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**DECISION**



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

**FILE:** B-214551

**DATE:** March 25, 1985

**MATTER OF:** HUD Obligation of Public Housing Authority  
Operating Subsidy Funds by Letters-of-Intent

**DIGEST:**

1. The Department of Housing and Urban Development should treat the amounts it obligates by letter-of-intent for Public Housing Authorities' operating subsidies under subsection 9(a) of the United States Housing Act of 1937 (42 U.S.C. § 1437g(a)(1982)) as estimates subject to later adjustments on the basis of its regulatory criteria when all the necessary information is available.
2. Amounts obligated on an estimated basis during one fiscal year which are later found to be in excess of a Public Housing Authority's operating subsidy eligibility under 42 U.S.C. § 1437g(a) (1982) and under 24 C.F.R. part 990 must be deobligated and returned to the Treasury at the close of the fiscal year. It is a violation of the bona fide need rule, 31 U.S.C. § 1502, to send the funds instead to the Authority's operating reserve to offset the amount of subsidy needed for the following fiscal year.

The Inspector General, Department of Housing and Urban Development (HUD), has asked for a decision on the legality of HUD's interpretation of its authority in obligating annual appropriations to pay operating subsidies to State Public Housing Authorities for low income housing projects. He is particularly concerned because when HUD is unable to determine the exact amount payable to the Authorities before the end of the fiscal year, it obligates an estimated amount by means of a letter-of-intent, but then treats it as a firm obligation rather than as an estimate subject to adjustment. As a result, if the exact amount to which the State Authority is entitled is later determined to be less than the amount obligated, the Authority is permitted to retain the excess funds in an operating reserve in order to reduce its subsidy needs in subsequent years.

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We agree with the Inspector General that HUD should treat the amounts obligated by means of letters-of-intent as estimates, which should be adjusted appropriately as soon as HUD has determined the exact amount of its subsidy liabilities for the fiscal year in question.

Except when exercising its limited authority to redistribute excess funds on an emergency basis to specific lower income housing projects, pursuant to 42 U.S.C. § 1437g(d), HUD should deobligate amounts which exceed its liability, and return the surplus unobligated budget authority to the Treasury at the close of the fiscal year, pursuant to 31 U.S.C. § 1552(a)(2)(1982).

#### BACKGROUND

Under the United States Housing Act of 1937 (Act), as amended, 42 U.S.C. §§ 1437 et seq. (1982), the Secretary of HUD is authorized to provide various forms of financial assistance to States (or political subdivisions of States) to develop and operate low income housing projects. An assistance commitment is made, subject to the availability of funds, in an annual contribution contract entered into between HUD and a State Public Housing Authority.

Section 9 of the Act, as amended, 42 U.S.C. § 1437g (1982), authorizes the Secretary of HUD to make annual contributions specifically for the operation of lower income housing projects. The statute provides that:

"\* \* \* The contributions payable annually under this section shall not exceed the amounts which the Secretary determines are required (A) to assure the lower income character of the projects involved, (B) to achieve and maintain adequate operating services and reserve funds, \* \* \*."

Standards for determining the proper amount of contributions are set forth in regulations, known as the Performance Funding System, 24 C.F.R. part 990. The regulations include a formula based on the amounts needed to operate a "prototype well-managed project." 42 U.S.C. § 1437g(a); 24 C.F.R. 990.101(c). The subsidy amount is generally the difference between the State Authority's projected expenses and projected operating income for the year. The Authority is required to submit this information in the form of an annual operating budget for each project covered by its annual contribution contract, which must then be approved by HUD.

In some cases, however, HUD has to obligate appropriations for operating subsidies on the basis of estimates rather than approved operating budgets. This occurs primarily in the case of Authorities having fiscal years which coincide with the Federal Government's fiscal year and which have not had time to submit approvable operating budgets. In such cases, HUD issues a document known as a letter-of-intent which contains an estimate of its total subsidy obligation on the basis of which it records the obligation.

It was a GAO decision--or rather, a misinterpretation of that decision--which gave rise to the practices of which the Inspector General now complains. In our decision on HUD's Obligating No Year Contract Authority, B-197274, February 16, 1982, we held that HUD's use of reservation and notification letters under various housing assistance programs under section 8 of the 1937 Act, as amended, 42 U.S.C. § 1437f (1982), to determine when no-year contract authority was considered obligated for purposes of reporting to the Congress, was inappropriate. At the time the reservation and notification letters were issued, HUD had taken no action imposing a legal liability upon the Government which could result in the expenditure of funds at a later time or 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. Unlike the section 9 program we have been discussing, HUD had not entered into an annual contribution contract or any other firm commitment prior to issuing the letters. Therefore, no "obligation" as such had been incurred. The recording of obligations on the basis of such preliminary documents presented a misleading picture to the Congress as to the need for funds for new projects.

Following our decision, several HUD Regional Accounting Divisions stopped disbursing section 9 subsidy payments based upon letters-of-intent because they were concerned that our decision on the section 8 program prohibited such payments. In response, relying upon advice obtained from HUD's Office of General Counsel, the Assistant Secretary for Housing issued a memorandum on April 20, 1982, addressing this concern.

