on a state's Attorney General's opinions.

192. Please clarify there is a discrepancy between page 5 of "Highlights of PBCA NOFA & ACC for NOFA" and the Grants Application Package as downloaded from grants.gov. Which document is correct? The Grants Application Package indicates that the Application for Federal Assistance (SF-424) and HUD Facsimile Transmittal forms are mandatory, while the HUD Detailed Budget Form, Disclosure of Lobbying Activities (SF-LLL), HUD Applicant-Recipient Disclosure Report, and Faith Based EEO Survey are optional. HUD's Highlights of PBCA NOFA & ACC for NOFA (updated 4/6/2012) indicates that all documents are required, with the exception of the Faith Based EEO Survey (SF424SUPP) as an optional submission.

- Please see the answer to number 27.
193. In the PBCA NOFA Q&A, the answers to questions 27 and 29 are contradictory regarding the requirement of the Faith Based EEO Survey. Answer 27 states that “documents listed on the SF-424 under ‘Optional Documents’ are all required except the Faith Based EEO Survey.” Answer 29 states that “application must include all of the documents listed in Section C.4.....and Faith Based EEO Survey.” Please clarify, is the Faith Based EEO Survey is required or not?
- Please see the answer to number 27.
194. If you are a contractor who is performing 100% of the work for PBT’s 1 through 6, Is a disaster recovery plan required to be submitted for both the contractor and the PHA or just the contractor actually performing the tasks?
- Please see the answer to number 166.
195. Can HUD please clarify the work that MUST be performed by the PHA and what is allowed to be contracted out? For instance, can the contractor hold the bank accounts and distribute the HAP funds or must this function be performed by the actual PHA?
- The PHA is required to enter into a Depository Agreement with HUD. Therefore, the bank account must be in the name of the PHA. The contractor can process payments on behalf of the PHA.
196. As for the A-133 audit requirement, if there is a contractor performing more than 50% of the work would this audit be required for the PHA and the contractor?
- The A-133 audit applies only to the PHA.
197. Does each applicant entity need to disclose ANY lobbying activity connected to a federal department/agency/program or only lobbying activity relation to the PBCA program in the state(s) for which they are applying? If there are no lobbying activities to report, then the omission of this form will not be considered missing, correct?
- The applicant entity must disclose any registered lobbyists. If there is not a registered lobbyist but the organization does lobbying, then put NA in the boxes for lobbyist information. If the organization is not required to report lobbying based on form instructions and pursuant to 31 U.S.C. 1352, the organization may send a certification stating that the organization is not required to report but a certification is not required.
198. Could you please check the accuracy of your response to question #134? Your answer indicates that you are acknowledging that “wet” signatures are required to the SF-424 and accompanying forms, however, the signature boxes on the forms are all pre-filled with “Completed by Grants.gov upon submission” which would seem contradictory.
- The 424 has an electronic signature. Other forms and certifications must be signed.
199. On the SF0424, #9 – if the applicant is a State Government who is also a Public Housing Authority, should both types of applicants be entered at #9, even if the applicant is only one entity that meets both definitions?

- Only the eligible applicant for the PBCA Program (that matches IRS records) should be entered.
200. Regarding the Disclosure of Lobbying Activities – if we have nothing to report, do we leave items 5-10 blank? Also, should #2, the Status of Federal Action be identified as a. bid/offer/application or b. initial award on this form?
- Use N/A for nothing to report. The status of federal action would be b.
201. Where in the Disaster Plan submission is the Disaster Plan Coordinator's qualification statement or resume supposed to be included? In the same pdf file as the rest of the disaster plan or in a separate document? If in a separate document, how should it be titled?
- Please see the answers to numbers 86 and 150.
202. Question 144 addresses the issue that the change in handling of Management and Occupancy Reviews pursuant to the new risk rating will result in a significant number of properties not having an MOR for two years and will increase the likelihood that the number of MORs required after the two year contract period will increase in Year 3, the 12 month period following the current ACC to be executed for this NOFA. The answer specifically states that "HUD will address the issue before awarding the next ACC". Does this response mean that HUD will no longer extend ACC contracts beyond the original contract period of two years as indicated in the NOFA and that all ACC contracts for periods after the two year contract period contemplated by this NOFA will again be subject to a NOFA bid process for award?
- HUD expects to solicit applications for contract administrators and award a new ACC in 2014 for all 53 States. Applicants will be provided with MOR ratings for the projects in each State that require MORs. The ACC has a provision for HUD to unilaterally extend ACCs beyond the two-year ACC term.
203. Section III.E.4 of the NOFA states "In addition, applicants must disclose, using Standard Form SFLLL "Disclosure of Lobbying Activities," any funds, other than federally appropriated funds, that will be or have been used to influence Federal employees, members of Congress, or congressional staff regarding specific grants or contracts." The source of this requirement is 24 CFR 87.100(c) and Standard Form LLL is incorporated into Part 87 as Appendix B. If no disclosure is required to be made, then 24 CFR 87.100(b) requires that "Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section." Shouldn't each application include either the required certification on Appendix A OR the required disclosure on Appendix B (SF-LLL)?
- Yes.
204. SF-424 Section 4: What is the applicant identifier number?
- This field may be left blank- HUD did not provide a number for PBCA applicants.

205. SF-424 Section 8f. What should be put in box that states organizational affiliation? Does it relate to the contact person or the applicant? The Instructions refers to 7a but no 7a on Form 424.
- This refers to the affiliation of the Point of Contact for the application. It can in some cases be different than the applicant entity/organization.
206. SF-424 Section 9: Type of Applicant: Would an instrumentality of a public housing authority be considered a public/Indian housing authority?
- You may provide the answer that best suits your organization. You can use “other” as well and specify in the box.
207. SF-424 Section 11- confirm that the correct response is 14.327
- Yes.
208. SF-424 Section 11-What is the correct title to be used?
- Performance-Based Contract Administration (PBCA) Program for the Administration of Project Based Section 8 Housing Assistance Payments Contracts.
209. SF-424 Section 12 What is the correct funding opportunity number? The number, when prepopulated differs from docket number. Which number should be used (FR-5600-NJ-33 when prepopulated; docket says FR-5600-N-33).
- It is FR-5600-N-33. The other on grants.gov is a typo. The federal register number is correct and was published under that number.
210. SF-424 Section 12- What is competition identification number. Is it PBCA-33? Is it prepopulated? If prepopulated and incorrect, do we leave it or change it.
- PBCA-33 is the competition identification number.
211. SF-424 Section 13: What is competition identifier number and what title should be used?
- **Competition ID:** PBCA-33, **Opportunity Title:** Performance Based Contract Administration
212. SF-424 Section 14 Areas affected by Project Do we leave this blank, or what Form Project/Performance Site location. . Do we need to complete this Form? Where can we find this form?
- Section 14 should be filled with the state for which you are applying if not already on the form. You can add information from your computer (a list of areas) using the attachment button.
213. SF-424 Section 15: What should we include as descriptive title of applicants project?

- Whatever the applicant organization decides best describes the application is acceptable.
214. SF424 Section 16: please confirm that for 16b that should be two letter code for state-all.
- Yes for the whole state it is e.g., MD-all for all congressional districts in Maryland.
215. SF-424 Section 17b; What should end date be?
- Estimate the date using this: 4. Section II.D on page 7 of the PBCA NOFA changes the Period of Performance and is modified to read as follows: “D. Period of Performance. The PBCA will administer the HAP Contracts that HUD assigns during the ACC term. The ACC shall have a term of twenty-four (24) months unless extended at the sole election of HUD. HUD anticipates that ACCs awarded under this NOFA will become effective on December 1, 2012. The full text of the ACC may be found at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or in Appendix C of this NOFA.”
216. In section 18 is the funding amount the bid and should the amount be inserted under a. Federal?
- The estimated dollar amount of fee should be entered here.
217. On forms requiring signatures-sf-III , sf-424 application, should we print form, sign it and send as attachment?
- The LLL needs to be signed, the 424 is signed electronically. Some of the forms state in the signature line that they are signed when submitted electronically using grants. Gov.
218. HUD 2080-Should we put bid amount in #4?
- On the 2880 put the estimated dollar amount of the fee in 4.
219. Section 5: what is the project name?
- Use a name is the applicant organization considers appropriate to identify the application.
220. Part 2: Is Part II applicable for PBCA application? What should we put in box for type of assistance and amount requested or provided and what are expected use of funds?
- Do the thresholds in Part I to determine if your organization needs to do Part II. Usually the answer is yes.
221. Is Part III applicable for PBCA application? If so, who should be included? Should all subcontractors be included?
- Complete the thresholds in Part I to determine if your organization needs to do Part III. You need to list: (1) All developers, contractors, or consultants involved in the application for the assistance or in the planning, development, or implementation of the project or activity and (2) Any other person who has a financial interest in the project or activity for which the

assistance is sought that exceeds \$50,000 or 10 percent of the assistance (whichever is lower). So subcontractors may be included if doing 10% or more of the work

222. Regarding completion of form HUD 424-CB, please confirm that the bidders costs are entered in column 1 of this form because the instructions to the form state for "Column 1- Identify the amount of funds that you will need from the HUD grant program for which you are seeking funding".
- See question 224
223. Regarding completion of form HUD 424-CB, please confirm that the bidder's costs that exceed the amount of funds the bidder is seeking from HUD as the "Basic Administrative Fee" be entered in Column 5 because the instructions to the form state " Column 5-Identify any State funds that you will be adding to this program" and that Column 1 will only reflect the bidder's costs up to the amount requested from the "Basic Administrative Fee".
- See question 224
224. Regarding completion of form HUD 424-CB, please confirm that since the "Grand Total" on form HUD 424-CB will not be used to calculate the bid percentage then the "Non Program Income" which is caused by excess "Basic Administrative Fee" over applicant's costs should be excluded from the form.
- Confirmed. The estimated cost information provided in form HUD 424-CB is for the applicable cost categories specified in the form. The form does not include a cost category for estimated excess administrative fee.
225. Regarding completion of form HUD 424-CB, please confirm that a percentage is not required to be reflected in item J Indirect Costs if an amount is entered in Column 9 and the bidder does not have an "% Approved Indirect Cost Rate".
- If you are not using an indirect cost rate percentage, no indirect cost rate is needed. If you do not have one and wish to use one, you may submit a cost proposal to HUD.
226. Question #12 under ACC for NOFA states that the requirement under PBT #3 Error Tracking Log is for MOR error reporting. In the Technical Approach, under which PBT do we discuss our approach to the MOR Error Tracking Log?
- Both
227. Rating Factor 3 and 4 indicate that the applicant should identify specific output or outcomes in furthering the policy priorities of Job Creation and Affirmatively Furthering Fair Housing. During the course of the contract, or at its conclusion, will the applicant be penalized if they have not achieved these goals?
- The applicant's accomplishments will be evaluated during the Annual Compliance Review conducted by Multifamily Housing staff from the Hub or Program Center serving the State. The applicant's performance may be considered as a qualifying factor in future requests for applications to serve as Performance Based Contract Administrators.

228. Number 6 on Page 16 references an Affirmative Fair Housing Marketing Plan. Do applicants need to provide a copy of a plan with their application?
- No. The Plan will be reviewed during the Annual Compliance Review conducted by Multifamily Housing staff from the Hub or Program Center serving the State. The applicant's plan and performance may be considered as a qualifying factor in future requests for applications to serve as Performance Based Contract Administrators.
229. Page 16 number 6 of the Program NOFA states that "Successful applicants must comply with certain requirements regarding affirmatively furthering fair housing, including affirmative fair housing marketing, rather than the General Section. It then goes to list three actions and/or procedures that the applicant must perform. Are applicants to only respond to these three requirements, rather than anything else in General Section pertaining to affirmatively furthering fair housing, in its Response to Rating Factor 3?
- Page 16 number 6 of the NOFA refers the applicant to Rating Factor 3. Together, these two sections are clear about what the applicant should describe in its response to Rating Factor 3 to achieve the stated outcome: "Address impediment to fair housing and promote fair housing rights and choice."
230. Regarding Item 6 Fidelity Bond Coverage, which requires the PHA to carry adequate fidelity bond coverage, as required by HUD to compensate the PHA and HUD for any theft, fraud or other loss program property resulting from action or non-action by PHA officers or employees or other individuals with administrative functions or responsibilities for contract administration under the ACC, if the PHA bidder is required by its state regulations to participate or maintain a self insurance program, will this comply with this requirement?
- While the PHA's contractual obligation to provide adequate fidelity bond coverage, at the PHA's expense, is an explicit obligation of the PHA under the ACC, self-insurance is not a substitute for a fidelity bond. The PHA must obtain the coverage from a third party carrier, so that the PHA and HUD if necessary, has a legal contractual right to claim reimbursement from the insurer without the problematic necessity of seeking restoration of funds from the PHA itself which may be difficult or impractical.
231. Regarding Item 6 Fidelity Bond Coverage, which requires the PHA to carry adequate fidelity bond coverage, as required by HUD to compensate the PHA and HUD for any theft, fraud or other loss program property resulting from action or non-action by PHA officers or employees or other individuals with administrative functions or responsibilities for contract administration under the ACC, if the PHA bidder is self insured by state regulation, what date will the PHA have to provide to HUD satisfy this requirement?
- See answer to number 230.
232. After reviewing Q/A # 134,160 and 161, I still need clarification. Is electronic signature acceptable for HUD-2880 and SF-LLL?
- See answer to number 134.
233. While we understood that the contract for this work would be of limited duration, the proposed form of Performance-Based Annual Contributions Contract (ACC) issued by HUD with the

Notice of Funding Availability (NOFA) for the Performance Based Contract Administrator (PBCA) Program has an initial term of 24 months, which appears to be subject to unilateral extensions by HUD for an indefinite period of time with no allowance or accommodation for a fee change or adjustment. It appears that, pursuant to this provision, if the costs of providing these services increase above costs which were the basis for the initial fee, HUD may require a PHA to continue providing services beyond the expected two year term under the ACC at a fixed rate that provides insufficient revenue to cover costs. By contrast, Section 4(d)(4) of the PBCA ACC executed in Summer 2000, and extended to date in many jurisdictions, allowed the PHA to unilaterally terminate the ACC at the end of the initial term, or any subsequent renewal term, provided that the PHA gave HUD twelve months' notice prior to termination. Since this NOFA is intended to cover services to be performed over a two year period, would HUD either (i) consider adding a similar termination provision to the proposed form of ACC, or (ii) explain why the language found in the proposed ACC would not create the problem described above?

- No change to Section 2c, ACC Term, will be made. The Department expects to award a new and execute a new ACC prior to the end of the two-year term of this ACC for NOFA.

234. We understand the narratives for Rating Factors #3 and #4 have no page limitation. Further, we understand Rating Factors #1 and #2 are limited to 60 pages (collectively). Can HUD confirm if the narratives for Rating Factors #3 and #4 need to be w/in the same 60 pages? HUD's response to question 139 (of the Q&A document) appears to confirm RFs #3 and #4 are outside of the 60-page count.

- There is no page limitation for RLO, SL, Rating Factors 3 or 4 or the FTE chart. The 60 page limit applies only to Rating Factor 1, Capability and Rating Factor 2, the Technical and Quality Control Plan.

235. HUD's question 139 (of the Q&A document) re-states the following NOFA language, "total narrative response cannot exceed 60 pages, not including attachments for each narrative." Is this to say if the narrative for the Capability Statement filled the max number of pages for this document (which is 10 pages) that an additional two pages if included as an exhibit or attachment would be acceptable to HUD?

- Section IV.C.2 of the NOFA states that "Narrative statements cannot exceed the number of single-sided standard 8.5" by 11" pages specified in the application document descriptions." The application document description for the Abstract specifies a limitation of four (4) pages. The application document description for the Capability Statement specifies a limitation of ten (10) pages. Neither the application document description nor the Rating Criteria for the Capability Statement requests or requires the submission of any attachments. The application document description for the Technical Approach specifies a page limitation of thirty (30) pages. Neither the application document description nor the Rating Criteria for the Technical Approach requests or requires the submission of any attachments. The application document description for the Quality Control Plan specifies a page limitation of twenty (20) pages. Neither the application document description nor the Rating Criteria for the Quality Control Plan requests or requires the submission of any attachments. Only information submitted for a specific subfactor will be considered for the corresponding subfactor for which it was written. The Technical Evaluation Panel team members will not refer to information that is not included within the narrative for each subfactor that may be provided in an attachment. Attachments to these documents will not be reviewed or considered in the evaluation of the applicants narrative responses to the subfactors.

236. Rating Factors #1 and #2 have file naming conventions and the NOFA does not describe any naming conventions for Rating Factors #3 and #4. Does HUD want these included as two separate MS Word documents and if so, how should the files be named for the purpose of submission?
- See the answer to number 15.
237. In response to question 169, HUD states that it will not be questioning the conclusions regarding state law by a state's Attorney General, "unless presented with a reason to do so."
- a. What "reason(s)" would be sufficient to cause HUD to question an Attorney General?
 - b. How should such reasons or potential reasons be presented to HUD?
 - c. What will HUD do if presented with such potential reasons?
 - d. As HUD noted in response to question 171, HUD has "received many acceptable RLO's in previous competitions" for out-of-state PHAs. These RLOs specifically cover the ability of those out-of-state PHA's ability to perform the PBCA services in the state in question. Why aren't these RLO+s alone sufficient reason to question the Attorney General letters?
 - e. In addition to the RLOs, HUD has received numerous written submissions from interested parties specifically challenging the Crossing State Lines provision and the validity and effect of the Attorney General letters.
 - i. When will HUD respond to these letters?
 - ii. Do they provide a sufficient reason for HUD to question the Attorney General letters? If not, why not?
- HUD is unable to speculate as to reasons why an opinion of a state Attorney General may not be considered dispositive. Notwithstanding, HUD may not consider the opinion of a state Attorney General to be dispositive if the opinion fails to address the relevant legal questions or if the opinion does not address all the relevant facts.
238. Page 27 of the NOFA in the Technical Approach, Subfactor d, General ACC Requirements, the third and seventh bullets refer to, "Applicants." Please clarify what type of "Applicants" we are required to speak to in this section. Do you mean applicants for PBCA employment? Project Based Section 8 applicants? Other?
- Applicant refers to the entity submitting an application under the NOFA.
239. On Page 25 of the NOFA, Section 2(a), Technical Approach, the NOFA requires that, "Each applicant should submit a description of its technical approach, including relevant organizational staff, to performing each of the following subfactors as they relate to the ACC...." Please clarify what HUD's intent is in asking that respondents include "relevant organizational staff" in the Technical Approach section of the proposal. Does this mean that respondents should speak to relevant organizational staff in every subsection of the Technical Approach, b-f? If so, would an organization chart placed before all sections b-f suffice for this requirement? Or, are respondents not required to speak to relevant organizational staff in any particular section of Technical Approach.
- Applicants should identify the relevant organizational staff in the narrative for each subfactor. An organizational chart may be included but is not required. If included, the organizational chart will be included in the page count for the Technical Approach.

240. It appears paragraph "a." of the Technical Approach (page 25 of the invitation for bid) appears to be the introductory paragraph for the Technical Approach sub-factors (paragraphs b – f on pages 25 – 27 of the invitation for bid). Does HUD expect a written response to the Technical Approach paragraph "a." and paragraphs b - f? Or does HUD expect a written narrative only for paragraphs b – f of the technical approach?
- Paragraph "a." is an introduction. No narrative is required for paragraph "a." Narrative responses are required for paragraphs "b." through "f."
241. HUD indicated in the Q&As that "name check" will only apply to the applicant organization and not any contractors or subcontractors. However, given that throughout the Q&A, HUD appears to be accepting of the fact that the PHA is a conduit in performing and executing the ACC, by allowing a subcontractor to be performing up to 100% of the tasks, including the payment of vouchers, wouldn't it be prudent for HUD to perform a name check on all contractors and subcontractors performing at least 50% of the tasks?
- The name check will apply only to the applicant organization. The ACC is a contract between HUD and the PHA. The PHA is responsible for performing the requirements of the ACC.
242. HUD indicated in #53 of the Q&A published on 4/27/12 that HUD reserves the right to adjust the award amounts if there is a workload reduction (such as risk based MORs). Would HUD adjust the award amounts upwards if there is an increase in services required? Example of this would be an increase in the number of MORs created by using the mandated risk based approach for conducting MORs in contract year two, whereby the current rating is satisfactory but in performing the MOR in year one the score becomes below average or unsatisfactory and requires an MOR conducted again in contract year 2.
- HUD does not expect to adjust the service requirements of the ACC during its two-year term. No adjustment of the basic administrative fee percentage will be made based on the number of MORs that are required to be conducted in year two.
243. In answer to question #82 of the Q&A published on 4/27/12, HUD indicated that FY 2012 NOFA, "in evaluating applications of funding, HUD will take into account applicants past performance in managing funds...", "HUD may consider information available from HUD's records, the name check review, public sources such as newspapers, Inspector General or GAO reports or findings, or hotline or other complaints that have been proven to have merit. In evaluating past performance, HUD may elect to deduct points from the rating score..." How will HUD implement this requirement? Will HUD make inquiry using the HUD intranet, the Internet, direct inquiry of the IG, GAO, etc? How will they determine complaints have merit? How will HUD make the TEP team members aware of this information? If the TEP team members are not made aware of facts, how will HUD implement this requirement?
- To determine past performance, information in the application and in HUD records or systems may be used. Name Check Reviews through DUNS are completed before selection announcements are made.
244. What happens if HUD finds out that facts impacting an applicant or its contractors past performance? Will HUD reduce points awarded by the TEP team? If the point reduction is up to the TEP team who will determine the point reduction so all applicants and their contractors will

be handled appropriately and consistently since they maybe be submitting more than one application? Will the overall quality control process HUD indicated it is implementing take these facts into consideration?

- HUD will notify the applicant if there are unresolved past performance issues. There are no points for past performance in the PBCA NOFA. The process is overseen by the Office of Grants Management and Oversight.

245. In one of the conference calls, HUD indicated that as part of the quality control review process, HUD headquarters will review the findings and recommendations of the TEP panels to ensure consistency of evaluations. How is HUD planning to implement this process?

- Headquarters staff will not review the evaluations and points assigned by TEP Teams. The TEP Team members will individually evaluate and assign points to assigned applications. Then, the TEP Team members will compare their evaluations and points and arrive at a final determination of points for the application. If less than the maximum number of points are assigned to a subfactor, the TEP Team will provide a decision statement specifying why less than the maximum number of points were assigned. Headquarters staff will review the decision statement to ensure that it is clearly written and provides sufficient detail. If it is not clearly written, Headquarters staff will ask the TEP Team leader to be more specific, provide more detail, or clarify exactly what the team found deficient.

246. HUD indicated in the Q&A that the same TEP will review proposals of applicants with multiple state submissions? What about consistency in reviewing subcontractors with multiple state submissions? It is conceivable that one subcontractor will apply to perform over 50% of PBTs and provide more than 50% of the FTEs in performing the work in all 42 states.

- The same TEP Team will review proposals from PHAs with the same multi-state contractor.

247. In number 105 of the Q&A dated 4/27/12, HUD indicated that that "none of the 11 PBCAs in question will be required to participate in future competitions. What if there is an in-state applicant who will be interested in applying to be the PBCA?

- HUD expects to receive applications for the fifty (50) United States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands when applications to service as a PBCA are submitted under a new ACC in 2014.

248. In number 109 of the Q&A dated 4/27/12, HUD indicated that it will compare the budgeted costs to the actual costs. If this NOFA is for fee for services, why will HUD do that? If the actual is higher or lower than budgeted, is HUD planning to make adjustments to the fee?

- HUD will use the information provided in form HUD-424-CB required by the NOFA and in the Annual Financial Operations Report required by the ACC to evaluate program costs. The information will not be used to adjust the Basic Administrative Fee Percentage during the ACC Term.

249. In number 117 of the Q&A dated 4/27/12, HUD indicated that only Mark to Market projects will required annual MORs. Please confirm that all properties with an MOR rating of below average and unsatisfactory will also require annual MORs.

- Refer to the ACC, Exhibit A, PBT #1.
250. In number 202 of the Q&A dated 4/27/12, HUD indicated that 'The ACC has a provision to unilaterally extend the ACCs beyond the two year term. If HUD chooses to exercise this option at the end of the two year term, will HUD require the PBCA to perform MORs on the properties that have not had an MOR in two years because they had above average or superior ratings? In most states, this would be an undue increase in cost, would HUD negotiate an increase in fee to compensate for this increase in workload or would HUD simply postpone these MORs till a new ACC is executed?
- The Department expects to award a new and execute a new ACC prior to the end of the two-year term of this ACC for NOFA.
251. If HUD is requiring the PBCA applicant to be a PHA and allowing its subcontractor to perform principally all the PBTs including the payment of the vouchers, what functions and oversight are the minimum required by the PHA to satisfy HUD's requirements and assure compliance with the ACC and NOFA requirements.
- HUD requires the PHA to fully perform all of the requirements of the ACC. The oversight of contractors is the PHA's responsibility. HUD monitors the PHA's performance on a monthly, quarterly, and annual basis as specified in the ACC.
252. Regarding Item 6 Fidelity Bond Coverage, which requires the PHA to carry adequate fidelity bond coverage, as required by HUD to compensate the PHA and HUD for any theft, fraud or other loss program property resulting from action or non-action by PHA officers or employees or other individuals with administrative functions or responsibilities for contract administration under the ACC, if the PHA bidder is required by its state regulations to participate or maintain a self insurance program, will this comply with this requirement?
- No. See the answer to number 230.
253. Regarding Item 6 Fidelity Bond Coverage, which requires the PHA to carry adequate fidelity bond coverage, as required by HUD to compensate the PHA and HUD for any theft, fraud or other loss program property resulting from action or non-action by PHA officers or employees or other individuals with administrative functions or responsibilities for contract administration under the ACC, if the PHA bidder is self insured by state regulation, what data will the PHA have to provide to HUD satisfy this requirement?
- See the answer to number 230.
254. Q&A #174 asked: Will HUD give a contractor access to HUD funds via eLOCCS and allow the contractor to make HAP payments to owners/agents? HUD's answer was no. We request clarification to this Q&A in light of the HUD Lanier Hylton Memo Guidance, issued May 11, 2007, "Housing Assistance Payment Under/Overpayment Close Out Procedures and Guidance for Annual Interest Earned Certification," which makes several references to contractor accounts acting as "HAP Payment intermediaries." This reference would seem to indicate contractors are authorized to disburse HAP payments "as intermediaries." Please clarify the answer in light of the Lanier Hylton Memo: Can a contractor receive and disburse HAP payments.

- No. A contractor cannot receive HAP payments. A contractor can submit the electronic requests through TRACS for the payment of subsidy to owners. HUD will pay subsidy only to the PHA controlled account for which a Depository Agreement has been executed with HUD.
255. Currently our agency is not subject to a separate A-133 audit, rather our federal funds are included as a part of our state's single audit. As I understand it from reviewing the information about CFDA #14.327, these funds are not subject to an A-133 audit. Therefore, if we were awarded the contract, we would not expect our agency would be required to submit to a separate A-133 audit. Is this accurate? If so, with what specific federal audit requirements would we be expected to comply? For what audits would we be expected (required) to engage an independent auditor to complete (per section 8, g of the ACC)?
- The ACC requires the PHA to submit an audit under OMB Circular A-133.
256. As I understand it, we would be subject to a potential program audit. If so, what compliance supplement would be used during the audit? Other than circular A-87 (as codified at 2 CFR part 225), what OMB Circulars would apply?
- HUD staffs conduct an Annual Compliance Review of the PBCAs to verify compliance with the ACC and performance of the Performance Based Tasks. Currently, only OMB Circular A-87 is specified in the NOFA and ACC.
257. It appears that, if we were awarded this contract the Owner's/Operators to whom we would distribute Housing Assistance Payments, would NOT be subject to any subrecipient monitoring by our agency other than the monitoring specifically required under the ACC. Is that accurate? Rather, the Owners/Operators would be considered direct recipients of federal funds with reporting responsibility, in compliance with A-133, directly to HUD. Is that accurate?
- The ACC specifies the PHA's monitoring requirements.
258. We anticipate subcontracting with a qualified provider, might you have examples of the agreements other agencies have used with the contractor and an outline of monitoring responsibilities?
- No examples are available from HUD.
259. Follow-up to HUD response to Question 195: Currently, PHAs enter into Depository agreements with HUD. HAP money flows from HUD to the PHA held bank account. Many PHAs, however, have partners or contractors who process owner vouchers on behalf of the PHA and, historically, the PHA has transferred electronic funds to the contractor's HAP account for HAP payment dispersal. This is particularly true in states where the PBCA is a part of the state government and the state rules hinder HAP dispersal in a timely fashion from the state treasury. The accounts are fully secure and the contractor is bonded under HUD PBCA requirements. Can you confirm this remains an acceptable way to disperse HAP funds?
- See answer to number 254.

260. Follow-up to HUD response to questions 172 & 173: PHAs with partners or contractors have contractually delegated many responsibilities to their partners or contractors such as the signing of HAP Contract renewals and Rent schedules and the issuance of the initial appeal decision in an MOR or rent adjustment. These PBCAs have gone through 12 years of HUD Annual Compliance Reviews with no findings or concerns expressed regarding these procedures. In some cases the HUD IG has audited the program and found no issues or concerns with this business practice. Specifically restricting to an authorized PHA employee the approval of contract renewals and rent schedules, and the issuance of the initial appeal decision in an MOR or rent adjustment represents a significant change in existing HUD policies and procedures. Is it still acceptable for PHAs to contractually delegate to partners or contractors responsibilities such as: (1) the signing of HAP Contract renewals and Rent schedules, and (2) the issuance of the initial appeal decision in an MOR or rent adjustment?

- PHA staff must execute contractual documents and program related documents that may potentially require a HUD decision or action such as an appeal decision or enforcement action.

ACC for NOFA

1. Exactly what is different about the ACC (for the 11 states) and the ACC for NOFA?
 - The limitation on the number of covered units that a multi-state PBCA may be assigned or a contractor may service has been removed.
 - PBT #1 Management and Occupancy Reviews has changed from conducting MORs annually for 100% of assigned projects to a Risk-Based and a Mark-to-Market projects requirements.
 - The Basic Administrative Fee Percentage has been changed to “not to exceed 2%” from “not to exceed 2.5%.” This change is based on the reduced MOR workload.
 - OMB circulars or requirements (including 2 CFR Part 225) have been added.
2. If a project is listed on the MOR report as unsatisfactory or below average at the time of assignment and in FY1 the project receives a satisfactory or better, is an MOR required in FY2?
 - No.
3. If a project is listed on the MOR report as satisfactory at the time of assignment and in FY1 the project receives a unsatisfactory or below average, is a MOR required in FY2?
 - Yes.
4. What if a project assigned to the PBCA from a Traditional Contract Administrator does not have a MOR rating?
 - This issue will be addressed in the new Contract Administration Guidebook.
5. Is there an expectation that MORs will be conducted on watch list properties?
 - No.
6. Does HUD expect to execute one or two ACC with the awardee for California?

- Two. One for Southern California, Los Angeles Hub, and one for Northern California, San Francisco Hub.
7. Can you provide guidance on what the PBCA role will be for inquiries that do not fall under the “health, safety and maintenance” categories (regardless if received directly from a Resident, or if forwarded to the PBCA from HUD staff)?
 - The ACC does not require the PBCA to maintain records of or perform tasks related to tenant inquiries, issues, or concern related to other categories. As appropriate, the PBCA may direct tenants to the owner/management agent or HUD for assistance with other matters.
 8. The new ACC states that Above Average and Outstanding, non M2M MORs will not be reviewed during the term of the contract. The provision for extensions does not discuss how these might be added on. For example, if there were multiple two year extensions given on this ACC, when would Above Average or Outstanding MORs be reviewed again? Also, what happens if a project with an Outstanding or Above Average MOR changes owner or agents? The 4350.1 requires a new MOR be done within six months. However, this is not addressed. The project, for example, may be well managed under a third party agent, switch to self-managed, and do a poor job. How will this be addressed in the contract?
 - The ACC will not be extended. The Department plans to request applications for contract administration prior to the expiration of the ACC and award contracts at the end of the two-year ACC term. The issues presented in the question will be addressed.
 9. The ACC requires the PBCA to follow-up with residents in three days on health and safety and maintenance complaints, with the owner’s response. As the prior contract allowed two weeks for response, it is not clear how responsive the owners will be under the new time-frames. How is the PBCA to address situations where the owner’s response is not timely or forthcoming?
 - The ACC requires the PBCA to “Monitor owner’s corrective action completion performance and keep tenant informed of changes in corrective actions and/or scheduled completion dates until corrective actions are completed and verified by the tenant.”
 - The PBCA should notify HUD if corrective actions are complete within a reasonable time given the gravity of the issue or concern. HUD will take action to enforce the HAP Contract.
 10. The PBTs for rent adjustments and renewals reference the timeliness of the PBCA processing “upon owner request.” As AAF renewals are automatic, and the Auto-OCAF is likewise automatic, shouldn’t this language be revised?
 - No changes will be made to the PBTs in the ACC. ACC clarifications will be provided in the revised contract administration guidebook.
 11. The ACC notes that HUD will be providing reports of REAC inspections and scores. Will this be handled out of HQ?

- REAC inspection data can be accessed in iREMS. HQ is providing REAC data from iREMS to the PBCAs as part of the Quarterly Risk Assessment Report process (see PBT#6).
12. Please provide clarification regarding the Error Tracking Log now in the ACC as part of PBT #3 – Review and Pay Monthly Vouchers. Will we be tracking voucher adjustments or continue to track errors discovered as part of the MOR? It’s difficult to describe a Technical Approach and QCP without more specifics.
- The PBT # 3 ACC requirement to “submit error tracking log to HUD Headquarters semi-annually ...” is for the MOR error reporting. For guidance, submission instructions and data collection tools for the MOR error reporting requirements, please refer to the memorandum, “Interim Management and Occupancy Review (MOR) Error Reporting” dated August 12, 2008. This information is posted on the following website:
http://www.hud.gov/offices/hsg/mth/rfp/ca_docs.cfm.
13. To help applicants plan and have adequate staff in place please provide clarity to ACC requirement regarding REAC follow up. Currently REAC follow up is listed in the ACC under PBT 1 and states that the PBCA (1) will obtain a copy of the owner certification that all EHS deficiencies have been corrected and (2)determine whether EHS and other deficiencies have been corrected. Some of the 11 territories that currently work under this ACC are obtaining the REAC certification after EHS items post to iREMS (same duties as listed under IBPS 16 in the old ACC). Is HUD going to revise this ACC to reflect the true practice or policy of HUD offices? If so will a new PBT be added to cover the additional work? If no revision to the ACC and REAC follow up (obtaining owner certification) occurs during the MOR please provide clarity regarding timing (how far back) based on the new Risk Based MOR schedule.
- The policies and procedures for conducting MORs and following up on REAC inspections have not changed. For details, see HUD Handbook 4350.3, Chapter 6 and Appendix 1, form HUD-9834. The ACC requires the PHA to obtain a copy of the owner’s certification that all EH&S deficiencies have been corrected but does not specify when to obtain it. The PHA must have the certification prior to conducting an MOR in order to complete its “Desk Review.” The PHA will verify EH&S compliance when it conducts an MOR.
14. Please clarify AQL timeframes for rent adjustments and contract renewals. When calculating PBCA processing times for PBT #2 & #4 AQL requirements (30 or 45 days respectively), will the PBCA be responsible for processing activities outside of their control (i.e.: waiting for funding from HUD or waiting to receive documents from the owner)?
- PBCAs are not subject to disincentive deductions for events or activities outside their control. The timeframes for rent adjustments and contract renewals are specified in the ACC.
15. Please provide clarification on the REAC follow-up in the new ACC. Since it is now embedded in PBT #1, will follow-up only be conducted at the time of the MOR, thus replacing the EH&S “real time” follow-up that is currently required following the release of all REAC inspection results?
- See the answer to number 13.

16. The ACC currently posted on the NOFA Web page refers to Housing Notice H 2010-10, EIV System on Page 26. Will this reference be replaced with Housing Notice H 2011-21 which superseded Housing Notice H 2010-10 on August 17, 2011?
- PBT references in the ACC are not updated. Section 2 of the ACC requires the PHA to comply with all new and amended regulations or requirements related to the performance of the ACC.
17. Please provide clarification on the REAC follow-up in the new ACC. Since it is now embedded in PBT #1, will follow-up only be conducted at the time of the MOR, thus replacing the EH&S “real time” follow-up that is currently required following the release of all REAC inspection results?
- See the requirements of HUD Handbook 4350.1 and form HUD-9834.
18. The proposed time frame for CA and Owners to address tenant’s complaints is too tight for all parties to investigate thoroughly and take appropriate actions. Owners need time to investigate the cause of the complaint, talk or meet with all parties involved and in some cases to contact contractors for repair. The proposed 3 day turn-around is not feasible. The owner needs at least 10 days to do the initial investigation and respond with their proposed actions.
- No changes will be made to the requirements of PBT #5.
19. The requirements to obtain consensus that the complaint(s) have been “fully resolved” prior to closing of the finding could potentially leave the case open for years and affect owners HAP contracts. As long as the owners have done their due diligence, and have taken the necessary actions to correct the item(s) the case should be closed. The monitoring agent should have the authority to close a complaint without the consensus of a tenant.
- No changes will be made to the requirements of PBT #5.
20. The time frames set forth for the owners to resolve resident complaints and work through Contract Administrators is extremely narrow. 1-3 days is just not enough time. More thought needs to be placed on this issue. To have a consensus that complaints have been fully resolved prior to the closing of a finding is unrealistic. If we have findings open, unresolved for whatever reason, HAP contracts would be affected. Please review these outlines.
- Unresolved health, safety, and maintenance issues are a violation of the HAP contract. The PHA should refer the owner to HUD if tenant health, safety, and maintenance issues that are unresolved within agreed upon completion schedules because the owner is unable or unwilling to correct the issue. HUD will determine if enforcement actions are required.
21. Monitor owner compliance with obtaining access to and using EVI system is part of PBT #3 Vouchers (p.31, Sect. A.). Will we continue to verify owner/agent access and use of EIV as part of the MOR? Even though we won’t be performing a MOR for quite a few properties?
- a. The requirement for PBCAs to monitor owner compliance with obtaining access to and using EIV system in its entirety is shown under two PBTs in the ACC, PBT 1, Management and Occupancy Reviews, and PBT 3, Review and Pay Monthly Vouchers.

The PHA will be required to perform EIV owner compliance under PBT 1 as a part of the MOR and the PBCA will also monitor EIV compliance under PBT #3 to ensure adjustments are completed correctly on the voucher and that owners/agents are regularly reviewing and clearing discrepant items on the EIV Verification Reports.

22. The most current ACC (Dated 2.24.2012) – PBT # 3 – Review and Pay Monthly Vouchers – includes the following requirement: “The PHA disburses housing assistance payments to the owner in response to the owner’s payment request as verified by the PHA.” Does this task have to be directly completed by the applicant PHA or can the PHA use a contractor to process HAP voucher requests and distribute the HAP voucher funds when that contractor is an out of state PHA related entity?
- b. The PHA may hire a contractor to complete all the requirements under PBT #3 except for the actual distribution of HAP voucher funds to the owner. Please refer to Q&A #174. Only the PHA, not the contractor, is authorized to make HAP voucher payments to owners/agents. Vouchers are submitted electronically through TRACS and payment is made directly to the owner through HUD financial systems.
23. Can a PHA setup a recipient’s email address for a contractor to receive email notifications from eLOCCS of estimated deposit of HAP funds into the PHA’s depository account?
- Yes.
24. Can the PHA give a contractor viewing rights in eLOCCS to be used in the reconciliation with TRACS, ensuring all amounts and property names are accounted for prior to the contractor setting up the EFT to the owner?
- Yes.
25. Can a contractor enter cutover dates for the award or any additional properties added by HUD after the contract has been awarded?
- The PBCA may assign access rights to a contractor to eLOCCS for the purpose of: [1] reviewing financial data for Project-based Section 8 HAP contracts assigned to the PBCA and [2] entering the cut over dates for HAP contract award.
 - The Contract Oversight Administrator Monitor (COAM) with jurisdiction over the specific PBCA is required to approve the cut over dates entered in eLOCCS by the PBCA or its contractor.



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GAO PROTECTIVE ORDER**

June 11, 2012

Office of General Counsel
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

BY E-MAIL

Attention: Procurement Law Control Group

Re: Protest of Massachusetts Housing Finance Agency of the U.S.
Department of Housing and Urban Development's Notice of
Funding Availability for the Performance-Based Contract
Administrator Program for the Administration of Project-Based
Section 8 Housing Assistance Payments Contracts, Docket No.
FR-5600-N-33

Dear Sir or Madam:

Massachusetts Housing Finance Agency ("MassHousing") hereby protests U.S. Department of Housing and Urban Development's ("HUD's") Notice of Funding Availability ("NOFA") for the Performance-Based Contract Administrator ("PBCA") Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts, Docket No. FR-5600-N-33.

I. THE PARTIES TO THIS PROTEST

The protester's address is One Beacon St., Boston, MA 02108. Its telephone number is (617) 854-1000; its fax number is (617) 854-1029. The contact at MassHousing for this protest is Henry Mukasa, whose email address is hmukasa@masshousing.com and telephone number is (617) 854-1161. The Cohen Mohr LLP attorneys on this pleading are Andrew Mohr (amohr@cohenmohr.com), John O'Brien (jobrien@cohenmohr.com), and Gabe Kennon (gkenon@cohenmohr.com). The contact information for Cohen Mohr LLP is set forth above.

The contracting agency is the:

AR 1072

JA300/AR1072

COHEN MOHR LLP

Office of General Counsel
June 11, 2012
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B. MassHousing

MassHousing was created by statute in 1966 by the Commonwealth of Massachusetts (the "State," "Commonwealth" or "Massachusetts"). MASS. GEN. LAWS ch. 23A, App. §§ 1-1 through 1-17. As set forth in its enabling statute, MassHousing is a "body politic and corporate" that is "constituted a public instrumentality" to provide "an essential governmental function." *Id.* at § 1-3. Specifically as it concerns the NOFA, MassHousing is a Public Housing Agency ("PHA"), as that term is defined in 42 U.S.C. § 1437a(b)(6), authorized to operate throughout the Commonwealth of Massachusetts. Since it began operations in 1970, MassHousing has been providing the citizens of Massachusetts with housing assistance, financing, development, and services.

Currently, MassHousing has over 41,000 HUD Section 8 housing units in its Section 8 portfolio in Massachusetts. Over the past five years HUD's regional office in Boston has conducted Annual Compliance Reviews ("ACR") of MassHousing's operations as a PHA, and none of the ACR's have resulted in any adverse findings or the imposition of disincentive fee deductions.

C. Cambridge Housing Services LLC

Cambridge Housing Services LLC ("CHS") was organized in December 2010 by the Cambridge Housing Authority ("CHA"), which is a local PHA authorized to operate in the City of Cambridge, Massachusetts ("Cambridge") and is one of approximately 253 local PHA's operating in Massachusetts. As a local PHA, CHA is not authorized to operate as a PHA outside of Cambridge.

D. The Prior Invitation for Submission of Applications

In 2011, HUD issued an Invitation for Submission of Applications to select PHAs to administer project based Section 8 rental assistance contracts. CHS received the award from HUD to provide contract administration for HUD's Section 8 housing units in Massachusetts. After making awards pursuant to the invitation, a number of protests were filed by disappointed applicants, including MassHousing. HUD decided to take corrective action and conduct a new competition.¹

E. The NOFA

HUD issued the "Notice of Funding Availability for the Performance-Based Contract Administrator Program for the Administration of Project-Based Section 8 Housing Assistance

¹ HUD's corrective action only applied to 42 jurisdictions that had multiple applicants because there were eleven jurisdiction in which only one party submitted an application pursuant to the Invitation.



OFFICE of GENERAL COUNSEL

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

June 12, 2012

BY EMAIL
(protests@gao.gov; formicaj@gao.gov)

John Formica, Esq.
Office of General Counsel
Procurement Law Control Group
United States Government Accountability Office
441 G Street, NW
Washington, DC 20548

RE: B-406738.3, B-406738.4, B-406738.5, B-406738.6, and B-406738.7

Dear Mr. Formica,

On June 11, 2012, the following protesters, through counsel, filed objections to HUD's document production letter: Jefferson County Assisted Housing Corp. (JeffCo), National Housing Compliance (NHC), Southwest Housing Compliance Corp. (SHCC), and Contract Management Services (CMS). Pursuant to the Government Accountability Office's (GAO) request, the U.S. Department of Housing and Urban Development ("HUD", "the Agency", or "the Department") hereby responds.

The Bid Protest Regulations at 4 C.F.R. § 21.3(c) set forth the requirements for the Agency's document production:

The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof.

These four elements were satisfied in the Agency's June 8, 2012 letters. The Agency identified whether documents existed for each request. The third paragraph and succeeding bullets set forth the documents the Agency will produce in response to these protests. Specifically, HUD will provide documents related to: (1) the Annual Contributions Contract's (ACC) status as a cooperative agreement, (2) the decision to solicit bids through a Notice of Funding Availability (NOFA), and (3) the decision to exempt the NOFA and ACCs from OMB Circular A-102.

Paragraphs 4 and 5 explain the nature of the requested documents HUD intends to withhold and the rationale. As a preliminary matter, the Regulations mandate that *protesters* explain the relevancy of the documents to the protest grounds. 4 C.F.R. § 21.1(d)(2) (emphasis added). The Agency notes that the protesters provided no explanations. As indicated above, Section 21.3(c) requires the Agency to articulate a basis for withholding documents. The assessment of relevance is not a "usurpation" of the

AR 1150

GAO role; it is an explanation as to why the Agency will not produce certain documents in the absence of the explanation required of the protesters. This assessment is especially apposite in light of protesters' request for draft documents. Not one protester has even attempted to explain why the request for unfinished, pre-decisional documents is anything other than a fishing expedition.

In addition to drafts, HUD stated that it will not produce documents that are subject to the attorney-client and/or work product privileges. In order to maintain these privileges HUD will not produce them in camera. In the spirit of disclosure, HUD is compiling a log of privileged documents and anticipates that it will be ready to submit to GAO on Thursday, June 14, 2012.

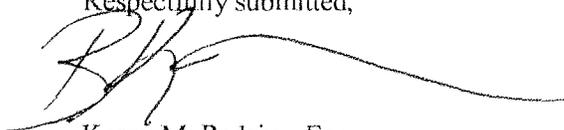
The Agency respectfully reminds the protesters and GAO that the principal purpose of the relationship between HUD and the Performance Based Contract Administrator (PBCA) is unambiguously set forth in a statute, vitiating the need for the Agency to have created superfluous memoranda. Because there were not lengthy deliberations on the matter underlying the protests, there are few responsive documents. This action was not conducted as a FAR procurement. Accordingly, the voluminous record to which GAO and counsel are accustomed simply does not exist.

Finally, it is HUD's position that the ACCs are cooperative agreements and not subject to federal procurement laws. The only issue in controversy is whether the NOFA properly announced an application process for the award of cooperative agreements or whether HUD should have issued a solicitation for goods or services leading to a procurement contract. The Agency admits it did not follow the requirements in CICA or the FAR. In the event that GAO asserts jurisdiction over the cooperative agreement on the grounds that it should have been conducted as a procurement, HUD would expect the protests to be sustained. Therefore, HUD will not produce documents relating to the alleged violations of federal procurement statutes because they are not relevant to the sole issue in controversy.

Thus, to summarize the Agency's position: HUD will produce all non-privileged documents that are relevant to the jurisdictional question before the GAO and are responsive to the protesters' requests.

Should GAO require any further information, please do not hesitate to contact us on (202) 402-4864 or (202) 402-6698.

Respectfully submitted,



Kasey M. Podzius, Esq.

~~A~~ Blythe I. Rodgers, Esq.

On behalf of the Department of Housing
and Urban Development

cc: Robert K. Tompkins
Michael R. Golden
Colm P. Nelson
Richard J. Vacura



OFFICE OF GENERAL COUNSEL

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

June 13, 2012

John Formica, Esq.
Office of General Counsel
Procurement Law Control Group
United States Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Re: B-406738.1, Protest of Assisted Housing Services Corp.
B-406738.2, Protest of North Tampa Housing Development Corp.
B-406738.3, Protest of Jefferson County Assisted Housing Corp.
B-406738.4, Protest of National Housing Compliance
B-406738.5, Protest of Southwest Housing Compliance
B-406738.6, Protest of Contract Management Services
B-406738.7, Supplemental Protest of Jefferson County Assisted Housing Corp.

Dear Mr. Formica,

This letter responds to the protests filed with the United States Government Accountability Office (“GAO”) by Assisted Housing Services Corporation, North Tampa Housing Development Corporation, Jefferson County Assisted Housing Corporation, National Housing Compliance, Southwest Housing Compliance, and Contract Management Services (collectively referred to herein as “protesters”). Protesters object to the Department of Housing and Urban Development’s (“HUD”) Notice of Funding Availability (“NOFA”) for the Performance-Based Contract Administrator (“PBCA”) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts. The NOFA, posted March 9, 2012, stated HUD’s intent to issue cooperative agreements for public housing agencies (“PHAs”) to act as PBCAs and provided application information. Applications were due on June 11, 2012.

As explained below, this NOFA is, and was intended by HUD to be, a notice of competition for the issuance of 42 cooperative agreements, not procurement contracts. Because the NOFA does not involve a contract for the procurement of property or services, HUD requests that GAO deny the protests on the grounds that GAO lacks jurisdiction over these matters pursuant to the Competition in Contracting Act (CICA) and GAO’s implementing bid protest regulations. 31 U.S.C. § 3551(1)(A); 4 C.F.R. § 21.1(a).

agencies are required to promote and provide for full and open competition within procurements. 41 U.S.C. § 253; FAR 6.101. There is no authority that would permit limiting a full and open procurement competition to only PHAs.⁸ Therefore, if HUD has no grant authority and can only use procurement contracts, the role of PHAs in project-based housing would be reduced, if not eliminated, by full and open competition. However, HUD is authorized to enter into an ACC only with a PHA, as defined in 42 U.S.C. § 1437a(b)(6)(A). A requirement to do a full and open competition would therefore conflict with HUD's explicit statutory authorization to enter into ACCs. Congress went to great lengths to set forth a statutory framework whereby HUD and the PHAs work side by side in providing safe, affordable housing. Without these annual contributions to PHAs, the programmatic structure set forth by the statute would cease to exist.

In sum, Congress gave clear authority for the assistance relationship between HUD and the PHAs. It specifically stated that HUD was to use federal funds "to assist states and political subdivisions of states" in achieving safe, affordable housing. 42 U.S.C. § 1437(a). Congress also prescribed that this assistance would be provided in the form of annual contributions to PHAs because PHAs were "best suited" to administer the program. H.R. Rep. No. 93-1114, 93d Cong., 2d Sess., at 19.

3. The Principal Purpose of the ACCs is To Transfer a Thing of Value to the PHA to Serve Its Public Purpose.

The principal purpose of the ACCs between HUD and the PHAs is to assist the states and local governments by having PHAs, which are governmental entities, administer housing assistance payment contracts with property owners in order to serve the federal, state, and PHAs' public purpose of promoting affordable housing for low-income families.

As shown above, Section 2 of the 1937 Act expresses Congress' stated goals to "assist States and political subdivisions of States to address the shortage of housing affordable to low-income families," and to provide PHAs with the "maximum amount of responsibility and flexibility in program administration." 42 U.S.C. § 1437(a)(1)(B),(C). Also included is an acknowledgment that the federal government alone cannot directly provide for the housing needs of the national citizenry and that the country as a whole "should promote the goal of providing decent and affordable housing for all citizens" through the collective efforts of federal, state, and local governments. 42 U.S.C. § 1437(a)(2) and (4).

In addition, Section 8(b)(1) of the Act expressly directs and authorizes PHAs to be the primary administrator of the housing assistance payment contracts. 42 U.S.C. § 1437f(b)(1) provides:

The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this

⁸ FAR 6.302-5(c) states that an agency may limit competition as authorized by statute only if the law specifically "(i) Identifies the entity involved; (ii) Refers to ... section 303(h) for the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions; and (iii) States that the award to that entity shall be made in contravention of the merit-based selection procedures in ... section 303(h) of the Federal Property and Administrative Services Act." Section 8(b)(1) of the 1937 Act does not fulfill subsections (ii) and (iii) of these requirements.

section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

The statute makes it clear that HUD is authorized to perform the functions assigned to the PHA only when a PHA is unable to implement the statute or no PHA has been created. Further, the fact that HUD may only enter into an ACC with a public housing agency and not any private, non-governmental entity, demonstrates that Congress' objective was for HUD to assist the PHAs in serving their own public purpose. The protesters, which are all public housing agencies, do not and cannot dispute that they were created, pursuant to state law, specifically to address the shortage of affordable housing for low-income families.

Protesters argument that HUD is not transferring a "thing of value" to the PHA ignores the relevant facts. First, HUD transfers the HAP payments to the PHA for eventual distribution to the owners. *See* AR193, ACC, Section 4(a). This is clearly a "thing of value" to an agency, authorized by state law, to provide affordable housing. Second, HUD transfers an administrative fee to the PHAs. *See* AR193, ACC, Section 4(b). This fee assists the PHAs in performing its administering responsibilities and supports the PHA's public purpose. For instance, the PHAs performs reviews of the projects to ensure that the project is providing safe conditions. *See* AR207, ACC, Section 3.1. The PHAs also accept and record tenant concerns and inquiries related to health, safety, and maintenance issues and follows-up with owners to ensure that owners take appropriate corrective actions. AR219, ACC, Section 3.5. This corresponds directly with the PHAs public purpose to "remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families." 42 U.S.C. § 1437(a)(1)(A).

Moreover, many of the PBCAs use the excess funds generated by the ACC to provide additional housing services. For example, in its prior protest to GAO, the Connecticut Housing Finance Authority argued that HUD had failed to consider "its ability to create synergy" between its HAP contract administration and its "unique and additional Connecticut-based resources," to preserve affordable housing. AR268, Connecticut Housing Finance Authority Protest at 12, Aug. 4, 2011. Similarly, the Colorado Housing and Finance Authority claimed that "[t]he loss of the annual revenue generated by the [ACC] will have wide repercussions for CHFA's other homeless and low-income housing assistance programs." AR256, Colorado Housing and Finance Authority Protest at 4, July 11, 2011. And in asking HUD to reconsider its decision to cancel the prior Invitation and resulting awards, the Wisconsin Housing and Economic Development Authority (WHEDA) boasted of its creation of "the Save Our Stock (SOS) Initiative to preserve Section 8 housing in Wisconsin. The SOS Initiative received a national housing award for program excellence, and it would not have been as successful without the synergy of WHEDA's affordable housing programs and Section 8 contract administration." AR316, Letter from WHEDA to HUD at 1, Sept. 15, 2011. From these statements of PHAs, it is clear that many of the PHAs are using the PBCA program "synergistically" with their other affordable housing programs, which could suffer if they were not awarded the ACC. There can be no doubt; the ACC provides a benefit to PHAs that is directly related to the mission that they were created to achieve – providing decent, affordable housing in their communities.

