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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Department of Housing and Urban Development – Competitive Selection of Recipients for Rural Housing and Economic Development Grants.

File: B-285794

Date: December 5, 2000

DIGEST

The Inspector General, Department of Housing and Urban Development (HUD), questions the applicability of a proviso in the appropriation for “Community Development Block Grants” (CDBG) in the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act for 1998 (1998 Appropriations Act) to HUD’s Rural Housing and Economic Development (RHED) grants. The proviso states that “the Secretary shall select public and Indian housing agencies to receive assistance under this heading on a competitive basis.” The proviso was included in a paragraph under the CDBG heading appropriating funds for, and imposing restrictions on, another grant program not the RHED grant program and, accordingly, the 1998 Appropriations Act does not require HUD to competitively select recipients receiving RHED grants.

DECISION

The Inspector General (IG), Department of Housing and Urban Development (HUD), requests our opinion on whether the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998 (1998 Appropriations Act) required HUD to competitively select recipients of Rural Housing and Economic Development (RHED) grants made out of \$25 million earmarked in that Act for three specified purposes. Pub. L. No. 105-65, 111 Stat. 1344. The IG and the General Counsel for HUD have polar interpretations of the relevant provisions of the 1998 Appropriations Act. The Inspector General concludes that the Act requires competition whereas the General Counsel for HUD concludes the contrary. For reasons discussed below, we conclude that the 1998 Appropriations Act did not require HUD to competitively select recipients of these RHED grants.

BACKGROUND

For fiscal year 1998, HUD received an appropriation of \$4,675,000,000 for its Community Development Block Grants program authorized by 42 U.S.C. § 5301. Pub. L. No. 105-65, 111 Stat. 1356. In the fifth paragraph under the Community Development Block Grants heading, the Appropriations Act earmarked \$25,000,000 for RHED grants. Pub. L. No. 105-65, 111 Stat. 1357. The specific language in the 1998 Appropriations Act reads as follows:

Of the [\$4,675,000,000] made available under this heading, \$25,000,000 shall be available for the Secretary, in consultation with the Secretary of Agriculture, to make grants, not to exceed \$4,000,000 each, for rural and tribal areas, including at least one Native American area in Alaska and one rural area in each of the States of Iowa and Missouri, to test comprehensive approaches to developing a job base through economic development, developing affordable low- and moderate-income rental and homeownership housing, and increasing the investment of both private and nonprofit capital.

At issue here are three grants, of \$2,000,000 each, that HUD made from their earmarked funds to two Indian Tribes on a noncompetitive basis.¹ On December 18, 1998, HUD announced that it had awarded \$9,000,000 of the \$25,000,000 earmarked for RHED grants, including the \$6,000,000 awarded to the two Indian Tribes. 63 Fed. Reg. 70154 (1998).

The IG argues that HUD should have competitively selected the two Indian Tribes to whom it awarded the \$6 million. The IG bases its argument on the language of a proviso contained in the third paragraph of the Community Development Block Grants lump sum appropriation. This paragraph appropriates funds for HUD's public and assisted housing self-sufficiency program, commonly known in HUD as the Economic Development and Self-Sufficiency program (EDSS). The proviso reads as follows:

“[p]rovided further, [t]hat the Secretary **shall select public and Indian housing agencies to receive assistance under this heading on a competitive basis**, taking into account the quality of the proposed program, including any innovative approaches, the extent of the proposed coordination of supportive services, the extent of commitments of funding or services from other sources, the extent to which the proposed

¹ HUD awarded two of the grants to Native American tribal entities in Alaska for an Alaska Native Heritage Center and the reconstruction of a United States Air Force dormitory and office facility into a vocational education center. The third grant went to the Oglala Sioux Lakota Tribe to fund a nonprofit entity that plans to become the principal funding source of the Shared Vision Initiative on the Pine Ridge Reservation.

program includes reasonably achievable, quantifiable goals for measuring performance under the program over a three-year period, the extent of success an agency has in carrying out other comparable initiatives, and other appropriate criteria established by the Secretary” (emphasis added).

