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DECISION

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

FILE: B-197274 DATE: February 16, 1982

MATTER OF: HUD's Obligating No-Year Contract Authority

DIGEST: HUD's use of reservation and notification letters under various housing assistance programs to determine when no-year contract authority was considered obligated for purpose of reporting to Congress was inappropriate since at the time of their being issued, HUD had neither taken action imposing a legal liability upon the Government which would result in the expenditure of funds nor which could mature into a legal liability of the Government by virtue of actions on the part of other parties beyond the control of the Government.

BACKGROUND

This decision to the Secretary of Housing and Urban Development (Secretary) is in response to a request that we provide a more definitive ruling on the use of reservation and notification letters for obligating contract authority under various federally assisted housing programs. This matter has previously been the subject of a report by this Office, B-197274, dated April 30, 1980, in which we stated that "notification and reservation letters are not legally sufficient to constitute obligations," and recommended to the Secretary that, among other things, HUD record obligations at a later time in the housing process.

The Secretary, in his response to our report, took issue with our determination and requested a decision from this Office on this matter. HUD's positions on the various questions presented are taken from a letter with attachments dated March 28, 1980 from Irving R. Margulies, Associate General Counsel, Finance and Administrative Law Division, to Mr. Sidney Wolin, Group Director Procurement and Systems Acquisition Division of this Office and from a letter dated June 31, 1980, from the Secretary to Representative Jack Brooks, Chairman, of the House Committee on Government Operations

We note that our criticisms of HUD at that time were based upon practices it followed in reporting to the Congress amounts of contract authority obligated during the fiscal year for the purpose of justifying requests for additional contract authority. Consequently, our analysis was based in part upon the rules and regulations in effect at the end of the most recently completed fiscal year for which obligations were reported; that is, September 30, 1979. Since that time, however, numerous changes have taken place in the regulations governing some of these programs.

For example, the use of reservation letters in the Public Housing Development Phase has been discontinued (see 45 Fed. Reg. 60836 (September 12, 1980)), and funds are reserved for the program when an Annual Contribution Contract is executed.

Our concern is the point in time HUD considers the contract authority obligated for the purpose of reporting it to the Congress. By obligating contract authority well in advance of the time that a project is actually approved and funded, the potential is created for presenting to the Congress a misleading picture as to the amount of contract authority actually committed to authorized projects. The Congress, relying on HUD's reports of obligated (and therefore presumably no longer available) contract authority, could well be induced to authorize significant amounts of additional contract authority. HUD, by deobligating large amounts of previously obligated authority, could then have available for reobligation to new projects amounts in excess of what Congress intended it to have when it provided the additional authority. Congress might, were it aware of the amount of contract authority available to HUD for deobligation and reobligation, reduce or eliminate any authorization of new contract authority in addition to that already granted to HUD. It is this possibility that makes the timing of HUD's obligation of contract authority important.

Since the revised regulations do not address the issue of obligations under 31 U.S.C. § 200, it is unclear to us whether HUD has meaningfully implemented our recommendation in each of the programs discussed in our report. However, we were informally advised by officials at HUD that no change would take place until a more thorough explanation of our prior objection is received. With this in mind, we offer the following response to the Secretary on the basis for the recommendation set forth in our 1980 report, and reaffirm that recommendation.

THE CONTROVERSY

HUD used reservation and notification letters as obligating documents under 31 U.S.C. § 200. While agreeing that some of these letters had some technical deficiencies which it would correct, HUD argued that from both legal and programmatic viewpoints these letters were and should have been allowed to stand as the obligating documents in its housing assistance programs.

HUD's chief programmatic objection, as we understand it, was that if we ruled that it could not tell prospective contractors that it was legally obligated to them, it would have had difficulty in getting developers to go forward with projects. HUD stated that it would have made a difference to the developers whether the contract authority was "reserved" and so committed to the project or if it is "obligated" under 31 U.S.C. § 200 for that expenditure. We disagree.