Without question, HUD is substantially involved in the program in order to manage a

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**[Docket No. FR-5600-N-33]****HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts****AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.**ACTION:** Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2012 Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.**SUMMARY:** HUD announces this NOFA for the Performance-Based Contract Administrator Program for the Administration of Project-Based Section 8 Housing Assistance Payments (HAP) Contracts. Specifically, this NOFA provides applicant information, submission deadlines, funding criteria and other requirements for this Program including the availability of an annual contributions contract (ACC) with a public housing agency (PHA) for each of the 42 States for which an ACC has not previously been awarded, to provide for the administration of project-based Section 8 HAP contracts for Section 8 projects located in the 42 States identified in Appendix A to this NOFA.

There are 53 "States," as defined in the ACC, as each of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. After publication on its website of an Invitation for Submission of Applications on February 25, 2011, HUD awarded an ACC to a PHA for each of the following 11 states: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming and the United States Virgin Islands. HUD now seeks to award an ACC to a PHA for each of the remaining 42 states through this program NOFA. See Appendix A of this NOFA for the list of remaining 42 states.

In addition to the application requirements set forth in this NOFA, applicants must also comply with all terms and conditions contained in the Notice of HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA), Policy Requirements, and **General Section** to HUD's FY2012 NOFAs for Discretionary Programs (**General Section**), posted to www.Grants.gov (Grants.gov) on September 19, 2011.

APPLICATION DEADLINE DATE: The application deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date.**FOR FURTHER INFORMATION CONTACT:** Questions regarding specific program requirements should be directed to the agency contact identified in this NOFA. Questions regarding the FY2012 **General Section** should be directed to the Grants Management Office; at 202-708-0667 (this is not a toll-free number). Persons with hearing or speech impairments may access the number via TTY by calling the Federal Relay Service at 800-877-8339.**AR 1258**

OVERVIEW INFORMATION:

A. Federal Agency Name: U.S. Department of Housing and Urban Development.

B. Funding Opportunity Title: Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.

C. Announcement Type: Initial announcement.

D. Funding Opportunity Number: The Federal Register number for this NOFA is FR-5600-N-33. The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control number 2577-0157, 2502-0582, 2502-0587, 2577-0169, 2577-0229, 2510-0011, 2577-0259, 2502-0542, 2535-0116, and 2577-0270. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

E. Catalog of Federal Domestic Assistance (CFDA) Number(s): 14.327

F. Application Deadline Date: The deadline date is 11:59:59 p.m. Eastern Time on **April 10, 2012**. Applications must be received by Grants.gov no later than 11:59:59 p.m. Eastern Time on the application deadline date. Applications must meet the timely receipt requirements of the **General Section**. See Section IV of the **General Section** regarding application submission procedures and timely filing requirements. Applicants need to be aware that following receipt, applications go through a validation process in which the application may be accepted or rejected. Please allow time for the process to ensure that you meet the timely receipt requirements.

Please see the FY2012 **General Section** for instructions for timely receipt, including actions to take if the application is rejected. Applicants should carefully read the section titled “INSTRUCTIONS ON HOW TO DOWNLOAD AN APPLICATION PACKAGE AND APPLICATION INSTRUCTIONS” in the **General Section**. This section contains information on using Adobe Reader, HUD’s timely receipt and grace period policies, and other application information. The latest version of Adobe Reader used by Grants.gov is Adobe Reader 9.4 which is compatible with PCs and MAC computers.

G. Additional Information:

1. Purpose of the Program. The purpose of HUD’s PBCA program is to implement the policy of the United States, as established in section 2 of the United States Housing Act of 1937 (1937 Act), of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the maximum amount of responsibility and flexibility in program administration in PHAs that perform well. The PBCA program furthers these policies by effectuating the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based programs authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the funding

mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. See the ACC at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

2. Available Funds. Funding for this NOFA is subject to the availability of appropriations.

3. Type of Funds. Administrative fees to PBCAs.

4. Award Information. Funding for this NOFA is subject to the availability of appropriations.

5. Matching Funds. There is no matching requirement for applications under this program NOFA.

6. Eligible Applicants. PHAs as described in further detail in this NOFA.

7. Eligible Activities. PHAs selected must complete PBTs and meet the performance and compliance requirements in the ACC. The tasks that successful PHAs must perform include but are not limited to the following: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring that payments to property owners are calculated accurately and paid in a timely manner; and submitting required documents to HUD (or a HUD-designated agent).

FULL TEXT OF ANNOUNCEMENT

I. FUNDING OPPORTUNITY DESCRIPTION.

A. Program Description. HUD announces this NOFA for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments (HAP) Contracts. Specifically, this NOFA provides applicant information, submission deadlines, funding criteria and other requirements for this Program, including the availability of an annual contributions contract (ACC) with a public housing agency (PHA) for each of the 42 States for which an ACC has not yet been awarded (as identified in Appendix A to this NOFA) to provide for the administration of project-based Section 8 HAP contracts for Section 8 projects located in each of those States.

There are 53 "States," as defined in the ACC as each of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. After publication on its website of an Invitation for Submission of Applications on February 25, 2011, HUD awarded an ACC to a PHA for each of the following 11 states: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming and the United States Virgin Islands. HUD now seeks to award an ACC to a PHA for each of the remaining 42 States through this program NOFA.

B. Purpose of the Program. The purpose of HUD's PBCA program is to implement the policy of the United States, as established in section 2 of the 1937 Act, of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the

maximum amount of responsibility and flexibility in program administration in PHAs that perform well. The PBCA program furthers these policies by effectuating the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based programs authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the funding mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. The ACC includes Exhibit A, section 4 of which includes a detailed treatment of the Administrative Fee. Section 5, "Performance Requirements Summary" (PRS), includes a table that specifies the Acceptable Quality Level (AQL) for performance of each of the 8 Performance-Based Tasks (PBTs), the Performance-Based Allocation Percentage, the method used to evaluate performance, and the frequency with which HUD will assess and pay the Basic Administrative Fee Earned. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or Appendix C of this NOFA.

C. Authority. The NOFA is issued pursuant to section 102 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101-235; 103 Stat. 1987 (Dec. 15, 1989); and section 8 of the United States Housing Act of 1937 (1937 Act), 42 U.S.C. § 1437f, Pub. L. 93-383; 88 Stat. 662 (Aug. 22, 1974) (Section 8). Funding for this NOFA is subject to the availability of appropriations.

D. Crossing State Lines. HUD believes that nothing in the 1937 Act prohibits an instrumentality PHA that is "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act from acting as a PHA in a foreign State. However, HUD will consider applications from out-of-State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.

Based on past experience, HUD expects to receive at least one application from a legally qualified in-State applicant for the majority of the 42 States identified in Appendix A of this NOFA. However, HUD advises that, in connection with the February 25, 2011 Invitation, HUD received no application from an in-State applicant for Alaska, Hawaii, Mississippi, Nebraska, or Utah.

All opinions recently issued by states' Attorneys General relevant to the administration of the Section 8 PBCA program will be posted at time of publication of this NOFA on http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

E. Terms and Definitions.

1. In-State Applicant. An in-State Applicant is an applicant formed under the laws of the same State for which it proposes to serve as PBCA. An in-State applicant may be a governmental entity or an instrumentality of a governmental entity. However, in either case, the entity must demonstrate that it (a) satisfies the definition of PHA in section 3(b)(6)(A) of the 1937 Act and (b) has the legal authority to operate throughout the entire State.

Section 3(b)(6)(A) of the 1937 Act, which applies to the project-based Section 8 program, provides in relevant part: “the term ‘public housing agency’ means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing.” Applicants are advised that section 3 of the 1937 Act, 42 U.S.C. § 1437a, contains definitions of terms that appear within the foregoing definition (e.g., “public housing,” “development,” “operation”). Section III. D. 2.b. below sets forth the specific elements of an RLO required for applicants other than an instrumentality (generally referred to as a “governmental entity”). Section III. D.2.c. below sets forth the specific elements of an RLO required for instrumentality applicants.

5. Performance-Based Tasks (PBTs). PBTs are described in Exhibit A, Section 3 of the ACC and listed below for reference. There are eight of these tasks for which the PHA, as contract administrator, is responsible. The principal tasks of the PHA in accordance with the ACC include, but are not limited to: monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring payments to property owners are calculated accurately and paid in a timely manner; submitting required documents to HUD (or a HUD-designated agent); and complying with applicable Federal law and regulations, including 24 C.F.R. parts 880, 881, 883, 884, 886 subpart A, 886 subpart C and/or 891 subpart E, as applicable, and other program requirements, as they exist at the time of ACC execution and as amended or otherwise issued. In this NOFA PBTs are listed in the rating factors as:

- PBT #1 – Management and Occupancy Reviews;
- PBT #2 – Adjust Contract Rents;
- PBT #3 – Review and Pay Monthly Vouchers;
- PBT #4 – Renew HAP Contracts;
- PBT #5 – Tenant Health, Safety, and Maintenance Issues;
- PBT #6 – Administration – Monthly and Quarterly Reports;
- PBT #7 – Administration – Annual Reports and Certifications; and
- PBT #8 – Annual Financial Reports – PHA Fiscal Year End.

6. Reasoned Legal Opinion (RLO). HUD requires that each applicant, whether an in-State or an out-of-State applicant, establish through an RLO that the State statute under which it was created authorizes it to operate throughout the entire State in which the entity proposes to serve as PBCA. HUD requires that out-of-State applicants supplement their RLO with an SL that establishes that nothing in the laws of the State for which the applicant is applying in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying. If an RLO or an SL fails to satisfy any criterion or any part of any criterion required to establish legal eligibility under this NOFA, the applicant will not be provided an opportunity to cure such failure, and the application will be rejected without further review.

7. Full Time Equivalent (FTE). One FTE is defined as 280 hours per work year.

8. Supplemental Letter (SL). In addition to an RLO, HUD requires that each out-of-State applicant submit a Supplemental Letter (SL) signed by an attorney authorized to practice law in

the State for which it applies (e.g., State B) certifying that nothing in the laws of such State in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying.

II. AWARD INFORMATION

A. Funding Availability. Funding for this NOFA is subject to the availability of appropriations.

B. Type of Awards. The ACCs that HUD seeks to award via this NOFA are cooperative agreements. Pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (FGCA) (31 U.S.C. § 6304 *et seq.*), a cooperative agreement is the appropriate vehicle for making such an award when the principal purpose of the relationship between the Federal government and a State, or the political subdivision of a State (e.g., a PHA), is the transfer of money and services in order to accomplish a public purpose of support authorized by Federal statute, and substantial involvement is anticipated between HUD and the PHA during performance of the ACC. 31 U.S.C. § 6305. A principal purpose of the ACC between HUD and the PHA is to transfer funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by sections 2(a) and 8(b)(1) of the 1937 Act. HUD will notify all applicants as to whether or not they have been selected for an award. If selected, HUD's notice will constitute HUD's approval, subject to the execution of a cooperative agreement. HUD intends to have substantial and ongoing involvement in the review, development, and operation of the PBCA Program. The cooperative agreement will state the expected substantial involvement of HUD during the period of performance. Note that the ACC is not subject to A-102 (Grants and Cooperative Agreements With State and Local Governments) which is codified for HUD at 24 CFR Part 85 based on the Department's determination that the Section 8 programs are not appropriate for management under the uniform requirements of Part 85. However, the Department has determined that the PBCA program is subject to A-87 (Cost Principles for State, Local, and Indian Tribal Governments).

C. Number of Awards. Only one applicant per state may be awarded an ACC. HUD expects to provide 42 awards.

D. Period of Performance. The PBCA will administer the HAP Contracts that HUD assigns during the ACC term. The ACC shall have a term of twenty-four (24) months unless extended at the sole election of HUD. HUD anticipates that ACCs awarded under this NOFA will become effective on October 1, 2012. The full text of the ACC may be found at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp or in Appendix C of this NOFA.

III. ELIGIBILITY INFORMATION

A. Eligible Applicants. Eligible applicants are qualified PHAs. The applicant's RLO must identify the applicant entity as one of the following:

NOTE: This is the first threshold requirement which must be satisfied before HUD will review the remainder of an application.

a. General RLO Requirements. The following information must be enumerated at the top of the first page of the RLO:

- (1) The full legal name of the applicant (i.e., the entity that, if selected, would enter into an ACC with HUD);
- (2) The State under the laws of which the applicant was formed; and
- (3) The State for which the applicant proposes to serve as PBCA.

If an entity applies to serve as PBCA for more than one State, a separate RLO must be submitted in support of each application. The RLO must be signed by an attorney. It may not be signed by or in the name of a law firm or other business entity. The RLO must state that the signatory is licensed to practice law in the State under the laws of which the applicant was formed. It must contain a succinct but reasoned (i.e., non-conclusory) analysis establishing that each of the requirements in Section III. D.2.b.(Governmental Entities) or Section III. D.2.c (Instrumentality Entities), as applicable, is satisfied.

It must include proper citation to each provision of Federal, State, and/or local law on which the analysis relies. A legible copy of each such provision, other than any provision of the 1937 Act, must be attached to and labeled as an exhibit to the RLO. Any RLO that does not satisfy any of these requirements will be rejected without any further review.

While not subject to any page limitation, the RLO should be succinct. The RLO shall have a cover sheet that specifies the title of the document, identifies the PHA submitting the document, and identifies the State for which the document is being submitted. Each page must be printed on a single side of an 8.5" by 11" sheet of paper using a standard 12-point font. One copy of the RLO shall be submitted as a Portable Document Format (PDF) file using this file name format: Two-Letter State Postal Abbreviation of the State for which the applicant is applying_Two-Letter State Postal Abbreviation of the State under the laws of which the applicant was formed_Complete Legal Name of the Applicant_RLO.pdf. The name of the RLO file cannot exceed 50 characters, including spaces and underscores. If it does, it will be rejected. However, rejection for this reason can be avoided by providing as much of the complete legal name of the applicant as possible up to a total of 50 characters, including spaces and underscores, in the naming of the RLO file.

b. Required Elements of Reasoned Legal Opinion for a Governmental Entity. In the case of a governmental entity, the RLO must establish that the entity:

- (1) Was created under a statute that confers powers that qualify the entity as a PHA, as defined in the 1937 Act. Although the statute may not explicitly enumerate the power "to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred;

(2) Was created under a statute that confers powers that include the power to administer project-based Section 8 HAP Contracts, including the power to perform each of the eight PBTs identified in Exhibit A, Section 3, of the ACC. Although the statute may not explicitly enumerate such powers, the attorney signing the RLO must conclude and unequivocally state that all such powers are within the scope of those explicitly conferred;

(3) Was created under a statute that explicitly authorizes the entity to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences an unequivocal legislative intent for such entity to have such authority; and

(4) Has properly registered to do business in the State in which the entity proposes to serve as PBCA to the extent that the laws of such State require it to do so. If the laws of such State do not require it to do so, the RLO must contain an affirmative statement to this effect.

c. Required Elements of Reasoned Legal Opinion for an Instrumentality Entity. In the case of an instrumentality entity, the RLO must establish that:

(1) The parent entity (or, in the case of multiple parent entities, each such entity) and the instrumentality entity were created under laws that confer powers that qualify the parent entity (or each such entity) and the instrumentality entity as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Specifically, the RLO must establish that:

(a) The parent entity (or each such entity) was created under a statute that confers powers that qualify the parent entity (or each such entity) as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred; and

(b) The instrumentality entity was created under a statute (e.g., a State non-profit corporation law) that confers powers that qualify the instrumentality entity as a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. Although the statute may not explicitly enumerate the power “to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A) of the 1937 Act, the attorney signing the RLO must conclude and unequivocally state that such power is within the scope of powers explicitly conferred;

(2) The corporate charter or other organizational documents of the instrumentality entity explicitly provide that it is authorized “to engage in or assist in the development or operation of public housing,” within the meaning of section 3(b)(6)(A) of the 1937 Act, with citation to such specific provision(s);

(3) The corporate charter or other organizational documents of the instrumentality entity explicitly confer the right on the parent entity (or on each such entity) to:

(a) Approve the corporate charter or other organizational documents of the instrumentality, including the right to approve any amendments, with citation to such specific provision(s);

(b) Authorize the instrumentality entity to execute the ACC with HUD, with citation to such specific provision(s);

State in which the applicant proposes to serve as PBCA. The substantive content of the SL must meet the standard of Section III. D.2.e. It must include proper citation to each provision of Federal, State, and/or local law on which the analysis relies. A legible copy of each such provision, other than any provision of the 1937 Act, must be attached to and labeled as an exhibit to the SL. Any SL that does not satisfy any of these requirements will be rejected without any further review.

e. Standard for Entities Proposing to Serve as PBCA in a State Other than the State under the Laws of Which the Entity was Formed. HUD will consider the substantive content of the SL requirement satisfied so long as it meets the requirements of this section.

(1) The SL must contain an unequivocal statement that the signatory has examined all the laws of the State governing the creation and operation of PHAs, including any provision of State law that defines that term or comparable term, and that nothing in such laws in any manner prohibits or precludes the applicant, having been formed under the laws of a sister State, from acting as a PHA in and throughout the State for which it is applying to serve as PBCA.

(2) The SL must state that the applicant has registered to do business in the State. Conclusive documentary proof of such registration must be attached to and labeled as an exhibit to the SL. If the law of the State in which the applicant proposes to act as PBCA does not require such registration, the SL must contain an affirmative statement to this effect.

(3) The SL must contain an unequivocal statement as to whether the laws of the State or any other applicable laws impose any requirements or conditions that must be satisfied before the applicant may act throughout the State as a PHA. To the extent that they do, the SL must identify each such requirement, with citation to the state law provision imposing each such requirement. A legible copy of each such statutory provision must be attached to and labeled as an exhibit to the SL. Conclusive documentary proof that all such requirements or conditions have been satisfied must be attached to and labeled as an exhibit to the SL. For example, if the laws of such State or any other applicable laws require the existence of any cooperative agreements, contracts, or any other legally binding agreements between the applicant and any other party, including any PHA(s) established under the laws of the State, in order for the applicant to have the authority to operate throughout the entire State, the SL must clearly identify such law(s), and a copy of any and all such cooperative agreements, contracts, or other legally binding agreements, duly executed for a term through the anticipated term of the ACC (i.e., September 30, 2014), must be attached to and labeled as an exhibit to the SL.

f. Required by All Applicants. The RLO and any SL must conclude with a definitive, *unqualified* statement explicitly certifying that all representations therein are true and correct. Any RLO and any SL that does not contain such a statement will be rejected without any further review.

3. Basic Administrative Fee Percentage. The proposed Basic Administrative Fee Percentage for a State is not to exceed 2.0%. Applications proposing a fee that exceeds 2.0% will be rejected.

- This requirement informs the applicant that a minimum of 45 total points must be assigned by the Technical Evaluation Panel team to its responses to Rating Factors #1, #2, #3 and #4 for the applicant to qualify for an award.
93. It appears that HUD would like the total for both years to be shown, but instructions and form in grants.gov does not allow this, even though the form provides for an All Years presentation. The input does not allow this to be changed to that presentation. Please clarify how HUD form424CB should be completed.
- The form automatically fills the total for the first year and both years in if the subtotal lines at the bottom left of the form are completed.
94. Will HUD allow Joint Ventures or Partnerships as long as an in-state PHA is part of the Joint Venture or Partnership?
- HUD will consider joint ventures or partnerships as long as the joint venture or partnership meets all the applicant requirements in the NOFA. Any joint venture must itself constitute a PHA, as defined in section 3(b)(6)(A) of the 1937 Act, and meet all other legal requirements identified in the NOFA. For example, if the joint venture purports to be an instrumentality PHA, the Reasoned Legal Opinion submitted on its behalf must establish that the entity meets all requirements in section III. D. 2. c. of the NOFA.
95. Are there State Attorney General Opinions for all 42 states?
- No.
96. If HUD is relying on the State Attorney Generals opinions as a basis for its foreign state restriction, why does the foreign state restriction in the application extend to states where an opinion has not been issued?
- HUD is not relying solely on State Attorneys' General opinions as a basis for its decision to not permit the crossing of state lines, except in limited circumstances. However, the State Attorney General opinions that HUD has received, which are posted on the Office of Multifamily Housing's website, have been a factor in HUD's decision. HUD notes that nothing would prohibit a State Attorney General who has not yet written to HUD from submitting an opinion to HUD during the selection process or even after an award has been made, concluding that its State law does not permit the crossing of State lines. HUD has determined that such a possibility poses an unacceptable risk of interruption to its administration of the PBCA program.
97. Under Terms and Definitions, paragraph 3, Instrumentality, the last sentence states that "Submission of an RLO on behalf of an instrumentality that itself was created by one or more instrumentalities will result in disqualification of the application." What types of arrangements is HUD intending to prohibit by this language?
- An applicant that is the instrumentality of an instrumentality.
98. What is the basis for the prohibition if such an entity would otherwise be eligible to compete?

- The basis is that such an entity is not a “public housing agency” within the meaning of section 3(b)(6)(A) of the United States Housing Act of 1937. HUD interprets this provision to require that any instrumentality be created *directly* by a governmental entity that is “authorized to engage in or assist in the development or operation of public housing” within the meaning of section 3(b)(6)(A), not an entity that is created by an instrumentality or other subsidiary of such entity.

99. In paragraph D of the Funding Description, HUD states that it “believes that nothing in the 1937 Act prohibits an instrumentality PHA that is ‘authorized . . .’ from acting as a PHA in a foreign state.” In the next sentence, HUD states that it will consider applications from out-of-State applicants “only for States for which HUD does not receive an application from a legally qualified in-State applicant and that receipt by HUD of an application from a legally qualified in-State applicant will result in rejection of any application received from an out-of-state applicant for that state.” HUD’s position appears contradictory. If the 1937 Act does not prohibit PHA’s from providing services in a foreign state, what is the basis for HUD’s decision to effectively prohibit PHA’s from bidding in other States?

- The statements are not contradictory. The 1937 neither requires nor prohibits a PHA from crossing state lines. PHAs are organized pursuant to the laws of their states. Some States have made their position known to HUD that their State laws prohibit an out-of-state PHA from acting as a PHA to the extent necessary to comply with the 1937 Act and the ACC within their State. As stated in the NOFA, HUD has made the decision to consider applications from out-of-state applicants *only* for States for which HUD does not receive an application from a qualified in-state applicant.

100. Will HUD consider eliminating the restrictive language?

- No.

101. Do the responses in the Q&A amend or revise the requirements contained in the NOFA for PBCA? If there are answers in the Q&A that contradict the information included in the NOFA. Which should applicants follow?

- The answers that HUD posts on its website in response to questions supplement the NOFA. HUD does not believe that any of the answers it posts contradict the information provided in the NOFA. To the extent the applicant perceives any contradictions; they are urged to alert HUD to the potential contradiction and prepare applications based on the answers that HUD posts.

102. Item #4 of the Technical Correction states: “HUD anticipates that ACCs awarded under this NOFA will become effective on December 1, 2012.”
For the current 42 incumbents, HUD issued an ACC amendment for a 6 month base period plus three 3 month optional extensions.

- ✓ Based period: Oct 1, 2011 – March 31, 2012
- ✓ 1st 3-mo. extension: April 1, 2012 – June 30, 2012
- ✓ 2nd 3-mo. extension: July 1, 2012 – September 30, 2012
- ✓ 3rd 3-mo. extension: October 1, 2012 – December 31, 2012

Does HUD intend to change the 3rd extension to a two-month extension?

To the extent that the actual effective date for ACCs awarded under the NOFA is December 1, 2012, HUD intends to request that PHAs that are party to the ACC amendment to agree to a 3rd extension, which would run from October 1, 2012 through November 30, 2012.

- The costs entered in the Detailed Budget (form HUD-424-CB) must conform to the instructions (form HUD-424-CBW-1) and the requirements of OMB Circular A-84.
112. If applying with a partner, does the partnership have to be set up prior to application?
- The NOFA does not require that entities establish partnerships in order to submit an application. As described in the NOFA, an applicant is permitted to list and describe its contractor's experience, technical approach, and internal control procedures in addition to the applicant's own experience, technical approach, and internal control procedures. For example, instructions for Rating Factor 1 state, "The applicant may describe the experience of the PHA, the PHA's instrumentality, and contractors with which the PHA has contracted to provide services in each sub factor a. through d." The NOFA does not require that the applicant submit the executed agreements entered into with its contractors as a part of the application. Parties may choose to execute letters of intent, memoranda of understanding, or other such agreements prior to executing full service contracts, and depending on their substance, such executed contractual agreements may allow an applicant to certify in good faith as to the veracity of its application. Any applicant must meet the requirements of NOFA Section III.D.2.b or Section III.D.2.c.
113. If there is only one applicant and he does not meet the 45 point technical minimum on scoring, or there is no applicant, will HUD solicit other contract administrators?
- No, HUD will not solicit other contract administrators. If there is no qualified applicant for any jurisdiction, HUD will administer the HAP contracts for that state internally, in accordance with past practice and the United States Housing Act of 1937.
114. What legally constitutes an in-state applicant?
- An in-state applicant is an entity organized pursuant to the laws of the state in which it is proposing to act as a PBCA. An in-state applicant may be a governmental entity or the instrumentality of a governmental entity. Successful applicants must be able, under the laws of that state, to perform the functions identified in the ACC and the United States Housing Act of 1937 (specifically be "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b) (6) (A) of the United States Housing Act of 1937 Act). Whether or not an in-state applicant has the legal authority to operate throughout the state is determined by that state's laws.
115. SF-424 #19 Is Application Subject to review by Order 12372. From my research, we need to submit SF 424 for review to our State Clearinghouse Office of Planning and Research. Is this required?
- For the PBCA program, state coordination is not necessary. Order 12372 does not apply to the PBCA program.
116. #5 State name and location of project or activity: What do we input? Our agency information?
- State where work is proposed. Agency information should be entered in #1.
117. Which projects will require an annual MOR?

- Please see above.
162. Is it correct that a PHA Instrumentality may be a profit or a non-profit entity? The definition of Instrumentality in the Invitation for Submission of Applications expressly stated that an Instrumentality may be a for-profit or a not-for-profit. (Section 2.3 at page 6).
- Yes.
163. How will HUD fairly adjudicate the relative strengths of arguments between an Attorney General (or some other state entity with parochial interests in the matter) and other Reasoned Legal Opinions that meet all of HUD's stated requirements regarding statewide jurisdiction?
- Second only to the Supreme Court of the state, the Attorney General is top legal authority on its states laws. To the extent that the Attorney General's opinion is on-point and has considered all the relevant facts about any potential in-state applicants (e.g., instrumentalities), HUD will rely on a state's Attorney General's opinions.
164. To whom does HUD want Reasoned Legal Opinion (RLO) letters addressed?
- RLOs should be addressed to:
"United States Department of Housing and Urban Development, and its Office of Housing Assistance Contract Oversight."
165. In Section III.D.2.e(3) of the NOFA, the SL is required to "contain an unequivocal statement as to whether the laws of the State *or any other applicable laws* impose any requirements or conditions that must be satisfied before the applicant may act throughout the State as a PHA. Since the signatory of the SL is only required to be admitted to practice in the state being applied for, they will only be able to speak to the laws of that state, not the laws of any other state (e.g., the state under the laws of which the applicant was formed). Accordingly, should "any other applicable laws" be interpreted to mean "any other applicable laws enacted by a municipality, county, or other locality of the State"?
- We assume that attorneys will limit their legal opinions to federal laws and the laws of the relevant states, inclusive of any municipality, county, or other local laws within such states, in which they are licensed to practice, and this is acceptable.
166. If a subcontractor that will perform PBTs 1-7 in their entirety currently has a Disaster Plan that meets HUD's requirements, will HUD accept it on behalf of the PHA?
- Yes.
167. If a subcontractor will be responsible for performance of PBTs 1-7, which entity, PHA or subcontractor, is responsible for carrying the fidelity bond?
- The PHA is required to have a fidelity bond. The PHA may require its contractor to have a fidelity bond.

168. HUD stated in response to question 96 that “HUD is not relying solely on State Attorneys’ General opinions as a basis for its decision to not permit the crossing of state lines, except in limited circumstances” and that the Attorney General opinions that HUD has received that are posted on HUD’s website “have been a factor in HUD’s decision.” What were the other factors in HUD’s decision for adding the Crossing State Lines provision to the NOFA? Has HUD received other written communications that were a factor in its decision to add the Crossing State Lines provision? If so, will HUD post those documents on its website?
- A number of policy and logistical concerns were weighed. No other documents will be posted to the HUD website.
169. HUD stated in response to question 81 that State Attorney General Opinions may be submitted to Kerry Hickman, and that, “once received, they will be reviewed by the Office of General Counsel and a determination will be made about posting them to the NOFA Web page.” What will be the basis for posting or not posting an Attorney General Opinion? Will HUD be conducting a legal analysis of the Attorney General Opinions?
- Unless presented with a reason to do so, HUD will not be questioning the legal conclusions regarding state law by a state’s Attorney General. If HUD receives a conclusive and relevant opinion by a state Attorney General relating to the eligibility of and relevant to potential applicants in its state, HUD will publish such opinion on its website.
170. The Crossing State Lines provision has resulted in the ability of state entities to obtain a sole source position. For example, the Attorney General Opinion for New Mexico concludes that the New Mexico Mortgage Finance Authority (NMMFA) has the exclusive authority to operate as a public housing authority in the state. Without regard to whether the Opinion, which notes that federal law “could confer the requisite authority” for an out-of-state housing authority to operate as a PBCA, HUD apparently will award the PBCA contract to NMMFA provided it submits an RLO that establishes it is legally qualified and an application that meets the 45 point technical minimum score. There is no competitive force to constrain the applicant in such case from bidding the highest allowed price with the lowest acceptable performance standards. Does HUD intend to make an award to an applicant in a state with an Attorney General Opinion that states the applicant has the sole authority to perform the work, regardless of the overall competitive score of other applications received from qualified in-state applicants?
- Yes, but only if the Attorney General’s opinion is on-point and has considered all the relevant facts about any other potential in-state applicants (e.g., instrumentalities),. The minimum threshold score reflects the minimum score that HUD believes is necessary to demonstrate competency in contract administration in that state. If a state’s sole in-state applicant meets all eligibility criteria and attains the minimum required threshold score, HUD will award the ACC to that applicant.
171. The Supplemental Letter that must be provided by an out-of-state applicant includes the requirement that the attorney signing the letter must certify “that nothing in the laws of such State in any manner prohibits the applicant . . . from acting as a PHA in the State for which it is applying.” It further requires that the SL must contain “an unequivocal statement that the signatory has examined all the laws of the State governing the creation and operations of PHAs, including any provision of State law that defines that term or comparable term.” The

236. Rating Factors #1 and #2 have file naming conventions and the NOFA does not describe any naming conventions for Rating Factors #3 and #4. Does HUD want these included as two separate MS Word documents and if so, how should the files be named for the purpose of submission?
- See the answer to number 15.
237. In response to question 169, HUD states that it will not be questioning the conclusions regarding state law by a state's Attorney General, "unless presented with a reason to do so."
- a. What "reason(s)" would be sufficient to cause HUD to question an Attorney General?
 - b. How should such reasons or potential reasons be presented to HUD?
 - c. What will HUD do if presented with such potential reasons?
 - d. As HUD noted in response to question 171, HUD has "received many acceptable RLO's in previous competitions" for out-of-state PHAs. These RLOs specifically cover the ability of those out-of-state PHA's ability to perform the PBCA services in the state in question. Why aren't these RLO+s alone sufficient reason to question the Attorney General letters?
 - e. In addition to the RLOs, HUD has received numerous written submissions from interested parties specifically challenging the Crossing State Lines provision and the validity and effect of the Attorney General letters.
 - i. When will HUD respond to these letters?
 - ii. Do they provide a sufficient reason for HUD to question the Attorney General letters? If not, why not?
- HUD is unable to speculate as to reasons why an opinion of a state Attorney General may not be considered dispositive. Notwithstanding, HUD may not consider the opinion of a state Attorney General to be dispositive if the opinion fails to address the relevant legal questions or if the opinion does not address all the relevant facts.
238. Page 27 of the NOFA in the Technical Approach, Subfactor d, General ACC Requirements, the third and seventh bullets refer to, "Applicants." Please clarify what type of "Applicants" we are required to speak to in this section. Do you mean applicants for PBCA employment? Project Based Section 8 applicants? Other?
- Applicant refers to the entity submitting an application under the NOFA.
239. On Page 25 of the NOFA, Section 2(a), Technical Approach, the NOFA requires that, "Each applicant should submit a description of its technical approach, including relevant organizational staff, to performing each of the following subfactors as they relate to the ACC...." Please clarify what HUD's intent is in asking that respondents include "relevant organizational staff" in the Technical Approach section of the proposal. Does this mean that respondents should speak to relevant organizational staff in every subsection of the Technical Approach, b-f? If so, would an organization chart placed before all sections b-f suffice for this requirement? Or, are respondents not required to speak to relevant organizational staff in any particular section of Technical Approach.
- Applicants should identify the relevant organizational staff in the narrative for each subfactor. An organizational chart may be included but is not required. If included, the organizational chart will be included in the page count for the Technical Approach.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Performance-Based Annual Contributions Contract (ACC)

UNITED STATES

Department of Housing and Urban Development

PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT

Project-Based Section 8 Contract Administration

1. DEFINITIONS

ACCEPTABLE QUALITY LEVEL (AQL). The minimum required performance level for each Performance-Based Task. The Acceptable Quality Level for each Performance-Based Task specified in the Performance Requirements Summary (Exhibit A, Section 6). Performance is measured using the quantitative and qualitative requirements set forth in Performance Based Tasks (Exhibit A, Section 3), other provisions of the Performance-Based Annual Contributions Contract, and regulations, handbooks, forms, notices, and guidance issued by the United States Department of Housing and Urban Development.

ADMINISTRATIVE FEES. The sum of the Basic Administrative Fee that the United States Department of Housing and Urban Development pays the Public Housing Agency for each Covered Unit under a Housing Assistance Payments Contract (per unit per month) on the first day of the month, less any Disincentive Deduction Amount, plus any Incentive Fee for Customer Service and any Incentive Fees for Performance.

For descriptions of terms related to determination of Public Housing Agency administrative fees, see also Section 4 of Exhibit A of the Performance-Based Annual Contributions Contract.

BASIC ADMINISTRATIVE FEE. The amount that results when the Administrative Fee Percentage, approved by the United States Department of Housing and Urban Development, is multiplied by the current applicable 2-Bedroom Fair Market Rent for each Covered Unit under a Housing Assistance Payments Contract on the first day of the month during the Performance-Based Annual Contributions Contract Term.

BASIC ADMINISTRATIVE FEE EARNED. The Basic Administrative Fee less any Disincentive Deduction Amount.

BASIC ADMINISTRATIVE FEE PERCENTAGE. The percentage of the applicable annual per unit per month 2-bedroom Fair Market Rent within the State, which is used to calculate the monthly Basic Fee.

BASIC ADMINISTRATIVE FEE PERCENTAGE LIMITATION. The Basic Administrative Fee Percentage shall not exceed two (2.0) percent of the applicable per unit per month 2-bedroom Fair Market Rent for the State published by the United States Department of Housing and Urban Development.

BUDGET AUTHORITY. The maximum amount of funds available for payment to the Public Housing Agency under each Housing Assistance Payments Contract assigned to the Public Housing Agency under the Performance-Based Annual Contributions Contract. Budget authority is authorized and appropriated by the United States Congress.

CONTRACT ADMINISTRATION OVERSIGHT MONITOR (CAOM). Employees within the Office of Multifamily Housing, United States Department of Housing and Development, who conduct administrative, monitoring, and oversight functions related to the Public Housing Agency's compliance with and performance of the Performance-Based Annual Contributions Contract.

COVERED UNITS. Section 8 assisted units in the Service Area under Housing Assistance Payments Contracts assigned to the Public Housing Agency for contract administration under the Performance-Based Annual Contributions Contract.

DISASTER PLAN: Public Housing Agency's plan to respond to any threat or emergency that may interrupt essential Public Housing Agency functions and that the Public Housing Agency has tested and determined it to be sound and effective.

DISASTER PLAN CERTIFICATION: An annual certification by the Public Housing Agency that its Disaster Plan documentation is up-to-date, all employees and applicable contractors have been trained and all backup plans and systems have been tested (Exhibit D).

DISINCENTIVE DEDUCTION AMOUNT. The dollar amount by which the Basic Administrative Fee is reduced by applying the Disincentive Deduction Percentage to the Performance-Based Task Allocation Amount of the Basic Administrative Fee if the Public Housing Agency's performance of the Performance-Based Tasks falls below Acceptable Quality Level as specified in the Performance Requirements Summary (Exhibit A, Section 5).

DISINCENTIVE DEDUCTION PERCENTAGE. The percentage applied to the Performance-Based Task Allocation Amount of the Basic Administrative Fee amount to arrive at the Disincentive Deduction Amount (Exhibit A, Section 5).

FAIR MARKET RENTS (FMR). The rents established by the United States Department of Housing and Urban Development, as required under section 8(c) (1) of the United States Housing Act of 1937, for units of varying sizes (by number of bedrooms) that must be paid in the market area to rent privately owned, existing, decent, safe, and sanitary rental housing of modest (non-luxury) nature with suitable amenities.

FAIR MARKET RENT AREA. The area for which the United States Department of Housing and Urban Development has established a Fair Market Rent.

FISCAL YEAR END (FYE). The last day of the last month of the Public Housing Agency's fiscal year.

FULL-TIME EQUIVALENT (FTE). One (1.00) full-time equivalent is a measure of employee work hours based on two thousand eighty (2,080) work hours per year per employee. The full-time equivalent of two employees working one thousand forty (1,040) work hours per year is one (1.00) full-time equivalent.

HOUSING ASSISTANCE PAYMENTS CONTRACT (HAP Contract). A project-based housing assistance payments contract authorized under Section 8 of the United States Housing Act of 1937 (but not including any such contract authorized under section 8(o)(13) or under former section 8(e)(2) of such Act) including any renewal of such contract, as authorized under the Multifamily Assisted Housing Reform and Affordability Act of 1997.

INCENTIVE FEE FOR CUSTOMER SERVICE. An annual fee for customer service that the Public Housing Agency may earn that is equal to five (5) percent of the total Basic Administrative Fee Earned for each twelve (12) month period of the term of the Performance-Based Annual Contributions Contract.

INCENTIVE FEES FOR PERFORMANCE. Annual fees for performance that the Public Housing Agency may earn if it achieves twelve (12) months of one-hundred (100) percent quality level performance of Performance-Based Tasks numbers one (1) through five (5). This performance level is greater than the Acceptable Quality Level specified in the Performance Requirement Summary (Exhibit A, Section 5). The incentive for each Performance-Based Task is one (1) percent of the total Basic Administrative Fee Earned for each twelve (12) month period of the term of the Performance-Based Annual Contributions Contract

INDEPENDENT AUDITOR (IA). An auditor who meets the auditor qualifications of Government Auditing Standards, including the qualifications relating to independence and continuing professional education. Additionally, the audit organization is to meet the quality control standards of Government Auditing Standards.

MULTIFAMILY ASSISTED HOUSING REFORM AND AFFORDABILITY ACT OF 1997, AS AMENDED (MAHRA). The statute authorizing the renewal of Housing Assistance Payments Contracts for project-based assistance under Section 8 of the United States Housing Act of 1937 upon termination or expiration of such contracts (42 U.S.C. section 1437f).

PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT (ACC). This contract between the United States Department of Housing and Urban Development and the Public Housing Agency.

PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT TERM (ACC TERM). A term of twenty-four (24) months unless extended at the sole election of the United States Department of Housing and Urban Development.

PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT YEAR END (ACC YEAR END). The last day of the last month of each twelve (12) month period of the Performance-Based Annual Contributions Contract Term.

PERFORMANCE-BASED CONTRACT ADMINSTRATOR (PBCA). Any entity determined by the United States Department of Housing and Urban Development to meet the definition of “public housing agency,” as defined in section 3(b)(6)(A) of the United States Housing Act of 1937, and to be qualified to enter into and to perform the obligations of such an agency under the Performance-Based Annual Contributions Contract.

PERFORMANCE-BASED CONTRACT (PBC). The Performance-Based Service Contract is based on the development of Performance-Based Tasks in measurable terms with established quantitative and qualitative performance standards and review methods to assure quality performance of the work.

PERFORMANCE-BASED TASK (PBT). A functional task that a Public Housing Agency must perform as described in the Exhibit A, Section 3, in accordance with the requirements of the Performance-Based Annual Contributions Contract and regulations, handbooks, forms, notices, and guidance issued by the United States Department of Housing and Urban Development.

PERFORMANCE-BASED TASK ALLOCATION AMOUNT. The Basic Administrative Fee amount that is allocated to each Performance-Based Task based on the Performance-Based Task Allocation Percentage, as specified in the Performance Requirements Summary (Exhibit A, Section 5).

PERFORMANCE-BASED TASK ALLOCATION PERCENTAGE. The percentage of the Basic Administrative Fee Amount allocated to each Performance-Based Task for its performance, as specified in the Performance Requirements Summary (Exhibit A, Section 5). The Basic Administrative Fee Amount multiplied by the Performance-Based Task Allocation Percentage determines the Performance-Based Task Allocation Amount. This is the amount to which the Disincentive Deduction Percentage, if applicable, is applied to arrive at the Basic Administrative Fee Earned.

PERFORMANCE REQUIREMENTS SUMMARY (PRS). Exhibit A, Section 5 of the Performance-Based Annual Contributions Contract. The United States Department of Housing and Urban Development may amend the Performance Requirements Summary during the term of the Performance-Based Annual Contributions Contract by giving written notice to the Public Housing Agency.

PROGRAM EXPENDITURES. Amounts (including housing assistance payments and administrative fees) that may be charged against program receipts in accordance with the Performance-Based Annual Contributions Contract and the requirements of the United States Department of Housing and Urban Development.

PROGRAM PROPERTY. Program Receipts, including funds held by a depository institution, and the rights or interests of a Public Housing Agency under a Housing Assistance Payments Contract for Covered Units.

PROGRAM RECEIPTS. Administrative Fees and Housing Assistance Payments funds paid by the United States Department of Housing and Urban Development to the Public Housing Agency under the Performance-Based Annual Contributions Contract, and interest earned on Housing Assistance Payments funds in connection with the administration of the Section 8 program under the Performance-Based Annual Contributions Contract.

PUBLIC HOUSING AGENCY (PHA). The entity, as defined in section 3(b)(6)(A) of the United States Housing Act of 1937, that has entered into the Performance-Based Annual Contributions Contract with the United States Department of Housing and Urban Development.

QUALITY CONTROL PLAN (QCP). The PHA's internal control plan to ensure compliance with the provisions of the Performance-Based Annual Contributions Contract through procedures such as separation of duties, checks and balances, and reviews.

SECTION 8. Section 8 of the United States Housing Act of 1937, as amended (42 U.S.C. section 1437f).

SERVICE AREA. The State in which the Public Housing Agency performs under the Performance-Based Annual Contributions Contract.

STATE. One of the fifty (50) United States, the District of Columbia, the United States Virgin Islands, or the Commonwealth of Puerto Rico.

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. The Federal agency authorized under Section 8 of the United States Housing Act of 1937 to enter into the Performance-Based Annual Contributions Contract.

UNITED STATES HOUSING ACT OF 1937, AS AMENDED (1937 Act). The statute in which the Section 8 program and related requirements are codified (42 U.S.C. section 1437).

2. ACC

a. Purpose

- (1) This ACC is a contract between the PHA and HUD to administer project-based Section 8 Contracts as a PBCA. The ACC was awarded by HUD pursuant to a Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.
- (2) Under Section 8, HUD is authorized to enter into an ACC with a PHA that enters into a HAP Contract with an owner of a multifamily housing project to make housing assistance payments for housing units occupied by eligible households, including a HAP Contract assigned to the PHA by HUD for contract administration under the ACC. Under the ACC, the PHA will perform contract administration for Covered Units.
- (3) The ACC does not apply to contract administration of Section 8 projects assisted under the Section 8 moderate rehabilitation program (24 CFR part 882), including the Section 8 moderate rehabilitation single room occupancy program, or to contract administration of projects assisted under the Section 8 project-based voucher program or the project-based certificate program (24 CFR part 983).

b. Exhibits

This ACC includes the following exhibits, each of which is part of the ACC:

Exhibit A: PHA Contract Administration Responsibilities

Exhibit B: HAP Contracts

Exhibit C: Annual Financial Operations Report & FTE Certification

Exhibit D: Disaster Plan Certification

Exhibit E: Service Area

Exhibit F: Basic Administrative Fee Percentage

Exhibit G: MOR Ratings for Projects with PBCA Administered HAP Contracts

Exhibit H: Mark-Market Projects with PBCA Administered HAP Contracts

HUD may unilaterally amend Exhibit B from time to time to add HAP Contracts and/or withdraw HAP Contracts by giving the PHA written notice of the revised Exhibit B. Each such notice shall constitute an amendment of Exhibit B.

c. ACC Term

- (1) The PHA shall provide contract administration services for Covered Units during the initial ACC Term, which shall consist of twenty-four (24) months commencing on the first day of the month of HUD's first assignment to the PHA of existing HAP contracts for Covered Units for contract administration pursuant to this ACC.
- (2) After the initial term of the ACC, HUD may unilaterally elect to extend the ACC at HUD's sole discretion and shall exercise such extension by written notice to the PHA of HUD's election. HUD shall give any such extension notice at least three (3) calendar months before the expiration of the term of the ACC or an extension, if any.

3. PHA CONTRACT ADMINISTRATION RESPONSIBILITIES

1. Coverage

- (1) The PHA shall enter into or assume HAP Contracts with owners of Covered Units to make housing assistance payments to the owners of such units during the HAP Contract term.
- (2) During the ACC Term, the PHA shall provide contract administration services for the Covered Units in the Service Area.
- (3) HUD will assign to the PHA existing HAP Contracts for Covered Units. The PHA agrees to accept all such assignments by HUD for the purpose of administering such HAP Contracts in accordance with the ACC during the ACC Term. Upon assignment by HUD, the PHA immediately and automatically assumes, during the ACC Term, the contractual rights and responsibilities of HUD, or of any PHA that is or was party to the HAP Contract, pursuant to such HAP Contracts for Covered Units in accordance with the ACC and HUD requirements.

2. Responsibilities

- (1) The PHA shall perform all PHA responsibilities under the ACC in accordance with applicable provisions of:
 - The 1937 Act; and
 - MAHRA; and

- Other applicable Federal laws, including any amendments to or changes in such laws; and
 - OMB circulars or requirements (including 2 CFR Part 225); and
 - HUD regulations and requirements, as amended or revised from time to time. Amendments will be effective no later than the first month of the next quarter following such notification; and
 - This ACC and the NOFA pursuant to which this ACC was awarded.
- (2) The PHA shall perform all of the following PBTs as described in the Exhibit A, Section 3 and as required by HUD issued regulations, handbooks, notices, and guidance.
- Conduct management and occupancy reviews.
 - Adjust contract rents.
 - Pay monthly vouchers from Section 8 owners.
 - Renew HAP Contracts and process owner opt-outs (i.e., HAP expiration and non-renewal by owner) and HAP Contract terminations.
 - Respond to tenant health, safety, and maintenance issues.
 - Submit monthly and quarterly reports.
 - Submit ACC Year End reports and certifications.
 - Submit PHA FYE reports and certifications.
- (3) The PHA shall require owners to comply with HUD requirements for occupancy of Covered Units, including requirements governing eligibility for assistance, resident contributions to rent, and examinations and reexaminations of household income.
- (4) The PHA shall determine the amount of housing assistance payments to owners in accordance with the terms of the HAP Contracts and HUD requirements. The PHA shall pay owners the amount of housing assistance payments due to owners under such HAP Contracts from the amount paid to the PHA by HUD for this purpose.

3. The PHA shall take prompt and vigorous action, to HUD's satisfaction, and as required or directed by HUD, to ensure owner compliance with the terms of HAP Contracts for Covered Units within the scope of the ACC.

4. PROGRAM RECEIPTS

a. Housing Assistance Payments

- (1) HUD will make housing assistance payments to the PHA for Covered Units in accordance with HUD requirements.
- (2) The amount approved and paid by HUD for housing assistance payments shall be sufficient for timely payment by the PHA to owners under HAP Contracts for Covered Units. If the PHA is unable to make timely payments to owners because of HUD delay in paying the PHA the amount sufficient for such payment (and such HUD delay is not caused by the PHA's action or failure to act), the PHA's failure to make timely payments to owners shall not be a default by the PHA under the ACC.

b. Administrative Fees

- (1) The PHA earns a Basic Administrative Fee for each Covered Unit on the first day of the month in accordance with Exhibit A.
- (2) In addition to the Basic Administrative Fee, the PHA may earn annual Incentive Fees for Performance and Customer Service in accordance with Exhibit A.
- (3) The payment of Administrative Fees is subject to the availability of appropriated funds.
- (4) Basic Administrative Fees are subject to Disincentive Deductions if performance of the PBTs specified falls below the AQL specified in the PRS (Exhibit A, Section 5).
- (5) HUD will not pay a Basic Administrative Fee for any Covered Units for which the HAP Contract has been terminated.

c. Interest Earned

The dollar amount of interest earned on housing assistance payments deposited in a financial institution in connection with administration of the Section 8 program under the ACC.

5. FINANCIAL MANAGEMENT

a. Use of Program Receipts

- (1) The PHA shall use program receipts in compliance with the U.S. Housing Act of 1937 and all HUD regulations and other requirements.
- (2) The PHA shall use Administrative Fees to pay the operating expenses of the PHA to administer HAP Contracts.
- (3) The Administrative Fees that exceed the PHA's costs to perform the ACC are not subject to HUD requirements governing use of Program Receipts. The PHA may use or distribute any such excess Administrative Fees for any purpose.
- (4) The PHA shall use HAP funds to pay housing assistance to owners for Covered Units.
- (5) HAP funds in excess of current needs for payments for Covered Units shall be invested in accordance with HUD requirements and, if required, as determined by HUD, promptly remitted to HUD.
- (6) Interest earned on HAP funds shall be remitted to HUD at the end of the ACC year (see Annual Interest Certification requirement Exhibit A, PBT #8) or shall be invested in accordance with HUD requirements.

b. Depository

Unless otherwise required or permitted by HUD, all Program Receipts shall be promptly deposited with an institution under the control of, and whose deposits are insured by, the Federal Deposit Insurance Corporation under the following conditions:

- (1) The PHA must determine that the financial institution has a rating consistent at all times with current minimally acceptable ratings as established by Government National Mortgage Association (GNMA).
- (2) The PHA must monitor the institution's ratings no less than on a quarterly basis, and change institutions when necessary.
- (3) The PHA must document the ratings of the institution where funds are deposited and maintain the documentation in the administrative record for three years, including the current year.
- (4) The PHA shall enter into a Depository Agreement in the form prescribed by HUD.

- (5) The PHA may only withdraw deposited Program Receipts for use in connection with the program in accordance with HUD requirements, including payment of housing assistance payments to owners.
- (6) If HUD determines that the PHA has committed any default under the ACC, and has given the PHA notice of such determination, HUD may freeze deposited Program Receipts held by the depository institution and may withdraw deposited funds. The depository agreement shall provide that, if required under a written freeze notice from HUD to the depository institution:
 - The depository institution shall not permit any withdrawal of deposited funds by the PHA unless withdrawals by the PHA are expressly authorized by written notice from HUD to the depository institution.
 - The depository institution shall permit withdrawals by HUD of deposited funds.
- (5) Unless approved by HUD, the PHA may not deposit under the depository agreement monies received or held by the PHA in connection with any other ACC or other contract between the PHA and HUD.

6. FIDELITY BOND COVERAGE

The PHA shall carry adequate fidelity bond coverage, as required by HUD, to compensate the PHA and HUD for any theft, fraud or other loss of program property resulting from action or non-action by PHA officers or employees or other individuals with administrative functions or responsibility for contract administration under the ACC.

7. MANAGEMENT REQUIREMENTS

- a. The PHA shall (without any compensation or reimbursement in addition to Administrative Fee in accordance with Section 4.b of the ACC) perform all PHA obligations under the ACC, and provide all services, materials, equipment, supplies, facilities and professional and technical personnel, needed to carry out all PHA obligations under the ACC, in accordance with sound management practices, Federal statutes (including applicable OMB circulars*), the ACC, and HUD regulations and requirements, as amended or revised from time to time.
*Although this cooperative agreement is not subject to A-102 codified at 2 CFR Part 85, the Secretary has determined that it is subject to the appendices to A-87 codified at 2 CFR Part 225.
- b. The PHA shall:
 - (1) Maintain telephone service during normal and customary business hours.

- (2) Design and implement procedures and systems sufficient to fulfill all PHA obligations under the ACC.
- (3) Take necessary actions to maintain professional working relationships with owners, management agents, residents and their representatives, neighborhood groups, and local government agencies.
- (4) Refer inquiries from Congress or other governmental entities to HUD and promptly provide relevant information for HUD's responses.

8. PROGRAM RECORDS

- a. The PHA shall maintain complete and accurate accounts and other records related to operations under the ACC. The records shall be maintained in the form and manner required by HUD, including requirements governing computerized or electronic forms of recordkeeping. The accounts and records shall be maintained in a form and manner that permits a speedy and effective audit.
- b. The PHA shall maintain complete and accurate accounts and records for each HAP Contract.
- c. The PHA shall furnish HUD such accounts, records, reports, documents and information at such times, in such form and manner, and accompanied by such supporting data, as required by HUD, including electronic transmission of data as required by HUD.
- d. The PHA shall furnish HUD with such reports and information as may be required by HUD to support HUD data systems.
- e. HUD and the Comptroller General of the United States, or their duly authorized representatives, shall have full and free access to all PHA offices and facilities, and to all accounts and other records of the PHA that are relevant to PHA operations under the ACC, including the right to examine or audit the records and to make copies. The PHA shall provide any information or assistance needed to access the records.
- f. The PHA shall keep accounts and other records for the period required by HUD.
- g. HUD may review and audit PHA performance of its responsibilities under the ACC. The PHA shall comply with Federal audit requirements. The PHA shall engage an IA to conduct audits that are required by HUD. The PHA shall cooperate with HUD to promptly resolve all audit findings, including audit findings by the HUD Inspector General or the General Accounting Office.

