

DECISION

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

FILE: B-206272.2

DATE: November 2, 1982

MATTER OF: Civic Action Institute--Reconsideration

DIGEST:

1. When "new" facts do not clearly demonstrate that GAO determination to apply decision on sustained complaint only prospectively and not to recommend remedial action was inappropriate, GAO will affirm determination upon request for reconsideration.
2. GAO will not direct award of a contract to firm whose complaint was sustained. Since complainant is one of three firms which previously provided services, non-competitive award cannot be justified on basis of uniqueness or prior experience.
3. GAO does not normally review the implementation of or alleged failure to implement executive branch policy in its bid protest function.

The Civic Action Institute requests reconsideration of our decision not to recommend remedial action in sustaining its complaint against an award of a cooperative agreement by the Department of Housing and Urban Development. We affirm our prior determination to apply the decision only prospectively.

In Civic Action Institute, B-206272, September 24, 1982, 61 Comp. Gen. _____, 82-2 CPD 270, we found that the Department of Housing and Urban Development had improperly entered into a cooperative agreement with the National Citizens Participation Council (NCPC) for purposes of providing technical assistance to Community Development Block Grant recipients. Even though NCPC's services ultimately were to be delivered to authorized grant recipients,

we stated that in the absence of specific statutory authority--other than the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. § 501 (Supp. IV 1980)--to make grants to intermediaries, HUD in the future should contract for this type of services.

We stated, however, that we did not believe remedial action was appropriate in the Civic Action Institute's case because, among other reasons, the Institute previously had provided technical assistance to Community Development Block Grant recipients under a cooperative agreement and had not complained to our Office about the form of assistance until it appeared that HUD would not fund its unsolicited proposal for continued services.

In its request for reconsideration, the Institute has provided "new" facts which it believes we misunderstood because they were not sufficiently highlighted in its initial complaint. It states that the only time that it specifically requested HUD to award it a cooperative agreement was in August 1981. Following issuance of a report by our Office entitled "Contracting Agencies Need Better Guidance for Choosing among Contracts, Grants, and Cooperative Agreements," GGD 81-88, September 4, 1981, the Institute states, it submitted additional information to HUD showing that it also was qualified for a contract. The Institute argues that its complaint to our Office was filed in January 1982, after it became convinced HUD intended to award a cooperative agreement to NCPC.

The Institute states that our September decision shows that HUD treated it unfairly and probably illegally. Recognizing that the advanced stage of performance precludes termination of the grant, the institute asserts that equity nonetheless requires remedial action; it requests that we therefore direct HUD to award it a contract comparable to NCPC's on the basis of a \$229,990 proposal submitted on August 3, 1982, in response to HUD's request for cooperative agreement assistance No. H-10474.

Although the Institute's own actions in seeking a cooperative agreement provided one reason why we did not recommend remedial action, several others were stated in our decision. We acknowledged that the distinctions between "assisting" an intermediary and

"acquiring the services" of an intermediary, which determine whether a grant or a contract should be used, are not always clear. We noted that the Office of Management and Budget, which has statutory responsibility for interpreting and implementing the Federal Grant and Cooperative Act, has not issued any guidance with regard to use of intermediaries. In addition, we pointed out that the decisions of our Office on which HUD relied, Burgos & Associates, 58 Comp. Gen. 785 (1979), 79-2 CPD 194, and Bloomsbury West, Inc., B-194229, September 20, 1979, 79-2 CPD 205, both involved assistance relationships with intermediaries but did not discuss when these might be improper.

Even if we accept the Institute's statement that it sought a contract from HUD once it became aware that a cooperative agreement was not the proper form of assistance, the other reasons for our decision are still valid. Thus, the "new" facts introduced by the Institute do not clearly demonstrate that our decision was inappropriate. Cf. City Center Committee of the Philadelphia Building Trades Council--Request for Reconsideration, B-188836, November 1, 1977, 77-2 CPD 337 (affirming dismissal of a protest concerning repairs to Federally-insured housing because of lack of jurisdiction). Moreover, we would not direct the award of a contract to the Institute. We have no information at this time regarding HUD's needs or ability to fund additional technical assistance for Community Development Block Grant recipients. In any case, the record indicates that the Institute was one of three firms that provided such assistance between 1978 and 1981. We therefore do not believe that a noncompetitive award could be justified on the basis of either the Institute's uniqueness or its prior experience. See Electronic Systems U.S.A., Inc., B-200947, April 20, 1981, 81-1 CPD 309.

Finally, the Institute argues that a directed award to it would further goals of the President's Task Force on Private Sector Initiatives in promoting community partnerships and local self-help. These, however, are matters of executive branch policy, and our Office, in its bid protest function, does not normally review the implementation of (or alleged failure to implement) such policies. Fairplain Development Company, et al., 59 Comp. Gen. 409 (1980), 80-1 CPD 293.

Our prior decision is affirmed.

for *Milton J. Fowler*
Comptroller General
of the United States