The purposes of obligating funds under 31 U.S.C. § 200 are varied. Chiefly, that section is intended to prevent the overobligation of funds (including contract authority) or other violations of the Antideficiency Act, to assure that the proper fiscal year is charged with expenditures, and to advise the President and the Congress as to the Government's outstanding commitments for which appropriations will in all likelihood be needed. Section 200 is intended for internal bookkeeping and fiscal control purposes. It does not govern the relationships between the Government and any outside parties with which it deals. A contract which is improperly not recorded as an obligation under 31 U.S.C. § 200 remains a valid contractual obligation of the United States and, similarly, a contract which is not otherwise valid does not gain greater status simply because it is recorded as an obligation under that section. Furthermore, contractors participate in other agency programs similar to HUD's under which obligations are recorded as we have recommended to HUD. 1/ Therefore, we cannot agree with HUD's assertion that if it could not record notification and reservation letters as obligations on its books, it would have had difficulty obtaining developers willing to enter its programs.

1/ For example, the selection by the Farmers Home Administration (FmHA) of a developer to construct rental housing is divided into two phases: "a preapplication phase" and "a complete application phase." A builder desiring to obtain a rental housing loan submits a preapplication to the agency. Preapplications of the more experienced builders provide FmHA with a rough schematic development plan, indicate that the land is available and buildable, and the funding has been refused by the applicable State housing finance agency and by HUD. If the preapplication is determined to have merit and the building location is within an area that FmHA and State authorities have targeted for housing, FmHA will discuss program requirements with the applicant.

The applicant is then instructed to submit a "complete application" for the project, including obtaining completed architectural plans, completed engineering work, and State and local zoning approvals. Once the complete application has been reviewed by FmHA and all requirements met, FmHA obligates funds for the loan. The process for the complete application stage could take from three months to two years depending on the extent of requirements completed at the time the application is processed. The construction phase takes place after the FmHA approval. While there are, of course, differences between the FmHA's and HUD's programs, HUD could also obligate its contract authority when it enters into of the annual contributions contract or the housing assistance payments contracts (which occurs when the building is virtually habitable). At that point both HUD and the applicant would be legally committed to the project.

On the legal question, HUD contended that the Public Housing Development Phase reservations were valid obligations under 31 U.S.C. § 200 (a)(1), while the notification letters used by HUD under the various sections 8 programs constituted valid obligations under 31 U.S.C. § 200 (a)(1) and (5). 2/ HUD argued that its position is supported by both the legislative

2/ Section 1311 of the Supplemental Appropriations Act of 1955, as amended, 31 U.S.C. § 200, provides that:

"(a) After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

"(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; or

"(2) a valid loan agreement, showing the amount of the loan to be made and the terms of repayment thereof; or

* * * * *

"(5) a grant or subsidy payable (i) from appropriations made for payment of or contributions toward, sums required to be paid in specific amounts fixed by law or in accord with formulae prescribed by law, or (ii) pursuant to agreement authorized by, or plans approved in accord with and authorized by, law; or

* * * * *

"(e) Any statement of obligation of funds furnished by any agency of the Government to the Congress or any committee thereof shall include only such amounts as may be valid obligations as defined in subsection (a) of this section."

history of 31 U.S.C. § 200 3/ and various decisions of this Office construing this provision to the effect that obligations can be incurred on the basis of documentary evidence prior to the final contract or agreement. See 50 Comp. Gen. 857 (1971); 42 Comp. Gen. 733 (1963); 34 Comp. Gen. 418 (1955); and B-126652, August 30, 1977.

We agree with HUD that the Congress intended that written documentation such as letters and memoranda containing the elements of a contract and signed by the parties to be bound, could be recorded as obligations under 31 U.S.C. § 200 (a), even if the signing of a formal contract is contemplated but not finally consummated. This merely reflected the fact that in such circumstances, legally enforceable agreements have been held to be created. See Briggs and Turivas v. United States, 83 Ct. Cl. 664, 685 (1936); Penn-Ohio Steel Corp. v. United States, 173 Ct. Cl. 1064, 1085 (1965).