- h. Records, reports, documents, and information regarding tenants collected by the PHA pursuant to or in furtherance of HUD regulations shall be protected under the Privacy Act of 1974, 5 U.S.C. § 552(a), and the Federal Information Security Management Act (FISMA), 44 U.S.C § 3541.

9. DEFAULT BY PHA

- a. Definition of default

Occurrence of any of the following events is a default by the PHA under the ACC:

- (1) The PHA has failed to:
- Comply with PHA obligations under the ACC, or
 - Comply with PHA obligations under a HAP Contract with an owner, or
 - Take appropriate action, to HUD's satisfaction or as required or directed by HUD, for enforcement of the PHA's rights under a HAP Contract.
- (2) The PHA has made any misrepresentation to HUD of any material fact.

- b. Termination of ACC because of PHA default

- (1) HUD may terminate the ACC at any time in whole or in part if:
- HUD determines that the PHA has committed any default or pattern of default under the ACC,
 - HUD has given the PHA notice of the default and a reasonable opportunity to cure the default prior to termination, and
 - The PHA has not corrected the default within the cure period provided by HUD.
- (2) In determining the length of time within which the PHA must cure the default, and in determining the remedial actions that the PHA must take to do so, HUD shall have discretion to consider the circumstances of the case, including, but not limited to, such factors as any prior failure(s) or pattern(s) of failure by the PHA to comply with PHA obligations under the ACC, and the seriousness of any such failure(s).

- (3) If HUD determines that urgent or other exigent circumstances require immediate termination of the ACC, HUD may terminate the ACC at any time, without allowing any opportunity to cure by giving notice to the PHA. Such circumstances include diversion or misuse of program receipts, PHA misrepresentation to HUD of any material facts, or any failure of program administration that, in HUD's sole determination, adversely affects, or may so affect, the welfare of assisted families.
 - (4) If HUD elects to terminate the ACC, HUD shall terminate the ACC by written notice to the PHA, which shall state:
 - The reason for termination, and
 - The effective date of the termination.
- c. Other remedies
- (1) HUD may take title or possession to any and all Program Property:
 - Upon occurrence of a default by the PHA, or
 - Upon termination of the ACC in whole or in part, or
 - Upon expiration of the ACC Term.
 - (2) HUD's exercise or non-exercise of any right or remedy for PHA default under the ACC is not a waiver of HUD's right to exercise that or any other right or remedy at any time.

10. CONFLICT OF INTEREST

- a. Neither the PHA, nor any PHA contractor, subcontractor or agent for operations under the ACC, nor any other entity or individual with administrative functions or responsibility concerning contract administration under the ACC, may enter into any contract, subcontract, or other arrangement in connection with contract administration under the ACC in which any covered individual or entity has any direct or indirect interest (including the interest of any immediate family member), while such person is a covered individual or entity or during one year thereafter.
- b. "Immediate family member" means the spouse, parent, child, grandparent, grandchild, sister, or brother of any covered individual.
- c. "Covered individual or entity" means an individual or entity that is a member of any of the following classes:

- (1) A member, officer or director of the PHA, or other PHA official with administrative functions or responsibility concerning contract administration under the ACC.
 - (2) If the PHA is an instrumentality of a governmental body:
 - A member, officer or director of such governmental body.
 - A member, officer or director of any entity that holds a direct or indirect interest in the instrumentality entity.
 - (3) An employee of the PHA.
 - (4) A PHA contractor, subcontractor or agent with administrative functions or responsibility concerning contract administration under the ACC, or any principal or other interested party of such contractor, subcontractor or agent.
 - (5) An individual who has administrative functions or responsibility concerning contract administration under the ACC, including an employee of a PHA contractor, subcontractor or agent.
 - (6) A public official, member of a governing body, or State or local legislator, who exercises functions or responsibilities concerning contract administration under the ACC.
- d. The PHA shall require any covered individual or entity to disclose his, her or its interest or prospective interest in any contract, subcontract or other arrangement in connection with contract administration under the ACC to the PHA and HUD.
 - e. During the term of the ACC, the PHA shall not own or otherwise possess any direct or indirect interest in any Covered Unit (including a unit owned or possessed, in whole or in part, by an entity substantially controlled by the PHA), and shall not claim or receive any administrative fee for contract administration of a unit in which the PHA has any such interest.
 - f. Notwithstanding paragraph e, if the PHA is a State, or an agency or instrumentality of a State (not including a municipality, county or other agency of local government), and provides or has provided financing for development, repair or improvement of Covered Units, and holds a mortgage of the real property to secure such financing:
 - (1) The existence of such mortgage or interest shall not be considered a conflict of interest under paragraph e, (provided that the PHA has not obtained any other ownership interest in the property, by exercise of its remedies as mortgagee or otherwise), and in such case, paragraph e shall

not bar the PHA from claiming or receiving an administrative fee for contract administration of such Covered Units.

(2) The PHA shall fully disclose such mortgage or interest to HUD, regarding any defaults by the mortgagee or borrower under such mortgage, and any actions considered or taken by the PHA to enforce the mortgage or the terms of such financing against the owner or the real property. The PHA will provide HUD copies of written notices of default it provides to borrowers and written notices of remedial steps to be undertaken by the borrower. HUD may require the PHA to take measures or actions necessary to assure that the PHA's interest as lender or mortgagee does not prejudice the PHA's full and vigorous performance of contract administration services for the Covered Units in accordance with the ACC, or HUD may amend Exhibit B of the ACC to withdraw such Covered Units, and the funding for such units, from the scope of the ACC.

- g. HUD may waive the conflict of interest requirements for good cause. Any covered individual or entity for whom a waiver is granted may not execute any contract administration functions or responsibility concerning a HAP Contract under which such individual is or may be assisted, or with respect to a HAP Contract in which such individual or entity is a party or has any interest.
- h. No member of or delegate to the Congress of the United States of America or resident commissioner shall be admitted to any share or part of the ACC or to any benefits which may arise from it.

11. EQUAL OPPORTUNITY

- a. The PHA shall comply with all equal opportunity requirements imposed by Federal law, including applicable requirements under:
 - (1) The Fair Housing Act, 42 U.S.C. 3601-3619 (implementing regulations at 24 CFR parts 100 et seq.).
 - (2) Title VI of the Civil rights Act of 1964, 42 U.S.C. 2000d (implementing regulations at 24 CFR part 1).
 - (3) The Age Discrimination Act of 1975, 42 U.S.C. 6101-6107 (implementing regulations at 24 CFR part 146).
 - (4) Executive Order 11063, Equal Opportunity in Housing (1962), as amended, Executive Order 12259, 46 FR 1253 (1980), as amended, Executive Order 12892, 59 FR 2939 (1994) (implementing regulations at 24 CFR part 107).

- (5) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (implementing regulations at 24 CFR part 8).
 - (6) Title II of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.
- b. The PHA shall submit a signed certification to HUD that the PHA shall carry out its responsibilities under the ACC in accordance with the Fair Housing Act, Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, Executive Order 11063, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act.
 - c. The PHA shall cooperate with HUD in the conduct of compliance reviews and complaint investigations pursuant to applicable civil rights statutes, Executive Orders, and related rules and regulations.

12. COMMUNICATION WITH HUD

The PHA shall communicate with HUD through the official or officials designated by HUD.

13. EXCLUSION OF THIRD PARTY RIGHTS

- a. A family that is eligible for housing assistance under the ACC is not a party to or a third party beneficiary of the ACC.
- b. Nothing in the ACC shall be construed as creating any right of any third party to enforce any provision of the ACC, or to assert any claim against HUD or the PHA, either under the ACC or under a HAP Contract assigned to a PHA under the ACC.

PUBLIC HOUSING AGENCY

Name of Public Housing Agency

Name and title of authorized representative (print)

Signature of authorized representative

Date

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Name and title of authorized representative (print)

Signature of authorized representative

Date

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**EXHIBIT A
PHA RESPONSIBILITIES**

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1. OBJECTIVES

1.1. Programmatic Objectives: HUD seeks to achieve three programmatic objectives.

- Calculate and pay Section 8 rental subsidies correctly.
- Administer project-based Section 8 HAP Contract consistently.
- Take actions to ensure that owners fulfill their obligations to provide decent housing for eligible families.

1.2. Administrative Objectives: HUD seeks to achieve three administrative objectives.

- Execute an ACC only with a PHA that has the qualifications and expertise to oversee and manage affordable housing, and that has the capacity to perform the required contract administration services, including necessary personnel and other resources.
- Get the best value for dollars spent for PHA services.
- Encourage the development of joint ventures and or partnerships for contract administration services to obtain the benefit of the best practices of both public and private sectors.

2. PHA CERTIFICATION

The entity executing the ACC with HUD certifies that is a “public housing agency,” as defined in section 3(b)(6)(A) of the 1937 Act, 42 U.S.C. section 1437a(b)(6)(A), and that it satisfies all legal requirements set forth in the Notice of Funding Availability for the Performance-Based Contract Administrator Program. The entity executing the ACC with HUD further certifies that it will continue to satisfy the above-referenced definition of “public housing agency” and that it will remain in compliance with the foregoing requirements throughout the ACC Term.

3. PBTs

This section describes the eight (8) PBTs that the PHA must perform.

1. Management and Occupancy Reviews.
2. Adjust Contract Rents.
3. Review and Pay Monthly Vouchers.
4. Renew HAP Contracts and Process Terminations or Expirations.
5. Tenant Health, Safety, and Maintenance Issues.

6. Administration — Monthly and Quarterly Reports.
7. Administration — ACC Year End Reports and Certifications.
8. Annual Financial Reports — PHA FYE.

Each PBT description contains the following elements:

Outcome: The required result of the PBT.

Requirements: A description of specific elements required to perform the PBT. HUD will measure the PHA's performance of each such element as the performance standard to determine its AQL and to calculate the amount of the Administrative Fee.

References: HUD regulations, handbooks, notices, and guidance and other requirements, as amended or revised from time to time, that set forth additional requirements related to performance of the PBT.

All references mentioned in the description of the tasks are generally available on HUD's website at the following Uniform Record Locator (URL): <http://www.hud.gov/offices/adm/hudclips/index.cfm>. Copies of HUD guidance or directives may be ordered through the HUD website, or through the HUD Multifamily Clearinghouse at 1-800-685-8470.

HUD does not represent that the references listed in the ACC, or on the HUD website are a complete listing of current relevant HUD regulations and requirements. The PHA is required to comply with HUD regulations and requirements, as amended or revised from time to time.

HUD's regulations are codified in Title 24 of the Code of Federal Regulations (CFR). Revisions or additions to HUD regulations are initially published in the Federal Register. HUD may also publish Federal Register notices. In addition to publication in the Federal Register and the CFR, HUD issues additional program requirements as HUD "directives", including HUD handbooks, forms, notices, and guidance.

Quality Assurance: A listing of the methods and resources HUD will use to verify the accuracy of the PHA's reported performance and accomplishments. HUD may use other methods that it deems appropriate to assure quality.

3.1. PBT #1 – Management and Occupancy Reviews

The PHA must conduct an on-site Management and Occupancy Review (MOR) of assigned Section 8 projects in accordance with the Risk-Based and Mark-to-Market requirements specified in this Section. The review must evaluate, analyze, or assess the owner’s operating policies, procedures, and practices related to compliance with the HAP Contract as set forth in regulations, handbooks, forms, notices, and guidance issued by HUD, as amended or revised from time to time.

Outcome: Identify and resolve areas of noncompliance with HUD regulations and requirements, as amended or revised from time to time.

Requirements:

- Schedule and conduct a Risk-Based MOR of projects in the assigned portfolio during the term of the ACC, using Form HUD 9834, based on the following risk-based criteria for the projects listed in Exhibit G, captioned “MOR Ratings for Projects with PBCA Administered HAP Contracts”:
 - Projects for which the last MOR resulted in a rating of Below Average or Unsatisfactory: One (1) MOR shall be conducted during each 12-month period during the ACC Term.
 - Projects for which the last MOR resulted in a rating of Satisfactory: One (1) MOR shall be conducted for fifty-percent (50%) of the projects during the first 12-month period of the ACC Term and one (1) MOR shall be conducted for the remaining fifty-percent (50%) of the projects during the second 12-month period of the ACC Term.
 - Projects for which the last MOR resulted in a rating of Above Average or Superior will not be reviewed during each 12-month period during the ACC Term.
- Schedule and conduct an MOR annually during the ACC term, using Form HUD 9834, of each project in the assigned portfolio that is subject to a HAP Contract that is a Full Mark-to-Market Renewal Contract, entered into pursuant to Section 8 and section 515(a) [or section 515(b)] of MAHRA, as stated in section 4.b. of such Renewal Contract, without regard for the previous MOR rating for the project. Such projects are listed in Exhibit H, captioned “Mark-to-Market Projects with PBCA Administered HAP Contracts.”
- Evaluate the owner’s operating policies, procedures, and practices related to compliance with the HAP Contract.
- Verify compliance with HUD regulations and requirements, as amended or revised from time to time, regarding occupancy issues (e.g., resident eligibility

and selection, examination and reexamination of family income and assets, household characteristics), and verify that correct documentation is contained in each resident file to support claims for payment under the HAP Contract. Use the following resident file random sampling:

Number of Units	Minimum File Sample
100 or fewer	5 files plus 1 for each 10 units over 50
101-600	10 files plus 1 for each 50 units or part of 50 over 100
601-2000	20 files plus 1 for each 100 units or part of 100 over 600
over 2,000	34 files plus 1 for each 200 units or part of 200 over 2200

If the PHA's review of the sample indicates a pattern of deficient owner or management agent performance in one or more of areas of income and rent determination or process, the PHA must require the owner to conduct a one-hundred (100) percent review of the files and report the results of the review to the PHA. The PHA must evaluate the review done by the owner to determine its reliability and accuracy.

- Notify the jurisdictional HUD office by close of next business day of any potential fraud or potential violations of law identified during the PHA review.
- Prepare and submit to the owner a written report, on form HUD-9834, within thirty (30) calendar days of the PHA review, which records and describes deficiencies, findings and corrective actions.
- Provide the jurisdictional HUD office with reports rated below average or unsatisfactory.
- PHA must review and document compliance by Section 8 owners with civil rights regulations in accordance with the requirements of the Joint Agreement, Office of Fair Housing and Equal Opportunity and The Office of Housing, General Operational Procedures for the Civil Rights Front-End and Limited Monitoring Reviews of Subsidized Multifamily Housing Projects.
- Enter data into the appropriate HUD data system.

REAC Follow-up

- Obtain copy of owner certification that all Exigent Health and Safety (EH&S) deficiencies have been corrected.
- Determine whether EH&S and other deficiencies have been corrected.
- Recommend actions to stop HAP payments supported by specific reasons for the actions to the jurisdictional HUD office.

- If directed by HUD, stop HAP payments when owner fails to correct violations within designated time period.

Enterprise Income Verification (EIV) Monitoring

Monitor owner/management agent compliance with EIV requirements as specified in Rental Income Determination Quality Control Monitoring Guide for Multifamily Housing Programs and Housing Notice H 2010-10, EIV System.

References:

HUD Handbook 4350.1, Multifamily Asset Management and Project Servicing

Form HUD-9834, Appendix 1, HUD Handbook 4350.1

HUD Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Programs

Housing Notice H 2010-02, EIV & You Brochure

Housing Notice H 2010-10, EIV System

Housing Notice H 09-15, Implementation of the Violence Against Women and Justice Department Reauthorization Act of 2005 for the Multifamily Project-Based Section 8 Housing Assistance Payments Program.

Rent and Income Determination Quality Control Monitoring Guide for Multifamily Housing Program.

Joint Agreement, Office of Fair Housing and Equal Opportunity and the Office of Housing, General Operational Procedures (GOP) for the Civil Rights Front-End and Limited Monitoring Reviews of Subsidized Multifamily Housing Projects.

Performance Standards
• Conduct on-site MOR review at each project in the assigned portfolio in accordance with the Risk-Based and Mark-to-Market requirements during the term of the ACC.
• The Form HUD-9834 Summary Report is transmitted to the owner within 30 calendar days of completion of the on-site MOR.
• The Form HUD-9834 Summary Report utilizes HUD’s written rating policy.
• The Form HUD-9834 Summary Report is substantiated by the appropriate supporting documentation (HUD form 9834 and tenant file review forms).
• The MOR complies with HUD handbooks and Rent and Income Determination Quality Control Guide for Multifamily Housing Programs.
• Review and respond to owner response to the Form HUD-9834 Report findings, within thirty (30) calendar days of receipt.
• Respond to owner appeal within forty-five (45) calendar days of receipt.

Quality Assurance:

On-Site Reviews

Data Systems Reports

3.2. PBT #2 – Adjust Contract Rents

Contract rents under HAP Contracts that are adjusted at times other than Contract Renewal during the contract HAP Contract term must be adjusted in accordance with the HAP Contract and HUD requirements.

The PHA must process contract rent adjustments correctly when requested by the owner under appropriate Budget-Based, Annual Adjustment Factor, Operation Cost Adjustment Factor, and Special Adjustments options and in a timely manner.

If applicable, the PHA must analyze adjustments of the owner utility allowance schedule.

Outcome: Contract rent adjustments are timely and correct.

Requirements:

A. Budget-Based Rent Adjustments

Where applicable, the budget-based rent adjustment method requires a Section 8 owner to submit an operating budget and supporting documentation for PHA review. The rent adjustment may require HUD approval.

The PHA must determine budget-based adjustments of contract rent by performing the following tasks:

- Analyze the project’s operating budget and supporting documentation for a rent adjustment to determine reasonableness according to guidance in HUD Handbook 4350.1, Multifamily Asset Management and Project Servicing;
- Document contract rent increases on a rent schedule (Form HUD-92458);
- Analyze adjustments of the owner utility allowance schedule, if applicable;
- If the HAP Contract requires the owner to maintain a reserve for replacement, analyze adjustment to the monthly reserve for replacement deposit, as required, and recommend action to HUD;
- Approve or disapprove the amount of rent adjustment and provide written notification to the owner;

- Verify accurate, timely completion and submission of the adjusted rent schedule by the owner; and
- Submit proposed rent increases greater than ten-percent (10%) to HUD for approval or disapproval. HUD must notify PHA of the decision and the PHA must provide written notification to the owner.
- Enter data into the appropriate HUD data system.

B. Annual Adjustment Factor (AAF)

This rent adjustment method generally requires the PHA to apply the AAF to current contract rents. AAFs are published annually in the Federal Register. The PHA must perform the following tasks:

- Determine the amount of annual adjustments in accordance with HUD requirements;
- Analyze adjustments of the owner utility allowance schedule, if applicable;
- If the HAP Contract requires the owner to maintain a reserve for replacement, analyze adjustment to the reserve for replacement, and recommend action to HUD;
- Validate comparability study if submitted by the owner to support a rent adjustment request;
- Verify accurate, timely completion and submission of adjusted rent schedule by the owner; and
- Enter data into the appropriate HUD system.

C. Operating Cost Adjustment Factors (OCAF)

- Determine the amount of OCAF in accordance with HUD requirements;
- Analyze adjustments of the owner utility allowance schedule, if applicable;
- Calculate the amount of rent adjustment and provide written notification to the owner;
- Validate comparability study if submitted by the owner to support a contract renewal request;
- Verify accurate, timely completion and submission of adjusted rent schedule by the owner; and

- Enter data into the appropriate HUD system.

D. Special Adjustments

For HAP Contracts which provide for AAF adjusted rents, the Section 8 owner may request a special adjustment for cost increases generally applicable to housing in the locality, such as increases in cost items such as insurance, taxes or utility rates. The appropriate jurisdictional HUD office must approve or deny all special adjustments within thirty (30) calendar days of receipt of a properly documented request from the PHA.

The PHA must process the owner's request for a special rent adjustment to determine if the special adjustment should be approved by HUD. To accomplish this, the PHA must perform the following tasks:

- Analyze a special adjustment request from the owner;
- Recommend action to the appropriate jurisdictional HUD office;
- Based on notification from HUD, notify the owner of rent adjustment approval or disapproval;
- Verify accurate, timely completion and submission of an adjusted rent schedule by the owner; and
- Enter data into the appropriate HUD data system.

E. Rent Appeals

A Section 8 owner may appeal the PHA rent adjustment decision. The first level of appeal is to the PHA; the second level of appeal is to the appropriate jurisdictional HUD office. The PHA must review owner appeals.

The PHA must perform the following tasks:

First level appeal

Analyze the owner's rent appeal request.

Provide the owner with written notice of PHA decision and justification within thirty (30) calendar days of receipt of the owner's request.

If the appeal is approved:

- Verify accurate, timely completion and submission by the owner of the adjusted rent schedule, and

- Enter data into the appropriate HUD data system.

If the appeal is denied:

- Notify the owner of opportunity for second level appeal with notice of PHA decision and justification.

Second level appeal

If the appeal is approved by HUD:

- Receive approval from jurisdictional HUD office within thirty (30) calendar days after request for second level appeal;
- Verify accurate, timely completion and submission of adjusted rent schedule by the owner; and
- Enter data into the appropriate HUD data system.

If the appeal is denied by HUD:

Any decision rendered by HUD will be final and will not be subject to further appeal above that level.

References:

HUD Handbook 4350.1, Multifamily Asset Management and Project Servicing

Section 8 Renewal Policy Guide Book

Performance Standards
• Process rent adjustment request within thirty (30) calendar days of the owner's complete submission, as defined by written HUD guidance.
• Process the rent adjustment according to current written HUD policy.
• Receive HUD approval for budget-based rent increases of more than ten (10) percent.
• Process utility allowance adjustments based on current policy.
• Respond to owner appeals within thirty (30) calendar days of receipt.

Quality Assurance:

On-Site Reviews

Data Systems Reports

3.3.

PBT #3 – Review and Pay Monthly Vouchers

Part 208 of Title 24 of the Code of Federal Regulations, “Electronic Transmission of Required Data for Certification and Recertification and Subsidy Billing Procedures for Multifamily Subsidized Projects,” requires Section 8 project owners to request housing assistance payments by vouchers submitted monthly through the Tenant Rental Assistance Certification System (TRACS). Vouchers are due the tenth (10th) day of the month preceding the month for which the owner is requesting payment. For vouchers received after the tenth (10th) day of the previous month, the PHA must submit voucher within twenty calendar days of receipt. A PHA may not pay owners until owner vouchers are received, reviewed, and approved.

Outcome: Payments of Section 8 vouchers and claims are only authorized and paid for eligible Covered Units. Payments are to be made to owners monthly by the first business day after receiving HAP funds from HUD.

Requirements

A. Verify and certify accuracy of monthly Section 8 vouchers

The PHA must verify and provide written documentation certifying the accuracy of owner payment requests by the last day of each month before the month when payment is due to the owner in accordance with the HAP Contract. The PHA disburses housing assistance payments to the owner in response to the owner’s payment request as verified by the PHA. To accomplish this task, the PHA must:

- Monitor owner compliance with obtaining access to and using EIV system;
- Monitor owner compliance with requirements for entry of all resident certification and recertification data in TRACS;
- Verify voucher submissions by owner through the TRACS system by the tenth day (10th) of the month preceding the month for which the owner is requesting payment;
- Verify through TRACS that the amount of the housing assistance payment paid on behalf of each resident is accurate;
- Verify that all re-certifications are completed by the owner in a timely manner and entered into TRACS;
- Verify that the owner’s payment request does not include any vacant units or Covered Units for which Section 8 assistance has been stopped.
- Analyze required adjustments from prior month’s vouchers to determine accuracy and validity;

- Determine if authorized rent or utility allowance adjustments have been implemented timely and accurately;
- Verify pre-approval of Section 8 Special Claims (see paragraph B of this section);
- Notify the owner, in writing, of any corrections required and track corrections;
- Verify that owners are complying with HUD regulations and requirements, as amended or revised from time to time; and
- Submit error tracking log to HUD Headquarters semi-annually based on the Federal fiscal year, the number of errors discovered by category and the number of errors that are resolved or are in the process of being resolved. The reports are due 30-days after the end of the semi-annual period or on the next business day when the deadline falls on a weekend or holiday.

Semi-annual period Report Due: 10/1 through 3/31—4/30
4/1 through 9/30—10/31

B. Verify and authorize payment only on valid Section 8 Special Claims for unpaid rent, resident damages or vacancy loss.

A Section 8 project owner may claim reimbursement from the PHA to the extent provided in the HAP Contract for unpaid rent, resident damages, and vacancy losses on Covered Units. Eligible claims must be pre-approved by the PHA before being submitted with owner's monthly voucher. The PHA must:

- Analyze, verify, adjust, and approve or disapprove owner claims in accordance with HUD regulations and requirements, as amended or revised from time to time (including program requirements in HUD directives such as handbooks, notices or forms); and using TRACS and information provided by the owner;
- Enter data into a spreadsheet program for monitoring PHA payments. The program must comply with HUD standards and requirements; and
- For all approved or reduced claims, notify the owner of the approved claim in writing within thirty (30) calendar days of receipt in accordance with the Special Claims Processing Guide.

C. Disburse Section 8 Payments to Owners

The PHA shall process payments for only those units on the voucher that have a fully processed and approved Form HUD 50059, Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures. The PHA must:

PBT #3 – Review and Pay Monthly Vouchers

Part 208 of Title 24 of the Code of Federal Regulations, “Electronic Transmission of Required Data for Certification and Recertification and Subsidy Billing Procedures for Multifamily Subsidized Projects,” requires Section 8 project owners to request housing assistance payments by vouchers submitted monthly through the Tenant Rental Assistance Certification System (TRACS). Vouchers are due the tenth (10th) day of the month preceding the month for which the owner is requesting payment. For vouchers received after the tenth (10th) day of the previous month, the PHA must submit voucher within twenty calendar days of receipt. A PHA may not pay owners until owner vouchers are received, reviewed, and approved.

Outcome: Payments of Section 8 vouchers and claims are only authorized and paid for eligible Covered Units. Payments are to be made to owners monthly by the first business day after receiving HAP funds from HUD.

Requirements

A. Verify and certify accuracy of monthly Section 8 vouchers

The PHA must verify and provide written documentation certifying the accuracy of owner payment requests by the last day of each month before the month when payment is due to the owner in accordance with the HAP Contract. The PHA disburses housing assistance payments to the owner in response to the owner’s payment request as verified by the PHA. To accomplish this task, the PHA must:

- Monitor owner compliance with obtaining access to and using EIV system;
- Monitor owner compliance with requirements for entry of all resident certification and recertification data in TRACS;
- Verify voucher submissions by owner through the TRACS system by the tenth day (10th) of the month preceding the month for which the owner is requesting payment;
- Verify through TRACS that the amount of the housing assistance payment paid on behalf of each resident is accurate;
- Verify that all re-certifications are completed by the owner in a timely manner and entered into TRACS;
- Verify that the owner’s payment request does not include any vacant units or Covered Units for which Section 8 assistance has been stopped.
- Analyze required adjustments from prior month’s vouchers to determine accuracy and validity;

- Determine if authorized rent or utility allowance adjustments have been implemented timely and accurately;
- Verify pre-approval of Section 8 Special Claims (see paragraph B of this section);
- Notify the owner, in writing, of any corrections required and track corrections;
- Verify that owners are complying with HUD regulations and requirements, as amended or revised from time to time; and
- Submit error tracking log to HUD Headquarters semi-annually based on the Federal fiscal year, the number of errors discovered by category and the number of errors that are resolved or are in the process of being resolved. The reports are due 30-days after the end of the semi-annual period or on the next business day when the deadline falls on a weekend or holiday.

Semi-annual period Report Due: 10/1 through 3/31—4/30
4/1 through 9/30—10/31

B. Verify and authorize payment only on valid Section 8 Special Claims for unpaid rent, resident damages or vacancy loss.

A Section 8 project owner may claim reimbursement from the PHA to the extent provided in the HAP Contract for unpaid rent, resident damages, and vacancy losses on Covered Units. Eligible claims must be pre-approved by the PHA before being submitted with owner's monthly voucher. The PHA must:

- Analyze, verify, adjust, and approve or disapprove owner claims in accordance with HUD regulations and requirements, as amended or revised from time to time (including program requirements in HUD directives such as handbooks, notices or forms); and using TRACS and information provided by the owner;
- Enter data into a spreadsheet program for monitoring PHA payments. The program must comply with HUD standards and requirements; and
- For all approved or reduced claims, notify the owner of the approved claim in writing within thirty (30) calendar days of receipt in accordance with the Special Claims Processing Guide.

C. Disburse Section 8 Payments to Owners

The PHA shall process payments for only those units on the voucher that have a fully processed and approved Form HUD 50059, Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures. The PHA must:

- Notify the owner in writing of any required corrections;
- Maintain a record of required corrections in an error tracking log that records errors by category and the status of its resolution and
- Submit the error tracking log to HUD Headquarters semi-annually based on the Federal fiscal year within 30-days after the end of the semi-annual period.

After the PHA has approved the owner’s Section 8 voucher (see paragraph A of this section), the PHA must disburse housing assistance payments to the owner by an electronic fund transfer, after receipt of HAP funds from HUD.

Reference:

HUD Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Programs

Form HUD-50059, Owner’s Certification of Compliance with HUD’s Tenant Eligibility and Rent Procedures, Appendix 7-B, HUD Handbook 4350.3

Housing Notice H 2010-10, EIV System

TRACS Industry User Guide

Special Claims Processing Guide (HSG-06-01)

Performance Standards
• Review 100% of monthly vouchers submitted by owners.
• Make the HAP payment on units with approved and fully processed Form HUD 50059s.
• For vouchers received by the tenth (10 th) calendar day of the month, pay the owner on the first business day following receipt of the funds from HUD.
• For vouchers received after the tenth (10 th) calendar day of the previous month, the PHA shall submit the voucher for payment within twenty (20) calendar days of receipt.

Quality Assurance:

On-Site Reviews

Data Systems Reports

3.4.

PBT #4 – Renew HAP Contracts and Process Terminations or Expirations

As HAP Contracts approach expiration, owners who want to renew the HAP Contract must request renewal in accordance with HUD regulations and requirements, as amended or revised from time to time, to ensure continued Section 8 assistance. At the time of HAP Contract renewal, the owner may request a rent adjustment (see rent adjustment requirements at Section 3.2, PBT #2 – Adjust Contract Rents). The PHA must ensure that owners fulfill their obligations to residents and HUD, consistent with owner renewal decisions.

Outcome #1: Expiring HAP Contracts are renewed.

Outcome #2: Required tenant data is provided to HUD at the time of owner opt-out or HAP Contract termination.

Outcome #3: Eligible residents in occupancy at the time of owner opt-out or HAP contract termination receive rental assistance until a tenant-based voucher has been issued.

Requirements:

HAP Contract Renewals

- Verify that owners of projects with expiring HAP Contracts provide required notice to the PHA and project residents;
- Review owner's one (1) year tenant notification letter to verify that it meets statutory and administrative requirements;
- Maintain copies of owner's notice to PHA and project residents;
- Verify that the owner has submitted the appropriate HAP renewal option;
- Prepare HAP Contract in the form required by HUD and mail to owner for execution:
- After receipt of confirmation from HUD of funding for renewal, ensure the HAP Contract is executed (signed) by the PHA and mailed to HUD for execution;
- After receipt from HUD of a fully executed HAP contract, mail the original copy to the owner within five (5) business days and retain a copy for PHA file; and
- Execute and distribute copies of the HAP Contract within one (1) business week to the owner, jurisdictional HUD office, and PHA files.

Opt-out and HAP Contract termination

A HAP Contract may terminate because:

- The HAP Contract expires, and the owner chooses not to renew the expiring contract (opt-out); or
- The HAP Contract is terminated by the PHA for owner default (after HUD approves the termination).

A. Notification requirements

The PHA must:

- Inform the jurisdictional HUD office by close of next business day after notice by the owner that the owner has elected to opt-out of the HAP Contract;
- Inform the jurisdictional HUD office of the PHA's recommendation to terminate a HAP Contract because of owner default;
- Verify that the owner has complied with the notification requirements of the HAP Contract and current law and HUD guidance on opt-outs; and
- Provide residents with contact information for the entity providing tenant-based vouchers.

B. Reporting and assistance requirements

The PHA must provide resident payment (family income and total tenant payment) and family unit size data (family size and composition, and size of Section 8 unit currently occupied by family), using Form HUD 50059, to jurisdictional HUD office within 3 business days after receipt of such information from the owner, and at least 90 calendar days before HAP contract termination, for the purpose of obtaining Section 8 vouchers for tenant.

The PHA must ensure that eligible residents in occupancy at the time of owner opt-out or HAP contract termination receive rental assistance until a tenant-based voucher has been issued.

Reference:

Section 8 Renewal Policy Guide Book

Performance Standards	
•	Provide owner notification of HAP Contract expiration within 150-180 days in advance of HAP Contract expiration date.
•	Review owner's one (1) year tenant notification letter to verify that it meets statutory and administrative requirements.
•	Review owner's renewal submission for completeness, within seven (7) business days of receipt.
•	Process is completed within forty-five (45) calendar days of receipt of a complete owner submission.
•	In the case of opt-outs, PHA notifies HUD of opt-out by the close of the next business day after receipt of the owner's 120-day notification.
•	Submit complete resident data to HUD, using Form HUD-50059, within three (3) business days of receipt of the owner's 120-day notification of opt-out.
•	Rent adjustments in conjunction with contract renewals must be processed in accordance with standards and AQL for PBT 2, Adjust Contract Rents.

Quality Assurance:

On-Site Reviews

Data Systems Reports

Monthly Invoice

3.5. PBT #5 – Tenant Health, Safety, and Maintenance Issues

The PHA must accept and record tenant concerns and inquiries related to health, safety, and maintenance issues and follow-up with owners to ensure that owners take appropriate corrective actions.

Outcome: Resolve tenant issues and establish positive relations and communications with residents and the community.

Requirements:

- Maintain tracking system and log for tenant concerns and inquiries that includes PHA communication with owners and tenants, owner's corrective actions, and owner's planned vs. actual corrective performance. Submit log to jurisdictional HUD office with monthly invoices.
- Notify owner of tenant concerns or inquiries within one (1) business day of receipt of the tenant concern or inquiry, direct owner to contact tenant to clarify nature of the issue and report to the planned actions and scheduled completion date to correct issues to the PHA not later than close of the next business day.

- Notify tenant of owner’s planned corrective actions and scheduled completion date not later than three (3) business days of receipt of the tenant concern or inquiry.
- Contact owner to verify completion of corrective actions within one (1) business day following the scheduled completion date and notify the tenant.
- Monitor owner’s corrective action completion performance and keep tenant informed of changes in corrective actions and/or scheduled completion dates until corrective actions are completed and verified by the tenant.

References:

HUD Handbook 4381.5, The Management Agent Handbook

Performance Standards	
•	Submit tenant health, safety, and maintenance issues tracking log to HUD with monthly invoices.
•	Notify owner of tenant concerns or inquiries within one (1) business day of receipt of the tenant concern or inquiry, direct owner to contact tenant to clarify nature of the issue and report to the planned actions and scheduled completion date to correct issues to the PHA not later than close of the next business day.
•	Notify tenant of owner’s planned corrective actions and scheduled completion date not later than three (3) business days of receipt of the tenant concern or inquiry.
•	Contact owner to verify completion of corrective actions within one (1) business day following the scheduled completion date and notify the tenant.
•	Monitor owner’s corrective action completion performance and keep tenant informed of changes in corrective actions and/or scheduled completion dates until corrective actions are completed and verified by the tenant.

Quality Assurance:

On-Site Reviews

Monthly Invoice

3.6. PBT #6 – Administration – Monthly and Quarterly Reports

To track the performance of the Section 8 program, monitor and evaluate PHA performance, and identify technical assistance needs, HUD requires the PHA to regularly report its contract administration activities. Therefore, the PHA must provide monthly and quarterly reports to the CAOM in the jurisdictional HUD office.

Outcome: HUD can monitor and evaluate program performance from accurate, timely reports submitted by the PHA.

Requirements:

Monthly Invoice

The PHA must submit an invoice to the CAOM in the jurisdictional HUD office.

Monthly Work Plan Report

PHA must submit report to the CAOM in the jurisdictional HUD office by the tenth (10th) business day of each month for the previous month's activities.

The Monthly Work Plan report must contain a detailed description of:

- Actual accomplishments for the month and year-to-date compared to the Annual Work Plan for the same period, including the names and titles of the PHA staff performing the PBTs; and
- Instances where the actual performance of PBTs is below the AQL and actions taken to improve performance, and changes, if any, to the QCP to ensure performance is maintained at or above the AQL; and
- Quality control activities and results for each instance of PBT performance at less than the AQL as set forth in the PHA's application under the Notice of Funding Availability for the Performance-Based Contract Administrator Program under Quality Control Plan; and
- Owner issues that required special attention due to such matters as, abatement actions, excessive resident complaints, inquiries from governmental officials or the general public; and
- Major accomplishments, success stories, etc.; and
- Noteworthy meetings; and
- Pending issues.

Quarterly Risk Assessment Report

During each twelve (12) month period of the term of the ACC, HUD will provide the PHA a quarterly report based on data from HUD systems for assigned Section 8 HAP contracts within the PHA's service area. The PHA shall provide HUD its evaluations and analyses of the data along with discussions of factors influencing performance, changes, trends, etc., and shall provide HUD with specified owner reports.

The HUD report will be transmitted to the PHA not later than ten (10) calendar days following the end of each quarter. The PHA shall complete its evaluations and analyses

and submit a completed report to the CAOM within twenty (20) calendar days of receipt. The PHA will analyze the HUD report and assess the extent to which changes or trends may indicate increasing or decreasing risks to HUD, PHA, projects, owners, and/or tenants. The discussion may include descriptions of market conditions, employment trends, demographic trends, or special cases that are contributing to observed changes and trends. The discussion may include comparisons to previous quarters.

The Quarterly Risk Assessment Report will include the following:

A. HAP Contracts

HUD will provide data on:

1. Renewals within each quarter.
2. Terminations within each quarter.
3. Opt-Outs within each quarter.

The PHA will provide:

- a. Analyses and discussion of the data.
- b. Owner Opt-Out Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, that opted-out of HAP Contracts along with a detailed description of all of the efforts made by the PHA to preserve all Section 8 project-based units and all the reasons for any units which opted out or otherwise were lost as section 8 project-based units. Such analysis and discussion shall include a review of the impact of the loss of any subsidized units in that housing marketplace, such as the impact of cost and the loss of available subsidized, low-income housing in areas with scarce housing resources for low-income families.

B. Covered Units:

HUD will provide data on:

1. Covered Units Receiving Subsidy.
2. Covered Units Vacant:
 - 1st Month of Quarter.
 - 2nd Month of Quarter.

- 3rd Month of Quarter.

The PHA will provide:

- a. Analyses and discussion of the data.
- b. Vacancy Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, with ten (10%) or more [provide actual vacancy percentage] of covered units vacant all three (3) months of the quarter, and the reasons for sustained vacancies. Include a brief description of PHA and/or HUD actions taken or in process to compel owner to reduce vacancies.

C. Management & Occupancy Reviews (MORs)

HUD will provide data on:

1. MORs completed (report issued to owner) within quarter.
2. MORs issued rated less than "Satisfactory."
3. MORs issued with findings within quarter.
4. MORs closed within quarter.

The PHA will provide:

- a. Analyses and discussion of the data.
- b. MORs Open Findings Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, with MOR findings not corrected within thirty (30) calendar days after report issued to owner, reasons for owner's failure to correct findings within thirty (30) days, the actual number of days required to correct, if corrected. Owners with findings that have not been corrected shall be reported each quarter until all corrective actions have been completed. Include a brief description of the status of PHA referrals to HUD for sanctions or enforcement.

D. REAC Inspections

HUD will provide data on:

1. REAC Inspections (report issued to owner) within quarter.

2. REAC Inspections with EH&S Deficiencies within quarter.
3. REAC Inspections with scores below sixty (60) within quarter.

The PHA will provide:

- a. Analyses and discussion of the data.
- b. REAC Inspections Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, with REAC Inspections that included EH&S deficiencies and/or scores below sixty (60) during the quarter.
- c. Notice of Default (NOD) of HAP Contract Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, issued a NOD memorandum during the quarter, the status of the owner's response, and a brief description the status of HUD enforcement actions.

E. Tenant Health, Safety, & Maintenance Issues

The PHA will provide:

- a. Number of tenant health, safety, and maintenance issues logged and owner notified.
- b. Number and percentage of tenant health, safety, and maintenance issues not corrected by owner within fifteen (15) days of owner notification.
- c. Analyses and discussion of the data.
- d. Tenant Health, Safety, and Maintenance Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, that have been notified of tenant health, safety, and maintenance issues that the owner failed to correct within fifteen (15) calendar days of notification, reason for owner's failure to correct issues within fifteen (15) calendar days, the actual number of days required to correct, if corrected. Owners with HSM issues that have not been corrected shall be reported each quarter until all corrective actions have been completed. Include a brief description of the status of PHA referrals to HUD for sanctions or enforcement.

Performance Standards	
•	Monthly invoice is due to the CAOM by the tenth (10 th) business day of each month for the previous month's activity.
•	Monthly Work Plan Report updates Annual Work Plan by documenting actual to planned services and activities to perform the PBTs and ACC for the month and year-to-date. Describes adjustments required for the remainder of the year to fully perform the PBTs and ACC. Due to the CAOM by tenth (10 th) business day following the end of the month.
•	Complete Quarterly Risk Assessment Report and submit to the CAOM within twenty (20) calendar days of receipt from HUD following the end of each quarter within each twelve (12) month period of the ACC Term.

Quality Assurance:

On-Site Reviews

Data Systems Reports

Report Reviews

3.7. PBT #7 – Administration – ACC Year End Reports and Certifications

To track the performance of the Section 8 program, monitor and evaluate PHA performance, and identify technical assistance needs, HUD requires the PHA to annually report its contract administration activities. Therefore, the PHA must provide annual reports to the jurisdictional HUD office.

Outcome: HUD can monitor and evaluate program preparedness, performance, and costs from accurate, timely reports submitted by the PHA.

Annual Financial Operations Report & FTE Certification

Within sixty (60) calendar days of the ACC Year End, the PHA's CFO shall submit to HUD an Annual Financial Operations Report accompanied by supporting statements and schedules derived from the PHA's accounting systems. The CFO shall certify that the direct costs, indirect costs, and Administrative Fees Earned reported (Exhibit C), are complete and accurate for each twelve (12) month period of the ACC Term.

The Annual Financial Operations Report shall be accompanied by an FTE Certification. The FTE Certification shall identify the actual FTEs required to perform PBTs numbers one (1) through six (6) as specified in Exhibit A of the ACC for each twelve (12) month period of the ACC Term. For each PBT, identify the positions by title responsible for managing, supervision, and performing each PBT. Include the FTEs for PHA and contractor employees. Only include contractors that contract directly with the PHA. Do not include sub-contractors of contractors. One (1.00) FTE is defined as 2,080 work hours per year.

Annual Work Plan

- Sixty (60) calendar days prior to ACC Year End, the PHA must submit to HUD a report that describes its month-by-month work plan to fully perform all PBTs during the next twelve months of operation.
- Identify the processes required to perform each PBT and the principal point of contact, by name and title, responsible for managing each process.

Depository Institution Certification

The PHA must submit an annual depository institution certification to the CAOM certifying that the depository institution was minimally acceptable by GNMA each quarter of the fiscal year. If the rating was not minimally acceptable, the PHA must provide the CAOM documentation verifying that it changed institutions and Depository Agreement in the form prescribed by HUD.

Disaster Plan

The PHA shall provide HUD a PHA Disaster Plan that details how the PHA and, if applicable, subcontractors that perform services that provide fifty (50) percent or more of the full time equivalent (FTE) employees required to perform PBTs Numbers one (1) through six (6) as specified in Exhibit A, Section 3, of the ACC, in the event of a natural or human caused disaster.

The PHA shall notify HUD of any incident that disrupts the PHA's performance under the ACC and within one (1) business day following such incident even if normal operations have resumed. The PHA shall inform HUD of the nature of the incident, the extent of its impact on the PHA's operations, what actions have been initiated in response to the incident, and the expected date of the resumption of normal operations. If the PHA determines, at any time during or following an incident, that it is unable to comply with any provision of the ACC and/or fully perform any PBT, the PHA shall notify HUD of its determination.

The PHA Disaster Plan shall cover the following topics in detail:

- Incident Response Staff: The names, titles, incident response authority and responsibilities, and contact information for assigned staff.
- Communication Back-up Plans and Systems:
 - Procedures and methods of notifying and updating owners, and residents regarding changes in service procedures and the resumption of routine operations.
 - Procedures and methods of notifying in the event of an incident, updating HUD regarding changes in service procedures until the resumption of

routine operations, the performance status of each PBT or, if any PBT is not being fully performed, actions being taken to restore full performance of each PBT.

- **Operating and Management Back-Up Plans and Systems:** Procedures to relocate functions and staff to alternative office locations and/or telework sites; ensure access to IT systems; maintain internal and external communication systems (telephone, fax, email); and maintain supervisory, accounting, financial, and human resource functions.
- **Information Technology (IT) Back-up Plans and Systems:** Procedures to maintain IT staff support and ensure operability, data protection and system security.
- **Preparedness:** Plan to provide annual training for employees and, if applicable, subcontractor employees, and annual testing of back-up plans and systems.

The Disaster Plan shall be updated when changes occur and an up-to-date copy of the PHA’s Disaster Plan provided to HUD. The PHA shall provide HUD a PHA Disaster Plan Certification (Exhibit D) sixty (60) calendar days prior to the ACC year end. The Disaster Plan Certification shall be signed by a Disaster Plan Coordinator who has the education and experience to develop, manage, and test disaster, continuity of operations, or emergency management plans. The Disaster Plan Coordinator must attach a qualifications statement or resume to the certification

Performance Standards	
•	Annual Financial Operations Report (Exhibit C) submitted to HUD sixty (60) calendar days following the ACC year end.
•	Annual Work Plan – Submitted to HUD sixty (60) calendar days prior to ACC year end.
•	PHA Disaster Plan Certification (Exhibit D) submitted to HUD sixty (60) calendar days prior to the ACC year end.
•	Annual Depository Institution Certification – Submitted to HUD within forty-five (45) calendar days after the PHA FYE.

Quality Assurance:

Monthly Invoice

Report Reviews

3.8. PBT # 8 – Annual Financial Reports – PHA FYE

Public Housing Agency audit and annual interest earned certification.

The PHA must maintain complete and accurate financial records covering the PHA's contract administration of Covered Units under the ACC.

Outcome: The PHA's records are complete and accurate.

Requirements:

PHA Audit

- Records concerning contract administration under the ACC must be distinct and separate from records concerning any other business of the PHA.
- The PHA must maintain complete and accurate records regarding activities relating to each HAP Contract for Covered Units.
- If the PHA is required to submit audited financial statements under OMB's Circular A-133, the PHA must submit audited annual financial statements that fully comply with the requirements of OMB Circular A-133 by the earlier of thirty (30) days after receipt of the auditor's report, or nine (9) months after the PHA FYE. This audit must be performed by an IA.
- If the PHA submits its audited financial statements more than sixty (60) days after the PHA fiscal year end, the PHA must submit all financial reports required by the HUD in unaudited form within sixty (60) days after the PHA FYE.
- The PHA's submission of financial information must also be in accordance with the requirements of HUD's Uniform Financial Reporting Standards (24 CFR, Part 5, Subpart H). The audit must be performed by an IA, procured using the standards in Circular A-133 and other documents referenced in Circular A-133.
- If a PHA is not required to submit separate audited financial statements under OMB's Circular A-133, it must submit unaudited annual financial statements within sixty (60) calendar days after the PHA FYE.
- If there are audit findings that require corrective actions, the PHA must provide HUD with a proposed plan of corrective actions as part of the audit submission package. By the first (1st) day of each month, until all corrective actions are completed as required by HUD, the PHA must submit a status report to HUD of corrective actions being implemented. Corrective actions must proceed as rapidly as possible. If the PHA fails to timely provide all required audited or unaudited financial statements, or fails to proceed with timely implementation of required

corrective actions, HUD may determine that such failure is a default by the PHA under the ACC.

Annual Interest Earned Certification

The PHA must submit an annual interest earned certification certifying the amount of interest earned on HAP funds for the reporting period. Submissions will also be required for a negative report when the PHA does not have any interest to remit to the Department.

Reference:

ACC

HUD Handbook 7420.7

OMB Circular A-133

Performance Standards
<ul style="list-style-type: none">• PHA Audit – PHAs that must comply with OMB’s Circular A-133. The unaudited annual financial statements are submitted to HUD within sixty (60) calendar days after the PHA FYE and the audited annual financial statements are submitted to HUD within nine (9) calendar months after the PHA FYE. For PHAs that are not required to comply with OMB Circular A-133, unaudited annual financial statements are submitted to HUD within sixty (60) calendar days after the PHA FYE.
<ul style="list-style-type: none">• Annual Interest Certification – Submitted to HUD within forty-five (45) calendar days after the end of the PHA FYE.

Quality Assurance:

Review of the audit

Unqualified audit opinion

4. ADMINISTRATIVE FEES

This section describes the types of Administrative Fees that may be earned by the PHA and the Disincentive Deductions that will be applied if the PHA does not attain the AQL specified for each PBT.

4.1. Basic Administrative Fee

The PHA earns a monthly Basic Administrative Fee based on the Basic Administrative Fee Percentage approved by HUD (Exhibit F) multiplied by the current 2-Bedroom FMR for each Covered Unit under on the first day of the month. A portion of the

monthly Basic Administrative Fee is accrued for annual payment to the PHA when PBT number seven (7) and eight (8) are performed. The amount accrued is based on the Performance-Based Task Allocation Percentage specified in the PRS (Exhibit A, Section 6).

4.2. Disincentive Deductions

- (1) The Basic Administrative Fee is subject to Disincentive Deductions if HUD determines that the acceptable quality standards for the PBTs specified in the PRS (Exhibit A, Section 5) have not been attained.
- (2) If HUD determines that the PHA has performed below the AQL in any month, HUD will reduce the amount of the monthly Basic Administrative Fee by subtracting the amount of the Disincentive Deduction determined by HUD in accordance with the PRS. The Basic Administrative Fee less Disincentive Deductions is the Basic Administrative Fee Earned.
- (3) The Basic Administrative Fee amount allocated to each PBT is determined by multiplying the Basic Administrative Fee by the Performance-Based Task Allocation Percentage as specified in the PRS.
- (4) The Disincentive Deduction Percentage for each PBT is applied to the Basic Administrative Fee amount applicable to the PBT.

4.3. Annual Incentive Fees

- (1) The PHA may earn an annual Incentive Fee for Customer Service that is equal to five (5) percent of the sum of the Basic Administrative Fee Earned during each twelve (12) month period of the ACC Term. Incentive Fee for Customer Service will be based on a survey of owners, management agents, and residents. The results of the survey will be evaluated to determine whether any Incentive Fee for Customer Service has been earned, based on established criteria.
- (2) The PHA may earn annual Incentive Fees for Performance for twelve (12) months of one-hundred (100) percent AQL performance of PBT numbers one (1) through five (5) (Exhibit A, Section 5). The incentive for each PBT is one (1) percent of the total Basic Administrative Fee Earned for each twelve (12) month period of the ACC Term.

4.4. Monthly, Quarterly, and Annual Evaluation of PHA Performance

During the ACC Term, HUD will conduct monthly, quarterly, and annual evaluations of the PHA's performance in contract administration of the Covered Units. Calculation of the amount of the Administrative Fee Amount Earned by the PHA is based on HUD's rating of the PHA's performance of the PBTs as specified in the PRS.

Each month, HUD evaluates the PHA's performance in completion of PBTs to determine the amount of the Basic Administrative Fee Earned for performance of each PBT. If performance is less than the AQL, Disincentive Deductions are applied to the monthly Basic Administrative Amount. This scoring is based on HUD's review of data submitted and certified in the monthly invoice by the PHA and Annual Compliance Reviews.

4.5. Basic Administrative Fee Earned Payment

Each month, the PHA calculates the Basic Administrative Fee based upon the number of Covered Units under contract administration by the PHA on the first (1st) day of the month.

Column G of the PRS specifies whether the Basic Administrative Fee for a particular PBT is paid monthly or annually.

Each invoice for the Basic Administrative Fee Earned must be fully supported by documentation, as required by HUD, of the PHA's level of performance of each PBT. Such documentation shall be sufficient to show:

1. Whether the PHA has met the AQL for the performance standard (column C of the PRS).
2. The amount of any Disincentive Deductions (as calculated in accordance with column E of the PRS).

The PHA's determination of the Basic Administrative Fee Earned is subject to modification and adjustment as a result of HUD's quality assurance reviews. HUD may recover any overpayments, and may adjust amounts of payments against subsequent invoices to correct or adjust any overpayment or error in determination of any Basic Administrative Fee Earned.

5. PRS

The PRS specifies the AQL for performance of each PBT, the Performance-Based Allocation Percentage, the method used to evaluate performance, and the frequency with HUD will access and pay the Basic Administrative Fee Earned. The information in the PRS Table governs HUD's payment of Basic Administrative Fees Earned by the PHA for all work performed under the ACC. The PRS table is organized as follows:

1. Column A: PBT #;
2. Column B: PBT title and reference to Section Number in Exhibit A to the ACC;
3. Column C: AQL;

4. Column D: ALLOCATION PERCENTAGE: The percentage of the monthly Basic Administrative Fee amount allocated to each PBT;
5. Column E: DISINCENTIVE DEDUCTION: The percentage by which the monthly Basic Administrative Fee amount allocated to the PBT is reduced for performance at less than the AQL;
6. Column F: QA: (Quality Assurance) Method is how HUD will assure the quality of the PHA's reported performance; and
7. Column G: ASSESSMENT AND PAYMENT FREQUENCY: Frequency (monthly or annually) with which HUD will access and pay the Basic Administrative Fee Earned for each PBT.