Applying the test contained in our decision of February 16, 1982, HUD's Deputy Assistant Secretary concluded that: "letters-of-intent constitute valid documents for obligating and disbursing operating subsidies, but only if they do not condition the obligation of funds on future discretionary actions by the Department (e.g. future downward adjustments)." The Deputy Assistant Secretary concluded that subsequent adjustments to estimates based on the HUD regulations, established conditions not "beyond the control of the

United States" and therefore, the letters-of-intent could not be used to obligate appropriations if they contained that condition. The result was that the estimated amounts contained in the letters-of-intent were transformed from estimates into fixed obligations, not subject to deobligation.

HUD was then confronted with a dilemma. It could not deobligate any excess funds obligated but neither could it disburse them, because of the requirement in 42 U.S.C. § 1437g that annual contributions may not exceed the amount determined to be necessary. It resolved the matter by sending any excess to the appropriate State Authority's operating reserve fund. The Authority, in such cases, would use the funds to offset operating expenses in subsequent fiscal years, thus reducing the amount of HUD's subsidy obligation for those years. The net effect was an increase in the amount of obligation authority available to HUD in a subsequent fiscal year by use of an amount appropriated in a prior fiscal year.

This practice was approved in a legal opinion issued by HUD's General Counsel on June 17, 1983. The Inspector General included a copy of the opinion with his request and we have considered it in formulating this opinion. HUD's Office of General Counsel has indicated informally that the legal opinion continues to represent the views of that Office.

#### DISCUSSION

##### 1. Adjustment Of Estimated Amounts

HUD should consider the amounts which it obligates by letters-of-intent for section 9 operating subsidies to be estimates subject to adjustment. The letters-of-intent amendments which HUD made following our February 1982 decision were, as indicated earlier, based on a misinterpretation of our February 1982 decision.

The 1982 opinion questioned whether reservation and notification letters used in four housing programs under section 8 of the Act, as amended, 42 U.S.C. § 1437f (1982) constituted obligating documents under 31 U.S.C. § 1501 (then 31 U.S.C. § 200). We found in the case of each of the four programs that the letters could not obligate no-year budget authority because they did not authorize applicants to incur any costs for which HUD would be liable for payment prior to the final approval of an application for assistance and before entering into a contribution contract. Thus the letters-of-intent could not bind HUD or "mature into a legal liability by virtue of actions on the part of the other party (the applicants) beyond the control of the United States."

In contrast, the section 9 operating subsidy letters-of-intent are issued after HUD has entered into annual contributions contracts which make the United States liable for subsidy payments in some amount, even though the exact amount cannot be determined until the operating budget has been reviewed and approved.

A major purpose of the recording statute, 31 U.S.C. § 1501, is to provide to the Congress a reasonably precise picture of an agency's financial requirements so that it can assess more accurately that agency's appropriation needs for the upcoming fiscal year in question. A rule which prohibits an agency from recording an obligation if its underlying obligation is subject to a condition precedent, the satisfaction of which is in the Government's control, results in a more accurate picture of an agency's needs being presented to the Congress because unless and until the agency acts to satisfy the condition, it really has no need for funds. This was the situation we dealt with in our 1982 decision.

In the instant case, the approval of the operating budget is a condition subsequent, which merely permits HUD to adjust its estimate on the basis of its new information. To say that HUD should not record binding liabilities as obligations merely because HUD cannot determine the exact amount of its liability under its regulations until a later time runs contrary to the recording statute's purposes of having obligations be accurate reflections of agency financial requirements.

HUD is required to adjust the amount of its estimated operating subsidy for the section 9 program up or down, as appropriate, once it has approved the operating budget. Any suggestion in the letters-of-intent that the estimated amount is fixed and not subject to later deobligation, if excessive, is invalid.

## 2. Adding Excess Amounts To Operating Reserves

Generally, a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made. 31 U.S.C. § 1502. See 58 Comp. Gen. 471, 473 (1979); 54 Comp. Gen. 962, 966 (1975); B-183184, May 30, 1975. While actual expenditures of funds previously obligated may take place after the close of the fiscal year, the need for which they are being expended must have arisen prior to the close of the fiscal year.

The Congress makes an annual appropriation for payment of section 9 contributions to assist the Authorities in meeting that year's deficits in operating revenue caused by the

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low-income nature of the project. Thus, when HUD adds the excess over-obligated letter-of-intent funds to an Authority's operating reserve so that its subsidy needs for the next fiscal year are reduced, it is not using such funds to meet a legitimate need of the fiscal year for which they were appropriated. Rather, the excess funds are being used to meet a need arising during a subsequent fiscal year to the one for which the appropriation is intended to apply. Accordingly, HUD was violating the bona fide need rule in the absence of specific authority to so use the excess obligation.

We are aware of only one instance in which HUD received specific authority to use its annual section 9 appropriation for operating subsidies payable in fiscal year 1983. HUD's fiscal year 1983 appropriation act provides:

"\* \* \* That funds heretofore provided under this heading in Public Law 97-101 shall remain available for obligation for the fiscal year ending September 30, 1983, and shall be used by the Secretary for fiscal year 1983, requirements in accordance with section 9(a), notwithstanding section 9(d) of the United States Housing Act of 1937, as amended." Pub. L. No. 97-272, Sept. 30, 1982, 96 Stat. 1161

As far as we are aware, this exceptional authority was not repeated in any subsequent fiscal year appropriation acts. Therefore, HUD should discontinue the practice of adding over-obligations to the operating reserves of the State Authorities immediately, unless it is able to obtain comparable legislative carry-over authority.

for *Harry R. Van Cleave*  
Comptroller General  
of the United States