However, while letters of intent or letter contracts have been found to constitute legally enforceable agreements, Saul Bass and Associates v. United States, 205 Ct. Cl. 214, 226 (1974) and 21 Comp. Gen. 574 (1941), they may be recorded as obligations only to the extent of the amount necessary to cover expenses to be incurred by the contractor prior to the execution of the definitive contract, 34 Comp. Gen. 418, 421 (1955); B-127518, May 10, 1956. However, under none of the programs discussed below were applicants authorized to incur any program costs for which HUD would be liable prior to HUD's final approval of an application and the entering into of a contract for financial assistance.

We have also approved the recording as obligations documents which constituted nonrevocable offers and whose acceptance was beyond the control of the Government since by necessity money would have to be available to

3/ For example, the Conference Committee Report on the Supplemental Appropriation Bill, 1955, states with regard to section 1311 (a)(1) that:

"Section 1311 (a)(1) precludes the recording of an obligation unless it is supported by documentary evidence of a binding agreement between the parties as specified therein. It is not necessary, however, that this binding agreement be the final, formal contract on any specified form. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties * * *" (H.R. Rep. No. 2663, 83d Cong., 2d Sess. 18 (1954)).

liquidate these agreements should they be accepted. 4/ However, in HUD's situation, it is not clear that acceptance was beyond its control. HUD had, in most cases, significant functions to perform before it gave final approval to an application. 5/ Furthermore, whether HUD gave its approval depended upon whether it determined that all legal and administrative requirements had

4/ We discussed this principle in 42 Comp. Gen. 733 (1963). There we were confronted with a situation where, in connection with AID operations, allotments of funds were made to participating countries. Subsequently, these countries requested the issuance by AID of procurement authorizations to permit their purchase of stipulated commodities. Upon receipt of such authorization, the countries issued subauthorizations to importers who consummated the purchases.

Funds were considered obligated when the procurement authorizations were issued by AID. The purchases had to be consummated within a specific period of time in order to be covered by the purchase authorization. However, requests for extensions of the termination date which were received and approved prior to the termination date served to extend the purchase authorization. AID contended that requests for extension of the original termination date of the purchase authorization which were received prior to, but not acted upon by, the termination date could be approved and considered as a continuation of the obligations against the funds originally obligated. To this we responded:

> "The gist of your contention is that it is the intentions of your agency rather than its completed actions which control whether or not the United States is obligated under a particular circumstance. We cannot agree. The question whether Government funds are obligated at any specified time is answerable only in terms of an analysis of written arrangements and conditions agreed to by the United States and the party with whom it is dealing. If such analysis discloses a legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States, an obligation of funds may generally be stated to exist. * * *" Emphasis supplied. 42 Comp. Gen. 734.

5/ While this will be discussed below in greater detail, we note that upon receipt of a notification or reservation letter, the applicant or developer often had to undertake a large number of different tasks, including, for example, selecting a site, obtaining an option or title to the land, zoning, developing and equal opportunity program and the like. Generally one to three years passed between the letter and the breaking of ground, and HUD was frequently involved during that period. That one to three-year period was when the large dollar amounts of "deobligations" occurred.

been met. This determination required the further exercise of its discretion by HUD and thus HUD retained sole control over whether a contract would be entered into with the applicant.

In addition to the legal problems, there are strong policy considerations which militate against HUD using reservation and notification letters for recording obligations for these programs.

Since HUD was obligating no-year contract authority, the purposes served in this situation was to assure that it had not overcommitted the amount of contract authority available and that its records reflected an accurate description of the Government's legal liability for future expenditures. However, recording reservation and notification letters did not accomplish these purposes. Instead, it resulted in billions of dollars of "deobligations" and did not accurately reflect the Government's potential liability to program applicants. "Deobligations" occurred for a number of reasons, including, for example, applicants who decided not to proceed with a proposed project or applications which were not approved for one reason or another by HUD.

As suggested above, the problem with obligating large amounts of contract authority in one year and then deobligating billions of dollars of that authority in subsequent years is that the picture given of HUD's uncommitted contract authority is potentially confusing. HUD's "netting out" of contract authority committed in any given year did not provide sufficient explanation of the actual working of the programs involved. Further, if Congress was not sufficiently aware of the probability (judging from the prior several years experience) of large deobligations in the next succeeding year, it may have provided more contract authority than it otherwise would have provided.