PRS TABLE						
A	B	C	D	E	F	G
PBT #	PBT TITLE & SECTION NO. IN EXHIBIT A TO THE ACC	AQL	ALLOCATION PERCENTAGE	DISINCENTIVE DEDUCTION	QA METHOD	ASSESSMENT & PAYMENT FREQUENCY
1	Management & Occupancy Reviews (MOR) ACC Section 3.1.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly
2	Adjust Contract Rents ACC Section 3.2.	95% Performance	10%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly
3	Review & Pay Monthly Vouchers. ACC Section 3.3.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly

PRS TABLE						
A	B	C	D	E	F	G
PBT #	PBT TITLE & SECTION NO. IN EXHIBIT A TO THE ACC	AQL	ALLOCATION PERCENTAGE	DISINCENTIVE DEDUCTION	QA METHOD	ASSESSMENT & PAYMENT FREQUENCY
4	Renew HAP Contracts & Process Contract Terminations or Expirations ACC Section 3.4.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports. Monthly invoice.	Monthly
5	Tenant Health, Safety, & Maintenance Issues ACC Section 3.5.	95% Performance	10%	0.5% deduction for performance below the AQL.	On-site reviews. Monthly invoice.	Monthly
6	Administration - Monthly & Quarterly Reports ACC Section 3.6.	100% Performance	10%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports. Report reviews.	Monthly Quarterly

PRS TABLE						
A	B	C	D	E	F	G
PBT #	PBT TITLE & SECTION NO. IN EXHIBIT A TO THE ACC	AQL	ALLOCATION PERCENTAGE	DISINCENTIVE DEDUCTION	QA METHOD	ASSESSMENT & PAYMENT FREQUENCY
7	Administration - ACC Year End Reports & Certifications ACC Section 3.7.	100% Performance	8%	For Annual Financial Operations Report & FTE Certification 4% Annual Work Plan 2% Annual Depository Institution Certification 1% Annual Disaster Plan Certification 1%	Monthly invoice. Report reviews.	Annually
8	Annual Financial Reports - PHA FYE ACC Section 3.8.	100% Performance	2%	PHA Audit 1% Annual interest earned certification 1%	Report reviews.	Annually

6. DATA SYSTEMS

6.1. Federal Requirements

The PHA must comply with all Federal data processing and data reporting requirements applicable to PHA functions under the ACC, including requirements for Public Housing Agencies described in 24 C.F.R. Part 208 (“Electronic Transmission of Required Data for Certification and Recertification and Subsidy Billing Procedures for Multifamily Subsidized Projects”).

The PHA must have Internet Service Provider (ISP) access for electronic communication over the Internet with HUD, owners or others. The PHA must comply with HUD requirements for electronic communication (including requirements

concerning email and other communication over the Internet). The PHA must comply with HUD requirements for data entry and data transfer over the Internet. The PHA must ensure that all electronic data systems are virus free. The PHA must have the capability to implement changes in data processing and data reporting procedures to comply with changes in HUD requirements. HUD will provide reasonable advance notice (by HUD directive to PHAs or otherwise) of changes in HUD requirements concerning automated data systems and automated data reporting. HUD will provide such advance notice a minimum of ninety (90) days before PHA compliance will be required.

6.2. Communication with Owners

The PHA must have the capability to receive resident certification and recertification data (Form HUD 50059) and voucher data (Form HUD 52670) electronically from owners in a form consistent with HUD reporting requirements for the HUD TRACS System. The PHA must have the capability, in the form acceptable to HUD, for communicating errors in Form HUD 50059 and Form HUD 52670 submissions to owners.

6.3. Communication with HUD

The PHA must provide HUD with data on HAP Contracts, rent adjustments and payments to owners, contract renewal processing, management and occupancy reviews, and other documents and information relevant to the PHA responsibilities outlined in the ACC. The PHA must have the capability to transmit data to HUD over the Internet as required by HUD. The PHA must have the capability to transmit Form HUD 50059 data to the HUD TRACS Tenant System and Form HUD 52670 data to the HUD TRACS Voucher/Payment System to receive return messages transmitted from TRACS. The PHA's Internet access must provide the PHA with the capability to review the resident and voucher data that the PHA has transmitted to HUD, to ensure that the data maintained by HUD is correct and consistent with the data maintained in PHA files. Resident reporting requirements specified for HUD's TRACS Tenant System and voucher reporting requirements specified for the TRACS Voucher/Payment System are published on the TRACS Documents Page on the World Wide Web. The PHA must meet the requirements specified in these documents. At this time, the PHA can access the TRACS Documents at the following URLs:
<http://hudatwork.hud.gov/po/h/hm/tracs/trxhome.cfm> and
<http://hudatwork.hud.gov/lo/9/programoffices/mftracsaccess.cfm>.

6.4. Electronic Fund Transfer and Payment

The PHA must have a depository account with a federally insured financial institution capable of receiving and sending electronic fund transfer (EFT) transactions. See also depository requirements at Section 5.b. of the ACC.

The PHA must have facilities acceptable to HUD for making timely and accurate housing assistance payments to owners. The PHA must also transmit interest earned statement to HUD via the Internet, or as otherwise specified by HUD.

7. QCP

When changes in the QCP occur, the QCP shall be updated and a copy shall be provided to the CAOM. The PHA QCP must address each the following elements and highlight changes.

- For each PBT, describe the internal control procedures that will be implemented to ensure that performance is maintained at the AQL specified in the SOW.
- Describe the internal control procedures that will be implemented to ensure accountability and separation of duties to detect and prevent potential fraud, waste, and abuse of funds.
- Identify internal control procedures to prevent, detect, and resolve actual or appearances of conflicts of interest as stipulated in Section 10 ("Conflict of Interest") of the ACC.
- Identify the internal control procedures to prevent, detect, record, and report information privacy breaches.
- Describe the internal control procedures for information and information system access, management, and security for HUD systems; non-HUD systems that contain program related data, and print-based program documents.
- Describe the internal control procedures to initially and continuously train and cross train staff to perform PBTs and comply with the requirements of the ACC and HUD.
- Describe the methodology that will be used to review, analyze, and evaluate the effectiveness of QCP; and the date(s) scheduled for each QCP Element review.

8. CHANGE OF CONTRACTOR

The PHA shall notify HUD sixty (60) calendar days prior to any change of a contractor entity that performs fifty (50) percent or more of the FTEs required to perform PBTs numbers one (1) through six (6) under this ACC. The PHA shall submit a contractor transition plan to transfer responsibility from incumbent contractor and ensure continuity of operations. The PHA's plan must address the following:

- a) Communication protocols with incumbent contractor, HUD, owners, management agents, and tenants.

- b) File and document transfer protocol (digital and print-based) with incumbent contractor.
- c) Work in process identification, reporting, management and transfer protocol for each PBT with incumbent contractor.
- d) Timeline and action plan to be one-hundred (100) percent ready to perform each PBT on the date specified in the timeline and action plan.

EXHIBIT B
HAP CONTRACTS

Portfolio of HAP Contracts assigned under the ACC

EXHIBIT C

ANNUAL FINANCIAL OPERATIONS REPORT & FTE CERTIFICATION

Annual Financial Operations Report		
Organization:		
Certification: As Chief Financial Officer for the organization whose name appears above, I hereby certify that the financial information provided in this report and FTE Certification is accurate.		
Chief Financial Officer Name:	For 12-Month Period Ending 00/00/0000	
Chief Financial Officer Signature:		
Date:	Percent of Total Costs	Total Costs
Operating Cost Categories		
1. Personnel: Direct Labor Costs	%	\$
2. Fringe Benefits Costs	%	\$
3. Travel Costs	%	\$
4. Equipment Costs	%	\$
5. Supplies and Materials Costs	%	\$
6. Consultants Costs	%	\$
7. Contractor Costs	%	\$
8. Other Direct Costs	%	\$
9. Indirect Costs for Facilities and Services	%	\$
Total Costs (Categories 1-9)	100%	\$
Administrative Fees:		
Basic Administrative Fees Earned	\$	
Basic Administrative Fees Accrued	\$	
Total Basic Administrative Fees Earned & Accrued		\$
Less Total Costs		\$
Net Basic Administrative Fees Earned & Accrued		\$
Provide the following statements or schedules derived from the Public Housing Agency's budgeting and financial systems for each of the listed cost categories.		
<p>1. Personnel: Direct Labor Costs. List all individuals supporting the contract and their hourly wage or salary rate (use 2080 hours per year for salaried employees).</p> <p>2. Fringe Benefits Costs. List of all individuals supporting the contract and their fringe benefits costs (use fringe benefits rates or actual costs per individual).</p> <p>3. Travel Costs. Separately identify travel related to performance of the Performance-Based Tasks from other travel.</p> <p>4. Equipment Costs. Itemized list of equipment and costs.</p> <p>5. Supplies and Materials Costs. Itemized list of supplies and materials costs.</p> <p>6. Consultants Costs. List of consultants by name plus services provided and costs.</p> <p>7. Contractors Costs. List of contractors by name plus services provided and costs.</p> <p>8. Other Direct Costs. Itemized list of other direct costs.</p> <p>9. Indirect Costs for Facilities and Services. Itemized list of departments or agencies providing services, including facilities, service type, and cost.</p>		

FTE Certification

The PHA shall submit a FTE Certification that identifies the actual FTEs required to perform PBTs numbers one (1) through six (6) as specified in Exhibit A of the ACC for each twelve (12) month period of the ACC Term. For each PBT, identify the positions by title responsible for managing, supervision, and performing each PBT. Include the FTEs for PHA and contractor employees. Only include contractors that contract directly with the PHA. Do not include sub-contractors of contractors. One (1.00) FTE is defined as 2,080 work hours per year. The FTE Certification shall be in the following format with the actual number of Contractors, if any, included in the table:

Identify the Contractor(s) enumerated in the columns:

Contractor #1: Name of Contractor/ DUNS #

Contractor #2: Name of Contractor/ DUNS #

Contractor #3: Name of Contractor/ DUNS #

Contractor #4: Name of Contractor/ DUNS #

Add additional Contractors or Position Titles to list and add additional columns to the table as required.

Positions and Full-Time Equivalents (FTEs)	Total FTEs	PHA FTEs	Contractor #1	Contractor #2	Contractor #3	Contractor #4
			Name: Duns Number: FTEs			
PBT #1						
Management and Occupancy Reviews						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
Position title 3	0.00	0.00	0.00	0.00	0.00	0.00
PBT #1 Total	0.00	0.00	0.00	0.00	0.00	0.00
PBT #2 Adjust Contract Rents						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #2 Total	0.00	0.00	0.00	0.00	0.00	0.00
PBT #3 Review and Pay Monthly Vouchers						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #3 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #4 Renew
HAP Contracts and
Process
Terminations or
Expirations

Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #4 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #5 Tenant
Health, Safety, and
Maintenance Issues

Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #5 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #6
Administration -
Monthly and
Quarterly Reports

Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #6 Total	0.00	0.00	0.00	0.00	0.00	0.00

GRAND TOTAL

FTEs	00.00	0.00	0.00	0.00	0.00	0.00
PERCENTAGE OF GRAND TOTAL						
FTEs	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%

Is Contractor doing
50% or more of FTEs
required to perform PBTs
number 1-6? (Yes or no
in column under corresponding
Contractor Name)

If "Yes" for question above,
please list the states for which this
Contractor (entity) is engaged
or proposes to be engaged in
performing 50 percent or more of the
FTEs required to perform PBTs number 1-6
(list states under corresponding Contractor Name)

EXHIBIT D
DISASTER PLAN CERTIFICATION

This is to certify that I have reviewed the disaster plan for this organization and, if applicable, a Contractor entity that performs fifty (50%) percent or more of the FTEs required to perform PBTs numbers one (1) through six (6) under this ACC, and to best of my knowledge and belief:

- (1) The disaster plan has been updated to reflect changes in personnel, policies, practices, backup plans, and resources.
- (2) HUD has been provided a copy of the most recent disaster plan.
- (3) All employees and, if applicable, Contractor employees have participated in disaster plan training within the past twelve (12) months.
- (4) All backup plans and systems identified in the disaster plan have been tested within in the past twelve (12) months.

I declare that the foregoing is true and correct.

PHA Name: _____

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

Attach qualifications statement or resume of person executing this certification.

EXHIBIT E
SERVICE AREA

The Service Area is the State of _____.

EXHIBIT F
BASIC ADMINISTRATIVE FEE PERCENTAGE

The approved Basic Administrative Fee Percentage is 00.00%.

EXHIBIT G
MOR RATINGS FOR PROJECTS WITH PBCA ADMINISTERED HAP CONTRACTS

EXHIBIT H
MARK-TO-MARKET PROJECTS WITH PBCA ADMINISTERED HAP CONTRACTS

Subpart E—Entitlements [Reserved]

Authority: 22 U.S.C. 2658.

BILLING CODE 4710-24-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 44, 85, 111, 511, 570, 571, 575, 590, 850, 882, 905, 941, 968, 970, and 990

[Docket No. R-88-1338; FR-2178]

FOR FURTHER INFORMATION CONTACT:

Edward L. Girovasi, Jr., Director, Policy and Evaluation Division, Office of Procurement and Contracts, Department of Housing and Urban Development, Room 5260, 451 Seventh Street, SW., Washington, DC 20410. Telephone (202) 755-5294. (This is not a toll-free number.)

ADDITIONAL SUPPLEMENTARY

INFORMATION: The Department has determined that the following HUD programs with codified regulations are affected by the adoption of this rule implementing OMB Circular A-102 as a new Part 85:

1. Fair Housing Assistance Program (24 CFR Part 111);
2. Rental Rehabilitation Grant Program (24 CFR Part 511);
3. Programs Authorized under Title I of the Housing and Community Development Act of 1974 and codified at 24 CFR Part 570 (Entitlement Grants, the Secretary's Fund, the HUD-Administered Small Cities Program, Urban Development Action Grants, and Loan Guarantees) but not including the State's Program;
4. Community Development Block Grant Program for Indian Tribes and Alaskan Native Villages (24 CFR Part 571);
5. Emergency Shelter Grant Program (24 CFR Part 575);
6. Housing Development Grant Program (24 CFR Part 850);
7. Indian Housing (24 CFR Part 905);
8. Public Housing Development Program (24 CFR 941);
9. Comprehensive Improvement Assistance Program (24 CFR Part 968); and
10. Annual Contributions for Operating Subsidies for Public Housing Projects (24 CFR Part 990).

These HUD program regulations are being revised by this final rule to cross reference to the requirements for State, local, and federally recognized Indian tribal governments under OMB Circular A-102, as set out in the new Part 85. These revisions serve two purposes: First, they afford grantees a ready reference to the existence and

applicability of A-102 requirements set out in Part 85, and the relevance of those requirements to the particular grant program in which the cross reference appears. Second, where the requirements of A-102 (as set out in Part 85) are wholly or partially inapplicable, the cross reference in the program regulation specifies the effect of the new rulemaking on the existing grant program.

Note: Section 85.43, Enforcement, permits HUD to use any other remedies allowed by law and, therefore would not conflict with HUD's right, for example, to declare a substantial breach or default under an Annual Contributions Contract.

Exemptions and Substantive Revisions*Urban Homesteading Program*

The Urban Homesteading Program (24 CFR Part 590) is not subject to Part 85. The purpose of the Urban Homesteading Program is to use existing housing stock to provide homeownership. HUD transfers federally owned properties without payment to local urban homesteading agencies and the local agencies administer a program to provide the properties to "homesteaders" at nominal cost. The properties passed through local agencies to homesteaders are not provided as "grants" to local government. The local government agency serves merely as the facilitator of a program aimed at benefitting qualified candidates for homeownership. A technical change is being made to Part 590 to remove an existing reference to OMB Circular A-102, even though Standard Form 424 is used in the program.

Section 8 Program

The several Section 8 housing assistance payments programs also remain outside the scope of A-102 and Part 85 and HUD will continue separately regulating financial management associated with the Section 8 program as part of 24 CFR Chapter VIII.

The Section 8 Existing, Moderate Rehabilitation, and Housing Voucher programs are exempted from Part 85. Under these programs, housing assistance payments are made to private owners for the purpose of subsidizing rental charges for lower income families occupying privately owned housing units. Public Housing Agencies administer these funds and assist lower income families in locating suitable housing under these programs, but the public agency essentially acts as a conduit for Federal financial assistance to the private owners.

Similarly, Section 8 assistance under the New Construction and Substantial

Rehabilitation Programs is made available to owners of dwelling units that have been constructed or rehabilitated for lease to lower income families. Among the owners are profit-motivated and non-profit owners, including PHAs, the majority of which are the so-called "agency or instrumentality PHA's established under State not-for-profit laws for the purpose of owning and leasing the projects to their "parent entity PHAs" for subleasing to eligible lower income families. Less than 10 percent of Section 8 New Construction and Substantial Rehabilitation projects are owned outright by housing authorities. The great majority of the projects are privately owned. The duties and responsibilities of PHA Owners receiving housing assistance payments for eligible lower income families under the Section 8 New Construction and Substantial Rehabilitation programs do not differ from those of a private owner participating in this same program. In all cases, the assistance is being provided to lower income families; the owner is merely the conduit for the Federal financial assistance.

Accordingly, these programs are not appropriate for management under the uniform requirements of Part 85, and HUD will continue its existing administrative requirements with reference to 24 CFR Parts 880 through 886 (HUD's program regulations governing the Section 8 program) and Part 887 (HUD's pending final regulations to govern the Housing Voucher program). This rule, nonetheless, makes a technical correction to Part 882 to remove reference to audit requirements under OMB Circular A-102 and to instead refer to the audit requirements of Part 44.

Grant Programs in General

Subpart B—Pre-award Requirements—does not apply to the Community Development Block Grant Entitlement program (24 CFR Part 570, Subpart D) or to the Rental Rehabilitation program (24 CFR Part 511) because § 85.10 (Forms for applying for grants) does not apply to formula grant programs, and § 85.11 (State plans) is inapplicable when the program statute does not require State plans. In this connection, § 85.10 does not apply to the Emergency Shelter Grant program (24 CFR Part 575) because it also is a formula grant program. Additional revisions to Parts 511, 570, and 575 are discussed below.

July 11, 2011

To be delivered via email on July 11, 2011

Deborah K. Lear, Director
U.S. Department of Housing and Urban Development
Office of Housing Assistance Contract Administration Oversight
451 7th Street SW
Washington, DC 20410

RE: Protest of Award for the State of Colorado – Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts (“Invitation”)

Dear Ms. Lear:

On July 1, 2011, Colorado Housing and Finance Authority (CHFA) received your notification letter of the same date, sent electronically, advising that the U.S. Department of Housing and Urban Development (HUD) had selected Southwest Housing Compliance Corporation (“SHCC”) to serve as the Performance-Based Contract Administrator (“PBCA”) for the State of Colorado.

CHFA is hereby filing a protest of HUD’s selection of SHCC to serve as the PBCA for the State of Colorado, pursuant to the protest procedures set forth at Subpart 33.1 of the Federal Acquisition Regulation (“FAR”), and at Part 2433 of the HUD Acquisition Regulation (“HUDAR”). This protest is being submitted within 10 days of receipt of your July 1, 2011 letter; the date upon which CHFA first became aware that HUD had used an evaluation process that was materially different than the process outlined in the above-referenced Invitation.

Set forth below are the elements required to be included in a protest to the agency as described in FAR 33.103(d)(2):

1. Name, address, and fax and telephone numbers of the protester:

Colorado Housing and Finance Authority
Brian Miller, Director Asset Management Division
1981 Blake Street
Denver, CO

Facsimile No: 303.297.0911
Telephone No: 303.297.7489

AR 1424

CONNECTICUT HOUSING FINANCE AUTHORITY

August 4, 2011

General Counsel
Government Accountability Office
441 G Street, NW
Washington, DC 20548
Attention: Procurement Law Control Group
protests@gao.gov
Fax: 202-512-9749
BY EMAIL AND FACSIMILE

Report me
9, 6, 2011
CA me
11, 14

DOCUMENT CONTROL SECT.

2011 AUG -4 PM 3:36

GAO RECEIVED

Re: Protest to HUD Performance-Based Contract Administrator Award

Dear Procurement Law Control Group,

I write on behalf of the Connecticut Housing Finance Authority ("CHFA") pursuant to section 21 of title 4 of the Code of Federal Regulations, subpart 33.1 of the Federal Acquisition Regulation (the "FAR") and part 2433 of the HUD Acquisition Regulation (the "HUDAR") to protest the rescission of the Performance Based Contract Administrator (the "PBCA") contract award to CHFA and the recent determination of the U.S. Department of Housing and Urban Development ("HUD") to select Jefferson County Assisted Housing Corporation ("JeffCo") as the PBCA for the State of Connecticut. Upon information and belief, CHFA was the highest ranked eligible bidder under HUD's published selection criteria, yet was not awarded the contract due to HUD's application of an undisclosed cost factor and due to HUD's selection of an ineligible contractor.

CHFA was initially informed on July 1, 2011 that it had been selected as the new PBCA for the state of Connecticut. A copy of such notice is attached as Exhibit A. Subsequently, HUD sent notices, dated July 8, 2011, that CHFA was being awarded the contract to all owners and residents currently assigned to the PBCA program. A sample copy of each such notice is attached as Exhibit A.1. In addition, CHFA's selection was posted on HUD's website.

On Thursday, July 21, 2011 CHFA received an email from HUD requesting a conference call with CHFA later that day as a result of HUD's completion of a quality assurance review. HUD subsequently canceled and rescheduled the conference call for Friday, July 22, 2011. HUD staff was aware on Thursday, July 21, 2011, that CHFA's subcontractor, Multifamily Asset Managers ("MAM"), was planning to fly to Connecticut on Sunday, July 24th, in order to conduct employment interviews on Monday, July 25th, and to

999 West Street / Rocky Hill, Connecticut 06067-4006 / 860-721-9501
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AR 1428

AR000257

NCSHA proposes that HUD consider and fully capture in its scoring an applicant's demonstrated capacity to do the work, as we believe this is one of the most important applicant qualifications, which HUD did not adequately consider in the first competition. HFA applicants in the first competition believe HUD gave little or no weight to prior experience, ignoring the fact that many of them had performed as PBCAs in an exemplary manner for years.

We also recommend that HUD give weight in its scoring to the additional value applicants propose to contribute to further advance the program's goals, including the resources and skills to refinance and recapitalize properties for long-term preservation, the ability to provide rental assistance to and coordinate services for tenants, and a deep knowledge of the characteristics and needs of the communities and housing markets in which the properties are located.

NCSHA asks HUD to make clear in the NOFA what it is seeking to achieve by encouraging public housing agency (PHA) applicants to partner with other entities and what advantage, if any, applicants with partners will be given in the scoring process. We are concerned that in the first competition, HUD seemed to give an advantage to applicants with partners without adequately considering whether such applicants offered better qualifications than applicants without partners. We believe that demonstrated capacity to do the work and not the number of entities an applicant proposes share in that work should be the standard by which HUD consistently judges applicants. If HUD in the new competition encourages and gives an advantage to applicants with partners, it should value public and private partners equally.

Finally, we recommend that once HUD makes its decisions and notifies the winning and losing applicants, it immediately publish all of the applicants that sought contracts in each state, disclosing all of their partners and subcontractors, their proposed fees (if this remains a competitive factor), and their total scores. HUD should make available to each applicant a complete breakdown of its score.

Applicant Eligibility and Disclosure

NCSHA recommends that HUD require PHA applicants to certify and support with a reasoned legal opinion (RLO) their authority to conduct the work in the states in which they are applying to serve as PBCAs. Once the application deadline has passed, we ask that HUD publish the names of all PHA applicants, so that any challenges to their legal authority can be brought to HUD before it makes its decisions. We ask that HUD carefully and thoroughly consider RLOs and any challenges to them.

We also urge HUD to require the PHA applicant to play a meaningful role in the program's administration and oversight and to evaluate the PHA's capacity to do so. We were disturbed to learn that some PHA applicants in the first competition had been established just months before the application deadline, seemingly for the purpose of legitimizing the application.

We further recommend that all applicants be required to disclose in their applications all of the entities with which they propose to partner and to subcontract and the nature and extent of the work such entities will be performing. Only then can HUD truly judge an applicant's capacity and qualifications to perform the work and protect itself against unknowingly employing entities that may have poor track records in or have been previously disqualified from performing PBCA or other HUD work.

The National Council of State Housing Agencies
Questions and Recommendations on HUD's New PBCA Competition and Transition Issues

Questions About the Process Going Forward

- What is HUD's objective in this new PBCA competition? Is HUD's goal simply to cut the cost of the existing PBCA program and run the most efficient financial servicing system possible or is HUD also committed to maintaining and strengthening the financial and physical health of the properties? HUD should make its objectives known to applicants at the outset.
It is the Department's objective, through the PBCA NOFA, to offer a competitive process that will achieve significant cost savings, exceptional oversight and administration of the PBCA portfolio, and delivery of high quality products and services to residents of project based section 8 assisted housing and building owners.

- Will HUD participate in a give-and-take exchange with NCSHA on how to improve the process going forward? NCSHA and our member HFAs raised with HUD many of the issues that ultimately proved problematic in the first competition over the course of the development of that process, but HUD provided little opportunity for us to engage it in meaningful discussion of these issues.
HUD will not be offering formal opportunities for NCSHA or other interested parties to provide input regarding the NOFA. While HUD very much appreciates and values the suggestions NCSHA and others have provided, and is utilizing those suggestions where appropriate, HUD is confident that the NOFA will be a fair, open and improved process; and one that it should move forward in a expedited manner.

- Will HUD revisit NCSHA's request for a priority or at least some advantage to be given to qualified HFAs seeking to serve as PBCAs within their own states for reasonable fees? If the cost concern that led HUD to rebid this work in the first place is overcome, why not acknowledge the added value HFAs bring as mission-driven publicly accountable agencies, with sophisticated financial analysis and asset management skills, access to resources, and deep knowledge of their local markets?
While HFA's, as well as others, possess a variety of skills and knowledge that can be leveraged as value added beyond the ACC scope of work, HUD is committed to a fair and open NOFA and cannot give preference to HFA's that would disadvantage other applicants.

- Will HUD run the new competition as a procurement, a NOFA, or some other process? NCSHA asks that HUD reveal upfront its reasons for pursuing the course it chooses and its legal authority to do so.
The competition will be re-competed through a NOFA. The Department has chosen a NOFA as the vehicle for the re-competition because it provides a standardized, open and fair method with a long track record of success. The Department is authorized to offer NOFA's in a variety of areas, the PBCA program is one.

- How long will applicants have to respond to HUD's new invitation for proposals? NCSHA urges a reasonable response period, particularly if the process is significantly changed.
The timeframe from publication of the NOFA to application deadline is being considered and will likely be 30 days.
- Will HUD reveal its scoring of all applicants once it determines the winning bids? NCSHA believes that a fair and transparent process requires that this information be disclosed by HUD.
The HUD Reform Act requires that the scores of winning applicants be published. While there is no requirement that all scores be published, this option is under consideration.
- Will the course HUD follows allow for a meaningful appeals process? NCSHA believes strongly in the need for an appeals process, if for no other reason to give applicants an opportunity to expose errors in HUD's evaluation of their applications. We found it particularly disturbing that in the first competition HUD disqualified an HFA selectee after finding an error in its own scoring, yet if an HFA had found an error or other problem in its application's review, it had no appeals process available to it.
The Department is considering an appeals process.
- Will the new competition be open to any qualified bidder or only those that applied in the first competition? HFAs are concerned that competition will increase considerably in the new round, as potential applicants have access to so much information about bidders' applications and scores in the first competition.
It is the Department's objective, through the PBCA NOFA, to offer a competitive process that will achieve significant cost savings, exceptional oversight and administration of the PBCA portfolio, and delivery of high quality products and services to residents of project based section 8 assisted housing and building owners. In order to achieve this, the Department's position is that the NOFA must be open to any and all qualified applicants.
- How will HUD handle the fee issue in the new competition, given that so much is now known by likely bidders about the fees former selectees proposed, and those bidders are likely to attempt to undercut those fees, forcing former selectees to do the same? NCSHA asks HUD to consider setting a reasonable, standard fee based on a percentage of FMR and evaluating bids solely on the basis of applicant qualifications and experience to overcome this problem. NCSHA cautions HUD against simply using the prior winner's fee in a particular state, however, as HFAs believe some of those fees to be too low to cover the cost of quality work.
The NOFA will evaluate both cost and technical factors when evaluating applications; awards will not be based solely or primarily on cost.
- How will HUD evaluate the eligibility of the PHA applicant to perform the work? In the first competition, NCSHA believes HUD selected some PHAs that had no legal jurisdiction to serve as

PBCAs in the areas for which they were selected to do the work. For example, some local PHAs were selected to perform the work statewide and out-of-state PHAs were selected to do the work in some states.

This issue is under consideration and will be clearly defined in the NOFA.

- What process will HUD use to identify and disqualify PHAs with no experience or capacity, which seem to have been established simply to legitimize non-PHA applicants? NCSHA was disturbed to learn that in the last competition some PHA selectees had been established just weeks prior to the application deadline.

The specific process that HUD will use to evaluate experience, capacity, and other aspects of applicant's ability to meet the requirements of the ACC is being developed, and will be clearly defined in the NOFA.

- How will HUD ensure that the PHA is playing a meaningful role in the PBCA work? NCSHA is concerned that some PHAs simply fronted for non-PHAs to legitimize their applications.

The ACC is between the Department and the PHA. However, PHAs are free to partner with sub-contractors should they wish. HUD will evaluate the proposed organizational structure of the applicant to determine its ability to meet the requirements of the ACC.

- What is HUD seeking to achieve in encouraging private sector partners? Will public sector partnerships meet HUD's partnership test? NCSHA is concerned that HUD advantaged PHA applicants with private sector partners in the prior competition when many HFAs that proposed to do the work themselves brought stronger skills and experience.

PHAs are free to partner with either private sector or public sector subcontractors.

- Will HUD require applicants in the new competition to disclose all of their partners and subcontractors? NCSHA was troubled that HUD did not require such disclosures in the last competition, raising significant questions about how HUD was able to judge their capacity and qualifications and protect itself against unknowingly employing entities that may have poor track records in or have even been disqualified from performing HUD work.

Yes. HUD will require that applicants clearly define the organizational structures that will be responsible for meeting the ACC requirements. HUD will clearly define this requirement in the NOFA.

- How does HUD plan to weigh applicant experience in the scoring process? NCSHA is concerned that the first competition gave no weight to prior experience, ignoring the fact that many HFA applicants had performed as PBCAs for years in an exemplary manner, earning the maximum incentive fees permissible.

The scoring process that HUD will utilize to evaluate applicant experience is being developed, and will be clearly defined in the NOFA.

Finnerman, Doris S

From: Bodell, Nancie-Ann
Sent: Wednesday, May 30, 2012 11:11 AM
To: Finnerman, Doris S
Subject: FW: following up on PBCA meeting

From: Askew, Emily [mailto:Emily_E_Askew@omb.eop.gov]

Sent: Monday, February 06, 2012 2:30 PM

To: Bodell, Nancie-Ann

Subject: RE: following up on PBCA meeting

Hi Nancie-Ann,

Just wanted to touch base with you on the PBCA questions I had sent to Janet (see email on 1/25 below) – do you have any idea of when I can expect to hear back? Or is this something I should contact Janet about? It'd be helpful to get this soon so we can work through any additional questions before the official NOFA comes to us for review.

Thanks so much!

Emily

From: Askew, Emily

Sent: Tuesday, January 31, 2012 10:28 AM

To: Bodell, Nancie-Ann (NancieAnn.Bodell@hud.gov)

Subject: FW: following up on PBCA meeting

Nancie-Ann,

First, thank you SO MUCH for working with me to get these issues resolved. I really appreciate it, as always.

CJs: Per our conversation, I've attached a PDF version of the final FY13 approps language for PBRA – I could not convert this to Word, but I will try to do so again if I have an opportunity later today.

PBCAs: Below (in the forwarded email) are the PBCA questions I sent to Janet last week. In addition:

1. I believe that the CFR governing the emergency processing of PRA is available [here](#).
2. The two "Policy Priorities" that I thought may be worth considering (as an alternative to the "Job Creation" one) are below. As FYI, the full list of policy priorities is available starting on page 8 of the [HUD General NOFA](#). And to reiterate, I defer to HUD on which policy priorities they choose to pursue in the NOFA; I simply offer these for consideration in case they had not yet been considered.
 - a. Maybe "Expanding Cross-cutting Policy Knowledge"? Do any of the PBCAs collect any data?
 - b. Maybe "Using housing as a platform..."? Perhaps because of the inspections done by PBCAs?

I am happy to discuss any other portions of the CJ or PBCA NOFA at your convenience!

From: Askew, Emily

Sent: Wednesday, January 25, 2012 2:45 PM

To: Golrick, Janet M

Cc: Radzinschi, Lucas R.

Subject: following up on PBCA meeting

AR 1470

Hi Janet,

Thank you so much for taking the time to meet with us earlier this week. The meeting was very helpful to us in understanding the various aspects of the PBCA NOFA process, but there are few areas I'm hoping you can help us clarify:

- Background on PBCA process: One of the points raised in the meeting was that the process through which PBCAs have been competed has always been more similar to a NOFA. I'd appreciate if you could expand on this a little, perhaps providing some background on the prior rounds of competition.
- NOFA vs. Procurement: I'd also appreciate if you could provide some more information on the factors which led you to pursue the NOFA process, rather than a procurement process. Would doing a procurement reduce or increase the risk of protests and/or litigation compared to the planned NOFA process?

I'm still looking into the PRA's impact on the timeline, as we discussed, and I will get back you on that. In the meantime, if you could help us better understand these few points, I'd very much appreciate it. If it's easier in the interest of time to schedule a call, I'm happy to do so.

Thanks so much,
Emily

Emily E. Askew
Program Examiner, Housing Branch
Office of Management and Budget
202-395-5823

Finnerman, Doris S

From: Bodell, Nancie-Ann
Sent: Thursday, February 23, 2012 4:01 PM
To: 'Askew, Emily'
Cc: 'Radzinski, Lucas R.'; Opitz, John P
Subject: RE: follow-up questions on PBCA NOFA

Yes. John Opitz is available this afternoon and tomorrow to discuss. You can reach him directly at 708-2203 Ext. 5046. Copying John here also. Thanks

From: Askew, Emily [mailto:Emily_E_Askew@omb.eop.gov]
Sent: Thursday, February 23, 2012 3:03 PM
To: Bodell, Nancie-Ann
Cc: Radzinski, Lucas R.
Subject: RE: follow-up questions on PBCA NOFA

Hi Nancie-Ann,

Touching base on the cooperative agreement question below – we've reached out to our grants and procurement folks again, and we'd actually like to schedule a call between them and HUD's GC on this issue, hopefully for tomorrow. Do you think you could put me in contact with someone in GC so I can coordinate this?

Thanks so much,
Emily

From: Bodell, Nancie-Ann [mailto:NancieAnn.Bodell@hud.gov]
Sent: Thursday, February 23, 2012 1:20 PM
To: Askew, Emily; Radzinski, Lucas R.
Subject: FW: follow-up questions on PBCA NOFA

From: Askew, Emily [mailto:Emily_E_Askew@omb.eop.gov]
Sent: Wednesday, February 22, 2012 07:02 PM
To: Golrick, Janet M; Bodell, Nancie-Ann
Cc: Radzinski, Lucas R. <Lucas_R.Radzinski@omb.eop.gov>
Subject: follow-up questions on PBCA NOFA

Janet and Nancie-Ann,

Thanks for your patience as we move through the NOFA review over here. I think we're nearing the end of the road, but I do have some additional questions I need to ask based on conversations with our procurement and grant folks. I also wanted to follow-up on risk-based monitoring and on one of the responses provided by HUD below. I'll give you a call in the morning so that we can discuss timing and any questions.

Cooperative Agreement

- Were the 11 ACCs signed in 2011 considered to be grants, cooperative agreements, or procurements (or something else)? In the GAO proceedings, HUD said they were either grants or cooperative agreements. Were prior iterations of the ACC (such as the ones signed in 2011) subject to OMB Circular 102 (which governs grants and cooperative agreements), or to the Federal Acquisition Regulation (FAR), or to some other regulation or guidance? OMB Circular 102 has been codified as 24 CFR Part 85. Per a Preamble in the Federal Register relating, in part, to Part

85, it does not apply to Section 8 programs. 53 F.R. 8050 (Mar. 11, 1988) (Section 8 programs are “outside the Scope of A-102 and Part 85;” In all cases, the assistance is being provided in lower income families: the owner is merely the conduit for the Federal Financial Assistance. Accordingly, these programs are not appropriate for management under the uniform requirements of Part 85.”). So, no, the prior ACCs were not subject to OMB Circular 102. The FAR does not apply as the ACC is not a procurement contract. The ACC was not subject to regulations specifically addressing grants or cooperative agreements, but there are numerous references in the ACC indicating that performance must be in compliance with HUD regulations, handbooks, notices, and guidance and other requirements, as amended or revised from time to time.

- In reviewing the latest version of the ACC, there does not appear to be any reference as to whether the contract is subject to OMB Circular 102 or FAR. We’d like to discuss with HUD whether such a reference should be added. See above.
- In addition, the ACC also does not appear to require the awardee to adhere to the various program and NOFA requirements laid out in the NOFA. Although some of the requirements in the NOFA (e.g., Fair Housing) may be referred to in various places in the ACC, there is no explicit reference to the NOFA. What are HUD’s thoughts on including a reference like this in the ACC, perhaps under section 3.2 (“PHA Contract Administration Services”)?

Risk-Based Monitoring

- In the Cuts, Consolidation and Savings chapter of the Budget, we estimated that risk-based monitoring would save \$28 million in FY13, and \$69 million in FY12-FY16. Do you have estimates of how these projections (which were rough, I know) would change based on:
 - The required change to risk-based monitoring (excluding Mark-to-Market properties)
 - The proposed changes to the first two years (defining high-performing based only on MORs, and allowing only the MOR to be skipped for a max of only year)
- I know we’ve touched on this before, but I’d very much appreciate if you could explain the rationale for the proposed changes (nothing much, just a quick sentence or two). I understand that it has to do with the limited capacity of the field offices to administer this, but if you could provide just a bit more detail, it would be great.

Subcontractors

- I’m a bit confused by the response to my question on subcontractors below (see highlighted) – I think there may be some nuances lost in email, so I’m hoping we can discuss over the phone.

As I said, I’ll call in the morning to discuss – hopefully we can get these questions (particularly the risk-based monitoring ones) resolved as soon as possible. Likewise, I’ll review the NOFA as soon as I can, and get back to you. I know that this has been a long process, and I really appreciate your team’s responsiveness and hard work.

Thank you,
Emily

From: Bodell, Nancie-Ann [<mailto:NancieAnn.Bodell@hud.gov>]
Sent: Wednesday, February 22, 2012 4:40 PM
To: Askew, Emily
Subject: FW: comments on PBCA NOFA and ACC

Emily: Please see response below in bold. The NOFA and ACC will be sent over to you later today. Thanks. When you have a chance please call. I want to clarify something on the bids over 2%. Thanks

From: Brolin, Claire T
Sent: Wednesday, February 22, 2012 4:04 PM
To: Golrick, Janet M; Bodell, Nancie-Ann
Cc: Suiter, Lewis A; Hickman, Kerry E
Subject: RE: comments on PBCA NOFA and ACC

Answers are in **bold** below. They are ready with your approval to be sent to [Emily E Askew@omb.eop.gov](mailto:Emily_E_Askew@omb.eop.gov) and [Lucas R. Radzinschi@omb.eop.gov](mailto:Lucas_R.Radzinschi@omb.eop.gov).

From: Askew, Emily [mailto:Emily_E_Askew@omb.eop.gov]
Sent: Thursday, February 16, 2012 3:01 PM
To: Golrick, Janet M; Bodell, Nancie-Ann; Brolin, Claire T; Hickman, Kerry E
Cc: Radzinschi, Lucas R.
Subject: comments on PBCA NOFA and ACC

Hi everyone,

Thank you all for joining the call this afternoon, and for taking the time to address my questions and comments.

Attached are the NOFA and the ACC. As we discussed, I'd appreciate if you could send me a revised version of the NOFA for final review early next week (or whenever it's ready). If you'd like to discuss any of my comments or if anything is unclear, I'm happy to talk further.

In addition, there were a few issues that I'm hoping you can get back to me on directly:

- Risk-based monitoring:
 - As soon as you can, please send an updated estimate of cost savings based on the new process.
 - Also ASAP, I'd like to know how this affects our budget estimates for PBCAs in 2013. As you know, the requested set-aside of \$260 million was based in part on getting substantial savings from risk-based monitoring. Do we project that we will be able to fund all of the contracts with \$260 million?

We estimate that we will be able to fund all PBCA contracts with the \$260 million request for FY 2013, a savings of up to \$30 million.

- Scoring of rating factors: I'd appreciate if you could get back to me on how you decided to handle a couple of these points that I raised:
 - Changing awards of "two or zero" points

We are going to change these sections in the rating factors for award. The points will be 0, 1 or 2 rather than two or zero.

- Should 10 points be the minimum for the scaled fee score?

We can add that 0 points will be given for any requests at 2.01% or higher but there is no need to go from 0 to 30 in 2 point increments and break the fee percentages even smaller.

- After HUD requests a "final and best" fee, should the award be based on the lowest fee or the highest overall score?

Lowest fee. The top applicants if within 3 points are considered to be tied.

- Subcontractors in ACC: We have removed limits on the amount of work that can be subcontracted,

Yes, we are going to add back in the language that "when selecting a contractor, a PHA must ensure that the total number of Covered Units for which a contractor shall provide services shall not exceed thirty-three (33) percent of the total number of units in the Portfolio of All Active Project-Based Section 8 Contracts as published by HUD" because although PBCAs cannot cross state lines when applying, contractors may do so and this provision rather than the crossing state lines provision will limit them.

but we also removed requirements to report on subcontractors from the FTE statement, the "Change in Contractor" notification, and Annual Financial Operations Report. Is there a rationale for this?

The word subcontractor can remain removed from the NOFA and ACC, so that a procurement relationship with HUD is not implied. The provisions of the ACC weren't actually removed (just the word subcontractor).

Finally, as I mentioned, there are a few folks over here that need to be briefed on the NOFA before we can sign off. I'm trying my best to move that along, and I will get back to you on that as soon as I can. In the meantime, if there is anything I can do to help keep this process moving, please let me know.

Thank you so much!

Finnerman, Doris S

From: Bodell, Nancie-Ann
Sent: Wednesday, May 30, 2012 11:11 AM
To: Finnerman, Doris S
Subject: FW: Final ACC PBCA NOFA

From: Askew, Emily [mailto:Emily_E_Askew@omb.eop.gov]
Sent: Friday, February 24, 2012 2:48 PM
To: Bodell, Nancie-Ann; Golrick, Janet M; Brolin, Claire T
Cc: Radzinski, Lucas R.
Subject: RE: Final ACC PBCA NOFA

Hi everyone,

I have one main question on this, before I forward it on to others here for review. The changes made on page 14 do not appear to be consistent with the guidance we sent (pasted below). The revisions do mention Circular A-87, and I see that Circular A-133 is already mentioned on page 48. But we do not appear to reference or explain the exemption to A-102. Can you please clarify why?

Thank you!
Emily

Following OFFM's suggestion, the ACC should be revised to add:

- An explanation of the Section 8 exemption from A-102 and how it applies specifically to the PBCA cooperative agreement.
- An assertion that while the cooperative agreement is exempt from A-102, it is still subject to A-87 (cost principles) and A-133 (audit requirements).

For both of these, you may prefer to reference the Circulars by their locations in the CFR, which is fine as well.

From: Bodell, Nancie-Ann [<mailto:NancieAnn.Bodell@hud.gov>]
Sent: Friday, February 24, 2012 1:51 PM
To: Askew, Emily
Cc: Brolin, Claire T; Golrick, Janet M
Subject: Final ACC PBCA NOFA

Emily: Here is the final acc with the additions discussed during the 11:30 call and clarifying the scope of MORs covered under the risk based monitoring. Hopefully, this is the last piece for you to finalize your review. Thanks for your help.

Finnerman, Doris S

From: Bodell, Nancie-Ann
Sent: Friday, February 24, 2012 6:46 PM
To: 'Emily_E_Askew@omb.eop.gov'
Subject: Re: PBCA NOFA FINAL.docx

Thank you. I'm glad we have the chance to work together. Have a wonderful weekend.

From: Askew, Emily [mailto:Emily_E_Askew@omb.eop.gov]
Sent: Friday, February 24, 2012 06:17 PM
To: Golrick, Janet M
Cc: Radzinski, Lucas R. <Lucas_R_Radzinski@omb.eop.gov>; Bodell, Nancie-Ann; Brolin, Claire T; Hickman, Kerry E; Forrester, Althea M
Subject: RE: PBCA NOFA FINAL.docx

Hi Janet,

Assuming all the changes reflected in the most recent versions of NOFA and ACC are accepted, we're ready to go ahead and clear them. There have been lots of versions circulated, so to avoid confusion I've attached the versions we're clearing to this email – I have not made any changes since you sent them to me.

Thank you all for working with us and for responding to our questions and comments. I hope you have a great (and well-deserved) weekend!

Best,
Emily

From: Golrick, Janet M [<mailto:Janet.M.Golrick@hud.gov>]
Sent: Friday, February 24, 2012 5:48 PM
To: Askew, Emily
Cc: Brolin, Claire T; Hickman, Kerry E; Forrester, Althea M; Bodell, Nancie-Ann
Subject: RE: PBCA NOFA FINAL.docx

Thank you...and thank you again for your expedited review process...it is very much appreciated. We are currently doing the legwork needed to be able to announce the publication so once we get OMB approval, we can publish immediately.

Thanks again and have a great weekend!

From: Askew, Emily [mailto:Emily_E_Askew@omb.eop.gov]
Sent: Friday, February 24, 2012 5:39 PM
To: Golrick, Janet M
Cc: Brolin, Claire T; Hickman, Kerry E; Forrester, Althea M; Bodell, Nancie-Ann
Subject: RE: PBCA NOFA FINAL.docx

Hi Janet,

I want to give you an update on where we are at, as I know HUD is anxious to post the NOFA. I've asked some of the OMB folks on our call this morning to look over the revisions to the ACC, and I'm still waiting to hear from them. That's the last step in the process – I'll let you know as soon as I hear from them.

AR 1480

Thanks so much,
Emily

From: Golrick, Janet M [<mailto:Janet.M.Golrick@hud.gov>]
Sent: Friday, February 24, 2012 4:26 PM
To: Askew, Emily
Cc: Brolin, Claire T; Hickman, Kerry E; Forrester, Althea M; Bodell, Nancie-Ann
Subject: FW: PBCA NOFA FINAL.docx
Importance: High

As requested...thanks!

From: Forrester, Althea M
Sent: Friday, February 24, 2012 4:20 PM
To: Bodell, Nancie-Ann; Brolin, Claire T; Golrick, Janet M
Cc: Hickman, Kerry E; Suiter, Lewis A
Subject: RE: PBCA NOFA FINAL.docx

See attached. The language is on page 13

From: Bodell, Nancie-Ann
Sent: Friday, February 24, 2012 3:51 PM
To: Brolin, Claire T; Forrester, Althea M
Cc: Hickman, Kerry E; Suiter, Lewis A
Subject: RE: PBCA NOFA FINAL.docx

Great. Thanks Claire. Althea please send your addition of the exception language discussed with Emily back to Claire. Claire, please forward Althea's version to Emily at omb when you receive it and copy me and Janet. I need to leave for the day now. Thanks!

From: Brolin, Claire T
Sent: Friday, February 24, 2012 3:49 PM
To: Forrester, Althea M
Cc: Bodell, Nancie-Ann
Subject: PBCA NOFA FINAL.docx

Here is the version with tracked changes. I just double-checked it and still have to clean it up after you add your piece-claire



OFFICE OF THE GENERAL COUNSEL

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

August 10, 2011

John Formica, Esq.
Office of General Counsel
Procurement Law Control Group
United States Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Re: Protests of the Performance-Based Annual Contributions Contracts (PBCA)
Pursuant to HUD's Invitation for Submission of Applications: Contract
Administrators for Project-Based Section 8 Housing Assistance Payment
Contracts, issued on February 25, 2011.

Dear Mr. Formica:

This is to notify you that the U.S. Department of Housing and Urban Development (HUD) has determined that it will not make an award of Annual Contribution Contracts in the states subject to the above referenced protests filed with GAO between July 11, 2011, and August 10, 2011. At this time, HUD intends to evaluate and revise its competitive award process for the selection of Performance-Based Contract Administrators, and issue a new Notice of Funds Availability.

With this action, HUD believes that the protests are moot and respectfully requests that they be dismissed.

Sincerely,

A handwritten signature in black ink that reads "Linda Fallowfield".

Linda Fallowfield
Assistant General Counsel
Procurement Law Division
Office of General Counsel
U.S. Department of Housing and Urban
Development

AR 1482

1-4 Contract Administrators

- A. Subsidy contract administration involves a broad range of responsibilities, including program compliance functions to ensure that HUD-subsidized properties are serving eligible families at the correct level of assistance, and asset management functions to ensure the physical and financial health of HUD properties.
- B. HUD has primary responsibility for contract administration but has assigned portions of these responsibilities to other organizations that act as Contract Administrators for HUD. These Contract Administrators are generally housing agencies, such as State Housing Finance Agencies or local housing authorities. There are two types of Contract Administrators that assist HUD in performing contract administration functions.
 - 1. Traditional Contract Administrators. These Contract Administrators have been used for over 20 years and have Annual Contributions Contracts (ACCs) with HUD. Under their ACCs, Traditional Contract Administrators are responsible for asset management functions and HAP contract compliance and monitoring functions. They are paid a fee by HUD for their services.
 - 2. Performance-Based Contract Administrators (PBCAs). The use of PBCAs began as an initiative in 2000. Under a performance-based ACC, the scope of responsibilities of a Contract Administrator is more limited than that of a Traditional Contract Administrator. A PBCA's responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts. PBCAs are generally required to administer contracts on a statewide basis and have strict performance and reporting requirements as outlined in their ACC. *

1-5 Principles for Addressing Overlapping Federal, State, and Local Requirements*

A. General

In addition to complying with this handbook, owners must comply with other federal, state, and local laws applicable to the occupancy of multifamily housing properties. If other federal, state, or local laws conflict with HUD's requirements, owners must contact the HUD Field Office or Contract Administrator for guidance. Also, when addressing complex overlapping requirements, it is always prudent for owners to seek proper counsel.

B. Statutory Program Eligibility Requirements

Federal statutory program eligibility requirements cannot be overruled by state or local law.

ROGERS JOSEPH O'DONNELL

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202.347.8429 (f)

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Procurement Law Control Group
United States Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

B-406738.1; B-406738.2

**Comments of Assisted Housing Services Corp. and
North Tampa Housing Development Corp. on the Agency Report**

Dated: June 25, 2012

Rogers Joseph O'Donnell
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Dennis J. Callahan
Jeffery M. Chiow
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Attorneys for North Tampa Housing Development
Corp.

19492.131964 **AR 1748**

A Professional Law Corporation

JA300/AR1748



Section 8 Housing Assistance Payments Program

Project-based Section 8

Number: 14.195

Agency: Department of Housing and Urban Development

Office: Office of Housing-Federal Housing Commissioner

Program Information

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[Print](#)

Authorization (040):

United States Housing Act of 1937, Section 8(c)(9).

Objectives (050):

To provide rental assistance to very low income individuals and families enabling them to live in affordable decent, safe and sanitary housing.

Types of Assistance (060):

DIRECT PAYMENTS FOR A SPECIFIED USE

Uses and Use Restrictions (070):

This program is inactive. No new projects are being approved; however, tenants may apply for admission to projects with existing Section 8 assistance contracts. The assistance is paid by HUD to the owner of an assisted unit on behalf of an eligible family. The payment is the difference between the contract rent and the tenant rent. Assistance is currently available only on a renewal basis, i.e., projects currently assisted may receive a 1-year renewal, or multiple years, up to twenty years, upon expiration of the Section 8 contract.

Eligibility Requirements (080)

Applicant Eligibility (081):

No funding is available to new applicants. Funding is currently available only for the owners of record of projects with an existing expiring project-based Section 8 contract. The project must meet minimum decent, safe, and sanitary standards.

Beneficiary Eligibility (082):

Families currently receiving assistance as long as their income does not exceed 80 percent of area median income adjusted for smaller or larger families.

Credentials/Documentation (083):

Applications for new projects are no longer being accepted. Project must meet minimum decent, safe, and sanitary standards for HUD to renew the Section 8 contract. OMB Circular No. A-87 applies to this program.

Application and Award Process (090)

CONTACT INFORMATION

Website:

<http://www.hud.gov/offices/hsg/mfh/mfhsec8.cfm>

Regional or Local Office:

See Regional Agency Offices. Persons may contact local field offices listed in Appendix IV of the Catalog.

Headquarters Office:

Gail Williamson, 451 7th Street SW,
Washington, District of Columbia 20410 Email:
Gail.Williamson@hud.gov Phone: (202) 402-
2473 Fax: (202) 708-3104.

GENERAL INFORMATION

Assistance Types:

C - DIRECT PAYMENTS FOR A SPECIFIED USE

Applicant Eligibility:

35-Profit organization/ 44-Housing

Beneficiary Eligibility:

31 - Individual/Family

HISTORY

1998 (B): Section 8 Housing Assistance Payments Program_Special Allocations
2009: Section 8 Housing Assistance Payments Program

Preapplication Coordination (091):

Preapplication coordination is required. Environmental impact information is not required for this program. This program is excluded from coverage under E.O. 12372.

Application Procedures (092):

This program is excluded from coverage under OMB Circular No. A-102. This program is excluded from coverage under OMB Circular No. A-110. Project owner must notify HUD within 120 days of contract expiration that it wishes to renew the Section 8 contract.

Award Procedure (093):

Contract is renewed upon expiration.

Deadlines (094):

Not Applicable.

Range of Approval/Disapproval Time (095):

Approval given by date of contract expiration.

Appeals (096):

Not Applicable.

Renewals (097):

Subject to appropriations and owner's interest in renewing contract.

Assistance Consideration (100)

Formula and Matching Requirements (101):

This program has no statutory formula.

This program has no matching requirements.

MOE requirements are not applicable to this program.

Length and Time Phasing of Assistance (102):

1 year. See the following for information on how assistance is awarded/released: Funds are disbursed at amend rents and contract renewals anniversary dates.

Post Assistance Requirements (110)

Reports (111):

No program reports are required. No cash reports are required. No progress reports are required. The owner must submit to HUD within 60 days after the end of each fiscal year of the project, financial statements for the project audited by an Independent Public Accountant and other statements as to project operation, financial conditions and occupancy. Annual management and occupancy review.

