

Chapter 28 Bifurcating Section 8 Contracts

28.1 Purpose

A. This chapter explains the standards and conditions an Owner must meet to obtain approval from the Office of Multifamily Housing (MFH) to bifurcate a Section 8 Project-Based Rental Assistance (PBRA) Housing Assistance Payments (HAP) contract. It also explains the processing of approved bifurcation requests. Bifurcation means dividing a single HAP contract into two or more HAP contracts.

28.2 Background

A. An Owner may seek to bifurcate a HAP contract for any number of reasons. For example, a HAP contract may cover multiple properties that would be more appropriately managed as single assets. With respect to preservation, it may be that a single project is so large as to require multiple Low Income Housing Tax Credit allocations, creating a need to subdivide the project. Bifurcation might be used in combination with other tools, such as transfers of budget authority under section 8(bb), HAP Assignments, or Transfers of Ownership Interests. Bifurcation might also be used to reduce the assisted housing footprint in a particular location, either in combination with a redevelopment of the site into higher-density, market-rate housing with an affordable component or without any sort of redevelopment, but simply in the interest of deconcentrating assisted housing units. Bifurcation may also be necessary in cases where a portion of a project becomes unsafe or uninhabitable, for example as the result of a natural disaster. Applicability

B. This chapter applies to the bifurcation of HAP contracts under all project-based Section 8 programs administered by MFH.

C. This chapter does not apply to a request from an Owner to assign a HAP contract to a new ownership entity. Such requests must be made separately, following the applicable HUD procedures (see [Chapter XX](#)).

D. This chapter does not apply to a request from an Owner to transfer the budget authority associated with a HAP contract to another HAP contract pursuant to Section 8(bb) of the United States Housing Act of 1937. An Owner who wishes to request HUD approval for an 8(bb) transfer following HUD approval of a HAP contract bifurcation must do so separately (see [Chapter XX](#)).

28.3 Terms Used in this Chapter

Bifurcate. To divide a HAP contract into two or more HAP contracts.

Cause Determination. As defined at 24 C.F.R. § 103.400.

Contract A. The initial contract (at Project A) that is subject to bifurcation.

Contracts A1, A2. The contracts that result from the bifurcation of Contract A.

28.4 Standards for Approval

A. HUD's standards for approving a bifurcation request include the following:

1. The proposed bifurcation will facilitate the asset management of a project or the preservation of project-based assistance. The Owner's request must demonstrate that bifurcation would facilitate the asset management of a HUD-assisted project or the long-term preservation of project-based assistance, as determined by HUD. For example, the HAP contract (Contract A) might cover:
 - a. A project comprised of more than one building, where each building, or subset of buildings, would more appropriately be managed as separate financial assets; or
 - b. A project that must be split into two ownership entities (and thus two HAP contracts) in order to attract capital investment adequate to address the project's capital needs (e.g., in states that cap the dollar amount of individual 9 percent Low Income Housing Tax Credit (LIHTC) awards per applicant or where both 9 percent LIHTCs and tax-exempt bonds will be pursued).
2. The request to bifurcate a HAP contract may be a component of a larger preservation strategy, including, for example, a strategy that will require a subsequent request for HUD approval to transfer budget authority pursuant to section 8(bb), following the applicable HUD guidance. See **Chapter XX** for more information.
3. The Owner is in good standing with HUD. The Owner of Project A must be in good standing with HUD or must be able to demonstrate experience owning HUD-assisted or multifamily housing. For example, the Owner must not have any unresolved Management and Occupancy Review (MOR) findings; must be current in the submission of audited or owner-certified Annual Financial Statements (AFS), if applicable; and must be actively vouchering for monthly subsidy for Project A.
4. The Owner is in compliance with all applicable civil rights requirements.¹ HUD's Office of Fair Housing and Equal Opportunity (FHEO) may review a proposed bifurcation request, including when the Regional Director (RD) for the jurisdiction in which Project A is located has requested such a review. FHEO may request additional information, including information about the Owner's compliance with nondiscrimination requirements and the Owner's obligation to affirmatively further fair housing.