HUD has informally assured us that key committee staff members and Members of Congress were pretty much aware of what it had been doing. Even if this were so, and some staff members informally advised us that they were not aware of the large deobligations in terms of the dollars involved, the entire Congress must vote on the level of new contract authority to be provided. Obligating contract authority at a time closer to actual fruition of a project would not only have complied with the requirements of 31 U.S.C. § 200, but it would have more closely described, without the need for extended elaboration, HUD's actual contract availability for new projects.

Under these circumstances the reservation and notification letters were less than acceptable documents for the purpose of recording obligations under 31 U.S.C. § 200. A better document for obligating purposes was the Annual Contributions Contract since it was reflective of the legal commitment undertaken by the Government which would result in an expenditure of funds.

The following discussion reviews each program in greater detail to demonstrate why each program specifically fails to meet the requirements for obligating discussed above.

DISCUSSION

Public Housing Program, Development Phase 6/

Under this program, HUD provided financial and technical assistance to Public Housing Agencies (PHA) under sections 4 and 5 of the U.S. Housing Act of 1937, as amended. PHA's submitted applications in accordance with regulations set forth in 24 C.F.R. § 841.110(b) (1979). This application may have been accompanied by an application for a preliminary loan 24 C.F.R. § 841.110(c) (1979).

If the application met the requirements set forth in 24 C.F.R. § 841.111(a) (1979), it may have been approved. One of these prerequisites was that the PHA's application was likely to meet the requirements for approval of the Development Program under § 841.115 (c) (1979). 7/ Thereafter, HUD issued a program reservation to the PHA specifying certain matters and setting a time limit of not to exceed one year within which the public housing agency was required to submit an approvable Development Program. 24 C.F.R. § 841.111(d) (1979). The Program Reservation provided:

> "The Department of Housing and Urban Development (HUD) hereby makes the following Program Reservation, or change therein, for low-income dwelling units to be provided pursuant to the U.S. Housing Act of 1937. This is not a legal obligation but a statement of determination by HUD, subject to fulfillment of all legal and administrative requirements, to enter into a new or amended Preliminary Loan Contract or Annual Contributions Contract covering the number of units reserved, or such lesser number as may be consistent with the amount of contract and budget authority reserved by HUD with respect to the Program Reservation. A Development Program which is approvable by HUD must be submitted by _____

6/ This program was subsequently revised by regulations published at 45 Fed. Reg. 60838, September 12, 1980.

7/ "A Development Program is a statement of the basic elements of a project, which is prepared by the PHA (on the form and attachments prescribed by HUD) and includes: (1) Site documentation required by § 841.114(b), (2) Preliminary Plans and Specifications (or Work Write-Ups for acquisition projects under Subpart D of this part), (3) Estimate of Total Development Cost, (4) Demonstration of Financial Feasibility, and (5) Updating of Administrative Capability of the PHA. The Development Program shall be adopted by the PHA and submitted to the Field Office for approval." 24 C.F.R. 841.115(a) (1979).

> _____ (insert a date not to exceed one year from the date of this Program Reservation). If this time limit is exceeded, the Program Reservation will be cancelled unless HUD determines, for good cause, to extend the time limit." (Underscoring provided.) HUD Handbook 7417.1 (March, 1977) Appendix 6.

HUD considered the program reservations issued under 24 C.F.R. § 841.111(d) 1979) as evidencing valid obligation under 31 U.S.C. § 200(a)(1).

HUD stated that the Program Reservation "document is not designed to be the final, formal contract and, therefore, as is stated in the second sentence of the document, cannot be considered a 'legal obligation.'" However, HUD then went on to argue that:

> "The Application together with the Program Reservation constitute an offer and acceptance imposing mutual undertakings and liabilities on both parties. With the exchange of these two documents HUD undertakes: (1) to commit a reservation of funds to a PHA proposed housing project whose key elements are approved in the Program Reservation; and (2) subject to fulfillment of all legal and administrative requirements by the PHA, to enter into an Annual Contributions Contract (ACC) with the PHA once the PHA completes these requirements. The PHA's liability is to complete these remaining legal and administrative requirements within the time frame agreed to between the parties in the Program Reservation."