Audits (112):

This program is excluded from coverage under OMB Circular No. A-133. The owner must permit HUD to review and audit the management and maintenance of the project at any time to assure the owner is meeting its obligation to maintain the units and related facilities in decent, safe, and sanitary condition.

Records (113):

The owner must reexamine the income and composition of all families at least once each year and prepare and furnish other information required under the Section 8 contract.

Financial Information (120)

Account Identification (121):

86-0311-0-1-604; 86-0316-0-1-604; 86-0164-0-1-604; 86-0319-0-1-604; 86-0303-0-1-604.

AR 1826

Obligations (122):

(Direct Payments for Specified Use) FY 10 \$9,574,433,640; FY 11 est \$9,967,000,000; and FY 12 est \$10,328,000,000

Range and Average of Financial Assistance (123):

Eligible tenants pay no more than 30 percent of their monthly adjusted income for rent.

Program Accomplishments (130):

Not Applicable.

Regulations, Guidelines, and Literature (140):

24 CFR 886 Section 8 Housing Assistance Payments Program - Special Allocations. 24 CFR 880 - Section 8 Housing Assistance Payments Program for New Construction; 24 CFR 881 - Section 8 Housing Assistance Payments Program for Substantial Rehabilitation; 24 CFR 883 - Section 8 Housing Assistance State Housing Agencies; 24 CFR 884 - Section 8 Housing Assistance Payments Program for New Construction Set Aside for Section 515 Rural Rental Housing Projects; 24 CFR 891 Subpart E - Loans for Housing for the Elderly or Persons with Disabilities; HUD Section 8 Renewal Policy Guide (1/15/08).

Information Contacts (150)

Regional or Local Office (151) :

See Regional Agency Offices. Persons may contact local field offices listed in Appendix IV of the Catalog.

Headquarters Office (152):

Gail Williamson, 451 7th Street SW, Washington, District of Columbia 20410 Email: Gail.Williamson@hud.gov Phone: (202) 402-2473 Fax: (202) 708-3104.

Website Address (153):

<http://www.hud.gov/offices/hsg/mfh/mfhsec8.cfm>.

Related Programs (160):

Not Applicable.

Examples of Funded Projects (170):

Not Applicable.

Criteria for Selecting Proposals (180):

Not Applicable.

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[User Guide](#) [For Help: Federal Service Desk](#) [Accessibility](#)

Formula and Matching Requirements: Not applicable.

Length and Time Phasing of Assistance: One year.

POST ASSISTANCE REQUIREMENTS:

Reports: The owner must submit to HUD within 60 days after the end of each fiscal year of the project, financial statements for the project audited by an Independent Public Accountant and other statements as to project operation, financial conditions and occupancy.

Audits: The owner must permit HUD to review and audit the management and maintenance of the project at any time to assure the owner is meeting its obligation to maintain the units and related facilities in decent, safe, and sanitary condition.

Records: The owner must reexamine the income and composition of all families at least once each year and prepare and furnish other information required under the Section 8 contract.

FINANCIAL INFORMATION:

Account Identification: 86-0319-0-1-604; 86-0164-0-1-604; 86-0311-0-1-604; 86-0316-0-1-604.

Obligations: FY 99 \$7,552,062,000; FY 00 est \$7,813,032,000; and FY 01 est \$7,919,305,000.

Range and Average of Financial Assistance: Eligible tenants pay no more than 30 percent of their monthly adjusted income for rent.

PROGAM ACCOMPLISHMENTS:

There were approximately 1.5 million families assisted in fiscal year 1999.

REGULATIONS, GUIDELINES, AND LITERATURE:

HUD Notice H98-34, "Contract Non-Renewal Notice"; CFR Part 886 - Section 8 Housing Assistance Payments Program_Special Allocations.

INFORMATION CONTACTS:

Regional or Local Office: Persons may contact local field offices listed in Appendix IV of the Catalog.

Headquarters Office: Department of Housing and Urban Development, Office of Multifamily Asset Management and Disposition, Program Management Division, 451 7th Street, SW., Washington, DC 20410. Telephone: (202) 708-3730.

Web Site Address: <http://www.hud.gov/progdesc/multindx.html>.

RELATED PROGRAMS:

14.126, Mortgage Insurance Cooperative Projects; 14.132, Mortgage Insurance Purchase of Sales-Type Cooperative Housing Units; 14.134, Mortgage Insurance Rental Housing; 14.135, Mortgage Insurance Rental and Cooperative Housing for Moderate Income Families and Elderly, Market Interest Rate; 14.138, Mortgage Insurance Rental Housing for the Elderly; 14.139, Mortgage Insurance Rental Housing in Urban Renewal Areas; 14.155, Mortgage Insurance for the Purchase or Refinancing of Existing Multifamily Housing Projects; 14.157, Supportive Housing for the Elderly; 14.181, Supportive Housing for Persons with Disabilities.

EXAMPLES OF FUNDED PROJECTS:

Projects with HUD-insured mortgages; projects with HUD-held mortgages; projects with non-insured mortgages; projects with Section 202 Direct Loans.

CRITERIA FOR SELECTING PROPOSALS:

AR 1833



Performance Based Contract Administrator Program

PBCA Program

Number: 14.327

Agency: Department of Housing and Urban Development

Office: Office of Housing-Federal Housing Commissioner

Program Information

[Back](#)
[Print](#)

Authorization (040):

United States Housing Act of 1937 , Section 8b1,3b6A.

Objectives (050):

The purpose of HUD's PBCA program is to implement the policy of the United States, as established in section 2 of the 1937 Act, of assisting States and their political subdivisions (e.g., PHAs) for aiding lower income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of the above reference section. The PBCA program furthers these policies by effectuating authority explicitly under section 8(b)(1) of the 1937 Act for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts. For the project-based subprograms authorized under Section 8, the 1937 Act authorizes HUD to enter into an ACC with a PHA, as defined in section 3(b)(6)(A) of the 1937 Act. The ACC is the contractual mechanism to support the PHA's public purpose in making assistance payments to Section 8 project owners. This program will provide assistance to PHAs for the administration of Project-Based Section 8 program within a State. The objective is to have a contract administrator for all states.

Types of Assistance (060):

Direct Payments for Specified Use

Uses and Use Restrictions (070):

HUD is authorized to enter into an annual assistance contract (ACC) with a PHA for the administration of Section 8 housing assistance payment (HAP) contracts through the Performance-Based Contract Administrator (PBCA) program. Under the ACC, the PHA will provide ongoing contract administration services for units receiving project-based Section 8 housing assistance.

Eligibility Requirements (080)

Applicant Eligibility (081):

HUD will accept applications to provide contract administration services for the 42 "States," which are listed in Appendix A of the program Notice of Funding Availability (NOFA). State is defined in the ACC as one of the fifty United States, the District of Columbia, the United States Virgin Islands, or the Commonwealth of Puerto Rico. Please note that there have been 11 PHAs selected for PBCAs in a previous competition. HUD has already entered into an ACC with those PHAs. Entities applying to serve as PBCA in more than one State must submit a separate application for each State for which it applies. See program NOFA for more information. HUD may enter into an ACC for the administration

CONTACT INFORMATION

Website:

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/sec8rfp

Regional or Local Office:

See Regional Agency Offices. Persons may contact local field offices listed on <http://hud.gov>.

Headquarters Office:

Deborah Lear 451 7th Street SW,
Washington, District of Columbia 20410.
Email: Deborah.k.lear@hud.gov Phone:
(202) 402-2768.

GENERAL INFORMATION

Assistance Types:

C - DIRECT PAYMENTS FOR A SPECIFIED
USE/C - Direct Payments for Specified Use

Applicant Eligibility:

13-State/ 44-Housing
21-Other public institution/organization/ 44-
Housing

Beneficiary Eligibility:

88 - Low Income

HISTORY:

2012: Performance Based Contract
Administrator Program
2012: Number changed from 14.007

Reports (111):

Annual management and occupancy review. Monthly, quarterly and an annual report to HUD. The owner must submit to HUD within 60 days after the end of each fiscal year of the project, financial statements for the project audited by an Independent Public Accountant and other statements as to project operation, financial conditions and occupancy. Cash reports are not applicable. Progress reports are not applicable. Expenditure reports are not applicable. Annual management and occupancy review. Monthly, quarterly and an annual report to HUD. The owner must submit to HUD within 60 days after the end of each fiscal year of the project, financial statements for the project audited by an Independent Public Accountant and other statements as to project operation, financial conditions and occupancy.

Audits (112):

This program is excluded from coverage under OMB Circular No. A-133. The owner must permit HUD to review and audit the management and maintenance of the project at any time to assure the owner is meeting its obligation to maintain the units and related facilities in decent, safe, and sanitary condition.

Records (113):

All program records must be kept by the PBCA for three years. During the three-year period, the PBCA can maintain the storage of the records as they determine to be appropriate, i.e. on site or in a storage area. The three-year period is consistent with the archiving requirements according to HUD Handbook 4350.5, Contract Administration, for non-performance based ACC. During the three-year period, HUD reserves the right to request documents that the PBCA may have available and which HUD determines to be critical to retain by HUD. Section 12 of the PB-ACC provides general guidelines for the maintenance of program records.

The owner must reexamine the income and composition of all families at least once each year and prepare and furnish other information required under the Section 8 contract.

Financial Information (120)**Account Identification (121):**

86-0303-0-1-604; 86-0319-0-1-604.

Obligations (122):

(Salaries) FY 11 Not Available; FY 12 est \$10,328,000,000; and FY 13 Estimate Not Available

Range and Average of Financial Assistance (123):

estimated \$20 million per month for entire program.

Program Accomplishments (130):

Not Applicable.

Regulations, Guidelines, and Literature (140):

24 CFR 886 Section 8 Housing Assistance Payments Program - Special Allocations. 24 CFR 880 - Section 8 Housing Assistance Payments Program for New Construction; 24 CFR 881 - Section 8 Housing Assistance Payments Program for Substantial Rehabilitation; 24 CFR 883 - Section Housing Assistance State Housing Agencies; 24 CFR 884 - Section 8 Housing Assistance Payments Program for New Construction Set Aside for Section 515 Rural Rental Housing Projects; 24 CFR 891 Subpart E - Loans for Housing for the Elderly or Persons with Disabilities; HUD Section 8 Renewal Policy Guide (1/15/08).

Information Contacts (150)**Regional or Local Office (151) :**

See Regional Agency Offices. Persons may contact local field offices listed on <http://hud.gov>.

Headquarters Office (152):

AR 1838

June 25, 2012

Robert K. Tompkins
202-457-6168
rtompkins@pattonboggs.com

Via Electronic Delivery (protests@gao.gov)

Mr. John Formica, Esq.
U.S. Government Accountability Office
Procurement Law Control Group
441 G. Street, N.W.
Washington, DC 20548

Re: B-406738 .3 and 406738.7
The Jefferson County Assisted Housing Corporation's Comments on the Agency Report

Dear Mr. Formica:

On behalf of our client, The Jefferson County Assisted Housing Corporation ("JeffCo"), we submit these Comments on the Agency Report filed by HUD¹ on June 13, 2012. These Comments are timely filed, and JeffCo stands by the grounds of protest set forth in its initial and supplemental protests. As set forth below, HUD's position, as set forth in the Agency Report, is fatally flawed and demonstrates that JeffCo's protest and its supplemental protest, as well as the related protests filed by other PHAs, must be sustained.

Introduction

As a preliminary matter, it is clear that HUD's re-characterization of the Performance Based Contract Administrator Annual Contribution Contracts ("PBCA ACCs") as "cooperative agreements" is nothing more than a *post hoc* decision made in the heat of litigation. As discussed below, HUD admits that it has no contemporaneous documents related to an analysis of the principal purposes of the PBCA ACC. Rather, the few documents it has produced, and the internal deliberations as reflected in the agency's privilege log, make it clear that HUD only took this position in early August 2011 as a means to avoid GAO protest jurisdiction and review. They also reveal that HUD decided to reissue the solicitation as a NOFA – a decision it announced in conjunction with its "corrective action" in the prior protest – before it had fully examined the issue. HUD's ensuing efforts to justify its use of a NOFA were nothing more than an attempt to rationalize its litigation posture and to find a path that would subject it to the least degree of accountability.

¹ Abbreviations of specific terms are set forth in JeffCo's original protest. References to JeffCo's exhibits to this submission will begin with Exhibit 10 and serve as a continuation to protest exhibits 1 through 9.

Exhibit

10

AR 1869



OCT 8 2004

MEMORANDUM FOR: Traditional Contract Administrators and Performance Based Contract Administrators

FROM: *Beverly J. Miller*
Beverly J. Miller, Director, Office of Multifamily Asset Management, HTG

Lanier W. Hylton
Lanier Hylton, Director, Office of Housing Assistance Contract Administration Oversight, HTC

Subject: Contract Administrator (CA)/Performance Based Contract Administrator (PBCA) Responsibilities on Projects Referred to the Departmental Enforcement Center (DEC)

The purpose of this memorandum is to emphasize the responsibility and obligation that Contract Administrators (CAs) and Performance Based Contract Administrators (PBCAs) have with respect to subsidized projects referred to the DEC because of unacceptable physical or financial conditions.

Enforcing Owner Compliance by Issuing a Notice of Default of a Housing Assistance Payment (HAP) Contract

On November 1, 2002, Multifamily Housing and the DEC executed a revised protocol to address HUD insured and/or subsidized properties in unacceptable physical condition. Under that protocol (copy attached), Multifamily Housing or the Real Estate Assessment Center (REAC) refers to the DEC properties in unacceptable physical condition, as reflected by the REAC physical inspection report. The protocol requires the DEC to contact the owner and issue a Notice of Regulatory Agreement Violation and, if the property is subsidized, a Notice of HAP Default, to demand corrective action. In most cases, the DEC will issue such notices without obtaining concurrence from the CA or PBCA. However, in some instances, where HUD does not have the authority to issue the Notice of Default, the Department will request your assistance in acting under your Annual Contributions Contract (ACC) to obtain the owner's compliance with its contractual obligation to meet the physical condition standards set forth in HUD regulation 24 C.F.R. §5.703.

CAs and PBCAs will process the DEC's requests for enforcement assistance by signing the Notice of HAP Default upon request. However, if the CA and PBCA have additional information about the property that may impact upon the issuance of a Notice of Default, the PBCA should immediately notify the DEC of that information through the Contract Administrator Oversight Monitor (CAOM) and the CA would deal directly with the Project Manager assigned to the property.

Thus, in those cases where the ACC gives the CA or PBCA exclusive authority to issue a Notice of HAP Default, the DEC will prepare a Notice of HAP Default and forward it to the CA/PBCA for a signature, copying the CAOM, or Project Manager if CA, with the transmittal letter and the notice. The notices require an owner to take the following corrective action within 60 days of the date of receipt of the notice:

1. Conduct a survey identifying the physical deficiencies at the project;
2. Correct the physical deficiencies at the project including, but not limited to, those deficiencies identified in the REAC inspection; and
3. Provide an enclosed certification along with the completed survey to the appropriate HUD office.

The notices also advise the owner that the property will be re-inspected by REAC following the 60-day cure period. Upon re-inspection, if the property inspection report reveals non-compliance with HUD's physical condition standards, the DEC will forward recommendations to Multifamily Hubs and Program Center Directors which may include a recommendation that the PBCA/CA suspend, abate or terminate the subsidy as allowed under the contract

CA and PBCA Procedures on Open DEC referrals

You are also reminded that coordinate with your CAOM or Project Manager before taking any of the following actions when a project has an open referral to the DEC. (The DEC status can be found in REMS.)

1. Conduct Management and Occupancy Reviews
2. Adjustment of Contract Rents
3. Renewal of HAP Contract
4. Follow-up on Results of Physical Inspections

Should you have any questions concerning issues discussed in this memorandum, please contact Deborah Lear, Deputy Director, Office of Housing Assistance Contract Administration Oversight, at (202) 708-0614, ext. 2768.

Attachment

cc: Multifamily Hub Directors
Multifamily Program Center Directors
Contract Administration Oversight Monitors
Multifamily Project Manager
DEC Operations Division Director
DEC Satellite Office Directors
DEC Analysts

AR 1871

**U.S. Department of Housing and Urban Development
Enforcement Protocol concerning Physical Referrals
Office of Housing, Multifamily Housing
Office of General Counsel, Departmental Enforcement Center**

This protocol sets out the responsibilities of the Office of General Counsel, Departmental Enforcement Center (DEC) and the Office of Multifamily Housing (MF) for multifamily housing physical inspection referrals to the DEC. It supersedes prior physical inspection protocols. Both DEC and MF recognize the importance of this initiative and will work together cooperatively to resolve questions and issues that may arise under this protocol. Telecommunication (via email and facsimiles) between the parties is encouraged to expedite handling of these referrals. All parties agree to make timely REMS entries concerning the multifamily properties so that HUD will have a complete and accurate administrative record.

Revised referral procedures

Effective November 1, 2002, all multifamily properties receiving a new Real Estate Assessment Center (REAC) physical inspection score below 60, released on or after November 1, 2002, will be referred to the DEC. This revised procedure does not apply to properties that scored between 31-59 prior to November 1, 2002 and that have not already been referred to the DEC for enforcement action. This revised protocol does however apply to all PASS referrals presently in the DEC that are not under a corrective action plan as of November 1, 2002.

Properties scoring 30 and under will continue to be automatically referred to the appropriate DEC Satellite Office (SO) through the REMS system.¹ Properties scoring between 31 and 59 inclusive, will be referred to the DEC as physical elective referrals. *Within 5 business days of the release of the REAC inspection, the Multifamily Hub must make a Headquarters elective referral in the REMS system, or submit a memorandum justifying withholding the referral to the Director, Office of Asset Management.*²

The Multifamily Hub Director may exercise discretion to withhold based upon good cause. Some examples of good cause include:

- The Hub has decided to terminate Section 8 and relocate tenants and vouchers are necessary and the Hub needs additional time to develop a plan based upon local considerations.
- The Hub expects to issue a 21-day letter to commence foreclosure proceedings within the next 30 days.
- The owner has notified the Hub of its intention to prepay the mortgage within 90 days.

¹ Multifamily, DEC and REAC will work expeditiously to change the current letters that are sent to owners based on differing scores (30 and under, between 31-45, and 46-59) to avoid needless owner confusion about this revised process.

² The memorandum should be in writing until other procedures can be implemented.

- The Hub has received an approvable application for transfer of physical assets to a new owner with sufficient funds to immediately repair the property beginning within 90 days.
- The project note is scheduled for a Note Sale. (In this situation, the MF staff should review the financial statements to determine if there is any ability to offset funds at the note sale.)
- The owner has not renewed Section 8 subsidies and the contract will expire within 90 days and there is no mortgage insurance.
- The owner is in the process of refinancing the mortgage with HUD insurance within the next 90 days, and adequate funds will be escrowed, and repairs will be required as part of the transaction.

Within 5 business days of making the referral of the property to the DEC, MF will provide the DEC with the following documents:³

- All business agreements, including: the Regulatory Agreement, the Section 8 HAP contract(s), the Mortgage, the Note, Use Agreements, and Interest Reduction Payment Agreements, etc.
- Form HUD-2530 for the property owner and management agent, and the date and reasons for flagging the owner or agent in the APPS/2530 system.
- All repair plans executed within the past 12 months and any repair plan that has not been completed.
- All related or essential correspondence between HUD and the owner (and the owner's agent) within the past 12 months.
- All owner responses and certifications that repairs have been completed on the property's most recent corrective action plan or MIO.
- Any documentation of inspections, site visits or management reviews within the past 12 months that are not reflected in REMS *with narrative documentation*. (However, everything should be in REMS.)
- The Project Manager responsible for the project in MF must list any pending requests for the property for rent increases, or other actions.
- A statement from the Project Manager responsible for the project in MF that the data in the REMS system is accurate and current as of the date of the referral.
- A statement from the supervisor that REMS has been reviewed and that the information is accurate and complete. As these properties are physically substandard, their referral is a top priority for the Multifamily Program Center.

DEC procedures upon receiving the new physical referral

The DEC will consider all physical referrals from MF as its top priority work. Although the DEC staff is encouraged to consult and confer with MF staff on these referrals, it is understood that while a physical referral is in the DEC, the DEC will have primary responsibility for dealing with the owner regarding the property's physical condition. If the DEC staff recommends that MF take certain actions regarding a

³ If the DEC SO requests additional information from MF after its initial review, MF agrees to provide the DEC SO with additional documentation within 5 business days of the request.

property's reserve funds (such as release of reserves for replacement or residual receipts), MF agrees to expeditiously process such requests within 5 business days of receiving the owner's application.

Upon receiving the referral in its REMS queue, each DEC SO will immediately assign the referral to an analyst and an attorney. Upon receiving the referral, the analyst will notify the Project Manager responsible for the project in MF of his/her assignment so that the Project Manager will send the applicable documents directly to the analyst's attention.

Abbreviated review of REMS and documents

The DEC SO analyst will review the data contained in the property's REMS database and all documents received from Housing. This review will include an abbreviated analysis of the property's financial condition so that the DEC SO can assess whether project funds are available for repairs.

If the property has also been flagged for enforcement of financial violations, or if the review of the file reveals possible diversions of assets, the DEC SO will strive to include the financial violations in any Notice of Violation (NOV) letter it issues. However, if the review of the financial issues involves a significant resource and time allocation, the DEC SO will not delay the handling of the physical referral while it evaluates the financial matters. If the owner has failed to file required financial statements, the DEC SO will include that failure to file as an additional requirement for the owner to cure. The DEC SO will contact the owner to set up a meeting, as outlined below, to discuss the remediation of the project's physical needs. It is the DEC's policy to use its best efforts to complete these steps no later than 10 business days from receiving the documents from Housing.

If the owner refuses to meet

In cases where the owner refuses to meet, or agree to a phone conference with the DEC SO staff, or otherwise shows an unwillingness to cooperate, the DEC SO should issue a Notice of Violation (NOV) letter without first meeting with the owner. If the owner responds to the NOV, then the referral will be handled under the applicable process noted below. However, if the owner fails to respond within the time set out in the Notice of Violation, the DEC SO will then close the physical referral with a memorandum to the Hub Director. The close out memorandum will suggest the appropriate action for Multifamily to take against the owner. The DEC SO will include a proposed Notice of Default with its close out memorandum to the Hub Director. The Hub Director will be responsible for concurring or nonconcurring with the SO's recommendation. The Hub Director will proceed with the most appropriate option available to adequately deal with the circumstances.

DEC SO meeting with the owner.

SO staff will strive to meet with the owner of the property no later than 15 business days after receiving the documents from Housing.⁴ Prior to the meeting, the analyst will work with the attorney to prepare an NOV letter to be hand delivered to the owner at the meeting.⁵ The NOV will be based solely on the property's substandard condition, unless other violations, such as the owner's failure to file required annual financial statements, or misappropriation of assets are noted in the REMS system and are apparent and can be easily incorporated into the NOV.

At the meeting with the owner, the DEC SO will serve the owner with the NOV. The DEC SO will inform the owner of the following:

- The owner will have 60 days *from the date of the meeting* to repair the property.
- The owner must then certify to the completion of the repairs.
- REAC will then re-inspect the property to determine compliance after the 60-day period or upon owner certification of the completion of repairs, which ever comes first.
- If the property scores 60 or above on the REAC re-inspection, then HUD will accept the score as evidence of the owner's corrective action.
- If the property again scores under 60, however, then the DEC SO will prepare a Notice of Default under the Regulatory Agreement, HAP Contract, or other business agreements, and forward the Notice of Default with its close out memorandum to the Hub Director.

In all cases, the owner should be warned that if the property again scores under 60, that the consequences may include foreclosure or termination of subsidy. If the owner is not confident of its ability to achieve a score of 60 or above, they should immediately explore alternatives such as a transfer of the physical asset, out-year OMHAR restructuring, prepayment, refinancing, etc., to forestall foreclosure or termination of subsidy. Otherwise, they will be subject to enforcement action and/or possible loss of the property or termination of subsidy.

Possible owner responses.

In response, the owner may agree to repair the property within 60 days (with or without any HUD approval for project funds), the owner may refuse to repair the property within 60 days, or the owner may ask for more time to repair the property.

⁴ In situations where numerous referrals are received simultaneously, however, DEC Operations may need to reassign work between Satellite Offices or may otherwise need additional time to evaluate the referral before meeting the owner. The Hub and Program Center should be advised of any such assignments.

⁵Or, if the meeting is by phone, the NOV will be faxed and/or express mailed to the owner.

Owner agrees to repair.

If the owner agrees to repair the property within 60 days and does not seek any action on HUD's part, such as releasing reserves for replacement, the DEC SO will immediately ask MF to order a REAC re-inspection to take place as soon as possible 60 days after the meeting with the owner.⁶

Owner agrees to repairs but needs HUD action for funding repairs.

If the owner agrees to repair the property within 60 days but requires disbursements from the reserve for replacement or residual receipts accounts as part of its repairs, the DEC SO will contact the MF Project Manager via email to determine whether the use of the reserves for such repairs is acceptable. The DEC SO will immediately ask MF to order a REAC re-inspection to take place as soon as possible 60 days after the meeting with the owner. Where HUD has to approve any part of the owner's plan, the plan must be presented in writing to the DEC immediately. The 60-day time clock will continue to run based upon the meeting date.

Owner agrees to repairs but is unable to complete repairs in 60 days.

If the owner agrees to repair the property but is unable to do so within 60 days and seeks an extension of time, the SOD may choose to reject the owner's request for more time. In such a case, the owner will still have the opportunity to repair the property within 60 days. The DEC SO will immediately ask MF to order a REAC re-inspection to take place as soon as possible 60 days after the meeting with the owner.

In any case involving a request for a longer repair time than the 60-day period, the owner must demonstrate its capacity to fully fund the required repairs. If the SOD in his/her discretion, recommends allowing the owner to take more than 60 days to repair the property, the SOD must prepare and send a memorandum of recommendation to the Hub Director. That memorandum will explain the basis for the extension. The Hub Director will be responsible for submitting the request to the Director of Multifamily Asset Management. If MF agrees to allow the owner a longer time to repair the property, then the owner will have the HUD approved time frame to complete repairs. The DEC SO will immediately ask MF to order a REAC re-inspection to take place as soon as possible after the extended completion date. If MF denies the request for an extension of time to repair the property, it will notify the owner and the DEC SO of this denial. If denied the extension request, the owner will be expected to complete the repairs within the original 60-day time frame from the meeting. The DEC SO will immediately ask MF to order a REAC re-inspection to take place as soon as possible 60 days after the meeting with the owner.

⁶ If the owner claims that it has completed all repairs, then the DEC SO will obtain the prescribed certification from the owner so stating. DEC SO staff will immediately ask MF to order a REAC re-inspection to take place as soon as possible.

Owner refuses or admits that it cannot repair the property.

If the owner cannot or will not repair the property, the DEC SO should advise the owner of possible alternatives to foreclosure, such as a transfer of the physical asset, out-year OMHAR restructuring, prepayment, refinance, etc. However, the NOV will be issued. If the owner does not respond to the NOV, then the DEC SO will close the referral with its recommendations to MF concerning the appropriate action to be taken against the property.

If the owner shows a willingness to work on alternatives after receiving the NOV, the SOD will consult with the Hub Director to determine whether there are any viable alternative dispositions to the property. If the Hub Director agrees that alternatives are appropriate, the SOD will prepare and send a memorandum to the Hub Director, explaining the recommendation.

DEC SO actions upon receipt of REAC re-inspection score.

Within 10 business days of receiving the REAC re-inspection score, the DEC SO will take the following action:

- If the property scores 60 or above, the DEC SO will close the physical referral with a letter to the owner (copying MF) and return the property to Multifamily for regular servicing.
- If the property scores under 60, the DEC SO will close the physical referral with a memorandum to Hub Director containing a recommendation concerning the appropriate action for Multifamily to take against the property. The DEC SO may include a proposed Notice of Default with this recommendation. Such recommendations may include issuances of the 21-day foreclosure notice if the mortgage is HUD-held, notification to the mortgagee that the mortgagor is in default and instructions to the mortgagee to accelerate the outstanding indebtedness of an insured mortgage, abatement of the Section 8 contract and relocation of tenants, etc. Multifamily Housing will decide whether it wishes to implement the DEC's recommendation. The Hub Director will submit the memorandum to the Director, Multifamily Asset Management with his or her recommendation.

Where appropriate, the Satellite Office may also recommend enforcement actions against the property owner, including referrals for Program Fraud Civil Remedies Act violations, referrals for civil money penalties, debarments or other administrative sanctions. Such actions may be handled by other divisions within the DEC and will not delay any actions taken against the property.

Amendment of September 27, 2002 memo

Under the processes set out in Beverly Miller's memorandum to Multifamily Housing staff on September 27, 2002, MF staff was to contact all owners of properties where the owner had submitted a corrective action plan but HUD had not approved the plan. *In situations where the owner submits a certification that the property is fully repaired and a REAC re-inspection scores the property below 60, Multifamily Housing will not refer the physical referral to the DEC for further review and/or meetings with the owner.* Rather, Multifamily Housing will take immediate action against the property, similar to that described above. However, Multifamily Housing will continue to refer that owner to the DEC for possible debarment, civil money penalties or false claims enforcement action.

Need Signature Blocks for

Frederick Tombar, III and John Gant, DEC

Exhibit

11

AR 1879



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Special Attention of

All Multifamily Hub Directors
All Multifamily Program Center Directors
All Multifamily Operations Officers
All Multifamily Directors of Project Management
All Multifamily Field Counsel
All Contract Administrators

Notice H2010-04

Issued: January 22, 2010

Expires: January 31, 2011

Cross References:

Subject: Revised Protocol for Placing a Flag in the Active Partners Performance System (APPS) When a Property Receives a Physical Inspection Score Below 60 but Above 30

I. Purpose

This Notice revises the current protocol for placing flags in the Active Partners Performance System (APPS) when a property receives a physical inspection score that is below 60 but above 30. The revised protocol takes effect as of the date of this Notice. Properties that receive a physical inspection score of 30 or below will continue to be automatically referred to the Departmental Enforcement Center (DEC) and a flag will automatically be recorded in APPS.

II. Background

It has become clear that the current protocol requiring that a flag be placed in APPS when a property receives a physical inspection score that is below 60 is not accomplishing the results it was designed to achieve. At present, a flag is placed in APPS when a property receives a physical inspection score that is below 60 to alert HUD staff that there is a potential risk that should be evaluated when a participant applies to do new business with the Department. The current protocol also dictates that a Hub or Program Center should resolve the flag if the property receives a physical inspection score of 60 or above after it is re-inspected. However, in many cases, the current protocol actually hinders new business from taking place because the Department cannot complete a timely re-inspection of the property even though the Owner has certified that he or she has identified all deficiencies and completed all repairs.

AR 1880

The revised protocol, as outlined below, will help ensure that any flags placed in APPS after a property receives a first physical inspection score that is below 60 but above 30 are a true indicator of potential risk.

III. The Revised Protocol

As of the date of this Notice, Hub and Program Center staff will no longer be required to place a flag in the APPS system when a property receives a physical inspection score below 60 but above 30 on the first inspection. Instead, the Hub or Program Center will take the following actions:

The New Protocol for Physical Inspection Report Scores from 31 – 59

The Hub or Program Center will not place a flag in APPS but the Hub Director or his or her designee will strive to meet with the owner in person or by telephone and issue a notice of violation and/or notice of default of a business agreement(s) for substandard physical condition within 10 days of the release of a physical inspection report with a score below 60 but above 30.

- a. The Hub Director or his or her designee will meet with the Owner in person or by telephone to inform him or her that the inspection report identified serious physical deficiencies that demonstrate that the Owner is in default or violation of one or more business agreements and what actions may result if he or she fails to take the necessary corrective action. The Hub Director will also issue a notice of violation or notice of default of a business agreement(s). The notice of default or violation will inform the Owner that he or she: (1) must conduct a survey of the entire project and identify all physical deficiencies; (2) must correct all of the physical deficiencies at the project, including but not limited to, those deficiencies identified in the REAC inspection; and, (3) must execute and deliver the "Project Owner's Certification that the Physical Condition of the Project is in Compliance with HUD Contracts and the Physical Condition Standards of 24 C.F.R. § 5.703" and the comprehensive survey to the HUD Office cited in the notice (see attachment 1). The notice of default and/or violation must also inform the owner that HUD's Office of Multifamily Housing will flag the owner and other parties responsible for the subject of the notice in HUD's APPS if the owner does not submit the "Project Owner's Certification" within the 60-day timeframe specified in the notice.
- b. If the owner submits the "Project Owner's Certification" within the designated timeframe, the Hub Director or his or her designee(s) will not place a flag in APPS and inform the Business Relationships and Special Initiatives Division, Office of Asset Management, that the project will be subject to the annual inspection process and be inspected by the mortgagee or bid out in a Reverse

Auction on or about the new ideal date the following year.¹ If the property receives another score below 60 the following year, the Hub Director or his or her designee must place a flag in the APPS system, issue a new notice of violation and/or default, and order a new inspection through the Business Relationships and Special Initiatives Division, Office of Asset Management. The new inspection will be scheduled as soon after the end of the 60 day cure period referenced in the notice of violation and/or default as possible. If upon re-inspection the property once again receives a score that is below 60, the Hub or Program Center must once again flag the Owner in APPS and complete a Compliance, Disposition, and/or Enforcement (CDE) plan which recommends what actions should be taken to obtain owner compliance with the terms of all business agreements and submit it to the Business Relationships and Special Initiatives Division, Office of Asset Management in Headquarters for approval.²

- c. If the Hub or Program Center does not receive the "Project Owner's Certification" within the 60-day timeframe, the Hub Director or his or her designee(s) must place a flag in APPS and request a re-inspection of the property through the Business Relationships and Special Initiatives Division, Office of Asset Management, in Headquarters. The Business Relationships and Special Initiatives Division, Office of Asset Management, will strive to ensure that the property is re-inspected as soon after the end of the 60 day cure period referenced in the notice of violation and/or default as possible. If upon re-inspection the property once again receives a score that is below 60, the Hub or Program Center must once again flag the Owner in APPS and submit a Compliance, Disposition and/or Enforcement (CDE) plan which recommends what actions should be taken to obtain owner compliance with the terms of all business agreements to the Business Relationships and Special Initiatives Division, Office of Asset Management in Headquarters for approval within 30 days of the release on the last inspection report. The Business Relationships and Special Initiatives Division will strive to review and approve all CDE plans within 30 days of receipt.

In order to ensure that follow-up inspections are conducted at the appropriate time, the Hub Director or his/her designee must provide the Director, Business Relationships and Special Initiatives Division, Office of Asset Management with a bi-weekly report by email. This report will be used to ensure that the properties in question are inspected at the appropriate time. The report must list all of the properties in the Hub Director's jurisdiction that were issued a notice of violation and/or default within a two week period and provide all of the information included on attachment 2. The subject line of the email must read "Hub Name – Bi-weekly Re-Inspection Report." The bi-weekly report will be due on the first Monday after the end of every time and attendance

¹ The Hub Director retains the authority to request that a physical inspection be scheduled at anytime if he or she determines that there is good cause for doing so, such as tenant complaints, code violations, poor past performance, below average or unsatisfactory Management and Occupancy Review ratings, etc.

² An Office of Asset Management memorandum dated April 7, 2003, captioned, "Under 60 Compliance – Disposition and Enforcement," discusses some of the enforcement actions that may be taken to obtain owner compliance as well as what disposition options are available if the owner refuses to comply with the terms of all business agreements.

reporting period.

Administrative Procedures for Processing Physical Inspection Scores Above 30 but below 60 if the Score was Released Before the Date of this Notice.

If a property received a physical inspection score that was below 60 but above 30 before the date of this Notice and the Hub or Program Center has already made an elective referral to the DEC, then the Hub or Program Center should continue to process the referral using the protocol that was in effect before the date this Notice was issued. In cases where a property received a physical inspection score that was below 60 but above 30 before the date of this Notice and the Hub or Program Center has not made an elective referral to the DEC, then the Hub or Program Center should remove any flags that were placed as a result of the physical inspection score and follow the new protocol outlined above.

It should be emphasized that this change to the protocol only applies to physical inspection scores that are between 31 and 59. For first inspection scores that fall below 31, there is no change in protocol. If you have any questions regarding the attached guidance, please contact the Office of Asset Management, Business Relationships and Special Initiatives Division at (202) 402-2629. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information relay service at (800) 877-8339.

The information collection requirements referenced in this Notice have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) for approval. In accordance with the Paperwork Reduction Act, 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 currently valid OMB control number.

Attachments

David H. Stevens
Assistant Secretary for Housing -
Federal Housing Commissioner

Distribution: W-3-1,

AR 1883

Exhibit

12

AR 1884

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON DC 20410-8000



OFFICE OF THE ASSISTANT SECRETARY
FOR HOUSING-FEDERAL HOUSING COMMISSIONER

January 16, 2003

MEMORANDUM FOR: All Owners, Agents and Contract Administrators, Performance
Based Contract Administrators, Rural Housing Service

Beverly J. Miller

FROM: Beverly J. Miller, Director, Office of Multifamily Asset Management

SUBJECT: Properties With Inspection Scores Under 60 Points

The Office of Housing has revised its operating procedures as they relate to properties which receive a physical condition assessment score less than 60 points. The revised procedures concentrate on a specific class of properties and clearly focus attention on the owner and what the owner must do. If the owner cannot or will not improve conditions, then HUD will pursue action(s) to ensure the properties are decent, safe, sanitary, and in good repair.

Field Offices and the Departmental Enforcement Center received instructions to proceed according to these procedures on November 1, 2002.

The administrative handling of properties following the inspection is altered as described below.

Revised Administrative Procedures For Inspections That Score Less Than 60 Total Points

All multifamily property inspections that score below 60 points and are released on or after November 1, 2002, will be referred to the DEC¹. The revised protocol also applies to all PASS property inspection referrals presently in the DEC that are not under a corrective action plan as of November 1, 2002. The revised protocol replaces the following sections in the latest field guidance issued May 24, 2001:

1. Page 3 -- Property Scoring 46 to 59 Points;
2. Page 5 -- Property Scoring 31 to 45 points; and
3. Page 6 -- Property Scoring 30 or Below

¹ Some property owners supplied improvement plans to the field offices between June 1 and November 1. In cases where inspection scores were less than 60 points the field offices will be contacting owners to discuss the property condition, a new inspection and the possible actions by HUD should the new inspection not score above 60 points.

AR 1885

Exhibit

13

AR 1890



MOR FREQUENTLY ASKED QUESTIONS

The responses to these questions are organized in order of the form HUD-9834's format. As additional questions/responses are added, they will be added to the bottom of each section and the date above will reflect the date of the revision. **This document has been updated with additional questions and responses highlighted in blue.** For some of the questions and answers below, the term "Reviewer" refers to all Reviewers unless otherwise specified.

A. INSTRUCTIONS:

1Q. What specifically can we require from the Owner as part of our Desk Review? Part A under the instructions states "other documents." Therefore, this new form is unclear.

1A. Completion of the desk review is conducted independent of input from the owner. The Desk Review section is used to assist the Reviewer in preparing for the review by compiling and reviewing relevant project information prior to the on-site review. The term "other documents" refers generically to any pertinent documentation found in the project files, HUD systems and or reports.

2Q. Section C of the instruction page indicates that the HUD office should receive copies of reports with a below average or unsatisfactory rating. We currently also send a copy of the report to the mortgagee if the rating is below average or unsatisfactory. Is this still required?

2A. No.

3Q. In Part C right before the last two bullets is an "*" which states "A copy of the completed Management Review Report, form HUD-9834 and supporting documents must be maintained in the project file". In the case of where the PBCA is the contract administrator does this mean a copy needs to be also in HUD's project file or just in the PBCA's project file?

3A. If the review is conducted by a PBCA, copies of the Management and Occupancy Report (MOR) and supporting documents should be maintained in the PBCA's project file. If however, the property receives a below average or unsatisfactory rating, the PBCA is required to forward a copy of the MOR to the HUD office for their records as noted on the MOR instruction page.

4Q. Section C of the instruction page indicates that findings **should** include the condition, criteria, cause, and effect, and required corrective action. Since the instruction does not say **must** include, may we assume that including the cause and effect is optional?

and/or lead hazard control plan) that would enable the Reviewer to make a determination of lead-based paint compliance.

If the owner is not in compliance resulting in lead-based paint findings, Reviewers must document the finding on the Summary Report and cite the lead-based paint regulation (24 CFR Part 25).

6Q. What is the process for PBCAs/TCAs when a finding for lead-based paint compliance is issued?

6A. If PBCAs/TCAs determine that the owner/agent is in noncompliance with HUD's lead-based paint requirements, the PBCA/TCA must document the finding on the Summary Report and cite the lead-based paint regulation (24 CFR Part 25). If an owner/agent is uncooperative in resolving the lead-based paint finding, the PBCA/TCA must notify the HUD office for appropriate follow-up and/or enforcement action.

7Q. What is the process for HUD staff when an owner does not correct the finding?

7A. HUD staff would be responsible for flagging the owner/agent in the Active Partners Performance System (APPS), and if necessary, referring to Office of Healthy Homes and Lead Hazard Control for appropriate enforcement action.

8Q. What if an owner did not participate in HUD's "Big Buy" program and the lead results are not tracked by REAC? How would the Reviewer obtain lead-based paint inspection and result information?

8A. The HUD Project Manager would be able to obtain information for all lead-based paint properties (including those that did not participate in HUD's "Big Buy") by accessing the Lead-Based Paint Monitoring and Tracking Report.

9Q. If a property is a 236 with Section 8 units, does the CA include 236 units in the sample if EH&S items were noted in those units?

9A. No. CAs would only sample the Section 8 units.

3. PART C – MAINTENANCE AND STANDARD OPERATING PROCEDURES

1Q. Question 7 states "Is a HUD-approved Energy Conservation Plan required?" What properties are now required to have an Energy Conservation Plan?

1A. (UPDATED RESPONSE) The Energy Conservation Plan applies to the following:

- 1) A project assisted under the Section 236 interest reduction program, including State Agency non-insured projects, 221(d)(3) Below-Market Interest Rate (BMIR) program, or the Rent Supplement program.
- 2) A project that was constructed with a direct loan more than 15 years ago under the Section 202 Program for Housing for the Elderly or Handicapped.
- 3) A project assisted under the Section 8 Housing Assistance Payments program after conversion from assistance under the Section 236 Rental Assistance Payments Program or the Rent Supplement program.

ACC FOR NOFA REVISIONS

- PBT #1 Management and Occupancy Reviews (MORs)
 - **DELETED:** Requirement to conduct a MOR annually for 100% of assigned projects.
 - **NEW REQUIREMENTS:**
 - Schedule and conduct a Risk-Based MOR of projects in the assigned portfolio during the term of the ACC, using Form HUD 9834, based on the following risk-based criteria for the projects listed in Exhibit G, captioned “MOR Ratings for Projects with PBCA Administered HAP Contracts”:

1-4 Contract Administrators

- A. Subsidy contract administration involves a broad range of responsibilities, including program compliance functions to ensure that HUD-subsidized properties are serving eligible families at the correct level of assistance, and asset management functions to ensure the physical and financial health of HUD properties.
- B. HUD has primary responsibility for contract administration but has assigned portions of these responsibilities to other organizations that act as Contract Administrators for HUD. These Contract Administrators are generally housing agencies, such as State Housing Finance Agencies or local housing authorities. There are two types of Contract Administrators that assist HUD in performing contract administration functions.
1. Traditional Contract Administrators. These Contract Administrators have been used for over 20 years and have Annual Contributions Contracts (ACCs) with HUD. Under their ACCs, Traditional Contract Administrators are responsible for asset management functions and HAP contract compliance and monitoring functions. They are paid a fee by HUD for their services.
 2. Performance-Based Contract Administrators (PBCAs). The use of PBCAs began as an initiative in 2000. Under a performance-based ACC, the scope of responsibilities of a Contract Administrator is more limited than that of a Traditional Contract Administrator. A PBCA's responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts. PBCAs are generally required to administer contracts on a statewide basis and have strict performance and reporting requirements as outlined in their ACC. *

1-5 Principles for Addressing Overlapping Federal, State, and Local Requirements*

A. General

In addition to complying with this handbook, owners must comply with other federal, state, and local laws applicable to the occupancy of multifamily housing properties. If other federal, state, or local laws conflict with HUD's requirements, owners must contact the HUD Field Office or Contract Administrator for guidance. Also, when addressing complex overlapping requirements, it is always prudent for owners to seek proper counsel.

B. Statutory Program Eligibility Requirements

Federal statutory program eligibility requirements cannot be overruled by state or local law.

AL086V

Consolidated Annual Contributions Contract

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

Rental Certificate and Rental Voucher Programs

Section 8

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1. Definitions

ACC Annual contributions contract.

ACC Reserve Account An account established by HUD for a program from amounts by which the maximum payment to the HA under the consolidated ACC (during a HA fiscal year) exceeds the amount actually approved and paid. This account is used as the source of additional payments for the program.

Annual Contributions Contract The contract for each funding increment. HUD's commitment to make payments for each funding increment ("project") listed in the funding exhibit constitutes a separate ACC.

Budget Authority The maximum amount of funds available for payment to the HA over the term of a funding increment. Budget authority is authorized and appropriated by the Congress.

Consolidated Annual Contributions Contract (consolidated ACC) This consolidated contract for the HA certificate program and voucher program. HUD's commitment to make payments for each funding increment in a program constitutes a separate ACC. However, commitments for all the funding increments are listed in this consolidated ACC.

Contract Authority The maximum annual payment by HUD to the HA for a funding increment. The amount of contract authority for each funding increment in a program is listed in the funding exhibit for the program.

Fiscal Year The HA fiscal year. The funding exhibit states the last month and day of the HA fiscal year.

Funding Exhibit An exhibit to the consolidated ACC. The funding exhibit states the amount and term of funding for a program. There are separate funding exhibits for the HA certificate program and voucher program.

Funding Exhibit A The funding exhibit for the HA certificate program.

Funding Exhibit B The funding exhibit for the HA voucher program.

Funding Increment (also called a "Project"). Each commitment of budget authority by HUD to the HA for a program under the consolidated ACC. The funding increments for the program are listed on the program funding exhibit.

HA Housing agency.

Housing Agency (HA) The agency that has entered this consolidated ACC with HUD.

HUD U.S. Department of Housing and Urban Development.

Program The HA certificate program or voucher program.

Program Expenditures Amounts which may be charged against program receipts in accordance with the consolidated ACC and HUD requirements.

Program Receipts Amounts paid by HUD to the HA for a program, and any other amounts received by the HA in connection with the program.

Project A funding increment for the program.

2. Funding for HA Certificate or Voucher Program

a. The funding increments in the HA certificate program or voucher program are listed in the funding exhibit for the program.

b. The amount of contract and budget authority for each funding increment in a program is stated in the program funding exhibit.

c. By giving written notice to the HA, HUD may revise the funding exhibit for a program:

(1) To add a funding increment, or

(2) To remove a funding increment for which the ACC term has expired.

d. The HUD notice must include a revised funding exhibit, specifying the term, contract authority and budget authority for each funding increment under the consolidated ACC. The HUD notice of a revised funding exhibit for a program constitutes an amendment of the consolidated ACC.

3. **Term**

- a. The funding exhibit states the first date and last date of the ACC term for each funding increment.
- b. If the first or last date of the ACC term for a funding increment is not entered before the consolidated ACC is signed by the HA, HUD may enter the date subsequently, by giving written notice to the HA.

4. **HUD Payments for Program**

- a. HUD will make payments to the HA for a program in accordance with HUD regulations and requirements.
- b. For each HA fiscal year, HUD will pay the HA the amount approved by HUD to cover:
 - (1) Housing assistance payments by the HA for a program.
 - (2) HA fees for administration of the program.
- c. The amount of the HUD payment may be reduced, as determined by HUD, by the amount of program receipts (such as interest income) other than the HUD payment.

5. **Maximum Payments for Program**

- a. **Annual Limit** Except for payments from the consolidated ACC reserve account, the HUD annual payments for a program during a fiscal year must not be more than the sum of the contract authority amounts for the funding increments in the program.
- b. **Limit on Payments for Funding Increment** The total amount of payments for any funding increment over the increment term must not exceed budget authority for the funding increment.

6. **Reduction of Amount Payable by HUD**

- a. If HUD determines that the HA has failed to comply with any obligations under the consolidated ACC, HUD may reduce to an amount determined by HUD:
 - (1) The amount of the HUD payment for any funding increment.
 - (2) The contract authority or budget authority for any funding increment.
- b. HUD must give the HA written notice of the reduction.
- c. The HUD notice must include a revised funding exhibit specifying the term, contract authority, and budget authority for each funding increment under the consolidated ACC. The HUD notice of revisions to the funding exhibit for a program constitutes an amendment of the consolidated ACC.

7. **ACC Reserve Account**

An ACC reserve account may be established and maintained by HUD. The amount in the account is determined by HUD. The ACC reserve account may be used by HUD to pay any portion of the program payment approved by HUD for a fiscal year.

8. **Separate ACC for Funding Increment**

HUD's commitment to make payments for each funding increment ("project") listed in the funding exhibit constitutes a separate ACC.

*9. **Budget and Requisition for Payment**

- a. Each fiscal year, the HA must submit to HUD an estimate of the HUD payments for the program. The estimate and supporting data must be submitted at such time and in such form as HUD may require, and are subject to HUD approval and revision.
- b. The HA must requisition periodic payments on account of each annual HUD payment. Each requisition must be in the form prescribed by HUD. Each requisition must include certification that:
 - (1) Housing assistance payments have been made in accordance with contracts in the form prescribed by HUD and in accordance with HUD requirements; and
 - (2) Units have been inspected by the HA in accordance with HUD requirements.
- c. If HUD determines that payments by HUD to the HA for a fiscal year exceed the amount of the annual payment approved by HUD for the fiscal year, the excess must be applied as determined by HUD. Such applications determined by HUD may include, but are not limited to, application of the excess payment against the amount of the annual payment for a subsequent fiscal year. The HA must take any actions required by HUD respecting the excess payment, and must, upon demand by HUD, promptly remit the excess payment to HUD.

10. **HUD Requirements**

- a. The HA must comply, and must require owners to comply, with the requirements of the U.S. Housing Act of 1937 and all HUD regulations and other requirements, including any amendments or changes in the law or HUD requirements.
- b. The HA must comply with its HUD-approved administrative plan, and HUD-approved program funding applications.
- c. The HA must use the program forms required by HUD.
- d. The HA must proceed expeditiously with the programs under this consolidated ACC.

11. **Use of Program Receipts**

- a. The HA must use program receipts to provide decent, safe, and sanitary housing for eligible families in compliance with the U.S. Housing Act of 1937 and all HUD requirements. Program receipts may only be used to pay program expenditures.
- b. The HA must not make any program expenditures, except in accordance with the HUD-approved budget estimate and supporting data for a program.
- c. Interest on the investment of program receipts constitutes program receipts.
- d. If required by HUD, program receipts in excess of current needs must be promptly remitted to HUD or must be invested in accordance with HUD requirements.



12. Administrative Fee Reserve

- a. The HA must maintain an administrative fee reserve for a program. The HA must credit to the administrative fee reserve the total of:
 - (1) The amount by which program administrative fees paid by HUD for a fiscal year exceed HA administrative expenses for the fiscal year, plus
 - (2) Interest earned on the administrative fee reserve.
- b. The HA must use funds in the administrative fee reserve to pay administrative expenses in excess of program receipts. If any funds remain in the administrative fee reserve, the HA may use the administrative reserve funds for other housing purposes if permitted by State and local law.
- c. If the HA is not adequately administering any Section 8 program in accordance with HUD requirements, HUD may:
 - (1) Direct the HA to use the funds to improve administration of the Section 8 program or for reimbursement of ineligible expenses.
 - (2) Prohibit HA use of administrative fee reserve funds.

13. Depository

- a. Unless otherwise required or permitted by HUD, all program receipts must be promptly deposited with a financial institution selected as depository by the HA in accordance with HUD requirements.
- b. The HA must enter an agreement with the depository institution in the form required by HUD.
- c. The HA may only withdraw deposited program receipts for use in connection with the program in accordance with HUD requirements.
- d. The agreement with the depository institution must provide that if required under a written notice from HUD to the depository:
 - (1) The depository must not permit any withdrawal of deposited funds by the HA unless withdrawals by the HA are expressly authorized by written notice from HUD to the depository.
 - (2) The depository must permit withdrawals of deposited funds by HUD.
- e. If approved by HUD, the HA may deposit under the depository agreement monies received or held by the HA in connection with any contract between the HA and HUD.

14. Program Records

- a. The HA must maintain complete and accurate books of account and records for a program. The books and records must be in accordance with HUD requirements, and must permit a speedy and effective audit.
- b. The HA must furnish HUD such financial and program reports, records, statements, and documents at such times, in such form, and accompanied by such supporting data as required by HUD.

- c. HUD and the Comptroller General of the United States, or their duly authorized representatives, must have full and free access to all HA offices and facilities, and to all the books, documents and records of the HA relevant to administration of the program, including the right to audit and to make copies.
- d. The HA must engage and pay an independent public accountant to conduct audits that are required by HUD. The cost of audits required by HUD may be charged against program receipts.

15. Default by HA

- a. Upon written notice to the HA, HUD may take possession of all or any HA property, rights or interests in connection with a program, including funds held by a depository, program receipts, and rights or interests under a contract for housing assistance payments with an owner, if HUD determines that:
 - (1) The HA has failed to comply with any obligations under this consolidated ACC; or
 - (2) The HA has failed to comply with obligations under a contract for housing assistance payments with an owner; or
 - (3) The HA has failed to take appropriate action, to HUD's satisfaction or as directed by HUD, for enforcement of the HA's rights under a contract for housing assistance payments (including requiring actions by the owner to cure a default, termination, or reduction of housing assistance payments, termination of the contract for housing assistance payments, or recovery of overpayments); or
 - (4) The HA has made any misrepresentation to HUD of any material fact.
- b. HUD's exercise or non-exercise of any right or remedy under the consolidated ACC is not a waiver of HUD's right to exercise that or any other right or remedy at any time.

16. Fidelity Bond Coverage

The HA must carry adequate fidelity bond coverage, as required by HUD, of its officers, agents, or employees handling cash or authorized to sign checks or certify vouchers.

17. Exclusion from Program

Single-headed households, pregnant females, and recipients of public assistance may not be excluded from participation in or be denied the benefit of a program because of such status.

8. Exclusion of Third Party Rights

- a. A family that is eligible for housing assistance under this consolidated ACC is not a party to or third party beneficiary of the consolidated ACC.
- b. Nothing in the consolidated ACC shall be construed as creating any right of any third party to enforce any provision of this consolidated ACC, or to assert any claim against HUD or the HA.