B. Outstanding civil rights matters must be resolved before HUD will approve a request for bifurcation. The RD will deny the request for a bifurcation if the Owner of Project A has unresolved

¹ See 24 C.F.R. 5.105(a).

civil rights matters, including any charges, cause determinations, lawsuits, or letters of findings as described below that are not resolved to HUD's satisfaction:²

1. The Owner is subject to charges from HUD concerning a systemic violation of the Fair Housing Act or cause determination from a substantially equivalent state or local fair housing agency concerning a systemic violation of a substantially equivalent state or local fair housing law proscribing discrimination because of race, color, religion, sex (including sexual orientation and gender identity), national origin, disability, or familial status;
2. The Owner is a defendant in a Fair Housing Act lawsuit filed by the United States alleging a pattern or practice of discrimination or denial of rights to a group of persons raising an issue of general public importance under 42 U.S.C. 3614(a);
3. The Owner is a defendant in any other lawsuit filed or joined by the Department of Justice, or in which the Department of Justice has intervened or filed an amicus brief or statement of interest, alleging a pattern or practice or systemic violation of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 109 of the Housing and Community Development Act of 1974, the Americans with Disabilities Act, Violence Against Women Act, or a claim under the False Claims Act related to fair housing, non-discrimination, or civil rights generally including an alleged failure to affirmatively further fair housing;
4. The Owner has received a letter of findings identifying systemic non-compliance with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 109 of the Housing and Community Development Act of 1974, Violence Against Women Act, or the Americans with Disabilities Act; or
5. The Owner is subject to a cause determination from a substantially equivalent state or local fair housing agency concerning a systemic violation of provisions of a state or local law prohibiting discrimination in housing based on sexual orientation, gender identity, or lawful source of income.

C. As part of the bifurcation request, the Owner of Project A must disclose any of the above listed unresolved civil rights matters and whether they are operating under any federal, state, or local remedial order, compliance agreement, final judgment, consent decree, settlement agreement, or other court order or agreement, including but not limited to those related to a fair housing or other civil rights finding of noncompliance. If the Owner is operating under such a document, it must provide a citation to the document and attach a narrative description explaining how the proposed bifurcation and all associated actions comply with such document.

² Examples of actions that may be sufficient to resolve a charge, cause determination, lawsuit, or letter of findings include, but are not limited to: current compliance with a voluntary compliance agreement signed by all the parties; current compliance with a HUD-approved conciliation agreement signed by all the parties; current compliance with a conciliation agreement signed by all the parties and approved by the state governmental or local administrative agency with jurisdiction over the matter; current compliance with a consent order or consent decree; current compliance with a final judicial ruling or administrative ruling or decision; or dismissal of charges.

28.5 Conditions for Approval

A. A request that meets the standards for approval must also meet certain conditions for approval. These conditions vary based on whether the contract is a non-Mark-to-Market (M2M) HAP contract, a M2M HAP contract, or a RAD PBRA HAP contract, as described below.

28.5.1 Bifurcation of a Non-M2M HAP Contract

A. The conditions for approval of a request to bifurcate a non-M2M contract are as follows:

1. Unit mix and configuration. The total number of assisted units and the bedroom sizes of such units across all resulting contracts following bifurcation must equal the number and bedroom size mix of assisted units under Contract A prior to bifurcation.³
2. Renewal rents. Immediately following the bifurcation of Contract A, the resulting Contracts A1 and A2 must be terminated and renewed (see also Section 28.6.1.A.5, below). All resulting HAP contracts not subject to a M2M Use Agreement must be renewed under an option of the Owner's choice for which the project is eligible. For projects subject to a M2M Use Agreement, please refer to Section 28.6.2 below.
3. Renewal term. Unless the project is subject to a Use Agreement that cannot be extended for 20 years,⁴ each new renewal HAP contract resulting from bifurcation must have a term of 20 years. HUD does not require Contracts A1 and A2 to be subject to Preservation Exhibits solely as a result of bifurcation. If prior to bifurcation Contract A had a Preservation Exhibit, however, then both Contracts A1 and A2 will be subject to Preservation Exhibits. Such Preservation Exhibits must include only the number of years remaining on Contract A prior to bifurcation.
4. Utility Allowance Adjustment. No utility allowance analysis or adjustment will be required until 12 months following the previous year's utility adjustment. If the Owner chooses to submit a utility analysis or factor adjustment early, in conjunction with the bifurcation request, it will be effective on the date of renewal of the contracts resulting from bifurcation.
5. Transfer of budget authority. If the Owner has submitted or intends to submit within 12 months of submitting the bifurcation request a request to transfer budget authority pursuant to Section 8(bb) of the Housing Act from either Contract A1 or Contract A2, then the timing of termination and renewal for Contracts A1 and A2, following the bifurcation, shall be governed by Notice H 2015-03⁵ or successor guidance.

