



Decision

Matter of: Assisted Housing Services Corporation; North Tampa Housing Development Corporation; The Jefferson County Assisted Housing Corporation; National Housing Compliance; Southwest Housing Compliance Corporation; CMS Contract Management Services and the Housing Authority of the City of Bremerton; Massachusetts Housing Finance Agency

File: B-406738; B-406738.2; B-406738.3; B-406738.4; B-406738.5; B-406738.6; B-406738.7; B-406738.8

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DIGEST

The Department of Housing and Urban Development's (HUD) use of a notice of funding availability (NOFA) that results in the issuance of a cooperative agreement to obtain services for the administration of Project-Based Section 8 Housing Assistance Payment (HAP) contracts was improper because the "principal purpose"

of the NOFA was to obtain contract administration services for HUD's direct benefit and use, which should be acquired under a procurement instrument that results in the award of a contract.

DECISION

The Assisted Housing Services Corporation (AHSC), the North Tampa Housing Development Corporation, The Jefferson County Assisted Housing Corporation (JCAHC), National Housing Compliance, the Southwest Housing Compliance Corporation, CMS Contract Management Services and the Housing Authority of the City of Bremerton, and the Massachusetts Housing Finance Agency, protest the terms of Notice of Funding Availability (NOFA) No. FR-5600-N-33, issued by the Department of Housing and Urban Development (HUD), for the administration of Project-Based Section 8 Housing Assistance Payment (HAP) contracts. The protesters argue that HUD's use of a NOFA, which provides for the issuance of cooperative agreements to public housing agencies (PHA) for the administration of the HAP contracts, is improper, because HUD is seeking contract administration services that must be solicited through a procurement instrument that results in the award of contracts.¹

We sustain the protests.

BACKGROUND

The Project-Based Section 8 Rental Assistance Program, created by The Housing Act of 1937, as amended and codified, provides affordable housing for eligible low-income households. 42 U.S.C. § 1437f (2006). The program generally provides for the payment of "a rental subsidy to property owners on behalf of low-income tenants residing in those properties." Agency Report (AR) at 2. The rental subsidy is "attached to a specific dwelling," and is generally the difference between the total rental amount for the dwelling, and 30 percent of the tenant's adjusted income. Id.

The agreements by HUD to pay the rental subsidy to the property owners of low-income housing are set forth in HAP contracts. AR at 2. From the authorization of the Project-Based Section 8 Rental Assistance Program in 1974, to 1999, HUD administered approximately 21,000 Section 8 HAP "contracts executed between

¹ PHAs are "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. § 1437a(b)(6)(A); see 24 C.F.R. § 5.100 (2011); Agency Report (AR) at 6. As explained by HUD, PHAs "are created and given operating authority pursuant to state law." AR at 9.

HUD and private owners of multifamily housing developments.”² AHSC Protest (B-406378), Tab 10, HUD Housing Certificate Fund, at 3.

In 1999, because “of staffing constraints,” HUD began “an initiative to contract out the oversight and administration of most of its project-based contracts.” Project-Based Rental Assistance: HUD Should Update Its Policies and Procedures to Keep Pace with the Changing Housing Market (GAO-07-290), Apr. 2007, at 10. HUD explained at the time that it was seeking “new ways to conduct its business” consistent with its recently announced “2020 Management Reform Plan,” which provided for “major staff downsizing, modification of HUD’s Field and Headquarters organizational framework, [and] consolidation of HUD’s programs.”³ AHSC Supp. Comments (B-406738; B-406738.2), Tab 37, HUD Audit Related Memorandum No. 99-BO-119-0801, Advisory Report on Section 8 Contract Administration, (Oct. 26, 1998), at 7. According to HUD, one of the “new ways to conduct its business” would be HUD’s issuance of “Requests for Proposals [RFP] for outside contractors to administer HUD’s portfolio of Section 8 contract[s].” Id.

HUD’s 1999 Request for Proposals

HUD held “its first nationwide competition” for the contract administration services through the issuance of an RFP on May 3, 1999. AR at 2. The 1999 RFP provided that HUD was “seeking sources interested in providing contract administration services for project-based [HAP] Contracts under Section 8.” JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice (May 19, 1999)/RFP, at 1. The RFP, which was restricted to PHAs, explained that HUD administered approximately 20,000 HAP contracts, and that the “RFP cover[ed] contract administration for most of these HUD administered contracts.”⁴ Id. The solicitation informed offerors that

² The record also shows that as of May 1999, HUD administered approximately 16,000 HAP contracts and PHAs administered approximately 4,200 HAP contracts. AHSC Protest (B-406378), Tab 7, HUD Guidebook for Section 8 Contract Administration Initiative (March 15, 2001), Introduction.

³ The news release issued by HUD announcing its 2020 Management Reform Plan stated that it aimed “to transform HUD from ‘the poster child for inept government’ that ‘has been plagued for years by scandal and mismanagement’ into ‘a new HUD, a HUD that works.’” AHSC Protester’s Supp. Comments (B-406738; B-406738.2), Tab 38, HUD Archives: News Release, HUD No. 97-109, Cuomo Announces Historic Management Reforms to Stamp Out Waste, Fraud and Abuse and Improve Performance (June 26, 1997).