19. Consolidated ACC

- a. The consolidated ACC is a contract between HUD and the HA.
- b. This consolidated ACC supersedes any previous annual contributions contract for a program. Matters relating to funding or operation of the program under a previous annual contributions contract are governed by this consolidated ACC.

United States of America Secretary of Housing and Urban Development Date signed:
 Signature of Authorized Representative

x

Name & Official Title: (print or type)

Housing Agency Name of Agency: (print or type)

JEFFERSON CO. HOUSING AUTHORITY

Signature of Authorized Representative:

Date signed:

x *Eric P. Strong*

5/20/98

Name & Official Title: (print or type)

ERIC P. STRONG, C.E.O.

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
2013 Summary Statement and Initiatives
(Dollars in Thousands)

PROJECT-BASED RENTAL ASSISTANCE	Enacted/ Request	Carryover	Supplemental/ Rescission	Total Resources	Obligations	Outlays
2011 Appropriation	\$9,276,000	\$206,804 ^a	-\$18,552	\$9,464,252	\$9,349,783	\$8,694,568
2012 Appropriation/Request	9,339,672 ^b	114,469	...	9,454,141	9,454,141	9,157,000
2013 Request	8,700,400 ^c	---	---	8,700,400 ^d	8,700,400 ^d	9,480,000
Program Improvements/Offsets	-639,272	-114,469	...	-753,741	-753,741	+323,000

- a/ This amount includes \$126.1 million in carryover and \$80.7 million in recaptures realized in fiscal year 2011. Disaster Relief funds comprise \$2.3 million of this total.
- b/ The fiscal year 2012 appropriation includes \$8.940 billion for fiscal year 2012 and an advance appropriation of \$400 million to be available for fiscal year 2013.
- c/ The fiscal year 2013 request includes \$8.3 billion for fiscal year 2013 in addition to an advance appropriation of \$400 million to be made available for fiscal year 2014.
- d/ Total Resources and Obligations for fiscal year 2013 exclude an estimated \$74 million transfer into PBRA from Public Housing for implementation of Rental Assistance Demonstration, \$19 million transfer from PBRA into the Transformation Initiative Account, and \$73 million in spending authority from offsetting collections. These policies are described in further detail below.

1. What is this request?

The Department is requesting a total of \$8.7 billion to meet Project-Based Rental Assistance (PBRA) program needs. This includes \$8.3 billion for fiscal year 2013 and a \$400 million advance appropriation for fiscal year 2014. Under the request, the total funding level for fiscal year 2013 is \$639 million less than the fiscal year 2012 enacted amount of \$9.340 billion. At the requested level, some contracts will receive less than 12 months of funding. The number of contracts that will continue to receive 12 months of funding is a function of how HUD distributes funding across contracts throughout the year. Currently HUD estimates that it will administer this funding to provide 12 months of funding for approximately 5,300 renewal contracts, i.e., for contracts that expire during fiscal year 2013, and for multiyear term contracts that have an annual renewal funding cycle occurring during the first quarter of the fiscal year. These 5,300 contracts cover approximately 360,000 units, or about one-third of the PBRA renewal portfolio. The remaining 10,600 multiyear term renewal contracts, covering approximately 739,000 units (those with an annual renewal cycle other than during the first quarter of fiscal year 2013), would be funded for less than 12 months, to varying degrees depending on their renewal date. The fiscal year 2013 request also includes \$260 million for Project-Based Contract Administrators (PBCA).

Project-Based Rental Assistance

The contract renewals and amendments set-aside provides funding for the Department to renew and amend project-based rental assistance contracts. These funds are necessary to keep over 1.2 million families in safe, sanitary, and affordable housing. This funding is for Housing (Project-Based Section 8 contracts), Public and Indian Housing (Moderate Rehabilitation contracts), and Community Planning and Development (Single Room Occupancy contracts).

The need for Section 8 Amendment funds results from insufficient funds provided for long-term project-based contracts funded primarily in the 1970's and 1980's. During those years, the Department provided contracts for terms of up to 40 years. Estimating funding needs over such a long period of time proved to be problematic, and as a result, many of these Section 8 contracts were inadequately funded. Older long-term contracts that have not reached their termination dates and have not entered the 1-year renewal cycle must be provided amendment funds for the projects to remain financially and physically viable. The Department estimates that total Section 8 Amendment needs in fiscal year 2013 will be \$625 million.

The following table shows the change in the number of units under contract, average monthly subsidy payment per unit and the average utilization rate by fiscal year.

	Contract Units	Average Monthly Subsidy per Unit	Average Utilization ¹
FY 2008	1,260,865	\$587	93.7%
FY 2009	1,255,545	\$610	94.2%
FY 2010	1,251,460	\$635	94.7%
FY 2011	1,249,790	\$665	94.9%

The Department is proposing \$260 million for Project-Based Contract Administrators (PBCAs) in fiscal year 2013. Through this set-aside, the Department funds contracts with performance-based contract administrators. These administrators, which are typically Public Housing Authorities or state housing finance agencies, are responsible for conducting on-site management reviews of assisted properties; adjusting contract rents; reviewing, processing, and paying monthly vouchers submitted by owners. PBCAs are integral to the Department's efforts to be more effective and efficient in the oversight and monitoring of this program. As a result of the Department's implementation of new risk-based monitoring standards, the PBCA funding level for fiscal year 2013 is reduced from the fiscal year 2012 appropriation of up to \$289 million.

¹ The average number of contract units occupied or being utilized by families assisted with the program.

Project-Based Rental Assistance

The following policy proposals are expected to result in a cost savings of approximately \$139 million in Section 8 Project-Based Rental Assistance outlays in fiscal year 2012:

- Apply residual receipts accounts to offset assistance payments for new regulation contracts.
- For contracts renewed under Option 1 and Option 2, use Small Area Fair Market Rents (FMRs) as a benchmark in determining market rents by requiring the appraiser conducting rent comparability studies to justify market rent determinations that exceed 110 percent of the project's Small Area FMR.²
- For contracts renewed under Option 4 (renewal for projects exempt from Office of Multifamily Housing Assistance Restructuring), limit exception rent levels to Operating Cost Adjustment Factor (OCAF) increases if project budgets result in rent levels exceeding market.
- Fund original term amendments through November instead of through December.

The following policy proposals are expected to result in a cost savings of up to approximately \$400 million in Section 8 Project-Based Rental Assistance outlays in fiscal year 2013:

- Apply residual receipts accounts to offset assistance payments for new regulation contracts. These offsets would be achieved through owner remittance of residual receipts directly to the Department for application to the general PBRA program account. The Department requires legislative authority to require remittance by owners and to apply the remittance as described.
- Apply residual receipts accounts to offset assistance payments for old regulation contracts. Increase Total Tenant Payment (TTP) to \$75 per month (assumes that existing hardship exceptions or inability to pay minimum rent) will carry forward and that some number of new exceptions will be granted due to the minimum rent increase to \$75).
- For contracts renewed under Options 1 and 2, use Small Area Fair Market Rents (FMRs) as a benchmark in determining market rents by requiring the appraiser conducting rent comparability studies to justify market rent determinations that exceed 110 percent of the project's Small Area FMR.
- For contracts renewed under Option 4, limit exception rent levels to OCAF increases if project budgets result in rent levels exceeding market.
- Reduce the time period over which an owner may claim vacancy payments from 60 days to 30.

² A summary of six different options for owners at the expiration of their contracts is available at http://portal.hud.gov/hudportal/documents/huddoc?id=guidebk_ca_init.pdf

Project-Based Rental Assistance

Transformation Initiative

In fiscal year 2013, the Department renews its request for the Transformation Initiative, which provides the Secretary the flexibility to undertake an integrated and balanced effort to improve program performance and test innovative ideas. Up to 0.5 percent of the funds appropriated for this account may be transferred to the Transformation Initiative Fund account for the following purposes: research, evaluations, and program metrics; program demonstrations; technical assistance; capacity building and Information Technology. An estimated Transformation Initiative (TI) transfer of \$19.067 million in fiscal year 2013 is included. Departmentwide, no more than \$120 million is estimated to be transferred to the Transformation Initiative Fund account in fiscal year 2013. More details on the overall Transformation Initiative and these projects are provided in the justification for the Transformation Initiative Fund account.

Under the Rental Assistance Demonstration (RAD), authorized by the Consolidated and Further Continuing Appropriations Act of 2012 (P.L. 112-55), Public Housing Authorities and owners of rental properties assisted under the Public Housing and Section 8 Moderate Rehabilitation (MR) programs have the option to convert the assistance of their properties to long-term PBRA or Project-Based Voucher (PBV, funded in the Tenant-Based Rental Assistance account) contracts. The Department will begin to implement RAD conversions in 2013. An estimated \$51 million and \$23 million requested for the Public Housing Operating Fund and Public Housing Capital Fund, respectively, will be transferred to the PBRA account to fund the conversion of approximately 24,000 Public Housing units to long-term PBRA contracts.

Carryover into fiscal year 2012 was \$114 million, a small percentage of the program's total appropriation. This account is expected to have no carryover into fiscal year 2013.

2. What is this program?

The Project-Based Rental Assistance program, unlike the Tenant-Based Rental Assistance program, provides rental assistance on behalf of eligible tenants residing in specific multifamily rental developments. These households are primarily seniors, families with children, and persons with disabilities. Project-based rental assistance is provided through contracts between the Department and owners of multifamily rental housing; thus, if a tenant moves, the assistance stays with the housing development. The amount of rental assistance paid to the owner is the difference between what a household can afford (based on paying 30 percent of household income for rent) and the approved contract rent for the unit.

Project-Based Rental Assistance

Eligible owners include for-profit or non-profit organizations, cooperatives, Limited Liability Corporations, Limited Partnerships or other types of joint ownership structures organized to develop and operate affordable rental housing. These properties are financed in a similar manner to market rate rental developments, utilizing private financing, FHA financing, private equity, or equity raised from the sale of Low-Income Housing Tax Credits. Currently, the portfolio is leveraging over \$13 billion in FHA insurance and \$17 billion in private financing and equity. The owner must provide affordable decent, safe and sanitary housing units to continue to receive project-based rental assistance. Currently, the program serves nearly 1.2 million low-income and very low-income households.

The portfolio receives generally high standardized physical inspection scores at 17,500 projects throughout the country. Many PBRA projects are located in strong rental markets that have been preserved through the Department's successful Mark-Up-to-Market program and other preservation programs. The Mark-Up-to-Market Program adjusts rents to prevailing market conditions while maintaining affordability for low-income households. Such projects frequently provide the only affordable housing opportunities within these communities. Other PBRA projects are located in less strong markets and provide an important stabilizing influence to their communities often acting as important footholds for additional housing and other commercial neighborhood investment. Regardless of the market where PBRA housing is located, without it, the majority of the assisted residents would face worst case housing or homelessness.

The program set-aside of \$260 million for PBCAs is an important tool to administer the program in a cost effective manner. PBCAs provide direct oversight and monitoring of the program that carry out critical functions, including: (1) reduce payment errors; (2) improve the physical condition of units; and (3) ensure timely payment of rents to property owners. In conjunction with the Department's Rental Housing Integrity Improvement Project (RHIIIP), PBCAs have helped make HUD a leader among Federal agencies in reducing improper payments. A Government Accountability Office (GAO) report from November 2005, found that contracts administered by PBCAs had the lowest percentage of late payments when compared to other types of contract administration.

Staffing

	2011 Actual	2012 Estimate	2013 Estimate
Headquarters	54	55	55
Field	345	342	342
Total	399	397	397

Project-Based Rental Assistance

Descriptions of work to be performed by FTE (Headquarters and Field) to administer PBRA and Key Workload Drivers

Headquarters staff develops policy related to all aspects of implementing the program; provides oversight and management of performance-based contract administrators that carry out critical functions, including reducing payment errors, improving project physical condition, and ensuring timely subsidy payments to owners; provides oversight and monitoring of field staff implementation of policy and procedures related to management and occupancy, physical condition, financial accounting, owner obligations and responsibilities; develops and executes necessary enforcement actions; monitors field achievement of goals and targets regarding utilization of the PBRA program including compliance with HUD business agreements with respect to financial and physical requirements; and ensures availability of funding to guarantee timely payment of all assistance contracts.

Field Staff perform the following functions, with support from PBCA's, to administer the PBRA program: review and approve management agents; process reserve for replacement requests; analyze monthly accounting reports, annual financial statements, and requests to transfer project ownership; monitor service coordinator grant agreements; process contract renewal requests; review monthly assistance vouchers; disburse assistance payments; determine project rent levels; process contract opt-outs; secure tenant protection vouchers for contract terminations; negotiate management improvement plans; initiate necessary enforcement actions; monitor project physical condition; review project operating budgets; conduct management and occupancy reviews; review capital needs assessments; monitor project use agreements; respond to tenant and community inquiries; process waiver requests from project owners; and review utility allowance schedules and process special claims for vacancies or damages.

Impact of key workload on Secretarial Initiatives

Implementation of the PBRA program also supports the following Secretarial Initiatives: Rental Assistance Demonstration Program (RAD) and the Choice Neighborhoods Initiative. In furthering these initiatives, especially RAD, multifamily staff will be engaged and will draw on our expertise and experience as rental assistance to these properties are converted to a project-based rental assistance contract.

No changes to the PBRA staffing level are planned for fiscal year 2013.

3. Why is this program necessary and what will we get for the funds?

Addresses the Need for Quality Affordable Rental Homes

The PBRA program is one of three major Federal rental assistance programs for providing low-income families with decent, safe and affordable housing. The program currently provides affordable housing for over 1.2 million families. These households are primarily elderly (41 percent), families with children (31 percent) and persons with disabilities (15 percent).

Project-Based Rental Assistance

The vast majority of these families would be unable to find affordable rental housing in the private market and many would be at severe risk of homelessness. The average income of families assisted under this program is only \$11,000 per year, with over three-fourths earning less than \$15,000 per year. Almost two-thirds of the families with children were also working families with 65 percent reporting income earned from wages. In addition, the program supports a stock of long-term affordable housing and helps protect the Federal investment that went into developing and maintaining it over the years.

Reduces the number of families with severe housing needs and reduces or prevents homelessness

PBRA funding directly reduces worst case housing needs. Worst case housing needs are defined as paying more than half of one's income for rent and/or living in severely inadequate physical conditions. During fiscal year 2011, a Policy Development and Research (PD&R) study found that without Federal housing assistance, at least 68 of every 100 currently assisted families would have worst case housing needs in its absence (McClure, Kirk; prepared PD&R, Reduction of Worst Case Housing Needs by Assisted Housing, February 2011). It is likely that over 810,000 families currently occupying assisted units would have worst case housing needs if their assistance was withdrawn. Increased housing costs in turn would effectively diminish the already limited incomes of these families, even for necessities such as food, health care, child care, education and transportation costs. In addition, many would likely face the real prospect of actual homelessness.

Project-Based Rental Assistance

Preserves the affordability and condition of privately owned rental housing

PBRA supports a stock of long-term affordable rental housing for the lowest-income American families. This is increasingly important, as the private stock of rental housing that is affordable to the lowest income families has actually been shrinking. While there was an overall net increase of 694,000 rental units in the housing market, there was a massive decrease of 570,000 units that were affordable to families with extremely low-incomes in the same period (PD&R, Rental Market Dynamics: 2007-2009, May 2011).

Without this assistance, many projects would either convert to market with potentially large rent increases that the current families would not be able to afford, or alternatively would not be able to generate sufficient rental income to continue to be maintained in good condition. In addition, without on-going rental income, many projects would be unable to continue payments on existing debt, including mortgages insured by FHA, or mortgages backed by bonds issued by state housing finance agencies.

Expand choices of affordable rental homes located in a broad range of communities

The preservation of affordable units assures that units will continue to become available in a wide range of housing markets throughout the nation as vacancies occur. Many projects are located in good neighborhoods, where low-income families would otherwise be unable to find affordable housing, while other projects serve as anchors providing well-maintained properties in areas that might experience downward investment. Many projects also provide badly needed affordable housing in rural areas, as many projects were developed with financing through the USDA Rural Housing Service's Section 515 Multifamily program.

PBRA's Spillover Benefits to Local Communities and Economies

Multifamily housing assisted by PBRA stabilizes neighborhoods and contributes to local economic bases. PBRA housing draws workers, service providers, and retailers and returns to host communities significant and much relied-upon property tax revenue. Data from fiscal years 2009 and 2010 confirms that \$460 million was paid in property taxes from PBRA owners to municipalities. The PBRA program, through its 17,500 contracts with owner landlords, directly contributes to job creation and retention in the fields of property management, maintenance, administration, general construction, contract vendors such as landscapers, exterminators, security guards, snow removers, equipment servicers, legal representation and property insurance providers. It is estimated that the program directly supports approximately 55,000 jobs annually at projects throughout the country. In addition, owners of PBRA housing contract for services with local businesses and service providers that are estimated to produce another 45,000 indirect or induced jobs, totaling employment generation of 100,000 jobs annually.

In addition to local revenue generation and job retention associated with on-going project operation, the PBRA program is also a redevelopment and preservation tool for private multifamily rental housing owners. PBRA contracts act as a critical credit enhancement for project financing, allowing owners to leverage private debt and equity to permit project refinancing and

Project-Based Rental Assistance

recapitalization. Such transactions require owners to hire architects, surveyors, construction contractors as well as the professional services of consultants and attorneys to complete the work. The estimated unpaid principal balance of the FHA insured debt underlying the projects assisted by PBRA is \$13.6 billion. The FHA insured debt is secured by approximately 33 percent of the PBRA portfolio. The balance is conventionally financed. The periodic refinancing of this debt generates significant capital available for investment in construction repairs and improvements. If funding for the PBRA program is not provided, the value of this underlying debt to both FHA and private lenders as well as existing equity in the physical structures would be severely eroded, contributing to significant loss of privately held wealth and community investment.

4. How do we know that this program works?

In addition to the data on affordability and the tenants served, there have been several important studies and evaluations of different aspects of the program. A PD&R Study estimated that the Mark-to-Market program, enacted in 1997 to restructure the project-based portfolio, resulted in cost savings from reduced Federal subsidies of over \$830 million (and possibly over \$880 million) over 20 years (PD&R, Evaluation of the Mark-to-Market Program, August 2004).

Preventing Waste, Fraud and Abuse

Multifamily Housing has been and still is a major client of the Departmental Enforcement Center (DEC). Since its inception in 1998, the DEC has addressed possible non-compliance issues in over 75,000 referrals from Multifamily Housing. The DEC's work resulted in recoveries to the insured/assisted multifamily housing property project accounts of over \$280.9 million. In addition, the Department entered into 1,569 settlement agreements with multifamily owners, totaling more than \$11.2 million in civil money penalties. To date, the DEC has issued more than 4,300 notices to owners of multifamily housing of violations of regulatory agreements or defaults of the housing assistance payments contracts.

Currently this year the DEC has closed 5006 referrals; this includes 1,721 referrals for irregularities in the owners' audited financial statements, 155 referrals for physical property deficiencies, and 3,102 referrals for failing to file required financial statements. In addition, 103 notices were issued which included 36 notices of default of the Housing Assistance Payment contract and 67 notices of violation of the regulatory agreement. The DEC has entered into 93 settlement agreements, resulting in \$1.1 million in settlement payments to the general treasury fund and \$17.4 million in recoveries to the projects.

To reduce fraud, waste, and abuse in the PBRA Program, the Department has mandated the use of the Enterprise Income Verification (EIV) system by all PHAs or PBCAs that administer the program. The EIV system increases the efficiency and accuracy of income and rent determinations, reduces incidents of underreported and unreported household income, removes the barriers to verifying tenant-reported income, addresses material weaknesses in a PHA's reexamination process and program operations, assures

Project-Based Rental Assistance

that more eligible families are able to participate in the program, and reduces improper payments and ensures the right people receive the right amount of assistance at the right time. EIV is but one strategy of a larger, HUDwide effort to reduce income and rent errors and improper payments in the administration of voucher, and other HUD, programs. For example, HUD conducts a limited number of on-site reviews at PHAs to determine the accuracy of the PHA's rent and income calculations.

5. Notes to Justification

The Summary and Implementation Guide for fiscal year 2012 HUD Appropriations directed the Department to include the following information in its fiscal year 2013 congressional justification: "*The Committee directs HUD to include detailed information on OCAF, the number of contracts, and the required funding associated with the first time renewal of expiring contracts and subsequent years in its fiscal year 2013 congressional justification.*"

Detailed information on OCAF:

The OCAFs (Operating Cost Adjustment Factors) are calculated annually as the sum of the weighted annual average cost changes for wages, employee benefits, property taxes, insurance, supplies and equipment, fuel oil, electricity, natural gas, and water/sewer/trash using publicly available indices of these prices/costs. The weights used in the OCAF calculations for each of the nine cost component groupings are set using current percentages attributable to each of the nine expense categories in FHA properties. Average expense proportions were calculated using 3 years of audited Annual Financial Statements from projects covered by OCAFs. The expenditure percentage for these nine categories have been found to be very stable over time, but using 3 years of data increases their stability. The nine cost component weights were calculated at the state level, which is the lowest level of geographical aggregation with enough projects to permit reliable statistical analysis.

For 2013, HUD estimates that 10,640 contracts will be adjusted by OCAF.

Project-Based Rental Assistance

First term renewal costs of contracts expiring in 2012 through 2017:

Original Term Expiring Contracts Grouped By Year of Expiration, Arrayed through FY 2017
 Reflects Estimated Annual Renewal Need Funding (12 months) For Each Year

FISCAL YEAR of EXPIRATION	CONTRACTS	UNITS	FY 2012 Renewals	FY 2013 Renewals	FY 2014 Renewals	FY 2015 Renewals	FY 2016 Renewals	FY 2017 Renewals
2012	478	24,393	\$222,203,080	\$226,955,493	\$231,804,920	\$236,654,371	\$241,617,661	\$246,677,799
2013	328	18,365	\$0	\$198,227,110	\$202,467,107	\$206,707,088	\$211,037,510	\$215,461,880
2014	116	8,139	\$0	\$0	\$89,628,532	\$91,505,946	\$93,422,499	\$95,381,549
2015	85	3,789	\$0	\$0	\$0	\$40,162,781	\$41,002,818	\$41,863,751
2016	40	4,424	\$0	\$0	\$0	\$0	\$50,243,696	\$51,294,547
2017	107	8,262	\$0	\$0	\$0	\$0	\$0	\$65,027,294
	1,154	67,372	222,203,080	425,182,603	523,900,559	575,030,186	637,324,184	715,706,820

Assumptions for Annual Inflation: OCAF is 1.8 percent for fiscal year 2012 and all years beyond.

Project-Based Rental Assistance

**HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Summary of Resources by Program
(Dollars in Thousands)**

Budget Activity	2011 Budget Authority	2010 Carryover Into 2011	2011 Total Resources	2011 Obligations	2012 Budget Authority/Request	2011 Carryover Into 2012	2012 Total Resources	2013 Request
Contract Renewals and Amendments	\$8,932,100	\$204,550	\$9,136,650	\$9,022,831	\$9,050,672	\$113,819	\$9,164,491	\$8,440,400
Contract Administrators	325,348	...	325,348	325,348	289,000	...	289,000	260,000
Vouchers for Disaster Relief - (P.L. 111-32) .....	...	2,254	2,254	1,604	...	650	650	...
Total	9,257,448	206,804	9,464,252	9,349,783	9,339,672	114,469	9,454,141	8,700,400

NOTE: Total Resources for fiscal year 2011, and carryover into 2012 include \$9.980 million available for transfer to the Tenant Resources Network program (TRN).

Project-Based Rental Assistance

**HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Appropriations Language**

The fiscal year 2013 President's Budget includes proposed changes in the appropriation language listed below. New language is italicized and underlined, and language proposed for deletion is bracketed.

For activities and assistance for the provision of project-based subsidy contracts under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) ("the Act"), not otherwise provided for, [~~\$8,939,672,000~~] \$8,300,400,000, to remain available until expended, shall be available on October 1, [2011] 2012 (in addition to the \$400,000,000 previously appropriated under this heading that became available October 1, [2011] 2012), and \$400,000,000, to remain available until expended, shall be available on October 1, [2012] 2013. Provided, That the amounts made available under this heading shall be available for expiring or terminating section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for amendments to section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for contracts entered into pursuant to section 441 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11401), for renewal of section 8 contracts for units in projects that are subject to approved plans of action under the Emergency Low Income Housing Preservation Act of 1987 or the Low-Income Housing Preservation and Resident Homeownership Act of 1990, and for administrative and other expenses associated with project-based activities and assistance funded under this paragraph: Provided further, That of the total amounts provided under this heading, not to exceed [~~\$289,000,000~~] \$260,000,000 shall be available for performance-based contract administrators for section 8 project-based assistance: Provided further, That the Secretary of Housing and Urban Development may also use such amounts in the previous proviso for performance-based contract administrators for the administration of: interest reduction payments pursuant to section 236(a) of the National Housing Act (12 U.S.C. 1715z-1(a)); rent supplement payments pursuant to section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); section 236(f)(2) rental assistance payments (12 U.S.C. 1715z-1(f)(2)); project rental assistance contracts for the elderly under section 202(c)(2) of the Housing Act of 1959 (12 U.S.C. 1701q); project rental assistance contracts for supportive housing for persons with disabilities under section 811(d)(2) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013(d)(2)); project assistance contracts pursuant to section 202(h) of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667); and loans under section 202 of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667): Provided further, That amounts recaptured under this heading, the heading "Annual Contributions for Assisted Housing", or the heading "Housing Certificate Fund" may be used for renewals of or amendments to section 8 project-based contracts or for performance-based contract administrators, notwithstanding the purposes for which such amounts were appropriated: Provided further, That, notwithstanding any other provision of law, upon the request of the Secretary of Housing and Urban Development, project funds that are held in residual receipts accounts for any project subject to a section 8 project-based Housing Assistance Payments contract that authorizes HUD to require that surplus project funds be deposited in an interest-bearing residual receipts account and that are in excess of an amount to be determined by the Secretary, shall be remitted to the Department and deposited in this account, to be available until expended: Provided further, That amounts deposited pursuant to the previous proviso shall be available in addition to the amount otherwise provided by this heading for uses authorized under this heading. (Department of Housing and Urban Development Appropriations Act, 2012.)

Project-Based Rental Assistance

Changes from 2012 Appropriations

Project funds that are held in residual receipts accounts for any project will be subject to a section 8 project-based Housing Assistance Payments contract that authorizes HUD to require that surplus project funds be deposited in an interest-bearing residual receipts account and that are in excess of an amount to be determined by the Secretary, shall be remitted to the Department and deposited in this account, to be available until expended.

Exhibit

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HOUSING
PROJECT-BASED RENTAL ASSISTANCE
2012 Summary Statement and Initiatives
(Dollars in Thousands)

PROJECT-BASED RENTAL ASSISTANCE	Enacted/ Request	Carryover	Supplemental/ Rescission	Total Resources	Obligations	Outlays
2010 Appropriation	\$8,557,853	\$335,771 ^a	...	\$8,893,624 ^b	\$8,767,423	\$8,281,693
2011 CR	8,551,525	126,140	...	8,677,665	8,677,665	8,852,000
2012 Request	<u>9,428,672^c</u>	<u>---</u>	<u>---</u>	<u>9,428,672</u>	<u>9,428,672</u>	<u>9,378,000</u>
Program Improvements/offsets	+877,147	-126,140	...	+751,007	+751,007	+526,000

- a/ Carryover includes \$159.1 million from fiscal year 2009 (of which \$10.7 million is Disaster Relief funds), together with \$8.8 million of remaining unobligated authority from the \$2.0 billion American Recovery and Reinvestment Act (P.L. 111-5) (Recovery Act) supplemental in fiscal year 2009, plus recaptured funds of \$167.8 million (including \$10.3 million from ARRA funding).
- b/ Total fiscal year 2010 resources include \$61 thousand in Recovery Act funds that expired on September 30, 2010, and therefore are not included in the carryover from fiscal year 2010 into fiscal year 2011.
- c/ The \$9.429 billion reflects total resources available for 2012. This includes \$9.035 billion requested in this Budget and a \$394 million advance appropriation to become available on October 1, 2011.

Summary Statement

The Department is requesting a total of \$9.435 billion to meet Project-Based Rental Assistance (PBRA) program needs. This includes \$9.035 billion for 2012 and a \$400 million advance appropriation for 2013. Under the request, the total funding level for 2012 (\$9.429 billion) is \$871 million above the 2010 enacted level (\$8.558 billion). The increase is based on an estimated \$9.130 billion in renewal costs for 2012, assuming an Operating Cost Adjustment Factor (OCAF) of 1 percent. This will provide a full 12-months of funding on contracts at their renewal (or renewal anniversary) dates throughout the year (provided that Congress enacts the President's requested funding level for 2011). The fiscal year 2012 request includes \$289 million for Project-Based Contract Administrators (PBCA); and \$10 million for Tenant Resource Network (TRN) grants. Flexible language is proposed to augment proposed set-aside amounts as necessary by re-allocating funds from other set-asides or from recaptures, including an anticipated \$100 million in recaptures from the Housing Certificate Fund, which may be available for obligation.

PBRA provides rental assistance funding to privately owned multifamily rental housing projects. To be eligible for the program, a participant must be a private owner and can be a for-profit or non-profit organization, cooperative, Limited Liability Corporation, Limited Partnership or other type of joint ownership structure. The amount of rental assistance paid is the difference between what a household can afford (usually based on 30 percent of their income) and the approved market-based rent for an affordable housing unit in a multifamily rental housing project. These properties are financed in the same manner as market rate rental developments in utilizing private financing, equity or FHA mortgage insurance. Currently, the portfolio is leveraging over \$12 billion in FHA insurance and \$17 billion in private financing and equity. The owner must provide affordable decent, safe and sanitary housing units to receive this assistance. Currently, the program serves over 1.2 million low-income and very low-income households that are comprised of individuals, families, elderly and persons with disabilities.

Project-Based Rental Assistance

Without assistance, most of the families served by the PBRA program would be at risk of worst case housing (i.e. rental burden over 50 percent of income and/or distressed physical property) or even homelessness.

The program set-aside of \$289 million for PBCAs is an important tool that ensures that there is efficient and effective oversight and monitoring of this rental assistance. The Department uses PBCAs to: (1) reduce payment errors; (2) improve the physical condition of the properties; and (3) ensure the timely payment of the assistance to the owners.

The program set-aside of \$10 million for TRN will provide funding to eligible organizations that assist, inform, educate, train and provide technical assistance to tenants of eligible Section 8-assisted properties regarding their rights and responsibilities. This program aims to engage tenants in efforts to preserve eligible properties as affordable housing, and to provide tenants with information about their rights and responsibilities. TRN awardees will work directly with tenants in multifamily properties to support them in conducting activities protected under 24 CFR Part 245, subpart B.

Program Relationship to Strategic Plan Goals and Subgoals

Strategic Goal 2. Meet the Need for Quality Affordable Rental Homes

The Project-Based Rental Assistance programs (Section 8, including Section 8 Moderate Rehabilitation, Rent Supplements and Section 236 RAP), continue to serve over 1.2 million low-income households. HUD routinely renews Project-Based contracts and amends project budgets as necessary to assure the preservation of this crucial inventory, with the exception of a limited number of instances (for example, where owners fail to maintain projects in satisfactory condition, or where project owners decide to opt-out of the program).

Subgoal 2A: End homelessness and substantially reduce the number of families and individuals with severe housing needs

The renewal of approximately 8,500 PBRA contracts during fiscal years 2011 and 2012 will assure preservation of more than 1.2 million affordable housing units for occupancy by low-income households, many of whom would otherwise be at risk of homelessness.

Subgoal 2C: Preserve the affordability and improve the quality of Federally assisted and private unassisted affordable rental homes

The PBRA programs directly support affordability for rental housing by lowering the rent burden of eligible households to only 30 percent of adjusted household income. The Department typically conducts physical inspections on roughly half of the PBRA stock each year—assuring that the quality of this rental housing is preserved.

Subgoal 2D: Expand families' choices of affordable rental homes located in a broad range of communities

The preservation of affordable units assures that units will continue to become available in a wide range of housing markets throughout the nation as vacancies occur.

Project-Based Rental Assistance

Strategic Goal 3: Utilize Housing as a Platform for Improving Quality of Life

Subgoal 3B: Utilize HUD assistance to improve health outcomes

This is an aspirational goal reflecting the juncture of housing and health services, and a focus on health benefits of safe, sanitary housing as well as possible improved access to health services.

Subgoal 3C: Utilize HUD assistance to increase economic security and self-sufficiency

This is an aspirational goal and will focus on possible expansion of work incentives, and access to job and other related training and employment opportunities.

Subgoal 3D: Utilize HUD assistance to improve housing stability through supportive services for vulnerable populations, including the elderly, people with disabilities, homeless people, and those individuals and families at risk of becoming homeless

This is an aspirational goal and is related to the demographics of the income eligible population served by the program. The program has a notable influence on homelessness reduction.

Subgoal 4B: Promote energy-efficient buildings and location-efficient communities that are healthy, affordable, and diverse

Title XII of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), provided \$250 million for the Green Retrofit Program, which provides loans and grants for utility-saving retrofits and other retrofits that produce environmental benefits in certain existing HUD-assisted multifamily housing. The Act allowed up to 5 percent of the funds available to be used for underwriting and oversight which has been allocated to certain Mark-to-Market participating administrative entities (PAEs). These PAEs carry out due diligence, underwriting, and negotiation activities for the Green Retrofit Program pursuant to each PAE's existing portfolio restructuring agreement.

Subgoal 4C: Ensure open, diverse, and equitable communities.

The Project-Based program strengthens communities by providing decent, sanitary, affordable housing that serves as an asset and stabilizing force for families and communities. This subsidized housing will also emphasize green building technology and is emphatic about affirmatively furthering fair housing.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
2012 Summary Statement and Initiatives
(Dollars in Thousands)

<u>Budget Activity</u>	<u>2010 Budget Authority</u>	<u>2009 Carryover Into 2010</u>	<u>2010 Total Resources</u>	<u>2010 Obligations</u>	<u>2011 CR</u>	<u>2010 Carryover Into 2011</u>	<u>2011 Total Resources</u>	<u>2012 Request</u>
Contract Renewals and Amendments	\$8,315,853	\$311,721	\$8,627,574	\$8,513,038	\$8,309,525	\$114,536	\$8,424,061	\$9,129,672
Contract Administrators Vouchers for Disaster Relief - (P.L. 111-32)	232,000	18	232,018	232,018	232,000	...	232,000	289,000
Tenant Resources Network .....	...	4,803	4,803	3,199	...	1,604	1,604	...
Contract Renewals - Recovery Act - (P.L. 111-5)	10,000	...	10,000	...	10,000	10,000	20,000	10,000
Total	8,557,853	335,771	8,893,624	8,767,423	8,551,525	126,140	8,677,665	9,428,672
<u>FTE</u>	<u>2010 Actual</u>	<u>2011 Estimate</u>	<u>2012 Estimate</u>					
Headquarters	54	53	55					
Field	355	346	361					
Total	409	399	416					

Project-Based Rental Assistance

**HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Program Offsets
(Dollars in Thousands)**

	<u>Amount</u>
Contract Renewals and Amendments	
2010 Appropriation	\$8,315,853
2011 CR	8,309,525
2012 Request	<u>9,129,672</u>
Program Improvements/Offsets	+820,147

Proposed Actions

The contract renewals and amendments set-aside provides funding for the Department to renew and amend PBRA contracts. These funds are necessary to keep over 1.2 million families in safe, sanitary, and affordable housing. For fiscal year 2012, HUD requests \$9.130 billion of new Budget Authority for contract renewals and amendments. This amount is for Housing's Project-Based Section 8 contracts, Public and Indian Housing's Moderate Rehabilitation contracts, and Community Planning and Development's Single Room Occupancy contracts.

The need for Section 8 Amendment funds results from insufficient funds provided for long-term project-based contracts funded primarily in the 1970's and 1980's. During those years, the Department provided contracts for terms of up to 40 years. Estimating funding needs over such a long period of time proved to be problematic, and as a result, many of these Section 8 contracts were inadequately funded. The current practice of renewing expiring contracts for a 1-year term helps to ensure that the problem of inadequate funding for contracts is not repeated. However, older long-term contracts that have not reached their termination dates and have not entered the 1-year renewal cycle must be provided amendment funds for the projects to remain financially viable and thus maintain the inventory of affordable rental housing.

The Department estimates that total Section 8 Amendment needs in fiscal year 2012 will be \$667 million.

Project-Based Rental Assistance

**HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Program Offsets
(Dollars in Thousands)**

Contract Administrators	<u>Amount</u>
2010 Appropriation	\$232,000
2011 CR	232,000
2012 Request	<u>289,000</u>
Program Improvements/Offsets	+57,000

Proposed Actions

The Department is proposing \$289 million for Project-Based Contract Administrators (PBCAs) in fiscal year 2012. The appropriation is a \$57 million increase over the floor in the fiscal year 2010 enacted appropriation.¹ Through this set-aside, the Department funds contracts with performance-based contract administrators. These administrators, which are typically Public Housing Authorities or state housing finance agencies, are responsible for conducting on-site management reviews of assisted properties; adjusting contract rents; reviewing, processing, and paying monthly vouchers submitted by owners.

PBCAs are vital to the Department's efforts to be more effective and efficient in the oversight and monitoring of this program. In particular, the Department uses PBCAs to: (1) reduce payment errors; (2) improve the physical condition of units; and (3) ensure timely payment of rents to property owners. In conjunction with the Department's Rental Housing Integrity Improvement Project (RHIP), PBCAs have helped make HUD a leader among Federal agencies in reducing improper payments. PBCAs are required to perform extensive annual reviews of property operations, including reviewing owner rent subsidy calculations. PBCAs help the Department ensure that the right benefits are going to the right people.

¹Appropriations language provided for "not less than \$232,000,000 but not to exceed \$258,000,000" for PBCAs.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Program Offsets
 (Dollars in Thousands)

	<u>Amount</u>
Tenant Resources Network	
2010 Appropriation	\$10,000
2011 CR	10,000
2012 Request	<u>10,000</u>
Program Improvements/Offsets .....	...

NOTE: The Department plans to use up to \$10 million from the Contract Renewals and Amendments set-aside to fund this activity in fiscal year 2012.

Proposed Actions

HUD is proposing to use up to \$10 million from the Contract Renewals and Amendments set-aside for Tenant Resources Network (TRN) grants to build on previous efforts to provide assistance to tenant groups, non-profit organizations, and public entities for building the capacity of tenant organizations. The grants support tenants in Section 8 subsidized properties upon the expiration of the subsidy contracts, and include activities such as education, outreach, training and technical assistance activities.

Section 514(f) of the Multifamily Assisted Housing Reform and Affordability Act (MAHRA) of 1997 (47 U.S.C. 1437) authorizes the Department to provide financial assistance for building the capacity of tenant organizations and furthering the purposes of the Mark-to-Market program including preservation of low-income housing and tenant services. This activity is subject to an annual limitation of \$10 million to be derived from the PBRA account.

The TRN program will build upon best practices and lessons learned from predecessor programs to provide training and technical guidance in order to educate tenants about the ramifications of subsidy contract expirations and renewals under MAHRA, and to enable tenants to explore alternative outcomes.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Appropriations Language

Below is the italicized appropriations language for the Project-Based Rental Assistance Program.

For activities and assistance for the provision of project-based subsidy contracts under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) ("the Act"), not otherwise provided for, \$9,035,000,000, to remain available until expended, shall be available on October 1, 2011 (in addition to the \$393,672,000 previously appropriated under this heading that will become available October 1, 2011), and \$400,000,000, to remain available until expended, shall be available on October 1, 2012; Provided, That the amounts made available under this heading shall be available for expiring or terminating section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for amendments to section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for contracts entered into pursuant to section 441 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11401), for renewal of section 8 contracts for units in projects that are subject to approved plans of action under the Emergency Low Income Housing Preservation Act of 1987 or the Low-Income Housing Preservation and Resident Homeownership Act of 1990, and for administrative and other expenses associated with project-based activities and assistance funded under this paragraph: Provided further, That of the total amounts provided under this heading, not to exceed \$289,000,000 shall be available for performance-based contract administrators for section 8 project-based assistance: Provided further, That the Secretary of Housing and Urban Development may also use such amounts in the previous proviso for performance-based contract administrators for the administration of: interest reduction payments pursuant to section 236(e) of the National Housing Act (12 U.S.C. 1715z-1(a)); rent supplement payments pursuant to section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); section 236(f)(2) rental assistance payments (12 U.S.C. 1715z-1(f)(2)); project rental assistance contracts for the elderly under section 202(c)(2) of the Housing Act of 1959 (12 U.S.C. 1701q); project rental assistance contracts for supportive housing for persons with disabilities under section 811(d)(2) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013(d)(2)); project assistance contracts pursuant to section 202(h) of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667); and loans under section 202 of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667): Provided further, That amounts recaptured under this heading, the heading "Annual Contributions for Assisted Housing", or the heading "Housing Certificate Fund" may be used for renewals of or amendments to section 8 project-based contracts or for performance-based contract administrators, notwithstanding the purposes for which such amounts were appropriated.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Crosswalk of 2010 Availability
(Dollars in Thousands)

<u>Budget Activity</u>	<u>2010 Enacted</u>	<u>Supplemental/ Rescission</u>	<u>Approved Reprogrammings</u>	<u>Transfers</u>	<u>Carrvover</u>	<u>Total 2010 Resources</u>
Contract Renewals and Amendments	\$8,315,853	...	...	...	\$311,721	\$8,627,574
Contract Administrators	232,000	...	...	...	18	232,018
Vouchers for Disaster Relief - (P.L. 111-32) .....	...	...	...	...	4,803	4,803
Tenant Resources Network	10,000	...	...	...	...	10,000
Contract Renewals - Recovery Act - (P.L. 111-5) .....	...	...	...	...	<u>19,229</u>	<u>19,229</u>
Total	8,557,853	...	...	...	335,771	8,893,624

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Crosswalk of 2011 Changes
 (Dollars in Thousands)

<u>Budget Activity</u>	<u>2011 President's Budget Request</u>	<u>2011 CR</u>	<u>2011 Supplemental/ Rescission</u>	<u>Reprogrammings</u>	<u>Carryover</u>	<u>Total 2011 Resources</u>
Contract Renewals and Amendments	\$9,044,000	\$8,309,525	...	...	\$114,536	\$8,424,061
Contract Administrators	322,000	232,000	...	...	...	232,000
Vouchers for Disaster Relief - (P.L. 111-32) .....	...	...	...	...	1,604	1,604
Tenant Resources Network	10,000	10,000	...	...	10,000	20,000
Contract Renewals - Recovery Act - (P.L. 111-5)
Total	9,376,000	8,551,525	126,140	8,677,665

Exhibit

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HOUSING
PROJECT-BASED RENTAL ASSISTANCE
2011 Summary Statement and Initiatives
(Dollars in Thousands)

PROJECT-BASED RENTAL ASSISTANCE	Enacted/ Request	Carryover	Supplemental/ Rescission	Total Resources	Obligations	Outlays
2009 Appropriation	\$7,100,000	\$370,154 ^a	\$2,030,000 ^b	\$9,500,154	\$9,332,251	\$7,481,990
2010 Appropriation/Request	8,557,853	167,903 ^c	...	8,725,756	8,725,756	8,145,000
2011 Request	9,376,000 ^d	---	---	9,376,000 ^e	9,285,672	8,722,000
Program Improvements/Offsets	+818,147	-167,903	...	+650,244	+559,916	+577,000

a/ Includes \$221 million of carryover from fiscal year 2008 and \$159 million recaptured during fiscal year 2009 less \$10 million transferred to the Working Capital Fund (WCF). Carryover includes \$50 million for Disaster Relief Voucher assistance.

b/ Provides \$2 billion in the American Recovery and Reinvestment Act (P.L. 111-5) for Contract Renewals; also includes \$30 million in supplemental funding for Vouchers for Disaster Relief (P.L. 111-32).

c/ Carryover reflects \$159 million of carryover into fiscal year 2010 together with \$8.8 million of remaining unobligated authority from the \$2.0 billion Recovery Act supplemental in fiscal year 2009.

d/ Appropriation/Request amounts are based on fiscal year appropriation. Total budget authority requested in fiscal year 2011 is \$9.382 billion (\$8.982 billion for fiscal 2011 and \$400 million for fiscal year 2012).

e/ The \$9.376 billion includes \$8.982 billion of requested new appropriations for fiscal year 2011 and \$394 million provided in the Department of Housing and Urban Development Appropriations Act, 2010 (P.L. 111-117), to be available on October 1, 2010 for fiscal year 2011 needs. Of that amount, \$90 million is proposed to be transferred to the Transformation Initiative resulting in a net total of \$9.286 billion available for obligations in the PBRA account in fiscal year 2011.

Summary Statement

Project-Based Rental Assistance (PBRA) assists more than 1.3 million low- and very low-income households in obtaining decent, safe, and sanitary housing in private accommodations. This critical program serves families, elderly households, disabled households, and provides transitional housing for the homeless. Through PBRA funding, HUD renews Section 8 Project-Based assistance contracts with owners of multifamily rental housing. HUD makes up the difference between what a household can afford and the approved rent for an adequate housing unit in a multifamily development. Without this assistance, most of the people served by this program would face unsafe housing, over crowded housing, or homelessness.

The Department is requesting a total of \$9.382 billion (\$9.376 billion on a fiscal year) to meet PBRA program needs. This includes \$8.982 billion to be available in fiscal year 2011 and \$400 million advance appropriation to be available in fiscal year 2012. This provides funding not to exceed \$322 million for Project-Based Contract Administrators (PBCA); \$10 million for Tenant Resources, Information and Outreach; \$90 million to be transferred to the Transformation Initiative; and, the remaining resources in fiscal year 2011 to be made available for contract renewals and amendments. The \$90 million non-expenditure transfer to the Transformation Initiative program is excluded from carryover, obligations and outlays, but is reflected in the Transformation Initiative account. Flexible language is

Project-Based Rental Assistance

proposed to augment proposed set-aside amounts as necessary by re-allocating funds from other set-asides or from recaptures, including an anticipated \$100 in recaptures from the Housing Certificate Fund, which may be available for obligation.

The American Recovery and Reinvestment Act (Recovery Act) (P.L. 111-5) provided \$2 billion to fund all project-based contract renewals for a full 12 months in fiscal year 2009. This funding together with the fiscal year 2009 Omnibus Appropriation full year funding aids with the return of these projects to their original funding anniversary cycle. Of the total, \$1.991 billion of these funds were obligated in fiscal year 2009.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Summary of Resources by Program
 (Dollars in Thousands)

Budget Activity	2009 Budget Authority	2008 Carryover Into 2009	2009 Total Resources	2009 Obligations	2010 Budget Authority/Request	2009 Carryover Into 2010	2010 Total Resources	2011 Request
Contract Renewals and Amendments	\$6,868,000	\$260,154	\$7,128,154	\$6,973,234	\$8,315,853	\$155,072	\$8,470,925	\$8,954,240
Contract Administrators working Capital Fund (transfer)	222,000	70,000	292,000	291,982	232,000	...	232,000	322,000
Vouchers for Disaster Relief - (P.L. 111-32).....	10,000	-10,000	...	...	...	...	...	...
Transformation Initiative Transfer ..	30,000	50,000	80,000	76,866	...	4,000	4,000	...
Tenant Resources, Information and Outreach (TRIO) .....	...	...	...	...	...	...	...	89,760 ^a
Contract Renewals - Recovery Act - (P.L. 111-5).....	2,000,000	...	...	...	10,000	...	10,000	10,000 ^b
Total	9,130,000	370,154	9,500,154	9,333,251	8,557,853	167,903	8,725,756	9,376,000

a/ These funds are proposed to be transferred to the Transformation Initiative program. The \$90 million non-expenditure to the Transformation Initiative program is excluded from carryover, obligations and outlays, but is reflected in the Transformation Initiative account.

b/ The Department may transfer up to \$10 million from the Contract Renewals set-aside for Tenant Resources, Information and Outreach (TRIO) activities under Sec. 514(f) of the Multifamily Assisted Housing Reform and Affordability Act (MAHRA) of 1997 (42 U.S.C. 1437f note).

FTE	2009 Actual	2010 Estimate	2011 Estimate
Headquarters	77	75	76
Field	327	322	324
Total	404	397	400

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Program Offsets
 (Dollars in Thousands)

Vouchers for Disaster Relief - (P.L. 111-32)	<u>Amount</u>
2009 Appropriation	\$30,000
2010 Appropriation/Request .....	...
2011 Request	---
Program Improvements/offsets .....	...

Proposed Actions

A total of \$30 million was provided under the fiscal year 2009 Supplemental Appropriations Act (P.L. 111-32), amending Sec. 1203 of the "Continuous Security, Disaster Assistance, and Continuing Appropriations Act, 2009" (P.L. 110-329), under the heading "Project-Based Rental Assistance" to aid victims of Hurricanes Katrina and Rita. This supplemental funding amended the original Vouchers for Disaster Relief funding from \$50 million to \$80 million.

These project-based vouchers are provided under section 8 (o) (13) of the United States housing Act of 1937 (42 U.S.C. 1437f (o) (13)). This type of voucher is typically funded and renewed under the heading "Tenant-Based Rental Assistance." Therefore, the Department includes the renewal of these vouchers in the Tenant-Based Rental Assistance request.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Program Offsets
 (Dollars in Thousands)

Contract Renewals and Amendments	Amount
2009 Appropriation	\$6,868,000
2010 Appropriation/Request	8,315,853
2011 Request	<u>8,954,240</u>
Program Improvements/Offsets	+638,387

Proposed Actions

The contract renewals and amendments set-aside provides funding for the Department to renew and amend PBRA contracts. These funds are necessary to keep the nearly 1.3 million families assisted by this program in safe, sanitary, and affordable housing. For fiscal year 2011, HUD requests \$9.044 billion of new Budget Authority for contract renewals and amendments. This amount is for Housing's Project-Based Section 8 contracts, Public and Indian Housing's Mod Rehab contracts, and Community Planning and Development's Single Room Occupancy contracts. Of that amount, \$89.8 million is proposed to be transferred to the Transformation Initiative.

The need for Section 8 Amendment funds results from insufficient funds provided for long-term project-based contracts funded primarily in the 1970's and 1980's. During those years, the Department provided contracts for terms of up to 40 years. Estimating funding needs over such a long period of time proved to be problematic, and as a result, many of these Section 8 contracts were inadequately funded. The current practice of renewing expiring contracts for a 1-year term helps to ensure that the problem of inadequate funded contracts is not repeated. However, older long-term contracts that have not reached their termination dates and have not entered the 1-year renewal cycle must be provided amendment funds for the projects to remain financially viable and thus maintain the inventory of affordable rental housing.

The Department estimates that total Section 8 Amendment needs in fiscal year 2011 will be \$662 million.

Project-Based Rental Assistance

**HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Program Offsets
(Dollars in Thousands)**

<u>Contract Administrators</u>	<u>Amount</u>
2009 Appropriation	\$222,000
2010 Appropriation/Request	232,000
2011 Request	322,000
Program Improvements/offsets	+90,000

Proposed Actions

The Contract Administrators set-aside is necessary to fund the vast majority of the administration of the PBRA program. Through this set-aside, the Department funds contracts with performance-based contract administrators (PBCAs). These entities, which are typically Public Housing Authorities or state housing finance agencies, are responsible for conducting on-site management reviews of assisted properties; adjusting contract rents; reviewing, processing, and paying monthly vouchers submitted by owners; renewing contracts with property owners; and responding to health and safety issues at properties.

The Appropriation for Contract Administrators for fiscal year 2009 was \$232 million while obligations were \$292 million. Fiscal year 2009 Recaptures in the amount of \$70 million were used to provide necessary funding for this activity in order to cover total needs. For fiscal year 2010, the Appropriation for Contract Administrators is \$232 million, not to exceed \$258 million. The Department projects that the need for this activity will be \$317 million in fiscal year 2010, and anticipates that recaptures realized in the Housing Certificate Fund will be needed to cover a shortfall in this program. The Department also proposes to continue the flexible language permitting the use of recaptured authority if that contingency becomes necessary.

The implementation of PBCAs for project-based Section 8 contract administration is a vital tool in the Department's efforts to transform and improve program administration and monitoring. In particular, the Department uses PBCAs to: (1) reduce payment errors; (2) improve the physical condition of units; and (3) ensure timely payment of rents to property owners. In conjunction with the Department's Rental Housing Integrity Improvement Project (RHIP), PBCAs have helped make HUD a leader amongst Federal agencies in reducing improper payments. Because PBCAs are required to perform extensive annual reviews of properties' operations, including reviewing owners' rent subsidy calculations; they help the Department ensure that the right benefits are going to the right people.

Project-Based Rental Assistance

**HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Program Offsets
(Dollars in Thousands)**

<u>Working Capital Fund (transfer)</u>	<u>Amount</u>
2009 Appropriation	\$10,000
2010 Appropriation/Request .....	...
2011 Request .....	...
Program Improvements/offsets .....	...

Proposed Actions

The Department is not requesting any transfers for the Working Capital Fund in fiscal year 2011. Instead, these activities will be funded through the Department's Transformation Initiative. This initiative will allow the Secretary the necessary flexibility to undertake an integrated and balanced effort to improve program performance and test innovative ideas.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Program Offsets
 (Dollars in Thousands)

	<u>Amount</u>
Contract Renewals - Recovery Act - (P.L. 111-5)	
2009 Appropriation	\$2,000,000
2010 Appropriation/Request .....	...
2011 Request	---
Program Improvements/Offsets .....	...

Proposed Actions

The American Recovery and Reinvestment Act (Recovery Act) (P.L. 111-5) provided \$2 billion to fund all project-based contract renewals for a full 12 months in fiscal year 2009. This funding, together with the fiscal year 2009 Omnibus Appropriation full-year funding, aids with the return of these projects to their original funding anniversary cycle. Of the total, \$1.991 billion of these funds were obligated in fiscal year 2009. It reduces the administrative burden imposed by the necessity of reviewing the contracts multiple times during a 12-month period as a result of short term funding procedures. It spreads the workflow requirement on a more even monthly basis throughout the fiscal year. Finally, it helps to re-assure owners and project sponsors that funding will be available on a timely basis throughout the year.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Program Offsets
(Dollars in Thousands)

	<u>Amount</u>
Transformation Initiative Transfer	
2009 Appropriation .....	...
2010 Appropriation/Request .....	...
2011 Request	\$89,760
Program Improvements/Offsets	+89,760

Proposed Actions

The Department proposes to transfer \$89.8 million from Project Based Rental Assistance to the Transformation Initiative. Projects that could be facilitated include the Department's transition from paper-based and manual processes to automated processing and electronic document management, including: (1) implementation of the Integrated Real Estate Management System (IREMS) and (2) automation of the Section 8 Project-Based Assistance contract renewal and payment processes, with improved budget forecasting.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Program Offsets
 (Dollars in Thousands)

	<u>Amount</u>
Tenant Resources, Information and outreach (TRIO)	
2009 Appropriation .....	...
2010 Appropriation/Request	\$10,000
2011 Request	<u>10,000</u>
Program Improvements/Offsets .....	...