We disagree. The Program Reservation did not legally obligate HUD to do anything. This was explicitly made clear by the terms of the Program Reservation which stated that it was "not a legal obligation". It merely indicated that at that time (when the application was approved) that HUD was interested enough in the proposal to set aside some amount of contract authority for the purpose of assuring that if an approvable Development Program was submitted and HUD approved it, then adequate contract authority would be available to implement the Development Program.

This amount also provided a limit within which the applicant should work in structuring and submitting the Development Program. However, the

fact that HUD was at that time "determined" to enter into an Annual Contribution Contract did not mean that when the Development Program was finally submitted (and the applicant was to do so within a year or the contract authority HUD had set aside would become available for use on other projects) HUD would still be so inclined. Thus HUD was free to accept or reject the Development Program submitted.8/

Since final approval of a Development Program necessitated HUD's exercise of discretion and judgment as to whether the applicant met all the legal and administrative requirements, we cannot say that this was beyond the control of the Government. Thus there did not exist the mere act of acceptance--either through action or work on the PHA's part--which could have served to fix the Government's liability. In 42 Comp. Gen. 733 (see footnote 4), on the other hand, once importers were instructed to make purchases, funds were obligated, since once the importers purchased the commodities in question, the Government's liability to pay was fixed.

We point out in this regard that HUD's approval of an applicant's Development Program was not merely a perfunctory act. The approval required HUD to exercise its best judgment. The effort required to obtain HUD's approval was evidenced by the fact that HUD made loans to PHA's to assist them in preparing Development Programs which had to be repaid in the event the project failed to result in an Annual Contribution Contract. 24 C.F.R. § 841.113 (1979). We realize, of course, that the preliminary loan itself may have been properly recorded as an obligation. See 31 U.S.C. § 200(a)(2).

Furthermore, HUD's reliance on our decisions concerning letters of intent or letter contracts is misplaced. In those cases we held that where legally enforceable agreements had been entered into, agencies were authorized to obligate to the maximum limit of their liability incurred under those agreements prior to the time of entering into the formal contract. Here, however, unlike a letter contract, no legally enforceable commitments were created by the program reservation documents. Further, the Annual Contribution Contract specifically excluded reimbursement of any costs incurred prior to a program's authorization. Finally, the PHA was precluded from taking any action to implement the Program until after the Annual Contribution Contract had been executed. 24 C.F.R. § 841.116(a).

8/ If HUD was concerned about it inadvertently using contract authority set aside while awaiting submission of a Development Program, it could have protected itself against this by merely reserving this amount from obligation.

Section 8 Housing Assistance Payments Program--Existing Housing 9/

Under this program HUD made housing assistance payments to PHA's on behalf of eligible families leasing existing housing. These PHA's in turn entered into contracts with owners to make assistance payments on behalf of eligible families leasing properties from the owners.

PHA's submitted applications to HUD in accordance with regulations set forth in 24 C.F.R. § 882.204 (1979). These regulations required that the PHA submit either with the application or following application approval (but not later than with the PHA-executed annual contribution contract):

--an equal opportunity housing plan

--estimates of financial requirements for preliminary costs, administrative costs, and housing assistance payments;

--an administrative plan; and

--a proposed schedule of allowances for utilities and other services with justifications of proposed amounts. 24 C.F.R. § 882.204(b).

Following HUD's review and evaluation of the applications, it notified the PHA's that their applications were disapproved, conditionally approved or approved. 24 C.F.R. § 882.205(d) (1979).

If the application was accepted outright, HUD sent the PHA a notification letter which provided in pertinent part that:

> "You are hereby notified that: (1) your Application (Revised Application) dated _____ for existing housing to be assisted by housing assistance payments pursuant to Section 8 of the United States Housing Act of 1937 is approved; (2) Annual Contributions Contract authority in the amount of $ _____ has been reserved for the number

9/ The relevant provisions of this program have not been changed.

of units and unit size distribution specified below; and (3) the Annual Contributions Contract is being prepared and will be forwarded to you for execution. Although the specified funds have been reserved, it is noted that no HAP Contracts with owners may be executed utilizing these funds until such time as an Annual Contributions Contract has been executed by this office." Emphasis added. HUD Handbook 7420.3 (Rev. June 1978) Appendix 8-1.