The IG argues that because the RHED earmark appears under the Community Development Block Grants heading, the proviso subjects the RHED grants to competition. On the other hand, the General Counsel for HUD argues that while the language in the 1998 Appropriations Act earmark for the RHED grants (the fifth paragraph under the Community Development Block Grants heading) requires HUD to follow the stipulated funding caps, to make grants in the identified geographic States, to limit grants to rural and tribal areas, and to award the grants within the comprehensive approaches testing borders of the appropriation, it does not require HUD to compete the award of any RHED grant funding. The General Counsel points out that there is nothing in the fifth paragraph specifically requiring competition. The paragraph, along with its legislative history, is silent on the matter of competition.

ANALYSIS

Given the paragraph containing the earmark for the RHED grants is silent on the matter of competition, we looked at the language requiring competition located in a proviso in the third paragraph under the Community Development Block Grants heading of the Act. Generally, a proviso² is presumed to apply only to the section in which it is incorporated, although such presumption must yield if the intention of the Congress is otherwise. See generally, Gruver v. Secretary of Health, Education and Welfare, 426 F.2d 1195, 1199 (D.C. Cir. 1969), cert. denied, 397 U.S. 977, 90 S. Ct. 1092 (1970); U.S. v. Hescorp, Heavy Equipment Sales Corp., 801 F.2d 70, 74 (2nd Cir. 1986); 1A Sutherland, Statutes and Statutory Construction, § 20.22, at 111 (Singer 5th ed. 1993). In determining congressional intent, one must first look to the plain language of the statute. See generally, 2A Sutherland, Statutes and Statutory Construction, § 46.01 (Singer 5th ed. 1993). A literal reading of the plain language of the proviso in the third paragraph under the Community Development Block Grants heading requiring competition for assistance “under this heading” might lead to the conclusion that HUD needs to competitively select the RHED grants because Congress provided the funds for those grants in an earmark under the same appropriation heading, “Community Development Block Grants,” as is the proviso, albeit in a different paragraph (the fifth). However, we read the 1998 Appropriation Act as using the phrase “under this heading” in two different ways, and its application in any given instance needs to be analyzed in the context in which it is used.

² A proviso is said to remove special cases from the general enactment and provide for them specially. 1A Sutherland Statutory Construction § 20.22, at 110 (Singer 5th ed. 1993).

For the most part, when Congress used the phrase “under this heading” in the Community Development Block Grants appropriation, it was referring to the “Community Development Block Grants” lump sum appropriation. In analyzing whether the language “under this heading” in the proviso in the third paragraph applies to grants to Tribes made using funds appropriated in the fifth paragraph, we note first that the purpose of the third paragraph, other than the questioned proviso, is clearly to appropriate an amount for, and impose restrictions on, the EDSS program. Other than the questioned proviso, the third paragraph deals exclusively with the EDSS program. For example, earlier provisions of the third paragraph discuss “self-sufficiency activities,” that the “program shall provide supportive services,” and that “supportive services may include . . .” etc., Pub. L. No. 105-65, 111 Stat. 1357. Reading the questioned proviso in this context suggests that the proviso is applicable only to the EDSS program, and that the phrase “under this heading” in the questioned proviso is a reference to the EDSS program. We find support for such a reading in the questioned proviso itself. In addition to imposing a competitive selection requirement on HUD’s assistance to tribal agencies “under this heading,” the proviso states that the Secretary needs to take into account a variety of factors that appear relevant only to the EDSS program, e.g., “the extent of the proposed coordination of supportive services” and “the extent of success an agency has had in carrying out other comparable initiatives.” Pub. L. No. 105-65, 111 Stat. 1357. If we were to read the Act’s use of “under this heading” in the third paragraph to apply to grants made using funds appropriated in the fifth paragraph, we would have to read the questioned proviso as imposing not only a competitive selection requirement, but also a requirement in HUD to consider factors that have no relevance in selecting grantees for RHED grants. (As noted earlier, the funds appropriated for RHED grants serve entirely different purposes, i.e., for testing “comprehensive approaches to develop a job base through economic development, developing affordable low- and moderate-income rental and homeownership housing, and increasing the investment of both private and nonprofit capital.” *Id.*)