NOTE: The Department plans to use up to \$10 million from the Contract Renewals and Amendments set-aside to fund this activity in fiscal year 2011.

Proposed Actions

HUD is proposing to use up to \$10 million from the Contract Renewals and Amendments set-aside for Tenant Resources, Information and Outreach (TRIO) grants to build on previous efforts to provide assistance to tenant groups, non-profit organizations, and public entities for building the capacity of tenant organizations. The grants support tenants in Section 8 subsidized properties upon the expiration of the subsidy contracts, and include activities such as education, outreach, training and technical assistance activities.

Section 514(f) of the Multifamily Assisted Housing Reform and Affordability Act (MAHRA) of 1997 (47 U.S.C. 1437f)note) authorizes the Department to provide financial assistance for building the capacity of tenant organizations and furthering the purposes of the Mark-to-Market program including preservation of low-income housing and tenant services. This activity is subject to an annual limitation of \$10 million to be derived from the PBRA account.

The TRIO program would build upon best practices and lessons learned from predecessor programs to provide training and technical guidance on how to reach, educate and organize tenants about the ramifications of subsidy contract expirations and renewals under MAHRA and enable tenants to explore alternative outcomes.

This Budget presentation reflects the incremental \$10 million impact of the TRIO request in fiscal years 2010 and 2011.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Justification of Proposed Changes in Appropriations Language

The fiscal year 2011 President's Budget includes proposed changes in the appropriations language listed and explained below. New language is italicized and underlined, and language proposed for deletion is bracketed.

(INCLUDING TRANSFER OF FUNDS)

For activities and assistance for the provision of project-based subsidy contracts under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) ("the Act"), not otherwise provided for, [\$8,157,853,000] \$8,982,328,000, to remain available until expended, shall be available on October 1, [2009] 2010 (in addition to the \$393,672,000 previously appropriated under this heading that will become available October 1, 2010), and [\$393,672,000] \$400,000,000, to remain available until expended, shall be available on October 1, [2010] 2011; Provided, That the amounts made available under this heading [are provided as follows: (1) Up to \$8,325,853,000] shall be available for expiring or terminating section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for amendments to section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for contracts entered into pursuant to section 441 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11401), for renewal of section 8 contracts for units in projects that are subject to approved plans of action under the Emergency Low Income Housing Preservation Act of 1987 or the Low-Income Housing Preservation and Resident Homeownership Act of 1990, and for administrative and other expenses associated with project-based activities and assistance funded under this paragraph; (2) Not less than \$232,000,000 but not to exceed \$258,000,000; Provided further, That of the total amounts provided under this heading, not to exceed \$322,000,000 shall be available for performance-based contract administrators for section 8 project-based assistance; Provided further, That the Secretary of Housing and Urban Development may also use such amounts in the previous proviso for performance-based contract administrators for the administration of: interest reduction payments pursuant to section 236(a) of the National Housing Act (12 U.S.C. 1715z-1(a)); rent supplement payments pursuant to section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); section 236(f)(2) rental assistance payments (12 U.S.C. 1715z-1(f)(2)); project rental assistance contracts for the elderly under section 202(c)(2) of the Housing Act of 1959 (12 U.S.C. 1701q); project rental assistance contracts for supportive housing for persons with disabilities under section 811(d)(2) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013(d)(2)); project assistance contracts pursuant to section 202(h) of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667); and loans under section 202 of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667); (3) A: Provided further, That amounts recaptured under this heading, the heading "Annual Contributions for Assisted Housing", or the heading "Housing Certificate Fund" may be used for renewals of or amendments to section 8 project-based contracts or for performance-based contract administrators, notwithstanding the purposes for which such amounts were appropriated. (Department of Housing and Urban Development Appropriations Act, 2010.)

Explanation of Changes

No changes.

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
 Crosswalk of 2009 Availability
 (Dollars in Thousands)

<u>Budget Activity</u>	<u>2009 Enacted</u>	<u>Supplemental/ Rescission</u>	<u>Approved Reprogrammings</u>	<u>Transfers</u>	<u>Carryover</u>	<u>Total 2009 Resources</u>
Contract Renewals and Amendments	\$6,868,000	...	...	...	\$260,154	\$7,128,154
Contract Administrators	222,000	...	...	...	70,000	292,000
Working Capital Fund (transfer)	10,000	...	...	...	-10,000	...
Vouchers for Disaster Relief - (P.L. 111-32).....	...	\$30,000	...	...	50,000	80,000
Transformation Initiative Transfer ..	...	...	...	...	...	...
Tenant Resources, Information and Outreach (TRIO) .....	...	...	...	...	...	...
Contract Renewals - Recovery Act - (P.L. 111-5)	---	2,000,000	---	---	---	2,000,000
Total	7,100,000	2,030,000	...	...	370,154	9,500,154

Project-Based Rental Assistance

HOUSING
PROJECT-BASED RENTAL ASSISTANCE
Crosswalk of 2010 Changes
(Dollars in Thousands)

Budget Activity	2010 President's Budget Request	Congressional Appropriations Action on 2010 Request	2010 Supplemental/Rescission	Reprogrammings	Carryover	Total 2010 Resources
Contract Renewals and Amendments	\$7,858,000	\$8,315,853	...	...	\$155,072	\$8,470,925
Contract Administrators	232,000	232,000	...	...	...	232,000
Working Capital Fund (transfer) .....	...	...	...	...	...	...
Vouchers for Disaster Relief - (P.L. 111-32) .....	...	...	...	...	4,000	4,000
Transformation Initiative Transfer ..	...	...	...	...	...	...
Tenant Resources, Information and Outreach (TRIO)	10,000	10,000	...	...	...	10,000
Contract Renewals - Recovery Act - (P.L. 111-5) .....	...	...	...	...	8,831	8,831
Total	8,100,000	8,557,853	...	...	167,903	8,725,756

Project-Based Rental Assistance

Sources and Uses Estimates. The table below reflects actual activity in fiscal year 2009 together with revised estimates for fiscal years 2010 and 2011.

PBRA SOURCES AND USES OF FUNDS

Source of Funds	Actual	Estimate	Estimate
	FY 2009	FY 2010	FY 2011
	(Dollars in Millions)		
Source of Funds			
PBRA in Appropriations Acts	\$7,100	\$8,158	\$8,982
PBRA Recovery Act P.L. 111-5	2,000	...	...
PBRA Disaster Relief Supplemental P.L. 111-32	30	...	...
PBRA Advance Appropriation	...	400	394
PBRA Recaptures	159	...	...
HCF Recaptures (Original Term Contracts)	143	95	95
PBRA Carryover	221	168	...
HCF Carryover	37	121	...
PBRA WCF Transfer	(10)	...	...
PBRA Transformation Initiative Transfer	...	...	-90
Total Funds Available	9,680	8,942	9,381
Use of Funds:			
Housing Contract Renewals	\$6,264	\$7,710	\$8,130
Housing Contract Renewals - Recovery Act	1,991	9	...
PIH Contract Renewals	178	179	179
CPD Contract Renewals	70	84	93
Impact of Opt Outs	NA	(15)	(15)
Original Term Amendments	520	644	662
Contract Administrators	292	317	322
Disaster Voucher Assistance	76	4	...
Tenant Resources (TRIO)	...	10	10
Total Funds Used	9,391	8,942	9,381



May 11, 2012

HUD Desk Officer
Office of Management and Budget
New Executive Office Building
Washington, DC 20503

Re: OMB Approval Number 250—New Proposed Annual Customer Service Survey of Performance-Based Contract Administrators

To Whom It May Concern:

Thank you for the opportunity to comment on HUD's Proposed Annual Customer Service Survey of Performance-Based Contract Administrators (PBCAs). On behalf of a number of state housing finance agencies (HFAs) serving as PBCAs, the National Council of State Housing Agencies (NCSHA) has serious concerns with the proposed Annual Customer Service Survey and how its design may impact the evaluation and compensation of PBCAs. Our comments are based on many we received from a number of state HFAs currently serving as PBCAs both under the 2011 Annual Contributions Contract (ACC) and the short-term ACC in effect for many others.

We strongly agree that soliciting owner and tenant feedback and providing them with an opportunity to comment on the programs that affect them is valuable and important. In fact, many HFA PBCAs currently conduct surveys and meetings to solicit such feedback and comment. However, we continue to disagree strongly with the proposition that such feedback, in and of itself, should directly affect the compensation HUD provides PBCAs under the PBCA program, including compensation in the form of potential incentive fees.

NCSHA represents the nation's state HFAs, which administer a wide range of affordable housing and community development programs, including project-based Section 8 rental assistance, Housing Choice Vouchers, tax-exempt Housing Bonds, the Low Income Housing Tax Credit (Housing Credit), HOME, down payment assistance, and state trust funds. Eleven state HFAs currently serve as Performance-Based Contract Administrators (PBCAs) under the 2011 ACC. Twenty-six state HFAs also serve as PBCAs under HUD's interim short-term ACC, pending the conclusion of HUD's national competition through a Notice of Funding Availability (NOFA). All 37 state HFAs serving as PBCAs draw upon their years of experience in successfully financing and overseeing affordable rental properties.

General Comments on Survey Design

The stated objective of the Customer Service Survey is to measure the level of satisfaction of property owners and tenants with the PBCA. The likelihood of obtaining reliable and useful results, however, is highly doubtful given that most Section 8 tenants have little or no exposure to the PBCA and are likely to be unaware of ACC requirements. There is little reason for a tenant to be knowledgeable about the contractual relationship between the PBCA and HUD. Tenants are apt to be more familiar with property owners and managers.

In addition, owner and tenant responses may be skewed by their reaction to actions PBCAs must

AR 2000

To assure that the survey evaluates customer satisfaction, we recommend HUD remove a number of questions within the owner portion of the survey (6, 7, 8, 12, 15, 16, 17, 20-29) and the tenant portion of the survey (questions 1, 2, 7, 8, 11-17) related to PBT performance. Reducing the number of questions also will make completing the survey more convenient and likely increase response rates. If data collection on the PBCA's PBT performance is necessary, the responses from owners and tenants should be validated objectively by comparing them to the information available through iREMS or the CAOM.

The survey instrument also should clarify that the property manager may assist the owner in responding, as the manager is more likely to have daily interaction with the PBCA.

Reduce the Scope and Significance of the Tenant Survey

The new ACC limits PBCA contact with tenants to health, safety, and maintenance issues, therefore it is unclear why a Customer Satisfaction Survey from tenants is needed or desirable. PBCAs have infrequent contact with tenants, so it will be difficult to collect responses from a reliable sample size of tenants who have had direct contact with the PBCA over the previous year. Conducting the tenant survey is likely to yield a lower benefit and be harder and more expensive to manage than the owner survey.

It will also be difficult to determine if tenant responses accurately reflect the performance of the PBCA, as any tenant dissatisfaction with property management, HUD, or property-related circumstances will most likely be reflected in negative survey results of the PBCA.

The tenant survey includes an introductory paragraph which implies that the survey results will improve the quality of life at the property. Quality of life is defined subjectively, so this term should be removed.

The survey asks the tenant questions about noise, fighting, theft, and crime at the property. Responsibility for these conditions lies with property manager and should not be part of the PBCA Customer Satisfaction Survey. Similarly, the survey overview indicates that it will rank the PBCAs in terms of, "1) the owner scores to PBCA responsiveness, 2) the tenant scores to health, 3) the tenant scores to safety, and 4) the tenant scores to maintenance, etc." (page 23) The PBCA should not be evaluated for customer satisfaction based on factors which are the responsibility of the property owner and manager.

We recommend that HUD significantly decrease the use of the tenant portion of the survey as a tool to evaluate PBCAs. If the tenant survey is conducted, HUD should give it low weight due to the limited contact tenants typically have with PBCAs. The property owner and manager have significant responsibility for tenant satisfaction, not the PBCA.

HUD Should Provide PBCAs an Opportunity to View, Respond to, and Appeal Customer Surveys

We understand HUD's desire to provide anonymity to property owners, managers, and tenants responding to the survey. For a PBCA to improve customer satisfaction and its overall performance, however, the contract administrator must have an opportunity to review and respond to concerns raised about its performance. A PBCA must also have the chance to take action or reply to what might be unfounded or illegitimate complaints or allegations. Further, a PBCA should have the opportunity to appeal a Customer Satisfaction Survey whose results appeared to be biased.

HOUSING PROGRAMS

PROJECT-BASED RENTAL ASSISTANCE

For activities and assistance for the provision of project-based subsidy contracts under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) ("the Act"), not otherwise provided for, \$8,939,672,000, to remain available until expended, shall be available on October 1, 2011 (in addition to the \$400,000,000 previously appropriated under this heading that became available October 1, 2011), and \$400,000,000, to remain available until expended, shall be available on October 1, 2012: *Provided*, That the amounts made available under this heading shall be available for expiring or terminating section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for amendments to section 8 project-based subsidy contracts (including section 8 moderate rehabilitation contracts), for contracts entered into pursuant to section 441 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11401), for renewal of section 8 contracts for units in projects that are subject to approved plans of action under the Emergency Low Income Housing Preservation Act of 1987 or the Low-Income Housing Preservation and Resident Homeownership Act of 1990, and for administrative and other expenses associated with project-based activities and assistance funded under this paragraph: *Provided further*, That of the total amounts provided under this heading, not to exceed \$289,000,000 shall be available for performance-based contract administrators for section 8 project-based assistance: *Provided further*, That the Secretary of Housing and Urban Development may also use such amounts in the previous proviso for performance-based contract administrators for the administration of: interest reduction payments pursuant to section 236(a) of the National Housing Act (12 U.S.C. 1715z-1(a)); rent supplement payments pursuant to section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); section 236(f)(2) rental assistance payments (12 U.S.C. 1715z-1(f)(2)); project rental assistance contracts for the elderly under section 202(c)(2) of the Housing Act of 1959 (12 U.S.C. 1701q); project rental assistance contracts for supportive housing for persons with disabilities under section 811(d)(2) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013(d)(2)); project assistance contracts pursuant to section 202(h) of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667); and loans under section 202 of the Housing Act of 1959 (Public Law 86-372; 73 Stat. 667): *Provided further*, That amounts recaptured under this heading may be used for renewals of or amendments to section 8 project-based contracts or for performance-based contract administrators, notwithstanding the purposes for which such amounts were appropriated.

HOUSING FOR THE ELDERLY

For amendments to capital advance contracts for housing for the elderly, as authorized by section 202 of the Housing Act of 1959, as amended, and for project rental assistance for the elderly under section 202(c)(2) of such Act, including amendments to contracts for such assistance and renewal of expiring contracts for such assistance for up to a 1-year term, and for senior preservation rental assistance contracts, as authorized by section 811(e) of the American Housing and Economic Opportunity Act of 2000, as

For OAHP-Lites, only contracts that expire in the same fiscal year can be combined. For full restructures, OAHP requires that all contracts be combined, including those that expire in later fiscal years.

- H. Exception. An exception to HUD's preference to combine contracts is when there are pre-and post-October 1, 1981 contracts involved. Due to conflicting income eligibility requirements for these two categories of contracts, it is not practical at this time to allow Owners to combine a pre-October 1981 contract or stage with a post-October 1981 contract or stage.

Note: See Chapter Thirteen of this Guide for instructions on Rural Housing Service (RHS) contracts.

Preemption of State Laws Limiting Owner Distributions

Section 2-6

For consistency in administering the program as it relates to Owner distributions, Section 524(f) of MAHRA preempts State and local laws and regulations that limit or restrict owner distributions to an amount less than that provided for under regulations of the Secretary.

This preemption is now available to all projects which have Section 8 contracts renewed under any section of 524 of MAHRA and which have distributions of surplus funds accruing after October 20, 1999. Preemption does not apply to State-financed projects. An Owner may elect to waive the preemption.

HUD Responsibility for Contract Administrators

Section 2-7

The Owner enters a Renewal Contract with the contract administrator. The contract administrator may be HUD, or may be a PHA that executes the Renewal Contract as contract administrator under an annual contributions contract (ACC) with HUD. The Renewal Contract describes the contractual obligations of the contract administrator (whether HUD or a PHA), and also separately defines HUD's contractual role - regardless of whether the contract administrator is HUD or a PHA.

In both cases, the contractual commitment to the owner is the same - that the contract administrator (HUD or PHA) will live up to its contractual responsibilities in accordance with the terms of the HAP contract, and that HUD will live up to its role as defined by the terms of the Renewal Contract.

When a Renewal Contract is executed by a PHA pursuant to this Guidebook, in accordance with HUD requirements and on the form prescribed by HUD, HUD is

contractually bound by the Renewal Contract provisions that specify HUD's role pursuant to the Renewal Contract (including provisions concerning applicable HUD requirements, statutory changes during the term, distributions and PHA default).

For example, the Renewal Contract provides that if HUD determines that the PHA contract administrator has committed a material and substantial obligation of the PHA's obligation to pay amounts due to the Owner, "HUD shall take any action HUD determines necessary for the continuation of housing assistance payments to the Owner in accordance with the Renewal Contract." This provision defines HUD's role in the event of PHA default. HUD is contractually bound to carry out this role as defined in the contract, and the Owner may sue to enforce HUD's contractual obligation.

If the Renewal Contract is originally executed by HUD, HUD may assign the Renewal Contract to a PHA contract administrator, for the purpose of PHA administration of the Renewal Contract. Such an assignment does not affect the Owner's contractual rights - to enforce the contract administrator's contractual obligations against the new contract administrator, and to enforce HUD's contractual obligation to carry out HUD's role as defined in the Renewal Contract.

EARLY TERMINATION AND RENEWAL OF THE SECTION 8 CONTRACT VS CONTRACT EXTENSION

Section 2-8

Effective with the date of these page changes the Department is no longer allowing Section 8 contract extensions under Section 524 of MAHRA. Attachment 20 "Project-Based Section 8 Housing Assistance Payments - Extension of Contract Term" is being withdrawn.

If there is a need for a long term contract on the Section 8 assisted property, for which the original Section 8 HAP contract has already been renewed under MAHRA, the Hub Director or designee may allow the early termination of the existing Renewal Contract and the renewal of the contract under any option for which the property is eligible at the time. The owner and the Contract Administrator may mutually agree to terminate the existing Renewal Contract, provided that the Owner and Contract Administrator execute a 20-year Renewal Contract, which includes the "Preservation Exhibit" that is provided in Attachment 1 of Housing Notice 11-31. The term of the Renewal Contract must be equal to 20 years. The Preservation Exhibit must be completed to provide that upon expiration, the 20-year Renewal Contract shall renew for an additional term equal to at least the number of years remaining on the Renewal Contract that is being terminated. Should the contract term exceed the Use Agreement, the Use Agreement must be extended to the end of the contract term.

**HUD Handbook 4350.3:
Occupancy Requirements of Subsidized
Multifamily Housing Programs**

AR 2136

1-4 Contract Administrators

- A. Subsidy contract administration involves a broad range of responsibilities, including program compliance functions to ensure that HUD-subsidized properties are serving eligible families at the correct level of assistance, and asset management functions to ensure the physical and financial health of HUD properties.
- B. HUD has primary responsibility for contract administration but has assigned portions of these responsibilities to other organizations that act as Contract Administrators for HUD. These Contract Administrators are generally housing agencies, such as State Housing Finance Agencies or local housing authorities. There are two types of Contract Administrators that assist HUD in performing contract administration functions.
 - 1. Traditional Contract Administrators. These Contract Administrators have been used for over 20 years and have Annual Contributions Contracts (ACCs) with HUD. Under their ACCs, Traditional Contract Administrators are responsible for asset management functions and HAP contract compliance and monitoring functions. They are paid a fee by HUD for their services.
 - 2. Performance-Based Contract Administrators (PBCAs). The use of PBCAs began as an initiative in 2000. Under a performance-based ACC, the scope of responsibilities of a Contract Administrator is more limited than that of a Traditional Contract Administrator. A PBCA's responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts. PBCAs are generally required to administer contracts on a statewide basis and have strict performance and reporting requirements as outlined in their ACC. *

1-5 Principles for Addressing Overlapping Federal, State, and Local Requirements*

A. General

In addition to complying with this handbook, owners must comply with other federal, state, and local laws applicable to the occupancy of multifamily housing properties. If other federal, state, or local laws conflict with HUD's requirements, owners must contact the HUD Field Office or Contract Administrator for guidance. Also, when addressing complex overlapping requirements, it is always prudent for owners to seek proper counsel.

B. Statutory Program Eligibility Requirements

Federal statutory program eligibility requirements cannot be overruled by state or local law.

**U.S. Department of Housing and Urban Development
Office of Housing**

Project-based Section 8

**HOUSING ASSISTANCE PAYMENTS
BASIC RENEWAL CONTRACT
MULTI-YEAR TERM**

PREPARATION OF CONTRACT

Reference numbers in this form refer to notes at the end of the contract text. These endnotes are instructions for preparation of the Basic Renewal Contract. The instructions are not part of the Renewal Contract

Basic Renewal Contract

Multi-Year Term
REV-11-05-2007

AR 2264

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U.S. Department of Housing and Urban Development
Office of Housing

Project-based Section 8

HOUSING ASSISTANCE PAYMENTS

BASIC RENEWAL CONTRACT¹

MULTI-YEAR TERM

1 CONTRACT INFORMATION²

PROJECT

Section 8 Project Number:

Section 8 Project Number of Expiring Contract:

FHA Project Number (if applicable):

Project Name:

Project Description:³

TYPE OF RENEWAL

- Check this box for a project renewed under Section 524(a) of MAHRA (not including a Mark-Up-To-Market renewal).
- Check this box for a project renewed at exception rents under Section 524(b)(1) of MAHRA.

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PARTIES TO RENEWAL CONTRACT

Name of Contract Administrator⁴

Address of Contract Administrator

Name of Owner⁵

Address of Owner

2 TERM AND FUNDING OF RENEWAL CONTRACT

a The Renewal Contract begins on ⁶ and shall run for a period of ⁷ years.

b Execution of the Renewal Contract by the Contract Administrator is an obligation by HUD of \$ ⁸, an amount sufficient to provide housing assistance payments for approximately ⁹ months of the first annual increment of the Renewal Contract term.

- c** HUD will provide additional funding for the remainder of the first annual increment and for subsequent annual increments, including for any remainder of such subsequent annual increments, subject to the availability of sufficient appropriations. When such appropriations are available, HUD will obligate additional funding and provide the Owner written notification of (i) the amount of such additional funding, and (ii) the approximate period of time within the Renewal Contract term to which it will be applied.

3 DEFINITIONS

ACC. Annual contributions contract.

Anniversary. The annual recurrence of the date of the first day of the term of the Renewal Contract.

Contract rent. The total monthly rent to owner for a contract unit, including the tenant rent (the portion of rent to owner paid by the assisted family).

Contract units. The units in the Project which are identified in Exhibit A by size and applicable contract rents.

Fifth year anniversary. The Renewal Contract annual anniversary that falls at expiration of each 5-year period of the Renewal Contract term.

Fifth year comparability adjustment. An adjustment of contract rents by the contract administrator at the Fifth Year Anniversary. The contract rent for each unit size is set at comparable rent as shown by comparability analysis.

HAP contract. A housing assistance payments contract between the Contract Administrator and the Owner.

HUD. The United States Department of Housing and Urban Development.

HUD requirements. HUD regulations and other requirements, including changes in HUD regulations and other requirements during the term of the Renewal Contract.

MAHRA. The Multifamily Assisted Housing Reform and Affordability Act of 1997 (Title V of Public Law No. 105-65, October 27, 1997, 111 Stat. 1384), as amended.

Mid-term comparability adjustment. An adjustment of contract rents by the contract administrator within each 5-year period of the Renewal Contract term (in addition to the comparability analysis and adjustment at

the Fifth Year Anniversary). The contract rent for each unit size is set at comparable rent as shown by comparability analysis.

OCAF. An operating cost adjustment factor established by HUD.

PHA. Public housing agency (as defined and qualified in accordance with the United States Housing Act of 1937. 42 U.S.C. 1437 et seq.).

Project. The housing described in section 1 of the Renewal Contract.

Renewal Contract. This contract, including applicable provisions of the Expiring Contract (as determined in accordance with section 5 of the Renewal Contract).

Section 8. Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

4 RENEWAL CONTRACT

a Parties

- (1) The Renewal Contract is a housing assistance payments contract ("HAP Contract") between the Contract Administrator and the Owner of the Project (see section 1).
- (2) If HUD is the Contract Administrator, HUD may assign the Renewal Contract to a public housing agency ("PHA") for the purpose of PHA administration of the Renewal Contract, as Contract Administrator, in accordance with the Renewal Contract (during the term of the annual contributions contract ("ACC") between HUD and the PHA). Notwithstanding such assignment, HUD shall remain a party to the provisions of the Renewal Contract that specify HUD's role pursuant to the Renewal Contract, including such provisions of section 9 (HUD requirements), section 10 (statutory changes during term) and section 11 (PHA default), of the Renewal Contract.

b Statutory authority

The Renewal Contract is entered pursuant to section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), and section 524 of MAHRA.

c Expiring Contract

Previously, the Contract Administrator and the Owner had entered into a HAP Contract ("expiring contract") to make Section 8 housing

assistance payments to the Owner for eligible families living in the Project. The term of the expiring contract will expire prior to the beginning of the term of the Renewal Contract.

d Purpose of Renewal Contract

- (1) The purpose of the Renewal Contract is to renew the expiring contract for an additional term. During the term of the Renewal Contract, the Contract Administrator shall make housing assistance payments to the Owner in accordance with the provisions of the Renewal Contract.
- (2) Housing assistance payments shall only be paid to the Owner for contract units occupied by eligible families leasing decent, safe and sanitary units from the Owner in accordance with statutory requirements, and with all HUD regulations and other requirements. If the Contract Administrator determines that the Owner has failed to maintain one or more contract units in decent, safe and sanitary condition, and has abated housing assistance payments to the Owner for such units, the Contract Administrator may use amounts otherwise payable to the Owner pursuant to the Renewal Contract for the purpose of relocating or rehousing assisted residents in other housing.

e Contract units

The Renewal Contract applies to the Contract units.

5 EXPIRING CONTRACT – PROVISIONS RENEWED

- a Except as specifically modified by the Renewal Contract, all provisions of the Expiring Contract are renewed (to the extent such provisions are consistent with statutory requirements in effect at the beginning of the Renewal Contract term).
- b All provisions of the Expiring Contract concerning any of the following subjects are not renewed, and shall not be applicable during the renewal term:
 - (1) Identification of contract units by size and applicable contract rents;
 - (2) The amount of the monthly contract rents;

-
- (3) Contract rent adjustments; and
 - (4) Project account (sometimes called "HAP reserve" or "project reserve") as previously established and maintained by HUD pursuant to former Section 8(c)(6) of the United States Housing Act of 1937 (currently Section 8(c)(5) of the Act, 42 U.S.C. 1437f(c)(5)). Section 8(c)(5) does not apply to the Renewal Contract, or to payment of housing assistance payments during the Renewal Contract term.
- c The Renewal Contract includes those provisions of the Expiring Contract that are renewed in accordance with this section 5.

6 CONTRACT RENT

a Initial contract rents

At the beginning of the Renewal Contract term, and until contract rents for units in the Project are adjusted in accordance with section 6b, the contract rent for each bedroom size (number of bedrooms) shall be the initial contract rent amount listed in Exhibit A of the Renewal Contract.

b Contract rent adjustments

(1) OCAF or Budget-Based Rent Adjustments

- (a) Except as provided in section 6b(2) below (concerning comparability adjustments at each Fifth Year Anniversary and discretionary comparability adjustments within each five-year term), during the term of the Renewal Contract the Contract Administrator shall annually, on the anniversary of the Renewal Contract, adjust the amounts of the monthly contract rents in accordance with HUD requirements by either of the following methods (as determined by the Contract Administrator in accordance with HUD requirements):
 - (i) Using an OCAF; or
 - (ii) At the request of the owner, based on the budget for the Project, as approved by the Contract Administrator in accordance with HUD requirements.

-
- (b) Adjustments by use of the OCAF shall not result in a negative adjustment (decrease) of the contract rents. The OCAF shall not be used for adjustment of rent at each Fifth Year Anniversary (as determined in accordance with section 6b(2)(b) below).

(2) **Comparability adjustments**

- (a) **Applicability.** This section 6b(2) is applicable only if the contract has been renewed pursuant to Section 524(a) of MAHRA. This section 6b(2) does not apply to a project renewed at exception rents under Section 524(b)(1) of MAHRA (See section 1 of the Renewal Contract).
- (b) **Fifth year adjustment (comparability adjustment at expiration of each 5-year period, if applicable).**
- (i) This section 6b(2)(b) is only applicable if the term of the Renewal Contract is longer than five (5) years (from the first day of the term specified in section 2a).
- (ii) At the expiration of each 5-year period of the Renewal Contract term ("Fifth Year Anniversary"), the Contract Administrator shall conduct a comparability analysis of existing contract rents. At such Fifth Year Anniversary of the Renewal Contract, the Contract Administrator shall make any adjustments in the monthly contract rents, as reasonably determined by the Contract Administrator in accordance with HUD requirements, necessary to set the contract rent for each unit size at comparable market rent. Such adjustment may result in a negative adjustment (decrease) or positive adjustment (increase) of the contract rents for one or more unit sizes.
- (iii) To assist in the redetermination of contract rents at each Fifth Year Anniversary, the Contract Administrator may require that the Owner submit to the Contract Administrator a rent comparability study prepared (at the Owner's expense) in accordance with HUD requirements.

(c) Mid-term adjustment (discretionary comparability adjustment within 5-year term)

In addition to the comparability analysis and adjustment of contract rents at the Fifth Year Anniversary, HUD may, at HUD's discretion, require or permit the Contract Administrator to conduct a comparability analysis and adjustment of contract rents ("mid-term adjustment"), one more time within each 5-year period of the Renewal Contract term

(d) Adjusting contract rent

At the time of a fifth year or mid-term comparability adjustment, the Contract Administrator shall make any adjustments in the monthly contract rents, as reasonably determined by the Contract Administrator in accordance with HUD requirements, necessary to set the contract rent for each unit size at comparable rent. Such adjustment may result in a negative adjustment (decrease) or positive adjustment (increase) of the contract rents for one or more unit sizes.

(3) Procedure for rent adjustments during renewal term

- (a)** To adjust contract rents during the term of the Renewal Contract (including an OCAF or budget-based adjustment in accordance with section 6b(1), or a fifth year or midterm adjustment in accordance with section 6b(2)), the Contract Administrator shall give the Owner notice with a revised Exhibit A that specifies the adjusted contract rent amounts.
- (b)** The revised Exhibit A shall specify the adjusted contract rent amount for each bedroom size as determined by the Contract Administrator in accordance with this section. The adjustment notice by the Contract Administrator to the Owner shall specify when the adjustment of contract rent is effective.
- (c)** Notice of rent adjustment by the Contract Administrator to the Owner shall automatically constitute an amendment of the Renewal Contract.

(4) No other adjustments

Except for contract rent adjustments in accordance with this section, there shall not be any other adjustments of the contract rents during the term of the Renewal Contract. Special adjustments shall not be granted.

7 OWNER WARRANTIES

- a** The Owner warrants that it has the legal right to execute the Renewal Contract and to lease dwelling units covered by the contract.
- b** The Owner warrants that the rental units to be leased by the Owner under the Renewal Contract are in decent, safe and sanitary condition (as defined and determined in accordance with HUD regulations and procedures), and shall be maintained in such condition during the term of the Renewal Contract.

8 OWNER TERMINATION NOTICE

- a** Before termination of the Renewal Contract, the Owner shall provide written notice to the Contract Administrator and each assisted family in accordance with HUD requirements.
- b** If the Owner fails to provide such notice in accordance with the law and HUD requirements, the Owner may not increase the tenant rent payment for any assisted family until such time as the Owner has provided such notice for the required period.

9 HUD REQUIREMENTS

The Renewal Contract shall be construed and administered in accordance with all statutory requirements, and with all HUD regulations and other requirements, including changes in HUD regulations and other requirements during the term of the Renewal Contract. However, any changes in HUD requirements that are inconsistent with the provisions of the Renewal Contract, including the provisions of section 6 (contract rent), shall not be applicable.

10 STATUTORY CHANGES DURING TERM

If any statutory change during the term of the Renewal Contract is inconsistent with section 6 of the Renewal Contract, and if HUD determines, and so notifies the Contract Administrator and the Owner, that the Contract Administrator is unable to carry out the provisions of

section 6 because of such statutory change, then the Contract Administrator or the Owner may terminate the Renewal Contract upon notice to the other party.

11 PHA DEFAULT

- a** This section 11 of the Renewal Contract applies if the Contract Administrator is a PHA acting as Contract Administrator pursuant to an annual contributions contract ("ACC") between the PHA and HUD. This includes a case where HUD has assigned the Renewal Contract to a PHA Contract Administrator, for the purpose of PHA administration of the Renewal Contract.
- b** If HUD determines that the PHA has committed a material and substantial breach of the PHA's obligation, as Contract Administrator, to make housing assistance payments to the Owner in accordance with the provisions of the Renewal Contract, and that the Owner is not in default of its obligations under the Renewal Contract, HUD shall take any action HUD determines necessary for the continuation of housing assistance payments to the Owner in accordance with the Renewal Contract.

12 EXCLUSION OF THIRD-PARTY RIGHTS

- a** The Contract Administrator does not assume any responsibility for injury to, or any liability to, any person injured as a result of the Owner's action or failure to act in connection with the Contract Administrator's implementation of the Renewal Contract, or as a result of any other action or failure to act by the Owner.
- b** The Owner is not the agent of the Contract Administrator or HUD, and the Renewal Contract does not create or affect any relationship between the Contract Administrator or HUD and any lender to the Owner or any suppliers, employees, contractors or subcontractors used by the Owner in connection with implementation of the Renewal Contract.
- c** If the Contract Administrator is a PHA acting as Contract Administrator pursuant to an annual contributions contract ("ACC") between the PHA and HUD, the Contract Administrator is not the agent of HUD, and the Renewal Contract does not create any relationship between HUD and any suppliers, employees, contractors or subcontractors used by the Contract Administrator to carry out functions or responsibilities in connection with contract administration under the ACC.

13 WRITTEN NOTICES

- a** Any notice by the Contract Administrator or the Owner to the other party pursuant to the Renewal Contract shall be given in writing.
- b** A party shall give notice at the other party's address specified in section 1 of the Renewal Contract, or at such other address as the other party has designated by a contract notice. A party gives a notice to the other party by taking steps reasonably required to deliver the notice in ordinary course of business. A party receives notice when the notice is duly delivered at the party's designated address.

SIGNATURES

Contract administrator (HUD or PHA)

Name of Contract Administrator

By: _____

Signature of authorized representative

Name and official title

Date _____

U.S. Department of Housing and Urban Development

By: _____

Signature of authorized representative

Name and official title

Date _____

Owner

Name of Owner

By: _____

Signature of authorized representative

Name and title

Date _____

EXHIBIT A

**IDENTIFICATION OF UNITS ("CONTRACT UNITS")
BY SIZE AND APPLICABLE CONTRACT RENTS**

**Section 8 Contract Number:
FHA Project Number (if applicable):
Effective Date of the Rent Increase (if applicable):**

<u>Number of Contract Units</u>	<u>Number of Bedrooms</u>	<u>Contract Rent</u>	<u>Utility Allowance</u>	<u>Gross Rent</u>
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NOTE: This Exhibit will be amended by Contract Administrator notice to the Owner to specify adjusted contract rent amounts as determined by the Contract Administrator in accordance with section 6b of the Renewal Contract.

Comments:

Basic Renewal Contract
Multi-Year Term
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EXHIBIT B
DISTRIBUTIONS LIMITATION

FOR PROJECT NOT SUBJECT TO DISTRIBUTIONS LIMITATION:

If the project is not subject to any limitation on distributions of project funds, either pursuant to an FHA Regulatory Agreement or pursuant to the Expiring Contract, neither HUD nor the PHA may impose any additional limitation on distributions of project funds during the term of the Renewal Contract.

FOR PROJECT SUBJECT TO DISTRIBUTIONS LIMITATION:

If the project is subject to any limitation on distributions of project funds pursuant to an FHA Regulatory Agreement or pursuant to the Expiring Contract, such limitation on distributions shall continue to be applicable during the term of the Renewal Contract, provided that the owner may take an increased distribution in accordance with the Section 8 Renewal Policy Guidance for Renewal of Project-Based Section 8 Contracts, (the "Guidebook").

However, owners of Section 8 properties must maintain the property in good condition, as demonstrated by a REAC score of 60 or higher, in order to take increased distributions.

The owner shall comply with the distribution limitations. The maximum distribution to the owner shall be equal to the total of:

- 1 The limited distribution permitted pursuant to the FHA Regulatory agreement or the Expiring Contract, **plus**
- 2 Any increased distribution as approved by HUD in accordance with the Guidebook.

INSTRUCTIONS FOR PREPARATION OF RENEWAL CONTRACT

The following instructions are not part of the Renewal Contract.

Endnote numbers are keyed to references in the text of the Renewal Contract.

¹ This form of Renewal Contract is to be used for initial and subsequent renewals of an expiring Section 8 project-based HAP contract under the authority of Section 524(a) or 524(b)(1) of MAHRA for a term of two years or more. Attachment 11-1 is to be used for renewals under the authority of Section 524(a) or 524(b)(1) of MAHRA for a renewal term of one year.

This form may not be used for Mark-Up-To-Market Renewals. The HUD prescribed form of Mark-Up-To-Market Renewal Contract must be used for this purpose.

Section 2 of the Renewal Contract specifies the contract term.

² To prepare the Renewal Contract for execution by the parties, fill out all contract information in section 1 and section 2.

³ Enter a description of housing that will be covered by the Renewal Contract. The description must clearly identify the Project by providing the Project's name, street address, city, county, state, and zip code, block and lot number (if known), and any other information, necessary to clearly designate the covered Project.

⁴ Enter the name of the Contract Administrator that executes the Renewal Contract. If HUD is the Contract Administrator, enter "United States of America – Department of Housing and Urban Development (HUD)". If the Contract Administrator is a public housing agency ("PHA"), enter the full legal name of the PHA.

⁵ Enter the full legal name of the Owner. For example: "ABC Corporation, Inc., a Maryland corporation."

Basic Renewal Contract
Multi-Year Term
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⁶ The Renewal Contract must be entered before expiration of the Expiring Contract. Enter the date of the first day after expiration of the term of the Expiring Contract.

⁷ Enter a whole number of two or more years.

⁸ Enter the amount of funding obligated.

⁹ Enter a whole number of months.

**HUD Handbook 4350.3:
Occupancy Requirements of Subsidized
Multifamily Housing Programs**

AR 2489

From: [Formica, John L.](#)
To: [Tompkins, Robert](#); [Vacura, Richard J.](#); [Andrew Mohr](#); [Podzius, Kasey M](#); [Rodgers, Blythe](#); [goldenm@pepperlaw.com](#); [Dennis J. Callahan](#); [Neil O'Donnell](#); [Gill, Elizabeth M.](#); [weinerh@pepperlaw.com](#); [cardk@foster.com](#)
Subject: B-406738 et al.
Date: Friday, June 29, 2012 9:52:18 AM
Attachments: [SecureZIP Attachments.zip](#)

Counsel-

Attached in the above document are the questions GAO requests that HUD to respond to in its supplemental agency report. The dial-in number for our 11 am conference call is 800-779-0651, and the passcode is 10968.

John Formica



AR 2593

JA300/AR2593

HUD's supplemental report should include responses to the following questions, as well as responses to the issues and arguments raised by the protesters in their comments.

1. HUD's statutory authority to enter into a cooperative agreement with regard to the Section 8 project-based rental assistance program.

HUD has pointed to the "Declaration of Policy" set forth at 42 U.S.C § 1437(a) "to promote the general welfare of the Nation by employing the funds and credit of the Nation . . . to assist States," and the reference to "annual contribution contracts" with PHAs set forth in 42 U.S.C. § 1437f(b)(1), as HUD's authority to enter into cooperative agreements with PHAs with regard to the Section 8 program at issue.

The protesters' comments challenge HUD's position in a number of ways. These challenges include the assertion that 42 U.S.C. § 1437f(b)(2), is applicable to the Section 8 project-based rental assistance program here, and that 42 U.S.C. § 1437f(b)(1) is not.

A. The agency should expand on its argument regarding the statutory basis to enter into a cooperative agreement under the circumstances here. The agency's argument should include further explanation and analysis, with appropriate citation, supporting the agency's position, and should address the arguments made by the protesters in their comments.

B. As part of this discussion, the agency should explain its view regarding the applicability of 42 U.S.C. § 1437f(b)(1) to the Section 8 project-based program. With regard to 42 U.S.C. § 1437f(b)(1), the agency asserts in its report that "[t]he statute makes it clear that HUD is authorized to perform the functions assigned to the PHA only when a PHA is unable to implement the statute or no PHA has been created." Agency Report (AR) at 12. This assertion should be further explained, recognizing the references to HUD's responsibility to administer the HAP contracts set forth in the CFR (e.g., 24 C.F.R. § 880.505(a)), and HUD's apparent administration of the HAP contracts from the mid-1970s to 2000.

2. Certain aspects of HAP Contracts

GAO's "HUD Rental Assistance" Report" (GAO-05-224) noted that as "of October 2004, HUD's project-based Section 8 program consisted of about 21,900 properties, and HUD transferred contracts for about 11,800 of these properties to PBCAs."

A. How many properties does HUD's project-based Section 8 program consist of today?

B. Does the total number of properties equal the total number of HAP contracts, or do they differ? Please explain.

C. Are new HAP contracts entered into under HUD's project-based Section 8 program, or are all of the HAP contracts subject to the NOFA renewals?

It is GAO's understanding, and that of the protesters, that HUD and the property owners are the parties to the HAP contracts. Additionally, past HUD reports refer to HAP contracts as "executed between HUD and private owners of multifamily housing developments." Protest (B-406738), Tab 10, HUD Housing Certificate Fund, at 3. As another example, HUD's FY 2013 Budget Request, "Housing: Project-Based Rental Assistance 2013 Summary Statements and Initiatives," states that "[p]roject-based rental assistance is provided through contracts between the Department and owners of multi-family housing." Protester's Comments (B-406738.3; B-406738.7), Tab 20, HUD's FY 2013 Budget Request, "Housing: Project-Based Rental Assistance 2013 Summary Statements and Initiatives, at A-4. However, 24 C.F.R. § 880.201 references situations where the HAP contract would be between HUD or the PHA and the property owner.

D. Who are the parties to the HAP contracts?

The protesters argue that HUD, as a party to a HAP contract, is obligated to the property owner to administer the contract. Certain of the protesters refer to 24 C.F.R. §§ 880.201 and 880.505, wherein HUD is identified in certain circumstances as the contract administrator, and is authorized to "contract with another entity for performance of some or all of its contract administration functions." HUD asserts that "HUD is not obligated to administer the HAP contracts itself," and that "HUD is not assigning work to the PHAs that it is otherwise required to do." AR at 13.

E. HUD's supplemental report should address the protesters' arguments here, and provide support for HUD's assertions that it is not obligated to administer the HAP contracts itself and is not assigning work to the PHAs that HUD is not otherwise obligated to do.

3. Background

The record includes numerous GAO and HUD documents concerning HUD's Section 8 project-based program. The GAO documents repeatedly refer to HUD's relationships with PHAs, for the PHA's performance of contract administration services, as "contracts." The record includes a GAO report stating that "[a]ccording to HUD, the use of contract administrators to manage project-based Section 8 housing assistance contract will relieve HUD field staff of many duties they currently perform," and states that HUD "would select contract administrators through a competitive procurement process." Protest (B-406738), Tab 9, Housing and Urban Development, GAO/T-RCED-99-104. Another GAO report references a "HUD initiative to contract out the oversight and administration of most of its project-based contracts," with HUD having "hired" PHAs to perform this work. Protest (B-406738), Tab 6, Project Based Rental Assistance, GAO-07-290, at 10. The report states that HUD did so because of HUD's own "staffing constraints." Id.

A HUD document also refers, in the context of HUD's project-based Section 8 program, to HUD's "plans to procure the services of contract administrators to assume many" contract administration duties. Protest (B-406738), Tab 10, HUD Housing Certificate Fund, at 4.

The record further includes the RFP issued by HUD on May 3, 1999, for the provision of contract administration services for Section 8 project-based HAP contracts. Protest (B-406738.3), Tab 1, RFP. The RFP includes a statement of work, evaluation factors, "Proposal Organization," and "Contract Term," and "Factors for Award" sections.

These documents were referenced in the protests and included as exhibits. The agency report did not specifically address these documents, but rather, asserted that HUD "has never awarded an ACC through the means of a procurement contract." AR at 2.

A. HUD supplemental report should include an explanation regarding these documents, and their relevance to the issues in these protests.

B. HUD's supplemental report should also include a response to the protester's assertion that HUD has not previously identified the ACCs issued in connection with the Section 8 project-based HAP contracts in its "mandatory disclosure of assistance agreements." Protester's Comments (B-406738), at 28.



OFFICE OF GENERAL COUNSEL

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

July 9, 2012

John Formica, Esq.
Office of General Counsel
Procurement Law Control Group
United States Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Re: B-406738.1, Protest of Assisted Housing Services Corp.
B-406738.2, Protest of North Tampa Housing Development Corp.
B-406738.3, Protest of Jefferson County Assisted Housing Corp.
B-406738.4, Protest of National Housing Compliance
B-406738.5, Protest of Southwest Housing Compliance Corp.
B-406738.6, Protest of Contract Management Services
B-406738.7, Supplemental Protest of Jefferson County Assisted Housing Corp.
B-406738.8, Protest of Massachusetts Housing Finance Agency

Dear Mr. Formica:

This Supplemental Agency Report responds to the specific questions posed to the Department of Housing and Urban Development ("HUD") by the United States Government Accountability Office ("GAO") on June 29, 2012, as well as the comments filed with GAO by Assisted Housing Services Corporation ("AHSC"), North Tampa Housing Development Corporation ("NTHDC"), Jefferson County Assisted Housing Corporation ("JeffCo"), National Housing Compliance ("NHC"), Southwest Housing Compliance Corporation ("SHCC"), Contract Management Services ("CMS"), and Massachusetts Housing Finance Agency ("MassHousing") (collectively referred to herein as "protesters") regarding the Agency Report submitted by HUD in the above referenced protests. Section I of this Supplemental Agency Report answers GAO's questions and protesters' comments related thereto, and Section II addresses the protesters' remaining comments.

As evidenced below, this NOFA is, and was intended by HUD to be, a notice of competition for the issuance of 42 cooperative agreements, not procurement contracts. Because the NOFA does not involve a contract for the procurement of property or services, HUD renews its request that GAO deny the protests on the grounds that GAO lacks jurisdiction over these matters pursuant to the Competition in Contracting Act (CICA) and GAO's implementing bid protest regulations. 31 U.S.C. § 3551(1)(A); 4 C.F.R. § 21.1(a).

I. HUD's Response to GAO's Questions

1. HUD Has the Statutory Authority to Enter Into Cooperative Agreement with Regards to the Section 8 Annual Contributions Contracts ("ACCs").

The central issue under consideration by GAO is whether HUD is correctly using a cooperative agreement instead of a procurement contract to provide for the administration of the Section 8 program that makes available project-based rental assistance to low-income families. As to the threshold question to be decided by GAO--"whether the agency has statutory authority to engage in assistance transactions at all"--there is no dispute. 2 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 10-17 (3d Ed. 2004) (hereinafter GAO REDBOOK). See Comments of NHC at 5-6., Comments of JeffCo at 18. Further, "[o]nce the necessary underlying authority is found, the legal instrument (contract, grant, or cooperative agreement) that fits the arrangement as contemplated must be used, **using the statutory definitions for guidance** as to which instrument is appropriate." GAO REDBOOK at 10-17 (emphasis added).

A. The United States Housing Act, Sections 2 and 8(b)(1) Authorize HUD To Enter Into A Cooperative Agreement With PHAs To Administer the Section 8 Project-Based Rental Assistance Program.

i. HUD has authority to enter into Cooperative Agreements.

The authority for HUD to treat the statutorily identified "annual contributions contract" as a cooperative agreement is found in Sections 2 and 8(b)(1) of the 1937 Act, 42 U.S.C. § 1437, 1437f(b)(1). Section 2 of the 1937 Act clearly sets forth a policy to "assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families." 42 U.S.C. § 1437(a)(1)(A). Section 8 of the 1937 Act, sets forth the assistance programs for low-income families, 42 U.S.C. § 1437f(a), one of which is the project-based rental assistance program. See 42 U.S.C. § 1437f(b) and (d)(2); see also 42 U.S.C. § 1437f(f)(6) (defining project based assistance as "rental assistance under subsection (b) of this section that is attached to the structure pursuant to subsection (d)(2) or (o)(13) of this section."). As part of the Section 8 project-based assistance, Section 8(b)(1) authorizes HUD to "enter into annual contributions contracts with public housing agencies." 42 U.S.C. § 1437f(b)(1).

Thus the 1937 Act authorizes HUD "to enter into annual contributions contracts with public housing agencies" for the purpose of "assist[ing] States and political subdivisions of States" to provide decent and safe housing that is affordable to low-income families. 42 U.S.C. §§ 1437(a)(1)(A); 1437f(b)(1). These provisions, taken together, support HUD's use of an assistance relationship such as a cooperative agreement. See 31 U.S.C. § 6303(5)(1) (establishing that the principle purpose of a cooperative agreement is to provide assistance to a recipient "to carry out a public purpose of support or stimulation authorized by a law of the United States"); Comptroller General of the United States, *Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements*, GGD-81-88, at ii (Sept. 4, 1981) ("An assistance relationship, on the other hand, occurs when the principal purpose of the relationship is to transfer money, property, or anything of value to a recipient to accomplish a public purpose of support or stimulation.") .

Further, as has GAO explained, “if the program purpose contemplates support to certain types of intermediaries to provide consultation or other specified services to third parties, the Comptroller General has approved the agency’s choice of a grant rather than a contract as the preferred funding vehicle.” GAO REDBOOK 10-20. It cannot be disputed that the Section 8 program, as structured by Congress, contemplates support to public housing agencies (“PHAs”) to provide services to property owners who receive rental subsidies on behalf of low-income families.

MassHousing argues that HUD’s reliance on the overarching purpose of the Section 8 program would be analogous to “all defense contracts qualify[ing] as cooperative agreements because they all provide for the public benefit by furthering national security.” Comments of MassHousing at 7. If HUD were entering into cooperative agreements with any entity, including a private entity, who happens to promote affordable housing, that analogy could be true. Here, however, it is a flawed analogy because protester is disregarding the statute. Under the 1937 Act, an ACC may only be entered into with a PHA, defined by statute as “any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing.” 42 U.S.C. § 1437a(b)(6)(A). In addition, the statute specifically sets forth a policy to “assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families.” 42 U.S.C. § 1437(a)(1)(A). Protesters attempt to broaden the scope of HUD’s argument for the purposes of an inaccurate analogy is misguided and not in line with the specific language in the statute.

ii. HUD’s authority is not limited by the 1937 Act’s use of the term “contract.”

In analyzing the statutory authority, the protesters also ignore the guidance offered by the GAO and focus on the statutory use of the term “annual contributions **contract**,” noting that the statute uses the term “contract,” but does not use the terms “grant” or “cooperative agreement.” See Comments of NHC at 7. However, GAO advised agencies to analyze the relationship between parties as established by the authorizing statute instead of “simply looking for the word ‘grant’.” Comptroller General of the United States, *Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements*, GGD-81-88, at 16-17 (Sept. 4, 1981). Instead, NHC’s cites to statutory references to “grants” in other sections of the United States Housing Act to contrast the use of the term annual contributions contract in 42 U.S.C. § 1437f(b)(1). As explained below, these references do not bolster NHC’s position.

NHC relies on 42 U.S.C. § 1437v (m)(2), to show an instance where Congress specifically authorized a “grant, contract, or cooperative agreement.” See Comments of NHC at 8, footnote 6; However, the assistance authorized by this provision is technical assistance including the establishment of a computer center. 42 U.S.C. § 1437v (m)(2). It is not surprising that the language is different from Section 8, as it does **not** provide annual contributions to public housing agencies, as in Section 8. See 42 U.S.C. § 1437f(b)(1).

NHC also references 42 U.S.C. § 1437c(a)(2), in which grants are used to provide to public housing agencies the development cost of public housing projects. See Comments of NHC at 8, footnote 6; 42 U.S.C. § 1437c(a)(2) (“The Secretary may make contributions (in the form of grants) to public housing agencies to cover development cost of public housing projects.”). The reference

to grants was added to the statute merely to specify that HUD no longer had authority to make contributions in the form of loans with respect to the development cost of public housing projects. Housing and Community Development Act of 1987, P.L. 100-242, § 112, 101 Stat. 1815, 1823. Of greater significance than the references to “grants” however, is that in the very same section of the 1937 Act, section 1437c(1), the statute provides: “The Secretary may make annual contributions to public housing agencies to assist in achieving and maintaining the lower income character of their projects. The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment.” 42 U.S.C. § 1437c(a)(1) (emphasis added). Here the statute clearly and unambiguously sets forth an assistance relationship for an annual contributions contract, demonstrating that Congress did not use the term “contract” with the intent to refer to a procurement contract. Rather, assistance was to be provided through the annual contributions contract. *Id.*

NHC also fails to recognize that the HAP contract is in fact a “contract.” NHC recognizes that the HAP contract provides assistance, but yet questions the authority for the ACC because the word “contract” is in its title. Comments of NHC at 16 (“The HAP contract is the contract for the assistance, and it is pursuant to that contract that the private owners receive their assistance.) If the HAP contract is federal assistance, it should not be surprising that the same section of the statute that authorized the HAP contracts also authorized an assistance relationship for the Annual Contributions Contract.