If the application was approved prior to the submission of the items required by 24 C.F.R. § 882.204(b) (1979), HUD sent the PHA a notification letter which included, in addition to the statement quoted above, the following:

"We will execute the Annual Contributions Contract when your agency has submitted, and we have approved, the following additional items:

"(1) Equal Opportunity Housing Plan and Equal Opportunity Certification, Form HUD-916,

"(2) An Administrative Plan,

"(3) Schedule of Allowances for Utilities and Other Services, Form HUD-52667, with a justification of the amounts proposed, and

"(4) Estimates of Required Annual Contributions, Forms HUD-52671, HUD-52672, HUD-52673 and supporting documentations." HUD Handbook 7420.3 (Rev. June 1978) Appendix 8-2.

Thereafter, HUD transmitted an annual contribution contract to the PHA to execute and return to HUD for execution. If all the items set forth above were to HUD's satisfaction, it executed the annual contributions contract. 24 C.F.R. § 882.206(b) (1979).

HUD recorded the notification letters as obligations under 31 U.S.C. § 200 (a)(1), and contract authority was reserved for the projects as provided in HUD Handbook 7420.3 (Rev. June 1978), paragraphs 4.1 and 4.2. If the items submitted by the PHA, after it had been notified that its application had been approved, were found to be unacceptable by HUD, the annual contribution contract was amended to reduce or cancel the reserved authority and a letter was prepared and sent to the PHA explaining the reason for the cancellation. HUD Handbook 7420.3 (Rev. June 1978) paragraph 4-6c.

It can be argued that the approval notification letter set forth in HUD Handbook 7420.3 (Rev. June 1978) Appendix 8-1 when considered in conjunction with the application could be recorded as an obligation because it indicates the application has been approved with contract authority committed in the amount shown. However, even in this case our view is that obligations should not have been recorded until the Annual Contribution Contract was actually awarded.

While the application had received a degree of approval, the notification also indicated that an Annual Contribution Contract was contemplated and the PHA was precluded from incurring costs until the Annual Contribution Contract was executed. Thus, it is apparent that no agreement was intended to be effective until the Annual Contribution Contract was executed. Certainly, no program costs could be incurred for which the Government would be liable until the Annual Contribution Contract was executed and the possibility existed that the approval could be rescinded for reasons extraneous to the acceptability of the project.

The conditional approval notification letter set forth in Appendix 8-2 suffered from an additional infirmity which should have precluded obligating in the amount reserved. This letter indicated that the application had been approved, that an amount had been reserved, and that costs could not be incurred under the program until the Annual Contribution Contract was executed. However, it also required the PHA to submit additional items to HUD for its approval and HUD must have approved these items before the Annual Contribution Contract would be executed. Thus, HUD had conditioned execution of the Annual Contribution Contract on the approval of these items and no housing assistance commitments could have been made by the applicant until the Annual Contribution Contract was executed. Furthermore, mere submission of the items did not suffice as HUD must have approved them. HUD was required to use its best judgment and discretion in determining if these items were satisfactory.

Section 8 Housing Assistance Payments Program -- New Construction and Substantial Rehabilitation 10/

Under these programs HUD provided housing assistance payments on behalf of eligible families leasing newly constructed or substantially rehabilitated housing under section 8 of the U.S. Housing Act of 1937. While the two programs were governed by distinct regulations--24 C.F.R. Part 880 (1979) for the new construction program and 24 C.F.R. Part 881 (1979) for the substantial rehabilitation program--the regulations governing the application for assistance and approval were similar.