Similarly, if we were to read the phrase “under this heading” when used in the questioned proviso to apply to all grants made under the “Community Development Block Grants” heading, the proviso would require **all** grant awards to public and Indian housing agencies under this heading (the Community Development grants program) to be competitively selected. The consequence of this would be to mandate competition for all grants including those grants appropriated under the first paragraph which are distributed based upon a statutory formula. *See* 42 U.S.C. § 5306 (1994). It is a fundamental principle that statutory constructions that produce unreasonable or absurd results should be avoided when they are at variance with the purpose and policy of the legislation as a whole because laws are presumed to have been intended to produce reasonable consequences. *See generally* 2A Sutherland, Statutes and Statutory Construction §§ 45.12, 46.07 (Singer 5th ed. 1993). We find no evidence to suggest that Congress intended to impose the anomalous requirement of competing statutory formula grants. Without an affirmative expression of such

intent, we are unwilling to read the language of the questioned proviso in a way that would clearly produce unreasonable and impractical consequences³.

We find the legislative history of the proviso instructive. The EDSS program was first created and funded in HUD's 1996 Appropriations Act. See Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-272. Language virtually identical to that found in the questioned proviso was included in the program's 1996 enactment, and in the same format as in the 1998 Appropriations Act.⁴ The legislative history of the 1996 Appropriations Act states that the "new supportive services grant program [will] provide residents of public and assisted housing with necessary services to expand opportunities to become gainfully employed and self-sufficient This new grant program provides wide latitude in structuring effective and innovative approaches by recipient agencies, **which are to be selected on the basis of merit competition**" (emphasis added). S. Rep. No. 104-140, at 62 (1995). Clearly, the intent in 1996 was that the proviso apply solely to the EDSS grants. We are not aware of any prior or current legislative history that would suggest a broadening of the proviso's application⁵.

Accordingly, based on the plain meaning and the legislative history of the proviso, we conclude that the proviso applies only to the paragraph in which it is annexed.

³ Our analysis is consistent with principles of statutory construction followed by the Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron first asks "whether Congress has directly spoken to the precise question at issue." Id. at 842. If Congress has spoken to the question then the Court will "give effect to the unambiguously expressed intent of Congress." Id. at 843. Where Congress has not spoken directly to the issue, the Court defers to the agency's construction of the statute so long as it is permissible. Id.; see also Immigration and Naturalization Service v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999); Auer v. Robbins, 519 U.S. 452, 457 (1997).

⁴ The only difference is that where the 1998 Act used the language "under this heading," the 1996 Act had said "under this head."

⁵ The IG's Acting General Counsel notes correctly that the language of HUD's 1999 Appropriation Act now states that the RHED grants are to be awarded on a competitive basis. Pub. L. No. 105-276, 112 Stat. 2461, 2475. However, we are not persuaded by the argument that the existence of the competition requirement in the 1999 Appropriations Act validates the IG's conclusion that competition was required for 1998. Nothing in the 1999 Appropriations Act itself or the legislative history supports such a conclusion. To the contrary, the language of the 1999 Appropriation Act created a new Office of RHED to administer multiple RHED grant programs, including the one at issue. The competition language the IG refers to states that "**all** [RHED] grants shall be awarded on a competitive basis" (emphasis added). It does not refer individually to the type of RHED grants in question.

As such, the 1998 Appropriations Act did not require HUD to competitively select the two Indian tribes receiving RHED grants.

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