³ An Owner who wishes to reconfigure units prior to or following bifurcation may request HUD approval to do so following the procedures outlined in Notice H 2011-03, "Policies and Procedures for the Conversion of Efficiency Units to One-Bedroom Units." Although this Notice addresses the conversion of efficiency units to one-bedroom units, it also establishes the factors HUD will address when considering Owner requests for the reconfiguration of other unit types, which HUD will do on a case-by-case basis.

⁴ See Section 28.6.2, *Bifurcation of a Mark-to-Market HAP Contract; Renewal Term*.

⁵ Transferring Budget Authority of a Project-Based Section 8 Housing Assistance Payments Contract under Section 8(bb)(1) of the United States Housing Act of 1937

28.5.2 Bifurcation of a Mark-to-Market HAP Contract

A. In the case of bifurcation of a M2M HAP contract, the following conditions apply:

1. Renewal option. Option Three B (i.e., renewal with a Full M2M HAP Renewal Contract) is the only subsequent renewal option for which Contracts A1 and A2 are eligible while the M2M Use Agreement is in effect. Refer to the *Section 8 Renewal Policy Guidebook* for more information about these options.
2. Renewal Term. The term of a Full M2M Renewal Contract may not exceed the term of the M2M Use Agreement.⁶ In general, if the project was originally restructured with market rents, then the Full M2M Renewal Contract may be extended for a term of 20 years. The M2M Use Agreement will also be extended to have the same end date as the renewal contract. If the project was originally restructured with exception rents, then the M2M Use Agreement cannot be extended; therefore, the term of the Full M2M Renewal Contract may be less than 20 years so that both the renewal contract and Use Agreement have the same end date.
3. Contract rents. The rent level for Contracts A1 and A2 will remain unchanged. Rents will be adjusted only in accordance with the terms of the new Full M2M Renewal Contract (i.e., on that contract's anniversary date, by OCAF).
4. Use Agreement. The M2M Use Agreement must be bifurcated on a pro rata basis according to the number of units and configuration (i.e., bedroom size) covered by Contracts A1 and A2.
5. Treatment of Note(s).⁷ HUD may administratively require the bifurcation of some or all of the outstanding balance (including both principal and any accrued interest) under the Note(s). HUD will amend and restate the Note(s) to allocate the debt on a pro rata basis according to the number of units that are covered by Contracts A1 and A2, respectively. Contracts A1 and A2 will remain encumbered by all the mortgage liens and Use Agreements associated with such Note(s). The Return to Owner, Surplus Cash, and the resulting payments to HUD under the Note(s) must be calculated based on the entirety of the projects encumbered by the mortgage liens associated with the Note(s).

⁶ Please see Section 5–5 of the *Section 8 Renewal Policy Guidebook* for the specific requirements pertaining to M2M properties while the M2M Use Restriction is in place. Lenders who are also Ginnie Mae issuers are cautioned to consult and abide by the Ginnie Mae *MBS Guide*.

⁷ Through the M2M restructuring, HUD adjusts the rents down to market and the Owner obtains a new first mortgage loan that is supportable at the new rents. In most M2M restructuring transactions, HUD pays off a portion of the existing FHA-insured or HUD-held formerly insured first mortgage through a one-time, non-default payment of claim made on behalf of the Owner. HUD documents the Owner's continuing obligation to repay this amount through a Mortgage Restructuring Note ("MRN") and/or a Contingent Repayment Note ("CRN"). The Demo Program, a precursor to M2M, operated in much the same way, with the Owner's obligation documented by one or more "Demo Notes." Except as otherwise specified, for the remainder of this chapter, the term "M2M" will be used to mean either M2M or the Demo Program, and the term "Note(s)" will be used to mean an MRN, CRN, or Demo Note.

28.5.3 Bifurcation of a RAD PBRA HAP Contract

A. For a RAD PBRA HAP contract, the total budget authority must be equal to or less than the budget authority under the original contract. The total number of units under both contracts must equal the total number of units under the original contract. Contracts A1 and A2 will use the same form of RAD PBRA HAP contract as was used at conversion and maintain its terms (e.g., rent adjustments, mandatory contract renewal at expiration for projects converted from public housing or 202 PRAC assistance, etc.), except that HUD will require that, at a minimum, the term of the original contract be maintained for the contracts that result from bifurcation. For example, if bifurcation occurs in year 7 of a 20-year RAD PBRA HAP contract, then HUD will require the resulting Contracts A1 and A2 to have terms of at least 13 years. The resulting Contracts A1 and A2 will retain the Contract A anniversary date.