Finally, it is not subject to genuine dispute that grants are a type of contract. *See, e.g., McGee v. Mathis* 71 U.S. 143, 155 (1866) (“It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction, -competent parties, proper subject-matter, sufficient consideration, and consent of minds.”); *Knight v. United States*, 52 Fed.Cl. 243, 251 (2002), *rev’s on other grounds*, 65 Fed. Appx. 286 (Fed. Cir. 2003) (“A grant agreement is an enforceable contract in this court.”); *see also* GAO Redbook at 10-6 – 10-8. Thus, it is not significant that the statute describes an “annual contributions **contract**,” since the term “contract” includes grants and cooperative agreements.

iii. Prior to 2011, Amendment of the Assistance Relationship set forth in §1437f(b) was Unnecessary.

In its comments, MassHousing alleges that, “[a]lthough the 1937 Act predates the FGCAA [Federal Grant and Cooperative Agreement Act of 1977], Congress has since enacted several amendments to the 1937 Act, specifically to the sections at issue in this protest, and has not chosen to provide HUD with the explicit authority to enter into cooperative agreements.” Comments of MassHousing at 11. However, this allegation assumes that there was a need for Congress to add language to clarify the nature of the assistance related to the project-based program. That was not the purpose of the any of the amendments to §1437f(b). At the time of the 1998 Amendment to §1437f (b), which was both the last time §1437f(b) was amended and the only amendment cited by MassHousing in support of its argument, *id.* at 12, there was no issue as to whether an ACC was more properly considered a cooperative agreement or a procurement contract. As a result, there was no reason for Congress to amend the ACC language.

In fact, it has only been necessary once for Congress to add language to identify the form in which assistance would be provided. That was when section 5(a)(2) of the 1937 Act was amended

to add “(in the form of grants)” after “annual contributions” to make clear that HUD no longer had the authority to make contributions in the form of loans to PHAs with respect to the development of public housing. *See* 42 U.S.C. § 1437c(a)(2); Pub. L. 100-242, § 112. No such language was added to Section 9 when the public housing program was converted from a discretionary grant program to a formula grant program and fund, and HUD continues to treat the ACCs associated with the public housing program as a grant agreement. Accepting MassHousing’s argument would also mean that the Section 8 Housing Voucher program, which was created after the FGCAA, also provides no authority for HUD to enter into a grant or cooperative agreement because the words “grant” and “cooperative agreement” are not used in connection with that program either. Thus MassHousing’s claim that Congress would have necessarily amended the language of §1437f(b) to explicitly allow for cooperative agreements following enactment of the FGCAA is not persuasive and should be rejected.

B. Title 42, Section 1437f(b)(1) Authorizes HUD to Enter Into ACCs with PHAs for the Section 8 Project-Based Rental Assistance Program.

The Section 8 project-based housing assistance program is comprised of multiple subprograms, including, but not limited to, the Loan Management Set-Aside, Property Disposition, Section 8 New Construction, and Substantial Rehabilitation programs. *See* AR000531-2, Tab 17, HUD Occupancy Handbook 4350.3 REV. The Loan Management Set-Aside and Property Disposition programs deal with housing that already exists. *See id.* SubSection 8(b)(1) addresses ACCs relating to existing housing, and it has not been amended since its enactment. It states:

The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

42 U.S.C § 1437f(b)(1); *see also* AR000321, Tab 1, Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974). Section 8(b)(2), which has since been repealed, addressed the ACCs with respect to New Construction and Substantial Rehabilitation programs. It stated:

To the extent of annual contributions authorizations under section 5(c) of this Act, the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter

into contracts to make assistance payments to such owners or prospective owners.

AR000322, Tab 1, Housing and Community Development Act of 1974, § 201(a), 88 Stat. 663.

Accordingly, under the original statutory scheme for existing housing, including the Loan Management Set-Aside (“LMSA”) and Property Disposition (“PD”) programs, HUD was directed to enter into ACCs with PHAs unless there was no PHA available or able to “perform the other functions assigned to a public housing agency by this section.” 42 U.S.C. § 1437f(b)(1). If there was an ACC with a PHA, however, the statute did not require the PHAs to enter into HAP contracts. *Id.* (PHAs “may enter into contracts to make assistance payments to owners of existing dwelling units”). On the other hand, for newly constructed or substantially rehabilitated housing, the statutory scheme contemplated that HUD would enter into HAP contracts with the property owners, but it also permitted HUD to enter into ACCs with PHAs and PHAs to enter into HAP contracts. AR000322, Tab 1, Housing and Community Development Act of 1974, § 201(a), 88 Stat. at 663. HUD thus permitted the property owner to choose whether to apply for funding directly from HUD or to contract with a PHA. *See* AR000322, Section 8(b)(2), Housing and Community Development Act of 1974, § 201(a), 88 Stat. at 633; AR000326-7, Tab 2, 24 C.F.R. §§ 880.203(b), 881.203(b) (1976) (“The invitation [for new construction and substantial rehabilitation proposals] shall also state that preliminary proposal may be submitted by private owners or PHA owners for direct contracting with HUD, or by PHAs on behalf of private owners with whom the PHAs proposes to contract pursuant to an ACC with HUD.”). Pursuant to this authority under Section 8(b)(2), HUD did, in fact, enter into and administer many of the HAP contracts for new construction and substantially rehabilitated projects. Similarly PHAs entered into ACCs with HUD and then entered into and administered HAP contracts for new construction and substantially rehabilitated projects.

In 1983, Congress repealed new construction authority under the Section 8 program and Subsection (b)(2) was deleted. Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98-181, §209(a)(2), 97 Stat. 1153, 1183 (1983). However, the repealed provisions remained in effect “with respect to any funds obligated for a viable project under Section 8 of the United States Housing Act of 1937 prior to January 1, 1984.” *Id.* §209(b). After the repeal HUD no longer had authority to enter into new contracts for newly constructed or substantially rehabilitated housing, however, HUD was authorized to continue to fund the contracts that were signed prior to January 1, 1984.¹ *Id.* Because all of HUD’s project-based units are currently “existing dwelling units,” Section 8(b)(1) authorizes the use of an ACC with a PHA for their contract administration.

¹ Former Section 8(e)(1) of the 1937 Act provided that New Construction and Substantial Rehabilitation HAP contracts were to have terms of 20 to 40 years. *See* Housing and Community Development Act of 1974, § 201(a), 88 Stat. at 665. While a minority of these original contracts are still in existence, most have expired and been renewed under the Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. 105-65, 111 Stat. 1384 (MAHRA), 42 U.S.C. § 1437f note. In addition to authorizing the renewal of expiring contracts for project-based assistance under Section 8 of the 1937 Act, section 524(a)(1) of MAHRA provides that “[t]he assistance contract shall be provided under a contract having such terms and conditions as the Secretary considers appropriate, subject to the requirements of this section.” Pursuant to this grant of discretion, all MAHRA contracts provide that if HUD is the Contract Administrator, HUD may assign the Renewal Contract to a PHA for the purpose of PHA administration of the Renewal Contract, as Contract Administrator, during the term of the ACC between HUD and the PHA. *See e.g.*, AR000548, Tab 18, Basic Renewal Contract.

AHSC mistakenly argues that Section 8(b)(1) is statutory authorization for only the Section 8 tenant-based program (or Housing Choice Vouchers) and that all project-based assistance was authorized by the now repealed Section 8(b)(2). *See* Comments of AHSC at 8-9. This assertion is incorrect and contrary to the current statutory language which makes it clear that Section 8(b)(1) only applies to project-based assistance. The statute defines the term “project-based assistance,” as “rental assistance under subsection (b) of this section that is attached to the structure pursuant to subsection (d)(2) or (o)(13) of this section.” 42 U.S.C. § 1437f(f)(6). The definition’s use of “Subsection (b)” refers to Section 8(b), 42 U.S.C. § 1437f(b). Thus by statute, Section 8(b) applies to project-based housing. *Id.* On the contrary, the term “‘tenant-based assistance’ means rental assistance that under subsection (o) of this section that is not project-based assistance.” 42 U.S.C. § 1437f(f)(6). Subsection (o) refers to 42 U.S.C. 1437f(o), not 42 U.S.C. 1437f(b). Thus, by statute, Section 8(b)(1) applies only to project-based assistance.

As a result of this fundamental misunderstanding of Section 8(b), AHSC’s additional arguments regarding the distinctions between Section 8(b)(1) and 8(b)(2) and the program’s operation are fundamentally flawed and have no merit. For instance, AHSC further argues that Section 8(b)(2), which gave the authority for various project-based programs, has been repealed, and, therefore, HUD has no statutory authority to provide a cooperative agreement to a PHA for the project-based program. Comments of AHSC at 8-9. Once again, Section 8(b)(1) applies to project-based assistance and authorizes HUD to enter into ACCs with PHAs. *See* 42 U.S.C. § 1437f(f)(6). AHSC also claims that “[f]rom the 1974 enactment of the Section 8 legislation to the inception of the PBCA initiative in 1999, the Project-Based Program’s HAP contracts were administered almost entirely by HUD alone, with, at most, only incidental PHA involvement.” Comments of AHSC at 22. These allegations are not accurate and do not reflect how the program was administered in 1974 and thereafter. Under the now repealed Section 8(b)(2), the property owner could chose whether to apply for funding directly from HUD or to contract with a PHA. *See* AR000326-7, Tab 2, 24 C.F.R. §§ 880.203(b), 881.203(b). Thus, to the extent that there were a substantial number of HAP contracts administered directly by HUD, it was the result of choices made by owners, not HUD.

AHSC also wrongly alleges that the ACCs at issue in this protest “are not the instrument ‘under which HUD agrees to provide funding for a program under the 1937 Act.’” Comments of AHSC at 14; *see also id.* at 17-18, 23 (“the PB-ACCs are unique in that they are the only ACCs that transfer only the administrative fee to [the PHAs]”); Comments of JeffCo at 6 (the ACC is “separate from” the HAP contract that provides the rental assistance). This claim is unfounded as the project-based ACC transfers both the rental subsidy payment and the administrative fee to the PHA. *See* Ex. ___, ACC at ¶ 4.a. (“HUD will make housing assistance payments to the PHA for Covered Units in accordance with HUD requirements. The amount approved and paid by HUD for housing assistance payments shall be sufficient for timely payment by the PHA to owners under HAP Contracts for Covered Units.”).

In GAO Question 1.B., GAO also asked HUD to discuss its responsibility to administer the HAP contracts. A full discussion of HUD and PHA’s contract administration responsibility is found in response to Question 2.D and 2.E, below.

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B-406738; B-406738.2

**COMMENTS OF ASSISTED HOUSING SERVICES CORP. AND NORTH TAMPA
HOUSING DEVELOPMENT CORP ON SUPPLEMENTAL AGENCY REPORT**

Dated: July 15, 2012

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JA300/AR2697

Executive Summary

As reported in OIG's March 31, 1998 Semiannual Report to Congress, HUD plans to contract for the administration of Project-Based Section 8 Housing Assistance Payments Contracts. HUD is currently undergoing extensive reorganization under its HUD 2020 Management Plan. The Plan involves major staff downsizing, modification of HUD's organizational framework, consolidation of programs and significant changes in the way HUD conducts its business. With these changes, HUD has sought new ways to conduct its business; such as the Request for Proposals for outside contractors to administer HUD's portfolio of Section 8 contracts.

Our objectives are to evaluate the performance of Contract Administrators in New England and pro-actively identify issues that could affect the Department's plan to contract out the administration of Section 8 Housing Assistance Payments contracts. Contracting for administration of Section 8 projects is a critical area helping to form the framework of HUD's 2020 Management Reform Plan.

On March 24, 1998 and April 10, 1998, the Inspector General issued memoranda commenting on the draft Request for Proposals (RFP). The Housing staff did not reply in writing to these memoranda but held several discussions with OIG staff. Since that time, Housing has revised the RFP several times. Also, HUD staff advised us that OMB had verbally raised issues concerning the RFP which, they indicated, they are addressing.

On September 10, 1998, Housing officials advised that they are currently redrafting the RFP. The redrafted RFP will result in a performance-based contract that would include incentives for exemplary performance and disincentives when required tasks are not completed. This will be HUD's first RFP for a performance-based contract.

We examined the operations at six Contract Administrators: three Housing Finance Agencies, two Public Housing Authorities and one State Agency. These Contract Administrators administer HAP contracts for 362 projects in New England. We did not find any significant problems at the three HFAs. The two Public Housing Authorities were not performing all of the functions required; but were receiving full fees. The Public Housing Authorities did not believe that they were responsible for all of the required functions. Initially, HUD staff were performing some of these functions for the insured projects. The State Agency was not monitoring timely nor following up on identified concerns. The State Agency attributed its difficulties to its recent staff cutbacks and reorganizations.

In addition to the concerns raised in the Inspector General's memoranda, we identified several issues that we believe need to be addressed in order to successfully transfer the Section 8 contract administration function.

- Assure the accuracy of contract rents, assistance payments to owners, and utility allowances for tenant-paid utilities.
- Review all owner invoices, including special claims, to make Section 8 payments to the owner in accordance with the HAP contract for units which meet contract requirements.
- Maintain complete books and records on each HAP contract with submissions to HUD as provided in the RFP and the ACC.
- Assure owners' compliance with HUD's Annual Financial Statement protocol.
- Promote good community and tenant relations by encouraging resident initiatives, and supporting the formation and maintenance of resident councils.
- Cooperate with and support HUD HUBs/Centers
- Assist HUD field staff, management agents and owners to resolve outstanding issues.

Reasons why HUD wants to contract out this function

The Department is undergoing extensive reorganization under its HUD 2020 Management Reform Plan. The plan involves major staff downsizing, modification of HUD's Field and Headquarters organizational framework, consolidation of HUD's programs and significant changes in the way HUD conducts its business. With the downsizing of staff and changes in organization, HUD sought new ways to conduct its business; such as the Requests for Proposals for outside contractors to administer HUD's portfolio of Section 8 contract.

HUD is seeking to achieve the following objectives through contracting with Public Housing Agencies to administer Section 8 Contracts:

1. Improve the administration of project-based Section 8 HAP contracts;
2. Encourage participation by new entities by broadly defining Public Housing Agencies to include joint ventures between governmental entities and private entities in delivering contract administration services;
3. Enter into contracts only with entities which have the required qualifications and expertise in the oversight and management of affordable housing, and, that have the capacity to perform required services with the requisite personnel and resources

Objective, Scope and Methodology



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Thursday

June 26, 1997

CUOMO ANNOUNCES HISTORIC MANAGEMENT REFORMS FOR HUD TO STAMP OUT WASTE, FRAUD AND ABUSE AND IMPROVE PERFORMANCE

WASHINGTON -- Secretary Andrew Cuomo today announced historic management reforms to enable the Department of Housing and Urban Development to stamp out waste, fraud and abuse with a new Enforcement Division, and to help HUD better serve America's people and communities with improved business practices.

The management reform plan -- called HUD 2020 -- says it aims to transform HUD from "the poster child for inept government" that "has been plagued for years by scandal and mismanagement" into "a new HUD, a HUD that works."

HUD has been criticized by Congress and its Inspector General since 1980 for failing to modernize operations and fight waste, fraud and abuse. The General Accounting Office designates HUD as the only "high risk" agency in the federal government.

Vice President Al Gore, who has spearheaded government reinvention under President Clinton, said HUD 2020 "goes farther and does more than any other management reform plan not only in the history of HUD but in the recent history of the federal government."

"Our plan adopts major reforms that have improved the performance of some of America's most successful corporations," Cuomo said. "The reforms knock down bureaucratic walls within HUD to enable all parts of the Department to work together in a productive partnership with our nation's people and communities. Our key objectives are outstanding performance, efficiency, and accountability to the American people. We will not allow a single dollar to be wasted."

HUD 2020 was developed at Cuomo's direction by HUD staff with the help of Vice President Gore's office, the Office of Management and Budget, the HUD Inspector General's Office, and outside experts including Ernst & Young, David Osborne (co-author of "Reinventing Government") and James Champy (co-author of "Re-engineering the Corporation").

Key reforms in HUD 2020 include:

- Creating a new Enforcement Division to fight waste, fraud and abuse.
- Retraining some HUD employees as Community Builders to serve as HUD's service representatives for the public and retraining other employees as Public Trust Officers to monitor recipients of HUD funding.
- Consolidating over 300 HUD programs and activities into 71.
- Consolidating routine paperwork by HUD offices around the country in more efficient "back office" processing centers.
- Conducting the first comprehensive evaluation involving physical inspections and financial audits of HUD's housing portfolio.
- Establishing a new financial information management system.
- Reducing the size of HUD's staff from the current 10,500 to 7,500 by the end of the year 2000.
- Establishing new performance-based evaluation systems.

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HUD will implement most of the reforms on its own authority, but portions of some require Congressional approval.

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White House Chief of Staff Erskine Bowles said: "I salute Secretary Cuomo and the employees of the Department of Housing and Urban Development for innovative steps they are taking to deliver better services to more Americans at lower costs. The Department's emphasis on improving customer service, reducing waste, rewarding performance and leveraging information systems furthers this Administration's efforts to create smaller, more effective government."

Office of Management and Budget Director Franklin Raines said: "When implemented, these reforms will transform HUD into a more fiscally responsible and accountable agency that will better serve the American people. The reforms will play a vital role in helping the Department achieve its mission."

Cuomo said the reforms will enable HUD to become an empowerment agency that will strengthen communities to meet challenges detailed in the State of the Cities report released by President Clinton this week.

Here are details of the reforms the Department will launch under HUD 2020:

- **ENFORCEMENT DIVISION:** HUD will restore public trust by eliminating waste, fraud and abuse by those receiving HUD funds (public housing authorities, private landlords, local governments, businesses and individuals) and by HUD itself. Improper activities will be monitored, documented and prosecuted. HUD will create an Enforcement Division, which will carry out this effort. The Department-wide Enforcement Division will be headed by an FBI agent on detail to HUD. It will replace independent enforcement functions with different standards and procedures in HUD's program offices. The division's duties will include: 1) Taking legal action against housing authorities that get a failing grade on their annual assessments. 2) Acting against HUD-assisted housing on the private market that fails physical and financial audit inspections. 3) Cracking down on the improper use of grants from the Community Planning Division and the Office of Fair Housing and Equal Opportunity. HUD will also seek Congressional approval for new types of enforcement action.
- **COMMUNITY BUILDERS AND PUBLIC TRUST OFFICERS:** HUD will empower America's people and local governments to take the leading role in improving lives and strengthening communities. A new group of several hundred retrained HUD employees, called Community Builders, will spearhead this effort. These generalists will serve as one-stop customer service representatives in HUD's 81 field offices around the nation -- providing assistance and information on economic development, homeownership, public housing, homeless assistance, and HUD's other programs. HUD 2020 says this new structure will be more effective in helping people living in HUD-assisted housing to get jobs and become self-sufficient, and will help localities develop their own community development strategies. Another group of several hundred retrained HUD employees called Public Trust Officers will monitor recipients of HUD assistance to guard against waste, fraud and abuse. Public Trust Officers will refer significant problem cases to the new Enforcement Division.
- **CONSOLIDATING PROGRAMS:** Eliminate duplication by consolidating over 300 HUD programs and activities into 71 programs and activities, if Congressional approval is obtained. This will increase efficiency and allow HUD to focus on its most important functions.
- **"BACK OFFICES":** Instead of performing routine paperwork at field offices around the country, HUD will consolidate the work and perform it in more efficient "back office" processing centers, following the example of many banks. All of HUD's 81 field offices will remain open and will be better focused on serving the public.
- **PROPERTY EVALUATION:** HUD will conduct physical inspections and financial audits of all public housing authority properties and all privately owned properties receiving HUD financial assistance or Federal Housing Administration insurance. Assessments will determine which properties are most troubled. These properties will receive additional HUD oversight, while public housing and assisted housing operating without problems will be given more freedom. Under legislation proposed by HUD, the Department would be required to designate a housing authority as troubled if the authority fails to provide acceptable housing for residents. The legislation provides for mandatory appointment of a judicial receiver to take control of any large housing authority that fails to come off the troubled list within one year. HUD could appoint an administrative receiver for smaller authorities.
- **INFORMATION MANAGEMENT:** HUD will replace its 89 outdated computerized financial information management systems -- many of which are unable to communicate with each other -- with a new integrated system. HUD's deficient financial management systems are poorly organized, generally unreliable, and are the main reason HUD is on the General Accounting Office's "high risk" list. HUD's new financial management information management system will be fully implemented by mid 1999 and will include award-winning mapping software that provides a graphic display of local HUD funding.
- **STAFF SIZE:** HUD will use attrition and targeted buyouts to reduce the size of its staff from the current 10,500 to 7,500 by the end of the year 2000 to carry out a commitment made by former Secretary Henry Cisneros. HUD had 13,500 employees when Cisneros began the staff reductions.
- **PERFORMANCE-BASED SYSTEMS:** Establish performance-based systems to evaluate HUD programs, operations and employees. These will allow HUD to implement effective performance measures under the Government Performance and Results Act (GPRA). HUD will establish performance as the guideline to determine effectiveness of its programs.

AR 2767



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Assisted Housing Services Corporation; North Tampa Housing Development Corporation; The Jefferson County Assisted Housing Corporation; National Housing Compliance; Southwest Housing Compliance Corporation; CMS Contract Management Services and the Housing Authority of the City of Bremerton; Massachusetts Housing Finance Agency

File: B-406738; B-406738.2; B-406738.3; B-406738.4; B-406738.5; B-406738.6; B-406738.7; B-406738.8

Date: August 15, 2012

Neil H. O'Donnell, Esq., Dennis J. Callahan, Esq., and Jeffery M. Chiow, Esq., Rogers Joseph O'Donnell, Lawrence F. Feheley, Esq., and Allen Handlan, Esq., Kegler, Brown, Hill & Ritter, and Ricardo L. Gilmore, Esq., Saxon, Gilmore, Carraway & Gibbons, for Assisted Housing Services Corporation and North Tampa Housing Development Corporation; Robert K. Tompkins, Esq., Elizabeth M. Gill, Esq., and Trevor J. Tullius, Esq., Patton Boggs LLP, for The Jefferson County Assisted Housing Corporation; Michael R. Golden, Esq., Michael A. Hordell, Esq., Blair L. Schiff, Esq., Heather Kilgore Weiner, Esq., and Samuel W. Jack, Esq., Pepper Hamilton LLP, for National Housing Compliance; Richard J. Vacura, Esq., K. Alyse Latour, Esq., and Susan J. Borschel, Esq., Morrison Foerster, for Southwest Housing Compliance Corporation; Colm P. Nelson, Esq., and Kathryn Carder McCoy, Esq., Foster Pepper, PLLV, for CMS Contract Management Services and the Housing Authority of the City of Bremerton; and Andrew Mohr, Esq., John J. O'Brien, Esq., and Gabriel E. Kennon, Esq., Cohen Mohr LLP, for Massachusetts Housing Finance Agency, the protesters.

Kasey Podzius, Esq., and Blythe Rodgers, Esq., Department of Housing and Urban Development, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Department of Housing and Urban Development's (HUD) use of a notice of funding availability (NOFA) that results in the issuance of a cooperative agreement to obtain services for the administration of Project-Based Section 8 Housing Assistance Payment (HAP) contracts was improper because the "principal purpose"

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of the NOFA was to obtain contract administration services for HUD's direct benefit and use, which should be acquired under a procurement instrument that results in the award of a contract.

DECISION

The Assisted Housing Services Corporation (AHSC), the North Tampa Housing Development Corporation, The Jefferson County Assisted Housing Corporation (JCAHC), National Housing Compliance, the Southwest Housing Compliance Corporation, CMS Contract Management Services and the Housing Authority of the City of Bremerton, and the Massachusetts Housing Finance Agency, protest the terms of Notice of Funding Availability (NOFA) No. FR-5600-N-33, issued by the Department of Housing and Urban Development (HUD), for the administration of Project-Based Section 8 Housing Assistance Payment (HAP) contracts. The protesters argue that HUD's use of a NOFA, which provides for the issuance of cooperative agreements to public housing agencies (PHA) for the administration of the HAP contracts, is improper, because HUD is seeking contract administration services that must be solicited through a procurement instrument that results in the award of contracts.¹

We sustain the protests.

BACKGROUND

The Project-Based Section 8 Rental Assistance Program, created by The Housing Act of 1937, as amended and codified, provides affordable housing for eligible low-income households. 42 U.S.C. § 1437f (2006). The program generally provides for the payment of "a rental subsidy to property owners on behalf of low-income tenants residing in those properties." Agency Report (AR) at 2. The rental subsidy is "attached to a specific dwelling," and is generally the difference between the total rental amount for the dwelling, and 30 percent of the tenant's adjusted income. Id.

The agreements by HUD to pay the rental subsidy to the property owners of low-income housing are set forth in HAP contracts. AR at 2. From the authorization of the Project-Based Section 8 Rental Assistance Program in 1974, to 1999, HUD administered approximately 21,000 Section 8 HAP "contracts executed between

¹ PHAs are "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. § 1437a(b)(6)(A); see 24 C.F.R. § 5.100 (2011); Agency Report (AR) at 6. As explained by HUD, PHAs "are created and given operating authority pursuant to state law." AR at 9.

HUD and private owners of multifamily housing developments.”² AHSC Protest (B-406378), Tab 10, HUD Housing Certificate Fund, at 3.

In 1999, because “of staffing constraints,” HUD began “an initiative to contract out the oversight and administration of most of its project-based contracts.” Project-Based Rental Assistance: HUD Should Update Its Policies and Procedures to Keep Pace with the Changing Housing Market (GAO-07-290), Apr. 2007, at 10. HUD explained at the time that it was seeking “new ways to conduct its business” consistent with its recently announced “2020 Management Reform Plan,” which provided for “major staff downsizing, modification of HUD’s Field and Headquarters organizational framework, [and] consolidation of HUD’s programs.”³ AHSC Supp. Comments (B-406738; B-406738.2), Tab 37, HUD Audit Related Memorandum No. 99-BO-119-0801, Advisory Report on Section 8 Contract Administration, (Oct. 26, 1998), at 7. According to HUD, one of the “new ways to conduct its business” would be HUD’s issuance of “Requests for Proposals [RFP] for outside contractors to administer HUD’s portfolio of Section 8 contract[s].” Id.

HUD’s 1999 Request for Proposals

HUD held “its first nationwide competition” for the contract administration services through the issuance of an RFP on May 3, 1999. AR at 2. The 1999 RFP provided that HUD was “seeking sources interested in providing contract administration services for project-based [HAP] Contracts under Section 8.” JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice (May 19, 1999)/RFP, at 1. The RFP, which was restricted to PHAs, explained that HUD administered approximately 20,000 HAP contracts, and that the “RFP cover[ed] contract administration for most of these HUD administered contracts.”⁴ Id. The solicitation informed offerors that

² The record also shows that as of May 1999, HUD administered approximately 16,000 HAP contracts and PHAs administered approximately 4,200 HAP contracts. AHSC Protest (B-406378), Tab 7, HUD Guidebook for Section 8 Contract Administration Initiative (March 15, 2001), Introduction.

³ The news release issued by HUD announcing its 2020 Management Reform Plan stated that it aimed “to transform HUD from ‘the poster child for inept government’ that ‘has been plagued for years by scandal and mismanagement’ into ‘a new HUD, a HUD that works.’” AHSC Protester’s Supp. Comments (B-406738; B-406738.2), Tab 38, HUD Archives: News Release, HUD No. 97-109, Cuomo Announces Historic Management Reforms to Stamp Out Waste, Fraud and Abuse and Improve Performance (June 26, 1997).

⁴ The 1999 RFP stated that “[b]y law, HUD may only enter into an ACC [Annual Contributions Contract, defined below, infra at n.6] with a legal entity that qualifies as a [PHA] as defined in the United States Housing Act of 1937.” JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 2. The RFP added that this
(continued...)

“[u]nder this RFP, the offerors will competitively bid to perform contract administration services for properties with project-based Section 8 HAP Contracts.”⁵ Id. at 2.

The 1999 RFP informed offerors that “[p]roposals in response to [the] RFP may cover an area no smaller than an individual State (or U.S. Territory).” Id. at 1. The RFP explained that “[u]nder the approximately 20,000 Section 8 HAP Contracts this RFP covers, HUD pays billions of dollars annually to owners on behalf of eligible property residents,” and stated that “HUD seeks to improve its performance of the management and operations of this function through this RFP.” Id. The RFP included a detailed statement of work, and stated that the successful PHAs would be required, among other things, to perform the “major tasks” of “[m]onitor[ing] project owners’ compliance with their obligation to provide decent, safe, and sanitary housing,” paying “property owners accurately and timely,” submitting “required documents accurately and timely to HUD (or a HUD designated agent),” and complying “with HUD regulations and requirements . . . governing administration of Section 8 HAP contracts.” Id. at 2-11.

The 1999 RFP further stated that HUD would “use Performance-Based Service Contracting” for “work performed under the ACCs awarded in response to this RFP.”⁶ Id. at 3. The solicitation explained here that its performance work statement thus included work defined in “measurable, mission-related terms with established performance standards and review methods to ensure quality assurance,” and that the ACCs to be awarded “assign[] incentives to reward performance that exceeds the minimally acceptable and assesses penalties for unsatisfactory performance.” Id.

The 1999 RFP also included detailed proposal preparation instructions, and informed offerors that “[f]ailure to comply with the guidance of this section will

(...continued)

restriction did “not preclude joint ventures or other partnerships between a PHA and other public or private entities to carry out the PHA’s contract administration responsibilities.” Id.

⁵ Although not set forth in the RFP itself, the Federal Register notice that included the RFP noted that the RFP was “not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR),” but that it would “follow many of those principles.” JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 1.

⁶ “Annual Contributions Contracts,” or ACCs, are written contracts, and the vehicle for the agreement between HUD and a PHA. AR at 6; 42 U.S.C. § 1437f(b); 24 C.F.R. § 5.403 (2012).

disqualify an Offeror's proposal from consideration by HUD." Id. at 13. The solicitation included a due date for receipt of proposals, and specified that the ACCs awarded would have an initial "[c]ontract [t]erm" of 2 years, with "up to three (3) additional one-year terms." Id. The RFP stated that award would be made to the offerors whose proposals "represent the best overall value" to HUD, based upon certain stated evaluation factors, such as "Understanding and Technical Approach" and "Past Performance." Id. at 14-15. The solicitation further advised offerors that "[w]hile the cost or price factor has no numerical weight in the factors for award, it is always a criterion in the overall evaluation of proposals." Id. at 15.

HUD awarded 37 performance-based ACCs under its 1999 RFP. AHSC Protest (B-406738), Tab 13, HUD Office of the Inspector General, Audit Report No. 2010-LA-0001, HUD's Performance-Based Contract Administration Was Not Cost Effective (Nov. 12, 2009), at 4. The record reflects that HUD awarded an additional seven ACCs between 2001 and 2003 under another RFP, and awarded "the nine remaining [ACCs] between 2003 and 2005" under "an invitation for submission of applications." Id. The record further reflects that, at some point, "HUD received approval from its Office of General Counsel to extend the contracts for an additional 10 years." Id. at 9.

HUD's 2011 Invitation for Submission of Applications

In February 2011, HUD began "its second nationwide competition" for contract administration services through the issuance of an "Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 [HAP] Contracts." AR at 3; JCAHC Protest, Tab 3, Invitation for Submission of Applications (ISA). The ISA informed interested PHAs that it was issued "for the purpose of receiving applications from [PHAs] to administer Project Based Section 8 Housing Assistance Payments [HAP] Contracts as Performance-Based Contract Administrators (PBCA)." ⁷ Id. at 3. The ISA provided that HUD would "select one PBCA for each of the fifty United States, the District of Columbia, the United States Virgin Islands, and the Commonwealth of Puerto Rico," with the exception of California, where it would select PBCAs for Northern and Southern California. Id.

The ISA was similar to HUD's 1999 RFP through which HUD had conducted its first competition for these services. For example, the ISA stated that under the ACCs awarded, the PHAs would be required, among other things, to perform the "principal tasks" of "[m]onitoring compliance by project owners with their obligation to provide decent, safe, and sanitary housing," paying "property owners accurately and timely," submitting "required documents to HUD (or a HUD designated agent)," and complying "with applicable Federal law and HUD regulations and requirements, as

⁷ The 2011 ISA provided, as did the 1999 RFP, that HUD would only award ACCs to PHAs. JCAHC Protest (B-406783.3), Tab 3, ISA, at 5-6.

they exist at the time of ACC execution and as amended from time to time.” Id. at 4; see JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 2 (quoted above).

The ISA included relatively detailed instructions for the preparation of applications, and in this regard requested that applications include “portion[s]” addressing, among other things, the applicant’s capability, technical approach, quality control plan, and disaster plan. JCAHC Protest, Tab 3, ISA, at 15-18. The ISA informed applicants that the “Factors for Award” were capability statement, technical approach, and quality control plan, and provided the relative weights of these factors for determining awards. Id. at 18-19. With regard to cost or price, in response to questions posed by interested PHAs, HUD stated that the applicants’ proposed basic administrative fees “for the highest ranked Applications will be considered in the selection of the awardee[s].” HUD Request for Summary Dismissal on Prior Protests (B-405375.2 et al.), Tab 2, Questions and Answers, at 3.

HUD announced its “awards of the ACCs” under the ISA in July 2011. AR at 3. Our Office subsequently received 66 protests challenging the propriety of the awards of the ACCs for the performance of the contract administration services in 42 states.⁸ On August 10, HUD informed our Office and the parties that it would not “make an award of [ACCs] in the states subject to . . . protests,” and that HUD intended to “evaluate and revise its competitive award process for the selection of [PBCAs].” AR, Tab 7, HUD Corrective Action Letter, at BATES 311. Our Office dismissed the 66 protests as academic on August 11.

HUD’s 2012 NOFA

On March 9, 2012, HUD issued the NOFA that is the subject of this protest. The NOFA provides for the awards of performance-based ACCs to PHAs to serve as the PBCAs for the Project-Based Section 8 HAP contracts for each of the remaining 42 states.⁹ AR at 3. The ACCs to be awarded under the NOFA state that the “ACC is a contract between the PHA and HUD to administer project-based Section 8 Contracts as a PBCA,” and provide for a base term of 24 months, and for the unilateral extension of the ACC by HUD at HUD’s sole discretion. AR, Tab 3, ACC,

⁸ The 11 “states” with regard to which the awards of ACCs were not protested were: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming, and the United States Virgin Islands. AR, Tab 2, NOFA, at 1.

⁹ The NOFA “was published on www.grants.gov, the federal government’s electronic clearing house for grant award information, and applications were to be submitted only through that website.” AR at 3.

at BATES 190-91. The NOFA provides that the successful PHAs will be responsible for performing the following “Performance-Based Tasks” with regard to “the Section 8 assisted units” under the HAP contracts “assigned” to the PHA “for contract administration.”¹⁰

monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring payments to property owners are calculated accurately and paid in a timely manner; submitting required documents to HUD (or a HUD-designated agent); and complying with applicable Federal law and regulations . . . as they exist at the time of ACC execution and as amended or otherwise issued.¹¹

AR, Tab 2, NOFA, at BATES 94; Tab 3, ACC, at BATES 186.

The ACCs to be awarded provide for HUD’s payment of an administrative fee to the PHA “to pay the operating expenses of the PHA to administer HAP contracts.”¹² AR, Tab 3, ACC, at BATES 193-94. The ACCs also provide that “HUD will make housing assistance payments to the PHAs for Covered Units in accordance with HUD requirements,” and direct that the PHAs “shall pay owners the amount of housing assistance payments due to owners under such HAP Contracts from the amount paid to the PHA by HUD for this purpose.”¹³ Id. at BATES 192-93. The

¹⁰ The NOFA, like HUD’s 1999 RFP and 2011 ISA, provides for the award of “Performance-Based” ACCs that include monetary incentives for performance that exceeds the acceptable level and assesses penalties for unsatisfactory performance. See AR, Tab 2, NOFA, at BATES 92; Tab 3, ACC, at BATES 185-87, 229-34.

¹¹ The tasks set forth in the NOFA are nearly identical to those included in HUD’s 1999 RFP, through which HUD conducted its first nationwide competition for these services, and HUD’s 2011 ISA, through which HUD attempted to conduct its second nationwide competition and ultimately awarded 11 ACCs. Compare AR, Tab 2, NOFA, at BATES 94 with JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 2; JCAHC Protest, Tab 3, ISA, at 4.

¹² During the performance of the ACC, the PHA “earns a monthly Basic Administrative Fee based on the Basic Administrative Fee Percentage approved by HUD,” as set forth in the PHA’s response to the NOFA, multiplied by the current fair market rate for a 2-Bedroom unit for each covered unit as of the first day of the month. AR, Tab 3, ACC, at BATES 229.

¹³ HUD estimates that it will pay PHAs approximately \$260 million for their contract administration services, and that HUD, through the PHAs, will distribute approximately \$9 billion in HAP payments to property owners. AR at 3 n.4.

ACCs provide that HUD has the authority “unilaterally amend . . . [the ACC] from time to time to add and/or withdraw HAP contracts by giving the PHA written notice.” Id. at BATES 191. The ACCs further provide that “[t]he PHA shall take prompt and vigorous action, to HUD’s satisfaction, or as required and directed by HUD, to ensure owner compliance with the terms of HAP Contracts for Covered Units within the scope of the ACC.” Id. at BATES 193.

The NOFA includes relatively detailed instructions for PHAs, requiring, for example, that a PHA submit a “Technical Approach narrative,” a “Quality Control Plan” narrative, as well as its “Proposed Fee” for the performance of the tasks required. AR, Tab 2, NOFA, at BATES 108-09. The NOFA further includes evaluation factors and subfactors, such as “Capability of the Applicant and Relevant Organizational Experience” and “Soundness of Approach,” as well as a rating scheme for the evaluation of the PHA’s proposed “Basic Administrative Fee.” Id. at BATES 111-19.

The NOFA states that the ACCs will be awarded to the “highest rated application by State,” provided that the application meets certain threshold requirements set forth in the NOFA. Id. The agency advised PHAs that “[i]f there is no qualified applicant for any jurisdiction, HUD will administer the HAP contracts for that state internally, in accordance with past practice and the United States Housing Act of 1937.” AR, Tab 2, NOFA Questions and Answers, at BATES 152. Of particular relevance here, the NOFA differed from HUD’s 1999 RFP and 2011 ISA, by expressly providing that the “[t]he ACCs that HUD seeks to award via this NOFA are cooperative agreements.”¹⁴ AR, Tab 2, NOFA, at BATES 95.

These protests, challenging HUD’s use of the NOFA, rather than a procurement contract, were filed prior to the due date set for responses to the NOFA.

DISCUSSION

The protesters each raise various arguments about the terms and conditions of the NOFA. All of the protesters argue that HUD’s use of a NOFA, and the characterization of the ACCs that HUD seeks to award via this NOFA as cooperative agreements, are improper. The protesters contend that HUD is seeking contract administration services that must be solicited through a procurement instrument that results in the award of contracts.

The question of whether HUD is properly using a NOFA, rather than a procurement contract, involves our bid protest jurisdiction. As set forth more fully below, if HUD may properly use a cooperative agreement in this instance, we have no jurisdiction

¹⁴ Neither the 1999 RFP nor 2011 ISA stated that the awards of ACCs to PHAs for the contract administration services were considered by HUD to be the award of cooperative agreements rather than contracts.

under the Competition in Contracting Act of 1984 (CICA) to hear disputes about these agreements. On the other hand, if the use of a procurement instrument is required, we have jurisdiction, and will consider whether HUD has complied with applicable procurement laws and regulations.

Under CICA and our Bid Protest Regulations, our Office reviews protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R. § 21.2(a) (2012). We generally do not review protests of the award, or protests of solicitations for the award, of cooperative agreements or other non-procurement instruments, because they do not involve the award of a procurement contract, and are thus beyond our jurisdiction. Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121 at 2. However, we will review a timely protest asserting that an agency is improperly using a cooperative agreement or other non-procurement instrument, where a procurement contract is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. Id.

Our Office has noted that the identification of the appropriate funding instrument (grant/cooperative agreement or contract) is important because procurement contracts are subject to a variety of statutory and regulatory requirements that generally do not apply to grants or cooperative agreements. As noted above, the misidentification of a procurement contract as a cooperative agreement could be used to evade competition and other legal requirements applicable to procurement contracts. Conversely, a legitimate assistance arrangement, such as a cooperative agreement, should not be burdened by the formalities of procurement contracts. GAO, Principles of Federal Appropriations Law, vol. II, at 10-18 (3rd ed. 2006).

The Federal Grant and Cooperative Agreement Act (FGCAA) establishes the general criteria that agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a state, locality or other recipient for an authorized purpose. 31 U.S.C. §§ 6301-6308 (2006). In this regard, the FGCAA provides that an agency must use a procurement contract when “the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government;” or the agency otherwise “decides in a specific instance that the use of a procurement contract is appropriate.”¹⁵ 31 U.S.C. § 6303.

¹⁵ The FAR similarly provides that “Contracts shall be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government.” FAR § 35.003(a).

The FGCAA further provides that an “agency shall use a cooperative agreement” when the principal purpose of the relationship “is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government,” and “substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.”¹⁶ 31 U.S.C. § 6305.

Put differently, the use of a grant or cooperative agreement is appropriate if the principal purpose of the agreement is to provide assistance to the recipient to accomplish a public objective authorized by law. In contrast, if the federal agency’s principal purpose is to acquire goods or services for the direct benefit or use of the federal government, then a procurement contract must be used.

Our Office has recognized that it is often difficult to draw fine lines between the types of arrangements that require the use of procurement contracts and those that do not. Environmental Protection Agency--Inspector General--Cooperative Agreement--Procurement, B-262110, Mar. 19, 1997, 97-1 CPD ¶ 131 at 4. The principal purpose of the relationship between the federal government and the state, local government, or other entity is not always clear, and we have recognized that this can be particularly so where the federal government provides assistance to specified recipients by using an intermediary. GAO, Principles of Federal Appropriations Law, vol. II, at 10-20 (3rd ed. 2006); see 360Training.com, Inc. v. United States, 2012 U.S. Claims LEXIS 502 at *11-12 (Fed. Cl. Apr. 26, 2012). The intermediary or third party situation arises where an assistance relationship, such as a grant or cooperative agreement, is authorized to specified recipients, but the Federal grantor delivers the assistance to the authorized recipients by utilizing another party. GAO, Principles of Federal Appropriations Law, Vol. II, at 10-19. In such circumstances, “[t]he choice of instrument for an intermediary relationship depends solely on the principal federal purpose in the relationship with the intermediary.” S. Rep. No. 97-180, at 3 (1981) quoted in GAO, Principles of Federal Appropriations Law, vol. II, at 10-20.

In this regard, where the government’s principal purpose is to “acquire” an intermediary’s services, which ultimately may be delivered to an authorized recipient, or if the agency otherwise would have to use its own staff to provide the services offered by the intermediary to the beneficiaries, then a procurement contract is the proper instrument. Id; 360Training.com v. United States, Inc., supra;

¹⁶ In contrast, a “grant agreement,” rather than a cooperative agreement, shall be used where “substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.” (Emphasis added). 31 U.S.C § 6304.

Civic Action Institute, B-206272, Sept. 24, 1982, 82-2 CPD ¶ 270 at 4, aff'd, Civil Action Institute--Recon., B-206272.2, Nov. 2, 1982, 82-2 CPD ¶ 399. On the other hand, where the Government's principal purpose is to "assist" the intermediary in providing goods or services to the authorized recipient, the use of an assistance instrument, such as a cooperative agreement, is proper. GAO, Principles of Federal Appropriations Law, vol. II, at 10-20.

The FGCAA gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and our Office will not question such determinations unless it appears that the agency acted unreasonably, disregarded statutory and regulatory guidance, or lacked authority to enter into a particular relationship. Civic Action Institute, supra, at 3. In determining whether an agency's selection and proposed use of a grant or cooperative agreement, rather than a contract, is reasonably based and consistent with statutory and regulatory guidance, our analysis of the nature of the contemplated relationship between the federal agency and the other party includes the consideration of the substance of the proposed agreement based upon the surrounding circumstances. B-257430, Sept. 12, 1994.

In contending that the instruments at issue here are properly designated cooperative agreements, HUD points out that The Housing Act of 1937, as amended and codified, provides that it "is the policy of the United States . . . to assist states and political subdivisions of States to address the shortage of housing affordable to low-income families." 42 U.S.C. § 1437(a)(B); AR at 11; Supp. AR at 2. HUD maintains that the NOFA, which will result in the issuance of cooperative agreements, is in furtherance of the Act's stated policy to provide assistance to states and political subdivisions of states. HUD specifically argues here that the "principal purpose of the ACCs between HUD and the PHAs is to assist the states and local governments by having PHAs, which are governmental entities, administer [HAP] contracts with property owners in order to serve the federal, state, and PHAs' public purpose of promoting affordable housing for low-income families." AR at 11.

Referencing the FGCAA criteria for cooperative agreements, HUD further explains that through the ACCs, HUD transfers a "thing of value" to the PHAs, by providing the PHAs with the funds necessary to make payments under the HAP contracts, as well as by paying the PHAs an "administrative fee" that compensates the PHAs for its services.¹⁷ AR at 12. HUD notes here that under the ACC, a PHA may use the

¹⁷ HUD appears to argue that because PHAs are "member[s] of a class eligible to receive assistance" under The Housing Act of 1937, and because HUD, under the ACCs, provides the PHAs with the funds necessary to make payments under the HAP contracts and administrative fees for their services, PHAs cannot be considered "intermediaries." AR at 14; Supp. AR at 14-15.

“excess funds generated by the ACC to provide additional housing services” under other programs supported by the PHA, and that HUD is therefore supporting “the PHA’s public purpose.” Id.

HUD further maintains that it “is not assigning work to PHAs that it is otherwise required to do,” based upon its view that HUD “is not obligated to administer the HAP contracts itself.” AR at 13. HUD argues here that “[t]here is nothing in the United States Housing Act of 1937, or, more specifically, Section 8 of that Act, that obligates HUD to administer HAP contracts.” Supp. AR at 10. HUD also explains that the cognizant PHAs, rather than HUD, are listed as contract administrators on the majority of HAP contracts currently in effect, and that because of this, HUD is not obligated to serve as a contract administrator. Id. HUD thus concludes that its issuance of a NOFA providing for the issuance of cooperative agreements for the administration by PHAs of Project-Based Section 8 HAP contracts was reasonable and consistent with applicable statutes and regulations.

In addressing HUD’s arguments, we begin with the agency’s assertion that the principal purpose of the ACCs to be awarded under the NOFA--consistent with The Housing Act of 1937--is to “assist” PHAs “to address the shortage of housing affordable to low-income families” by providing a thing of value, that is, money, to the PHAs. See 42 U.S.C § 1437(a)(B); AR at 11; Supp. AR at 2. In this regard, we find unpersuasive HUD’s argument that its payments to property owners in accordance with the terms of its HAP contracts can properly be considered as the transfer of a thing of value to the PHAs. As set forth above, although the HAP contract payments are made through the PHAs in accordance with their obligations under the ACCs to administer the HAP contracts, the PHAs themselves have no rights to the payments (or control over them) once HUD authorizes the payments and transfers the funds to the PHAs for distribution. The PHAs, consistent with their roles as contract administrators, act only as a “conduit” for the payments. See AR, Tab 4, 53 Fed. Reg. 8050 (1988), at BATES 247 (HUD’s explanation as to why it views its Section 8 housing assistance payments as “outside the scope” of Office of Management and Budget’s Circular A-102 that governs grants and cooperative agreements with state and local governments). That is, and as described above, the PHAs have no right to retain or use for other purposes any of the funds it receives for payment to the property owners. In fact, the ACCs require that the funds, once received by the PHAs from HUD, be promptly transferred to the property owners, and require that any excess funds and interest earned on HAP funds by the PHAs be remitted to HUD or invested in accordance with HUD requirements. AR, Tab 3, ACC, at BATES 194.

Next, although we agree that HUD is clearly providing “a thing of value” to the PHAs through HUD’s payment of an administrative fee, we do not agree that the principal purpose of HUD’s payment of administrative fees to the PHAs is to “assist” the PHAs in the performance of their mission. Rather, as evidenced by the record, the administrative fees are paid to the PHAs as compensation for their provision of

service--i.e., administering the HAP contracts. This arrangement, that is, the payment of fees by HUD for the PHAs' services as contract administrators, is provided for by the NOFA and ACCs to be awarded. See AR, Tab 3, ACC, at BATES 194 ("The PHA shall use Administrative Fees to pay the operating expenses of the PHA to administer HAP Contracts").

We also disagree with HUD's assertion that it is under no obligation to administer the HAP contracts because the PHAs, and not HUD, are listed as the contract administrators on most HAP contracts.¹⁸ In this regard, the "HUD Occupancy Handbook" acknowledges, in the context of the Project-Based Section 8 rental assistance program, that "HUD has primary responsibility for contract administration but has assigned portions of these responsibilities" to PHAs whose "responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts." Supp. AR, Tab 17, HUD Occupancy Handbook 4350.3 REV-1, at BATES 533. Further, the Project-Based Section 8 HAP "Basic Renewal Contract" provided by HUD specifically obligates HUD, and not the contract administrator, to provide the housing assistance payments. Supp. AR, Tab 18, Project-Based Section 8 HAP Basic Renewal Contract, at BATES 546. HUD's HAP Basic Renewal Contract notes elsewhere that "HUD shall take any action HUD determines necessary for the continuation of housing assistance payments to the Owner in accordance with the Renewal Contract" where a PHA, serving as the contract administrator, fails to transfer the housing assistance payments to the property owner as required under the relevant HAP contract. Id. at BATES 551.

Accordingly, we agree with the protesters that the circumstances here most closely resemble the intermediary or third party situation, which we described on page 10, infra. As applied here, HUD is providing assistance to low-income households, in the form of a rental subsidy paid to property owners, pursuant to the terms of HAP contracts. Rather than administering the program through which this assistance is provided, that is, the Project-Based Section 8 Rental Assistance Program--as HUD has in the past and continues to do in limited circumstances--HUD has retained, through its 1999 RFP and 2011 ISA, and is seeking to retain through this NOFA, the services of PHAs to perform the HAP contract administration services.

Given our view, as set forth above, that HUD is legally obligated to pay the property owners under the terms of the HAP contracts, and HUD's recognition that it has primary responsibility for contract administration but has assigned portions of these responsibilities to PHAs, we also find that HUD's principal purpose for its relationship with the PHAs as contemplated by the NOFA and set forth in the ACC,

¹⁸ Although the PHAs are sometimes signatories, as the "Contract Administrator," on the HAP contracts, HUD is also a signatory on these contracts. Supp. AR at 10; Supp. AR, Tab 18, Project-Based Section 8 HAP Basic Renewal Contract, at BATES 553.

is to acquire the PHAs' services as contract administrators. In this regard, the asserted "public purpose" provided by the PHAs under the NOFA--the administration of HAP contracts--is essentially the same purpose HUD is required to accomplish under the terms of its HAP contracts, wherein HUD is ultimately obligated to the property owners. As such, the principal purpose of the NOFA and ACCs to be awarded under the NOFA is for HUD's direct benefit and use.¹⁹ B-257430, Sept. 12, 1994, at 4. Again, the NOFA provides, and HUD's past practices demonstrate, that if a PHA is unable to provide contract administration services for the Project-Based Section 8 rental assistance program, HUD staff has provided and will provide such services. See 360Training.com v. United States, Inc., supra (an agency is acquiring the intermediary's services for its own direct benefit or use if the agency otherwise would have to use its own staff to provide the services offered by the intermediary); see also GAO, Principles of Federal Appropriations Law, Vol. II, at 10-20.

For the reasons set forth above, we conclude that HUD's issuance of a NOFA providing for the award of cooperative agreements was unreasonable and in disregard of applicable statutory guidance. We also conclude that HUD is required to use a procurement instrument that results in a contract in order to obtain the provision of contract administration services by PHAs for the Project-Based Section 8 HAP contracts. Finally, given our conclusion that HUD should use a procurement instrument that results in the award of contracts, rather than a notice that results in the execution of cooperative agreements, these protests fall squarely within the jurisdiction of our Office. See Energy Conversion Devices, Inc., supra.

The protesters also argue that certain terms of the NOFA are inconsistent with procurement statute and regulation, including the FAR, and are otherwise improper. We need not address these concerns.²⁰ In this regard, HUD "admits that it did not

¹⁹ Contrary to HUD's arguments, as indicated above, the PHAs' general function as state or local entities responsible for public housing and their receipt of administrative fees under the ACC cannot be considered to be the primary purpose of the ACC.

²⁰ The protesters also argue that HUD is without authority to enter into cooperative agreements with PHAs with regard to the Project-Based Section 8 rental assistance program. In this regard, our Office has long recognized that while federal agencies generally have "inherent" authority to enter into contracts to procure goods or services for their own use, there is no comparable inherent authority to enter into assistance relationships (i.e., cooperative agreements or grants) to give away the government's money or property to benefit someone other than the government. 65 Comp. Gen. 605, 607 (1986); GAO, Principles of Federal Appropriations Law, Vol. II, at 10-17. Given our determination that HUD should solicit the contract administration services here through a procurement instrument that results in a contract, rather than a cooperative agreement, we need not decide whether HUD is

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follow the requirements in CICA or the FAR” in preparing its NOFA, and that it “would expect the protests to be sustained” should our Office determine, as we have, that the protests are within GAO’s jurisdiction.²¹ HUD Response to Protesters’ Requests for Documents (June 12, 2012) at 2. As a result, the protests are sustained.

RECOMMENDATION

We recommend that HUD cancel the NOFA, and solicit the contract administration services for the Project-Based Section 8 rental assistance program through a procurement instrument that will result in the award of contracts. In so doing, the agency should address the other concerns expressed by the protesters to the extent appropriate. We also recommend that the agency reimburse the protesters their costs of filing and pursuing the protests. 4 C.F.R. § 21.8(d)(1). The protesters’ certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(d)(1).

The protests are sustained.

Lynn H. Gibson
General Counsel

(...continued)

otherwise authorized to enter into cooperative agreements with regard to the Project-Based Section 8 rental assistance program.

²¹ In light of HUD’s concession, during the development of the protest record, we agreed with HUD that it need not provide documents or arguments responding to the protesters’ assertions that certain aspects of the NOFA, if considered as a solicitation that will result in a contract, fail to comply with CICA, the FAR, or other applicable procurement statutes or regulations.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 15th day of August, a copy of Volume 1 of 2 of the Joint Appendix was served upon all parties via the Court's electronic filing system.

/S/ Elizabeth M. Gill

Elizabeth M. Gill