“In order for HUD to ensure cost-effective and high quality services, NAHRO strongly supports maintaining a level playing field in the competition for contracts under the Section 8 Performance-Based Contract Administration initiative” (excerpt from NAHRO’s 2014 Legislative & Regulatory Agenda)

Why is HUD resisting competition and fairness in the project-based Section 8 program?

For more than a dozen years, through 2011, HUD successfully contracted with public housing agencies to administer the Performance-Based Contract Administration (PBCA) program for HUD’s project-based Section 8 housing program. HUD used a competitive process that ensured the lowest-priced, most qualified bidders secured the contracts.

That common sense, competitive approach was good for tenants and good for taxpayers. It helped to make HUD a leader among federal agencies in reducing improper payments under the project-based Section 8 program. In fact, this policy lifted HUD out of the “high-risk” category into which it had been placed by the Government Accountability Office (GAO), the respected, nonpartisan investigative arm of Congress.

The US Court of Appeals for the Federal Circuit ruled on March 25, 2014 that HUD cannot exclude qualified public housing agencies when contracting out for administrative services to support HUD’s low-income housing programs. Specifically, the court ruled that HUD violated federal law when it attempted to re-label contracts as “cooperative agreements” rather than proceed with a competitive contracting process as it had in the past.

The Federal Appeals Court couldn’t have been clearer: HUD can no longer follow a preference-based system and must follow the same basic competitive contracting rules as other federal agencies.

Yet HUD seems intent on disregarding the court’s ruling and proceeding as it sees fit, suggesting that they would even seek to change the law to avoid going back to a competitive procurement process.

This isn’t the first time HUD has become oddly entrenched on this issue. In a rare move for a federal agency, HUD ignored a 2012 ruling by the GAO in which GAO found that HUD acted improperly by issuing cooperative agreements over procurement contracts. Citing issues of fairness and competition, GAO instructed HUD to reissue the bids; HUD refused.

The question is why?

Since the year 2000, HUD contracted with PHAs nationwide to administer PBCA contracts. The process worked: competition, quality and price prevailed. More importantly, taxpayers and low-income residents benefited because the lowest, most-qualified bidder secured the contracts.
But in 2012, HUD hastily decided to upend the process, recasting the contracts as “cooperative agreements” by issuing a Notice of Funding Availability (NOFA). Among other things, the NOFA set up a preference-based system that provided that only in-state housing finance agencies could contract with HUD to administer low-income housing. HUD made this decision despite federal law requiring the use of contracts when the government is seeking to acquire services for the direct benefit or use of government.

In reviewing HUD’s motivation to go with a cooperative agreement arrangement over a competitive procurement, it is worth noting that:

- Cooperative agreement awards, unlike procurement awards, cannot be protested before the GAO and;
- Procurement statutes and regulations are far more stringent than those governing cooperative agreements and grants.

HUD’s curious decision prompted objections from PHAs and forced the issue into federal court. The PHAs argued HUD’s move was an illegal end-run on competition and this year, on March 25th, the Federal Appeals Court agreed.

Perhaps HUD simply doesn’t like to lose. At the very least, HUD should be asked to explain why they continue to oppose a policy that falls short of full, open and transparent competition.

For the sake of the taxpayers and the low-income residents, HUD should make a fresh start in the procurement of PBCA services for its project-based Section 8 portfolio.