B. HUD has developed a "Bifurcation Exhibit" that must be executed as part of a RAD PBRA HAP contract bifurcation (see Attachment II). At the end of the original RAD PBRA HAP contract term, the contract will be eligible for renewal in accordance with the RAD statute and the *Section 8 Renewal Policy Guidebook*.

28.6 Required Contents of Owner's Bifurcation Request

A. To request HUD approval for a bifurcation, the Owner must submit the following information (as applicable) to the Regional Director (RD) for the geographic location in which Project A is located:

1. A narrative statement with supporting documentation explaining why bifurcation is necessary to facilitate the asset management of a HUD-assisted project or the long-term preservation of assistance;
2. A description of any redevelopment activities for which an Owner intends to seek HUD approval following HUD's approval of the Owner's bifurcation request. The description must include the anticipated timeline for conducting and completing redevelopment activities, the improvements to be made, and the benefits to residents;
3. A copy of the original HAP contract and any renewal contract that is currently in place;
4. A description of the proposed bifurcation, including:
 - a. The number and bedroom counts of units assisted under Contract A;
 - b. The number of HAP contracts into which Contract A will be divided; and
 - c. The proposed number and bedroom counts of assisted units at Contracts A1 and A2 following bifurcation.
5. Requests to renew Contracts A1 and A2 for 20-year terms.⁸ The requests must comply with the requirements of the *Section 8 Renewal Policy Guidebook*. The Owner is advised to contact the RD prior to submitting a bifurcation request to learn what additional materials may be

⁸ See, however, Section 28.6.2.A.2.

required to support the subsequent request for a renewal. Examples of such materials include, but are not limited to, a Capital Needs Assessment, a Sources and Uses Statement, a document showing financing terms, a LIHTC commitment or award letter, or a statement from a current lender consenting to the bifurcation and renewal. Note that HUD approval of the bifurcation request does not constitute HUD approval of a renewal request, which must be considered separately.

6. A copy of any Use Agreement to which Project A is subject. HUD program counsel will be consulted on any request that involves the bifurcation of a Use Agreement.
7. Additional materials as required. For any project that is assisted under a RAD PBRA HAP contract or was restructured under the M2M program, additional materials may be required depending on activities for which an Owner intends to request HUD approval following HUD approval of the bifurcation request (e.g., sale or refinance). The Owner is advised to contact the Office of Recapitalization to learn what, if any, additional materials or approvals will be required.

B. The RD will require up to 14 calendar days to review the request *for completeness*. For any requests that are found to be incomplete, the RD will determine whether to return the application to the Owner or to request specific items by a specific date in order to avoid the return of the incomplete application.

28.7 HUD Review

A. After determining that a request for bifurcation is complete, the RD will evaluate the request. If the RD does not support the request, the RD will notify the Owner, citing specific reasons for the denial. If the RD supports the request, the RD will issue a memorandum to the Director of the Office of Asset Management (OAM). The memorandum will describe the proposed bifurcation and state the reason for which the RD supports the request. OAM will review all materials and either approve or deny the request. If OAM denies the request, it will notify the Owner. If OAM approves the Owner's request, then HUD will process the bifurcation.

