

DIGEST - NO CIRCULATION

COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

AUG 14 1975

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The Honorable Edward P. Boland, Chairman  
Subcommittee on HUD-Independent Agencies Appropriations  
Committee on Appropriations  
House of Representatives

Dear Mr. Chairman:

Your letter of July 25, 1975, requested our assistance in clarifying proper accounting of new budget authority under annual contract authorities for certain housing programs in relation to the Congressional Budget Act of 1974, Pub. L. No. 93-344 (July 12, 1974), 88 Stat. 7. The housing programs in question are long-term subsidy programs under which the Department of Housing and Urban Development (HUD) authorized to enter into contracts providing for annual assistance payments for terms of up to 40 years. Your inquiry relates to the inclusion of a provision for \$662,300,000 in new annual contract authority in the HUD-Independent Agencies Appropriation Bill for fiscal year 1976, H. R. 8070, 94th Cong., and the treatment of this amount in the annual HUD budget. As discussed with members of the subcommittee staff, the instant letter analyzes several legal issues concerning treatment of the new contract authority. We will respond separately to additional questions which have been raised with respect to this matter.

H. R. 8070 has been passed in different form by the House and Senate, and is now awaiting conference action. Title I of the bill (July 26, 1975), sections 2-3, provides for purposes here relevant:

"ANNUAL CONTRIBUTIONS FOR ASSISTED HOUSING

"The additional amount of contracts for annual contributions, not otherwise provided for, as authorized by section 5 of the United States Housing Act of 1937, as amended (42 U. S. C. 1437c), entered into after June 30, 1975, shall not exceed \$662,300,000, which amount shall be in addition to balances of authorization heretofore made available for such contracts \* \* \*"

For the largest share of this will be used for the so-called "Section 8" Lower-Income Housing Assistance Program (42 U. S. C. § 1437f).

Up to and including fiscal year 1975, the new budget authority recorded in the annual HUD budget for these subsidized housing programs did not include contract authority, but reflected only the appropriation being requested to provide the cash for payments due in a given year. (See, for example, Budget Appendix for Fiscal Year 1975, page 493.) The Office of Management and Budget (OMB) has justified the exclusion of contract authority from budget authority by pointing out that the total amount of the Government's liability in the subject programs would be indefinite and difficult to quantify.

Commencing with fiscal year 1976, OMB has advised HUD that the Congressional Budget Act of 1974 requires a change in the method of presentation of budget authority in the annual budget. OMB has advised that budget authority under the subsidized housing programs should be redefined to include the full amount of Federal payments authorized by an increase in budget authority, i. e., budget authority now equals the product of the increase in contract authority to make annual payments multiplied by the maximum number of years covered by the contracts. For example, since HUD is requesting new contract authority of \$662,300,000 for FY 1976, the budget authority shown would be this amount times 40 years, or approximately \$26 billion. See Budget Appendix for Fiscal Year 1976, page 489. Under this concept, the annual appropriation to meet payments due in a given year is no longer treated as budget authority but is termed an appropriation to liquidate contract authority. (FY 76 Budget Appendix, page 487).

An analysis of the proper accounting of the new HUD contract authority requires consideration of the following areas: (1) the relationship, in general terms, between budget authority and contract authority, and the impact, if any, of the Budget Act on this relationship; (2) the relationship between budget authority and appropriations to liquidate contract authority; and (3) the proper measure of budget authority to be reflected in the budget documents.

Section 3(a)(2) of the Congressional Budget Act of 1974, 88 Stat. 299, defines "budget authority" as --

"\* \* \* authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government."

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This definition clearly encompasses contract authority in the context of the instant HUD subsidy programs, discussed in more detail hereinafter, since each such contract constitutes an obligation "which will result in immediate or future outlays involving Government funds." The legislative history of the Congressional Budget Act supports this inclusion. For example, the Senate Committee on Government Operations stated in its report on S. 1541, the Senate version of the Budget Act:

"The term 'budget authority' means authority provided by law for the Federal Government to enter into obligations which will result in immediate or future outlays. Such authority is the 'seedbed' for all expenditures. It is granted not only through appropriation measures, but in legislation which by-passes the appropriations process (backdoor spending), such as measures providing permanent appropriations, contracting authority, borrowing authority, and mandatory entitlements." S. Rep. No. 93-579, 93d Cong., 2d Sess. 28 (1973).