Preliminary proposals were submitted in accordance with the requirements for new construction programs set forth in 24 C.F.R. § 880.205 (1979) and for substantial rehabilitation set forth in 24 C.F.R. § 881.205 (1979). After preliminary evaluation and technical processing, successful applicants were sent Notification of Selection of Preliminary Proposals and requested to submit final proposals, 24 C.F.R. § 880.208 (1979) and HUD Handbook 7420.1 (April 1979) paragraph 3-10 and Appendix 7; 24 C.F.R. § 881.208 (1979) and HUD Handbook 7420.2 (April 1975), paragraph 3-10, Appendix 7, which provided in pertinent part that:

> "You are hereby notified that your Preliminary Proposal, dated _____, to provide _____ units of newly constructed housing at _____ has been approved. Annual contributions authority in the amount of $_____ has been reserved for this project. Subject to the fulfillment of all administrative and statutory requirements, an Agreement to Enter into Housing Assistance Payments Contract will be prepared and executed for the number and size of units described below:

Unit Size (No. of Bedrooms)	No. of Units Total	No. of Units Elderly	Contract Rents

10/ These programs were subsequently revised by regulations appearing at 44 Fed. Reg. 59400, October 15, 1977, for Part 880 and 45 Fed. Reg. 7085, January 31, 1980, for Part 881.

"You are requested to submit to HUD, not later than _____ a Final Proposal in accordance with the requirements of the provisions of 24 C.F.R., Part 880, Section 880.209. Attached are the forms required to be submitted with your Final Proposal. If you have questions as to Final Proposal requirements, please call _____ to arrange for a meeting." (Footnotes omitted.)

Final proposals were submitted in accordance with the requirements of 24 C.F.R. §§ 880.209 and 881.209 (1979), one of which was that the final proposal be consistent with the preliminary proposals.

Thereafter, the final proposal was evaluated by HUD as follows:

"(a) Evaluation of Final Proposals by HUD. Each Final Proposal will be evaluated by HUD to determine that the provisions of this Part have been complied with and that such Final Proposal is consistent with the Preliminary Proposal.

"(b) Clarifications or Modifications. HUD may request clarification of individual items, additional information, or modifications of the Final Proposal.

"(c) HUD Determination. HUD shall notify the Owner (and the PHA, if applicable) that the Final Proposal is:

"(1) Approved.

"(2) Approvable only if specified deficiencies are corrected and that HUD will approve the Final Proposal if it receives within a specified time evidence of such necessary corrections.

"(3) Not approved. If a Final Proposal is not approved or if the conditions for approval under paragraph (c)(2) of this section are not met.* * *" 24 C.F.R. § 880.210 (1979). See also 24 C.F.R. § 881.210 (1979)

HUD considered contract authority obligated under these two programs at the time it sent Notifications of Selection of Preliminary Proposals to applicants. HUD has indicated that contract authority was obligated at the preliminary stage because otherwise applicants would find it difficult to obtain financing. It contends these notification were valid obligations under 31 U.S.C. § 200a (1) & (5).

All that HUD agreed to when it issued the Notification of Selection of Preliminary Proposal was that a certain amount of contract authority would remain available while the applicant's proposal was considered for final approval. It did not assure automatic approval but merely assured that if approved there would be contract authority available to support execution of an agreement. Since the contract authority could have been reserved whether or not the Notification of Selection of the Preliminary Proposal was considered an obligating document, a delay in obligating contract authority until a later point in time should not have had any effect on the ability of applicants to obtain financing.

Furthermore, in our opinion these notification letters did not constitute obligations under 31 U.S.C. § 200 (a)(1) & (5). The Notification of Selection of Preliminary Proposal indicated that the preliminary proposal had been approved and funding reserved and indicated that a Housing Assistance Payment Contract would be prepared and executed if a final proposal was prepared and approved. While the final proposal was expected to be consistent with the preliminary proposal, it did not have to be identical to it and HUD retained discretion as to whether it would reject the final proposal for material deviation from the preliminary proposal. See 24 C.F.R. §§ 880.209(b) and 881.209(b) (1979). Furthermore, HUD might have, and frequently did, request clarifications or modifications of final proposals or corrections of deficiencies found in final proposals. See 24 C.F.R. §§ 880.210 and 881.210 (1979). Thus it was not until much later that the actual terms of HUD's liability, if any, was to be established.