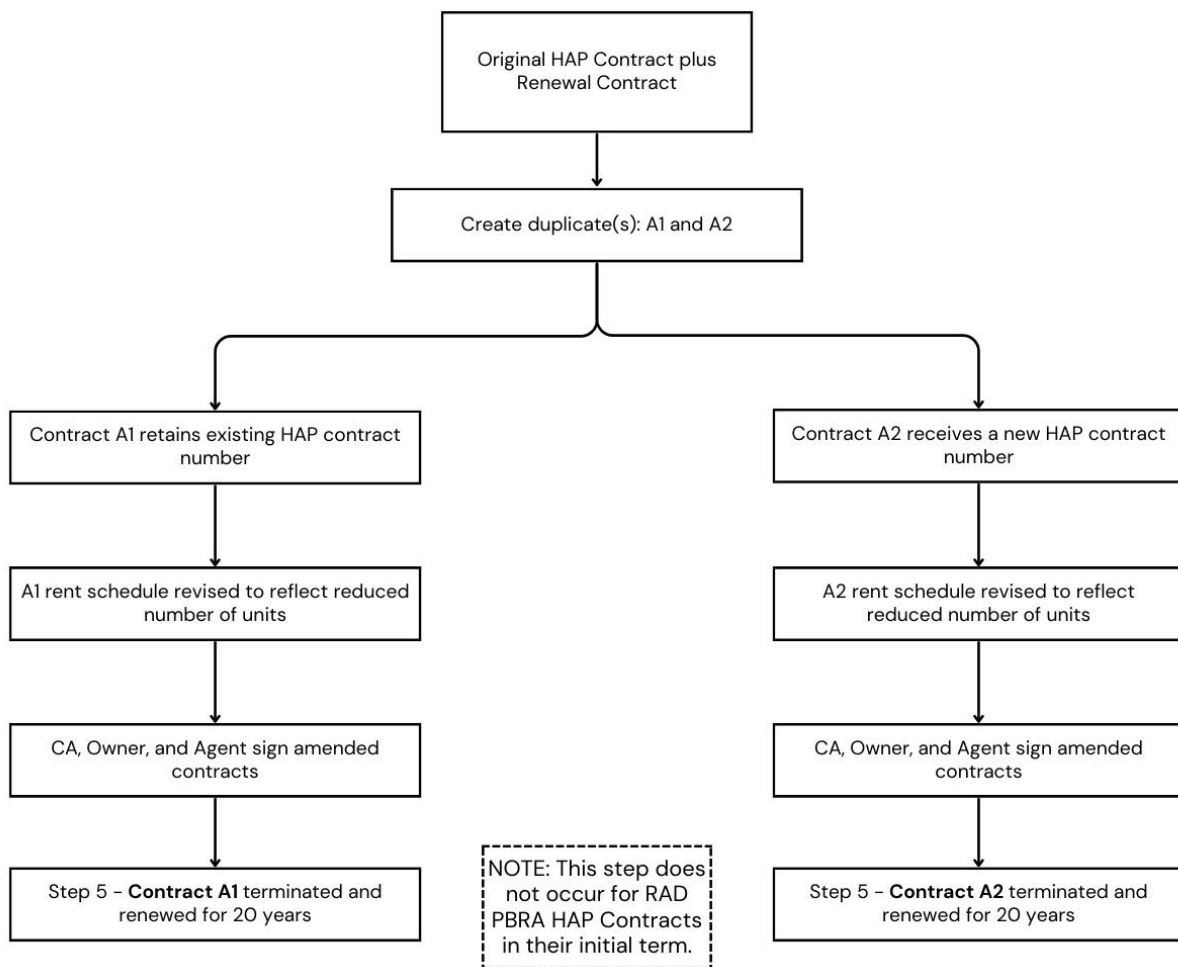
28.8 Processing Steps

A. This section describes the steps involved in bifurcating Contract A once HUD approval for bifurcation has been provided. Also refer to **Figure 28-1**, below.

1. For each resulting contract, HUD will duplicate the original HAP contract and, if it has been renewed, the renewal contract currently in effect. The resulting documents will be Contract A1 and Contract A2.
2. For Contract A1, the existing HAP contract number will be retained. HUD will apply a new HAP contract number to Contract A2.⁹

⁹ The Field Funding Specialist will request a new HAP contract number using the Financial Operations Branch SharePoint site.

3. HUD will amend the rent schedules associated with Contracts A1 and A2 to reflect the unit mix and the configuration of each renewal contract. The amendments must have an effective date and be signed by the Contract Administrator and the Owner.
4. Except for RAD PBRA HAP contracts in their initial term, HUD will terminate Contracts A1 and A2 and issue a new 20-year renewal contract for each one.¹⁰ If Contract A is administered by a Performance-Based Contract Administrator (PBCA), then, following bifurcation, both A1 and A2 will be assigned to the PBCA, according to the assignment process established by the Contract Administration Branch.

Figure 28-1. Bifurcation Steps¹¹

¹⁰ See, however, Section 28.6.2.A.2.

¹¹ See, however, Sections 28.6.1.A.5 (with respect to planned 8(bb) transactions) and 28.6.2.A.2 with respect to the bifurcation of M2M HAP contracts.

Appendix 28-1 Preservation Exhibit

Subject to all applicable laws and regulations in effect upon expiration, the Renewal Contract must renew automatically for a term of ____ year(s)¹² beginning on ____.¹³ This requirement must be binding on the Owner and the Contract Administrator, as identified in section 1 of the Renewal Contract, and on all their successors and assigns.

