



FAQs: HUD'S Fiscal Year 2025 PBCA Proposal

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What are Performance Based Contract Administrators?

Performance Based Contract Administrators (PBCAs) provide day-to-day monitoring and oversight of most of HUD's approximately 17,000 project-based Section 8 contracts with property owners throughout the nation. They oversee owner compliance, reviewing and renewing rental contracts, and managing tenant interactions, including responding to tenant complaints. HUD currently engages 53 PBCAs, each acting under a PBCA-Annual Contribution Contract (PBCA-ACC) with HUD.

Why are Performance Based Contract Administrators important?

PBCAs are essential to the sustainability of the Section 8 Project Based Rental Assistance (PBRA) program and the more than 1.2 million low-income households it serves. Prior to PBCAs providing this oversight, HUD jointly administered the PBRA assistance contracts with public housing authorities (PHAs) and state housing finance agencies (HFAs)—mission-driven agencies with deep expertise in managing and preserving affordable housing and addressing the concerns of tenants. At that time, HUD administered the majority of PBRA contracts using its own staff. This centralized program administration led to poor oversight of many properties in the program, as indicated by numerous HUD Inspector General findings. In 1999, exercising its statutory authority, HUD began assigning many PBRA program oversight tasks to PHAs and HFAs through competitively awarded PBCA-ACCs to serve as PBCAs.

Why is HUD proposing changes regarding PBCAs?

For more than a decade, HUD has tried to award new PBCA-ACCs on multiple occasions, but each time an interested party has mounted a challenge that has prevented these PBCA-ACCs from moving forward. As a result, HUD has been restricted to simply renewing the current PBCA-ACCs, raising significant operational challenges. For instance, HUD could suddenly be faced with an absence of day-to-day management for a state if a PBCA decides to not renew their PBCA-ACC, as HUD can only renew a PBCA-ACC to the extent a PBCA agrees to such extension. If a PBCA were to decide not to renew their contract, under current law, HUD would have to administer the PBRA program itself for that state, absent a mechanism for new PBCA arrangements. At least one current PBCA has indicated it may choose not to renew its PBCA-ACC in the near future. Additionally, because HUD has only been able to renew the current PBCA-ACCs, HUD has largely been unable to update these arrangements to meet current needs or conditions. For instance, the Department has been precluded from updating these arrangements to include additional tasks that could enhance resident protections and safety, including conducting fair housing reviews, maintaining standardized tracking of tenant complaints, and following up on physical inspections to ensure owners are complying with program requirements.

How has HUD been constrained from entering into new PBCA arrangements?

HUD's ability to enter into new PBCA arrangements was significantly constrained after a 2014 federal court decision in the case, *CMS Contract Management Services, et al. v. U.S. (CMS)*,¹ which held that going forward, any new PBCA-ACCs must be competed in compliance with federal procurement law, including the Competition in Contracting Act (CICA), as well as the Federal Acquisition Regulation (FAR). Prior to the *CMS* ruling, PBCA-ACCs were not subject to federal procurement laws and regulations, such as CICA and FAR, and therefore operated very differently than procurement contracts.

HUD has now twice tried to issue a CICA- and FAR-compliant PBCA procurement in accordance with the *CMS* decision, and each time these efforts have been widely rejected by stakeholders within the housing industry and in Congress.² As Congress has now prohibited HUD from reissuing its latest draft solicitation, HUD's ability to provide a solution that complies with *CMS*, meets program needs and is acceptable to stakeholders has become even more limited. Indeed, HUD believes that it is not likely possible to craft a PBCA arrangement using a CICA- and FAR-compliant procurement approach that meets most, let alone all, of the policy preferences expressed by stakeholders.

After reviewing alternative procurement options as instructed by Congress,³ HUD determined that these alternatives are not feasible and, in fact, could impede HUD's mission to ensure safe and decent housing for HUD-assisted residents living in PBRA properties. This is why HUD has requested statutory changes—informed by the invaluable insights, perspectives, and recommendations from stakeholders—to ensure the continued success of PBCAs and the wellbeing of the PBRA properties and the residents they serve.⁴

What are the changes HUD is proposing for PBCAs?

As currently drafted, HUD's legislative proposal would:

- Enable HUD to award cooperative agreements to eligible entities to serve as PBCAs through a Notice of Funding Opportunity (NOFO), rather than a Federal Acquisition Regulation (FAR) procurement;
- Limit the eligibility for the NOFO competition to public housing agencies and their non-profit affiliates, which includes state and local housing finance agencies;
- Require that one cooperative agreement be awarded for each state or territory, except it would allow HUD to award more than one cooperative agreement for states with a population that exceeds 35,000,000; and

¹ While the U.S. Court of Federal Claims initially sided with HUD's use of cooperative agreements when awarding new PBCA contracts, the U.S. Court of Appeals for the Federal Circuit reversed the decision, holding that the PBCA-ACCs HUD had sought to award in that case were procurement contracts and that HUD had not complied with federal procurement law when it sought to award them.

² See e.g. Bipartisan letter from 35 U.S. Senators requesting HUD to withdraw draft solicitation (Oct. 17, 2022). See also Letter from the National Council of State Housing Agencies requesting HUD to withdraw draft solicitation (Sept. 28, 2022); Letter from Stewards of Affordable Housing for the Future requesting HUD to withdraw draft solicitation (Sept. 28, 2022).

