July 13, 2012

Secretary Shaun Donovan
U.S. Department of Housing & Urban Development
451 7th Street SW
Washington, DC 20410

Dear Secretary Donovan,

We are concerned that the competition to procure Performance-Based Contract Administrators (PBCA) is not an open and fair opportunity for all qualified applicants, particularly for public housing authorities.

In times of exceedingly tight budgets, it is especially important that HUD and all of its many partners make every taxpayer dollar stretch as far as possible. Fair and open funding and contracting competition is the best way to make the most of our limited federal dollars. It is in the best interest of all that HUD focuses on and secures the best possible prices from the most responsive applications for the administration of HAP contracts.

There is growing concern that the current PBCA competition is neither as fair nor as open as it should be. The PBCA NOFA (Docket No. FR-5600-N-33) included features that, taken together, seem to artificially limit the number and type of applicants vying for contracts. At the very least, these features appear to favor state housing finance agencies (SHFAs) and to create a not-very-subtle bias against public housing authorities and their related entities, despite the fact that experienced and capable public housing authorities are currently administering numerous HAP contracts.

The current NOFA seems to create a protected class of vendors, the state housing finance agencies, while creating additional hurdles for all other applicants by making unnecessary distinctions between in-state and out-of-state applicants. Public housing authorities are not allowed to favor in-state vendors over out-of-state vendors when they procure services through competition, so geography seems out of place in the PBCA NOFA. Geography should not limit competition, create sole-source vendors, and potentially escalate costs.

The other item of concern is the reasoned legal opinion required of applicants to determine their “legal ability to perform as a contract administrator” and “to operate throughout the entire state in which it proposes to serve as PBCA.” This legal opinion creates partiality and an unfair threshold that “in HUD’s sole determination” decide an applicant’s eligibility to participate in the PBCA competition. This opinion letter too easily allows states’ Attorneys General to
establish exclusive rights to PBCA contracts by stating that SHFAs are the only entities with statewide jurisdiction, and therefore, are the only qualified entities to receive a HAP contract.

As a consequence, many competitive applications may not even be considered based on determinations of Attorneys General who have been provided the exclusive opportunity to render legal opinions without a broader discussion about the assumptions upon which such legal opinions are based. In other words, while an in-state public housing authority is: (i) certainly a “PHA” as defined in section 3(b)(6)(A) of the United States Housing Act of 1937, as amended, and (ii) typically has legal authority to operate throughout the state, or, alternatively, typically may form an instrumentality to assist in the development or operation of public housing throughout the state, Attorneys General are rendering more narrowly tailored opinions. While such opinions may answer the question of whether a given public housing authority can construct public housing outside of its jurisdiction, those opinions do not necessarily respond to the question posed in the PBCA NOFA and certainly do not respond to the question of whether a public housing authority can deliver the scope of services described in the PBCA NOFA. Moreover, these Attorney General opinions often omit discussion of whether the SHFA is itself a “PHA” under section 3(b)(6)(A), which is not always a straightforward determination.

These two features – favoring in-state vendors and establishing legal obstacles – tilt the playing field in favor of SHFAs. PHAs have had to expend considerable resources on these artificial issues just to be competitive in the PBCA. SHFAs, on the other hand, had a much smoother path to the June 11 NOFA deadline.

PHADA, CLPHA, and NAHRO request that the Department make every effort to ensure the focus of the PBCA competition remains on price and quality rather than geography and unnecessarily narrow legal interpretations.

Sincerely,

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