Finally, approval of the final proposal was not merely a perfunctory act but instead required HUD to exercise its best judgment and discretion. In such a situation, we cannot agree with HUD that the imposition of legal liability was beyond its control, with the actions of the applicant being the sole determinant of whether the project proceeded. HUD had too much more to do to fall within the purview of the rule in 42 Comp. Gen. 733, discussed above.

Section 8 Housing Assistance Payments
Program-Housing Finance and Development 11/

Under this program, the participating agency had up to and including the 45th day prior to the end of the Federal fiscal year to get a set-aside assigned to a project. To do this a participating agency must have submitted an application for assignment of contract authority to a specific project for HUD's approval. This application must have been accompanied by:

—An application for Existing Housing

—Either a Preliminary or Final Proposal meeting the requirements of 24 C.F.R. Part 880 (New Construction) or Part 881 (Substantial Rehabilitation) or

—A proposal for new construction or substantial rehabilitation under subpart c of 24 C.F.R. Part 883.

Applications were thereafter reviewed in accordance with the procedures set forth in HUD Handbook 7420.4 paragraph 2-2, and if approved the agency was notified as follows:

"You are hereby notified that: (1) your agency's Application for Assignment of Portion of Set-Aside to Specific Project dated _____, for housing to be assisted by housing assistance payments pursuant to Section 8 of the United States Housing Act of 1937 is approved; (2) annual contributions contract authority in the amount of $_____ has been reserved for this project; and (3) your agency, if it has not already submitted a proposal, is authorized to select an Owner willing to provide such housing, and to submit to HUD a new construction or substantial rehabilitation proposal in accordance with 24 CFR, Sections 883.105, 883.106, or 883.309, as applicable. Unless an Agreement to Enter into Housing Assistance Payments Contract is executed by your agency and an Owner and submitted to this office within six months of the date of this notification, this notification shall expire and the units not covered by any Such Agreement shall automatically be cancelled, unless the Assistant Secretary for Housing Production and Mortgage Credit agrees in writing to extend the date." (Emphasis added.) HUD Handbook 7420.4 Appendix 3.

11/ This program was subsequently revised by regulations appearing at 45 Fed. Reg. 6889, January 30, 1980.

HUD considered contract authority obligated when this notification was sent.

We disagree. Once again a final proposal had not yet been selected under 24 C.F.R. Parts 880 or 881 (1979) and in fact the project may not have even reached a point where the preliminary proposal had been selected. Thus the same argument that there was no true commitment on either side applies against recording this set-aside as an obligation. All this notice did was reserve contract authority while prospective owners or developers were sought out for the purpose of submitting a proposal. 12/ Whether or not proposals were finally approved remained within HUD's discretion. In our view, HUD must have exercised all of its approval authority under the specified programs before any legally enforceable liability on its part could have been incurred. While HUD had agreed to keep contract authority available, it had not done anything that would have inexorably resulted in expenditures at this point. That must have awaited compliance with the requirements of 24 C.F.R. Parts 880, 881 and subpart c of Part 883.

for Milton J. Socolar
Comptroller General
of the United States

12/ 24 C.F.R. § 883.104(f) (1979) provided:

"Termination of Set-Asides. Set-asides not assigned to projects on or before the 45th day prior to the end of each Federal fiscal year are automatically terminated as of that date, unless the Assistant Secretary for Housing Production and Mortgage Credit shall agree in writing to extend the date. For purposes of this paragraph, set-aside authority is deemed assigned on the date the field office issues a Notification of Application Approval for a specific number of units and a specific amount of annual contributions for a new construction or substantial rehabilitation project or, in the case of existing housing program, when an Annual Contribution Contract List is approved by HUD. However, with respect to any new construction or substantial rehabilitation project, unless an Agreement to enter into Housing Assistance Payment Contracts, executed by the Agency and the Owner, is submitted to HUD within six months of the date of Notification of Application Approval, the Notification shall expire and the units not covered by such Agreement(s) shall automatically be cancelled, unless the Assistant Secretary for Housing Production and Mortgage Credit agrees in writing to extend the date.