However, section 3(a)(2) is merely a definition of the term as used in other portions of the Act. It does not purport to create or alter any right, duty, or authority by its own force. Thus, to determine the significance of this definition, we must look to other provisions of the Act in conjunction with it. In this connection, section 601 of the Budget Act, 88 Stat. 323, amends 31 U. S. C. § 114 (1970) by adding to the required contents of the annual budget transmitted to Congress by the President, inter alia the following provision:

"(d) The Budget transmitted pursuant to subsection (a) for each fiscal year shall set forth separately the items enumerated in section 301(a)(1)-(5) of the Congressional Budget Act of 1974."

This provision is effective with respect to fiscal year 1976. Pub. L. No. 93-344, § 905(d), 88 Stat. 331.

Section 301(a) of the Budget Act, 88 Stat. 306, provides in pertinent part as follows:

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"Sec. 301. (a) ACTION TO BE COMPLETED BY MAY 15. - On or before May 15 of each year, the Congress shall complete action on the first concurrent resolution on the budget for the fiscal year beginning on October 1 of such year. The concurrent resolution shall set forth--

"(1) the appropriate level of total budget outlays and of total new budget authority;

"(2) an estimate of budget outlays and an appropriate level of new budget authority for each major functional category, for contingencies, and for undistributed intragovernmental transactions, based on allocations of the appropriate level of total budget outlays and of total new budget authority \* \* \*."

Thus, the President's Budget for fiscal year 1976 and thereafter must set forth new budget authority, including contract authority, for each "major functional category" and in the aggregate for the entire budget. While section 301(a) does not address budget authority in terms of specific departments, agencies or individual programs, it seems clear that the required totals can be derived only on the basis of data for the individual programs. Further, meaningful use of the totals would necessarily depend upon specification of the components from which the totals are computed. Accordingly, the inclusion of contract authority in the concept of budget authority for the HUD subsidy programs is, in our view, entirely consistent with the provisions of the Congressional Budget Act.

We note further that OMB directives have defined budget authority to include contract authority even prior to the enactment of the Congressional Budget Act. Thus, OMB Circular No. A-11, section 21.1(b) (June 1974) defines budget authority for a given year as "the authority becoming available during the year to incur obligations," and expressly includes contract authority. Similarly, OMB Circular No. A-34, section 21.1 (July 1971) specifically includes contract authority within the scope of the term "budget authority."

In sum, we believe that, as a general proposition, budget authority under the Congressional Budget Act includes contract authority, and that this inclusion would have been proper even prior to the Act.

The proper treatment of appropriations to liquidate contract authority, while not addressed to our knowledge in any statute, follows logically from the foregoing. To the extent that contract authority is reflected as budget authority, the subsequent appropriation to liquidate that contract authority should not be shown as budget authority for purposes of the Budget Act. This is appropriate in order to prevent the amount of the appropriation from being counted twice. Once again, OMB has recognized this in section 21.1, OMB Circular No. A-34, *supra*, which expressly notes that appropriations to liquidate contract authority are not counted as budget authority. Also, an appropriation to liquidate contract authority, since it is an appropriation to make payments under existing contracts, does not appear in and of itself to confer authority to enter into additional contracts or to take other actions to create obligations which will result in immediate or future outlays, and thus does not fit the section 3(a)(2) definition of budget authority.

Having established that budget authority should generally include contract authority but not the ensuing appropriations to liquidate such contract authority, the remaining area to consider is the proper measure of budget authority to be reflected. The problem here is that the Housing Act permits contracts of up to 40 years' duration under the "Section 8" program, but there have been indications from HUD that it does not intend to write "Section 8" contracts for terms greater than 20 years. Thus, the \$26 billion figure for new budget authority proposed by OMB is seen as unrealistic, exaggerated, and misleading. In a letter to us dated June 24, 1975, the OMB Assistant Director for Budget Review disputes any assertion that HUD intends to limit "Section 8" contracts to not more than 20 years. The Assistant Director states:

"The statement that HUD intends to limit contracts to 20 years is not correct. The U.S. Housing Act of 1937, as amended, authorizes the Secretary to enter into 40-year subsidy contracts with State or local agencies, under the Section 8 Lower-Income Housing Assistance Program and HUD fully intends to do so. This intention is evident in the regulations for the Section 8 program that have been published in the Federal Register. It is also reflected in the materials that the Department has submitted to the appropriation committees in support of its 1976 Budget request."