³ In both FY23 and FY24, Congress instructed HUD to include a legislative proposal in its budget request should HUD determine that it is not feasible to issue a subsequent draft solicitation that is not substantially equivalent to HUD's 2022 draft solicitation.

⁴ HUD included a legislative proposal in its FY24 and FY25 budget requests requesting statutory changes.

- In a worst-case scenario, where a PHA or HFA is unable to perform as a PBCA for a particular jurisdiction, enable HUD to enter into a procurement contract with another entity.

HUD's intent is to administer these cooperative agreements in the same spirit and practice as the current PBCA-ACCs to the greatest extent possible. In awarding cooperative agreements to PBCAs, HUD would, at a minimum, assign PBCAs the rights and responsibilities PBCAs currently have under Section 8 of the 1937 Housing Act to ensure the continued effective and efficient program oversight and monitoring of the PBRA program.

Why has HUD determined cooperative agreements are the best approach for entering into new PBCA arrangements rather than procurement contracts?

Based on HUD's analysis, and as reflected in its proposal, HUD has determined that the best approach to ensuring the continuity of PBRA contract administration is to award cooperative agreements to eligible entities to serve as PBCAs rather than going through a federal procurement.

Federal procurement contracts are subject to numerous federal laws and regulations related to eligibility, award, and contract administration that could significantly impede both HUD's and PBCAs' ability to administer the program in a manner that meets program needs and is acceptable to stakeholders. The main disadvantages of using procurement contracts would include:

- **Inability to Focus Competition on Appropriate Entities.** Full and open competition is required⁵ unless a specific statutory exception applies. HUD has carefully considered the 1937 Housing Act and applicable procurement law, and it is the Department's position that no specific exception applies to allow HUD to limit a PBCA procurement competition to certain entities, such as PHAs and HFAs.
- **Performance Delays.** Under federal procurement law, bid protests may be filed concerning both the content of the solicitation and the award. Mandatory "CICA stays" and injunctions resulting from bid protests can delay new awards, often by months and sometimes by years, endangering HUD's mission and the health of the PBRA portfolio.
- **Additional Administrative Burden.** The oversight and accountability that federal procurement law requires, such as complying with mandatory FAR clauses, developing small business subcontracting plans, complying with HUD's annual small business subcontracting goals, and addressing potential organizational conflicts of interest, could significantly increase the burden on PHAs that currently perform as PBCAs as well as on HUD.
- **No Collaborative Relationship Between Contractor and HUD.** Procurement contracts do not involve a collaborative relationship between the government and the contractor.

Federal agencies have significantly more flexibility in the award and administration of cooperative agreements than procurement contracts. For instance, and as reflected in its proposal, HUD has the ability to set the parameters for which types of entities can compete for a cooperative agreement through a NOFO. Cooperative agreements are not governed by CICA and the FAR, but rather by 2 CFR Part 200 and the language of the agreement itself. As such, awarding cooperative agreements more

⁵ Meaning that any contractor who is a responsible source is permitted to submit a bid or competitive proposal on the procurement. See 41 U.S.C. § 403(6)-(7).

closely approximates the current PBCA-ACCs than awarding CICA and FAR compliant federal procurement contracts.

Additionally, a cooperative agreement is a funding instrument that is consistent with the spirit of the 1937 Housing Act, as it contemplates substantial engagement and partnership between the federal agency and the recipient when carrying out the activity described in the agreement. PBCAs regularly collaborate with HUD on the administration of the PBRA portfolio through monitoring and oversight. HUD works hand in hand with PBCAs to address any deficiencies found during property assessments and provides guidance on how to resolve them. HUD program staff engage in regular communication with PBCAs to exchange information, share insights, and address emerging issues in the administration of the PBRA program. HUD also provides technical assistance to PBCAs related to changes in HUD guidelines. These sessions aim to enhance knowledge about program requirements, best practices and any updates and changes in policies. By partnering with PBCAs in monitoring, communication, and training efforts, HUD strengthens oversight, enhances operational capabilities, and ultimately improves the delivery of affordable housing assistance to eligible households.

How does HUD’s PBCA proposal benefit HUD-assisted residents and property owners?

HUD’s top priority is to ensure decent, safe, and sanitary housing for HUD-assisted residents living in PBRA properties and the continued availability of affordable housing for years to come. HUD believes that its PBCA proposal achieves this goal by:

- Ensuring HUD has the ability to update new PBCA arrangements to include essential new tasks that enhance resident protections and safety, including conducting fair housing reviews, maintaining standardized tracking of tenant complaints, and following up on physical inspections to ensure owners are complying with program requirements;
- Enabling the consistent administration and stability of PBCAs—through the flexibility cooperative agreements provide—to prevent potential disruptions in essential services to residents and flow of program funds to property owners;
- Ensuring HUD has the broadest ability to select PHAs and HFAs, mission-driven entities that have demonstrated experience working with owners of properties receiving project-based rental assistance, multifamily housing preservation, and addressing the concerns of low-income residents;
- Avoiding potential performance delays and additional administrative burdens required under federal procurement law that could impede a PBCA’s ability to respond to concerns from residents and property owners and other needs; and
- Supporting the ongoing and successful partnership and collaboration between PBCAs and HUD program staff to ensure the health and safety of residents and continued availability of affordable housing provided by property owners.

Will judicial remedies be available under cooperative agreements?

Both procurement contracts and cooperative agreements provide judicial remedies to contractors and grantees in a situation where HUD is not meeting its obligations under the arrangement. Under existing law, breach of contract claims for money damages may be brought under a procurement contract or a cooperative agreement.