¹² Enter the number of years remaining on Contract A prior to bifurcation. If less than 1 year remained on Contract A prior to bifurcation, enter the number “1.”

¹³ Enter the date of the first day after expiration of the initial or renewal contract.

Appendix 28–2

HUD Bifurcation of RAD PBRA HAP Contract

This instrument, *HUD Bifurcation of RAD PBRA HAP Contract*, provides as follows for the Multifamily Housing Project known as _____ (Section 8 Project Number _____):

I. Recitals

- A. The United States of America, acting by and through the Secretary of the Department of Housing and Urban Development (“HUD”), and [Name of Current Owner], entered into a project-based Section 8 HAP contract on [Signature Date] and [Signature Date], respectively, as authorized under the Rental Assistance Demonstration (“RAD”). See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55 (approved Nov.18, 2011) as amended. The Section 8 Project Number is _____. Section 1 identifies the project name as “_____.” The HAP contract will be referred to herein as Original RAD HAP contract.
- B. Section 1 of the Original RAD HAP contract reflects an effective date of _____, and a term of twenty (20) years. Section 1 reflects a total of _____ covered units (___ 1-BR units, ___ 2-BR units, ___ 3-BR units, and ___ 4-BR units) located at the following site(s): [address].
- C. The Original RAD HAP contract was executed on the contract form in use at that time for conversions under RAD from
 - ☐ Public housing
 - ☐ Project Rental Assistance Contracts
 - ☐ Section 8 Moderate Rehabilitation or Single Room Occupancy
 - ☐ Rent Supplement
 - ☐ Rental Assistance Payment to project-based section 8.
- D. [LIHTC Only] In [Year], [Name of Current Owner] was awarded Low-Income Housing Tax Credits (LIHTC) to rehabilitate [Project Name]. To accommodate the LIHTC structure, the project buildings and improvements for [Project Name] were transferred via a ground lease to [New Tax Credit Entity]. [Name of Current Owner] retained ownership of the land.
- E. HUD has agreed to a request by [Name of Current Owner] to bifurcate the Original RAD HAP contract to reflect the resulting two projects. One of the resulting HAP contracts will cover ___ units located on the [Project Names] site, the Owner of which will be [Name of Owner]. This project will be known as _____ and must retain the Section 8 Project Number of the Original RAD HAP contract (i.e., Section 8 Project Number of _____).

- F. The other resulting HAP contract will cover __ units at the [Project Name] site, the Owner of which will be [Name of Owner]. This project will be known as _____. The Section 8 Project Number for this project is _____.
- G. Both HAP contracts must have an effective date of _____ and a term of __ years and ____ months.
- H. The initial rents of the HAP contracts must follow the rent schedule previously in effect for the original HAP contract, adjusted by the applicable OCAF.
- I. The contracts must retain the same Anniversary date of the original HAP contract, which must be _____.

II. Bifurcation, Replacement of Original RAD HAP Contract with Two RAD HAP Contracts, and Amendment

- A. After bifurcation, the Original RAD HAP contract must be replaced by two project-based rental assistance RAD HAP contracts: one for [Project Name] and the other for [Project Name], as detailed above. Both HAP contracts must be executed on the same Form as the original RAD HAP contract (such as HUD-52620 for RAD Public Housing PBRA conversions) and must be governed by all of its terms, except for section 2.1(b) (Condition of the Property), which is hereby amended to read as follows:

“The Owner warrants that the rental units to be leased by the Owner under the HAP contract are in decent, safe, and sanitary condition (as defined and determined in accordance with HUD regulations and procedures). The Owner further warrants that it will remedy any defects or omissions covered by this warranty throughout the initial term and during any renewal term of the HAP Contract.”

- B. All other terms of the HAP contracts must remain the same.

Signature Page

Name of Project: [Project Name]

Name of Project Owner: [Owner Name]

Signature of Authorized Representative

Name of Signatory (Print or Type)

Official Title (Print or Type)

Date (mm/dd/yyyy)

Name of Project [Project Name]

Name of Project Owner: [Owner Name]

Signature of Authorized Representative

Name of Signatory (Print or Type)

Official Title (Print or Type)

Date (mm/dd/yyyy)

United States of America Secretary of Housing and Urban Development

Signature of Authorized Representative

Name of Signatory (Print or Type)

Official Title (Print or Type)

Date (mm/dd/yyyy)