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The situation is further complicated in that the "Section 8" program provides for 3 separate types of assistance contracts with different maximum durations: 15 years for contracts for existing structures; 20 years for contracts for newly constructed or substantially rehabilitated units not owned or financed by public housing agencies; and 40 years for contracts for newly constructed or substantially rehabilitated units owned or financed by State or local agencies. 42 U. S. C. A. §§ 1437(d) (2) and (e)(1) (Supp. 1975). The law does not specify an allocation among these types of contracts except to the extent of requiring that a minimum of \$150 million of each year's authority to enter into contracts be used for new or existing housing to be owned by public housing agencies. 42 U. S. C. A. § 1437c(c) (Supp. 1975). Otherwise, the allocation of contract authority among types of contracts appears to be left to the discretion of the Secretary of HUD.

In recently published regulations implementing the new construction portion of the "Section 8" program, HUD has generally reiterated the statutory guidelines as to contract duration, with no indication of any contrary intent. Thus, the new 24 C.F.R. § 880.109, concerning new construction, states in part:

"(a) A Contract may be for an initial term of not more than five years, with an option solely in the Owner to renew for additional terms of not more than five years each, provided that the total Contract term, including renewals, shall not exceed 20 years for any dwelling unit.

"(b) In the case of a Contract under which housing assistance payments are made with respect to a project owned by, or financed by a loan or loan guarantee from, a State or local agency, the total Contract term may be equal to the term of such financing but may not exceed 40 years for any dwelling unit." 40 Fed. Reg. 18687 (April 29, 1975).

The Assistant Director for Budget Review further states, in justification of OMB's position:

"In any event, OMB believes that, where the Congress has provided authority to incur obligations for a 40-year period, the authority must be reflected as such in the presentation of budget authority. This, too, is consistent with the treatment of budget authority elsewhere in the budget. Legislation frequently authorizes a Federal department or agency to incur obligations 'up to' or 'not to exceed' a fixed amount in support of a specific project or activity. The budget shows the maximum amount as budget authority, even though the volume of contracts executed may ultimately fall short of the ceiling."

Assuming that the above-cited provision from title I, H. R. 8070, is enacted and thus becomes the vehicle for the release of new "Section 8" contract authority for FY 1976, we are inclined to concur with OMB's view that budget authority should reflect the maximum potential duration of contracts authorized by law. We believe this approach is consistent with the section 3(a)(2) definition of budget authority ("authority provided by law . . ."). In addition, an intent stated today can readily change in the future in light of changing circumstances, agency policy or agency personnel. Also, as long as the statutory language conferring new contract authority is stated merely in terms of an annual increment, the legal authority would appear to exist to use this amount to the maximum extent permitted by law, regardless of what may be shown in tables in the Budget Appendix; that is, the \$62 million sought would appear to be legally available to HUD for 40-year contracts, or total budget authority of approximately \$26 billion. Thus, computation of "budget authority" based on maximum potential contract duration would seem to be consistent with the Budget Act.

Finally, one of the major purposes of the Congressional Budget Act, set forth in section 2(4) thereof, is to enable Congress to establish national budget priorities." As stated in the report of the House Committee on Rules on H. R. 7130, the House version of the Budget Act:

"[T]he dispersion of budget responsibility within Congress has left it unprepared for what are perhaps the two main contemporary purposes of the budget process: to manage the economy and to determine public priorities. \* \* \*"

"Under stable budget conditions, the primary interest of Congress was to secure legality and efficiency in expenditures. While these tasks remain, they have been surpassed by the fact that the budget has become the central instrument for determining governmental goals and priorities. It could not be otherwise in a budget that claims so large a share of the nation's wealth and in which there are so many competing claims. Unlike the past, the budget does change substantially from year to year and the basic issue is not whether the growth will occur but the directions it will take. \* \* \*

"The same situation applies to the use of the budget for the determination of macroeconomic policy. The overall levels of spending, revenues, and surplus or debt have a significant impact on the condition of the economy. No longer is the budget process merely a matter of estimating how much expenditures can be made with available revenues. The budget influences the levels of employment and inflation and can be utilized to stimulate or retard economic growth. Thus, when budget decisions are made, Congress must be [as] much concerned about economic issues as it is about the spending needs of government agencies."  
H. R. Rep. No. 93-658, 93d Cong., 1st Sess. 21-22 (1973)."

We believe Congress is best able to accomplish these goals if it is presented with the full costs of Federal programs.

Due to the nature of the "Section 8" program and the latitude of discretion vested in the Secretary in the allocation of contract authority, we believe the mere presentation of a total budget authority figure based on the 40-year maximum, without further explanation, could well be misleading both to Congress and to the public. Since it appears to be intended that the new "Section 8" contract authority be apportioned among 15, 20, and 40-year contracts, we believe the Budget Appendix should contain an explanatory comment or footnote to this effect, making it clear that the \$26 billion total budget authority figure is a maximum potential figure, based on the hypothesis that all "Section 8" contracts could be of 40-year duration, a result that is not intended to occur in fact.

In view of the nature of the "Section 8" program as described above, however, we believe that a more desirable alternative -- and an approach more consistent with the Budget Act -- would be for the appropriation act to include both a limitation on the annual cost (as in the provision on page 469 of the FY 1976 Budget Appendix) and a limitation on the total (run-out) cost of contracts which the Secretary is authorized to execute. The latter would then represent the total "budget authority" provided by Congress in terms of authority to enter into obligations during fiscal year 1976 resulting in present and future outlays. The total run-out cost would be set by Congress, using as a starting point the intended contract durations, subject to this overall limitation. This approach, in our view, would best implement one of the major purposes of the Budget Act -- to bring "backdoor spending" within the purview of the appropriation process -- as reflected in section 401 of the Act, set forth in part below:

"Sec. 401. (a) Legislation Providing Contract or Borrowing Authority. It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution which provides new spending authority described in subsection (c)(2)(A) or (B) (or any amendment which provides such new spending authority), unless that bill, resolution, or amendment also provides that such new spending authority is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

\* \* \* \* \*

"(c) Definitions.

"(1) For purposes of this section, the term 'new spending authority' means spending authority not provided by law on the effective date of this section, including any increase in or addition to spending authority provided by law on such date.

"(2) For purposes of paragraph (1), the term 'spending authority' means authority (whether temporary or permanent)--

"(A) to enter into contracts under which the United States is obligated to make outlays, the budget authority for which is not provided in advance by appropriation Acts; \* \* \*."

While section 401(a) appears to be geared primarily to legislation reported by legislative committees as distinct from appropriations committees (see, e.g., S. Rep. No. 93-579, *supra*, at 59), the inclusion of total run-out cost in the appropriation act would clearly maximize congressional control over "backdoor spending," especially in a case like the "Section 8" program, where the enabling legislation permits contracts of greatly varying durations.

We believe that there are also significant practical advantages, consistent with the fundamental purposes of Pub. L. No. 93-344, to inclusion of an overall budget authority limitation in the 1976 appropriation act language for the "Section 8" program. Such a limitation, constituting a congressional determination as to appropriate 1976 program levels in terms of run-out costs, (i.e., present and future outlays), would, if placed in the actual statutory language make irrelevant and unnecessary any reference to a theoretical figure for maximum potential outlays under present law. This approach would achieve a clear and realistic statement of program costs, which is lacking in either the \$662 million aggregate annual figure, standing alone, or the \$26 billion figure for maximum potential outlays. Moreover, specification of a maximum figure for 1976 budget authority in the appropriation language would assist in assuring that program implementation coincides with congressional expectations. Since this figure would constitute a statutory limit, it could not be exceeded, although the present flexibility in fixing the duration of contracts would be retained within the overall limitation. By the same token, the presence of this statutory benchmark might well facilitate congressional review pursuant to title X of Pub. L. No. 93-344, the Impoundment Control Act, of any attempts to implement the program at a level below that envisioned by the Congress.

If it is desired to legislatively specify a limitation on total run-out cost, a provision along the lines of the following could be used in place of the above-cited provision in title I, H. R. 8070:

**"ANNUAL CONTRIBUTIONS FOR ASSISTED HOUSING**

"The additional amount of contracts for annual contributions, not otherwise provided for, as authorized by section 5 of the United States Housing Act of 1937, as amended (42 U. S. C. 1437c), entered into after June 30, 1975, shall not exceed an aggregate annual amount of \$862,300,000, nor shall the total new budget authority obligated under such contracts entered into after June 30, 1975, exceed \$ [ \_\_\_\_\_ billion], which amounts shall be in addition to balances of authorization heretofore made available for such contracts \* \* \*."

The blank amount would reflect the congressional determination as to the appropriate program levels for FY 1976, taking into account the various administrative variables, particularly the anticipated duration of contracts.

In sum, we believe that under the proposed language for the "Section 8" program contained in the 1976 Budget Appendix, it is necessary to indicate potential budget authority of \$26 billion, even though this figure may be of no practical relevance at best and may even be seriously misleading. However, it is also our view that this problem could be eliminated by specifying in the proposed language a realistic figure for total budget authority to be available for 1976. It seems to us that the latter approach would further the objective of realistic disclosure of program costs, and also enhance congressional control in terms of assuring that actual program levels neither exceed nor fall short of expectations.

Sincerely yours,

~~SECRET~~ R. STAATS

Comptroller General  
of the United States