⁴ The 1999 RFP stated that “[b]y law, HUD may only enter into an ACC [Annual Contributions Contract, defined below, *infra* at n.6] with a legal entity that qualifies as a [PHA] as defined in the United States Housing Act of 1937.” JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 2. The RFP added that this
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“[u]nder this RFP, the offerors will competitively bid to perform contract administration services for properties with project-based Section 8 HAP Contracts.”⁵ Id. at 2.

The 1999 RFP informed offerors that “[p]roposals in response to [the] RFP may cover an area no smaller than an individual State (or U.S. Territory).” Id. at 1. The RFP explained that “[u]nder the approximately 20,000 Section 8 HAP Contracts this RFP covers, HUD pays billions of dollars annually to owners on behalf of eligible property residents,” and stated that “HUD seeks to improve its performance of the management and operations of this function through this RFP.” Id. The RFP included a detailed statement of work, and stated that the successful PHAs would be required, among other things, to perform the “major tasks” of “[m]onitor[ing] project owners’ compliance with their obligation to provide decent, safe, and sanitary housing,” paying “property owners accurately and timely,” submitting “required documents accurately and timely to HUD (or a HUD designated agent),” and complying “with HUD regulations and requirements . . . governing administration of Section 8 HAP contracts.” Id. at 2-11.

The 1999 RFP further stated that HUD would “use Performance-Based Service Contracting” for “work performed under the ACCs awarded in response to this RFP.”⁶ Id. at 3. The solicitation explained here that its performance work statement thus included work defined in “measurable, mission-related terms with established performance standards and review methods to ensure quality assurance,” and that the ACCs to be awarded “assign[] incentives to reward performance that exceeds the minimally acceptable and assesses penalties for unsatisfactory performance.” Id.

The 1999 RFP also included detailed proposal preparation instructions, and informed offerors that “[f]ailure to comply with the guidance of this section will

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restriction did “not preclude joint ventures or other partnerships between a PHA and other public or private entities to carry out the PHA’s contract administration responsibilities.” Id.

⁵ Although not set forth in the RFP itself, the Federal Register notice that included the RFP noted that the RFP was “not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR),” but that it would “follow many of those principles.” JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 1.

⁶ “Annual Contributions Contracts,” or ACCs, are written contracts, and the vehicle for the agreement between HUD and a PHA. AR at 6; 42 U.S.C. § 1437f(b); 24 C.F.R. § 5.403 (2012).

disqualify an Offeror's proposal from consideration by HUD." Id. at 13. The solicitation included a due date for receipt of proposals, and specified that the ACCs awarded would have an initial "[c]ontract [t]erm" of 2 years, with "up to three (3) additional one-year terms." Id. The RFP stated that award would be made to the offerors whose proposals "represent the best overall value" to HUD, based upon certain stated evaluation factors, such as "Understanding and Technical Approach" and "Past Performance." Id. at 14-15. The solicitation further advised offerors that "[w]hile the cost or price factor has no numerical weight in the factors for award, it is always a criterion in the overall evaluation of proposals." Id. at 15.

HUD awarded 37 performance-based ACCs under its 1999 RFP. AHSC Protest (B-406738), Tab 13, HUD Office of the Inspector General, Audit Report No. 2010-LA-0001, HUD's Performance-Based Contract Administration Was Not Cost Effective (Nov. 12, 2009), at 4. The record reflects that HUD awarded an additional seven ACCs between 2001 and 2003 under another RFP, and awarded "the nine remaining [ACCs] between 2003 and 2005" under "an invitation for submission of applications." Id. The record further reflects that, at some point, "HUD received approval from its Office of General Counsel to extend the contracts for an additional 10 years." Id. at 9.

HUD's 2011 Invitation for Submission of Applications

In February 2011, HUD began "its second nationwide competition" for contract administration services through the issuance of an "Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 [HAP] Contracts." AR at 3; JCAHC Protest, Tab 3, Invitation for Submission of Applications (ISA). The ISA informed interested PHAs that it was issued "for the purpose of receiving applications from [PHAs] to administer Project Based Section 8 Housing Assistance Payments [HAP] Contracts as Performance-Based Contract Administrators (PBCA)." ⁷ Id. at 3. The ISA provided that HUD would "select one PBCA for each of the fifty United States, the District of Columbia, the United States Virgin Islands, and the Commonwealth of Puerto Rico," with the exception of California, where it would select PBCAs for Northern and Southern California. Id.

The ISA was similar to HUD's 1999 RFP through which HUD had conducted its first competition for these services. For example, the ISA stated that under the ACCs awarded, the PHAs would be required, among other things, to perform the "principal tasks" of "[m]onitoring compliance by project owners with their obligation to provide decent, safe, and sanitary housing," paying "property owners accurately and timely," submitting "required documents to HUD (or a HUD designated agent)," and complying "with applicable Federal law and HUD regulations and requirements, as

⁷ The 2011 ISA provided, as did the 1999 RFP, that HUD would only award ACCs to PHAs. JCAHC Protest (B-406783.3), Tab 3, ISA, at 5-6.

they exist at the time of ACC execution and as amended from time to time.” Id. at 4; see JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 2 (quoted above).

The ISA included relatively detailed instructions for the preparation of applications, and in this regard requested that applications include “portion[s]” addressing, among other things, the applicant’s capability, technical approach, quality control plan, and disaster plan. JCAHC Protest, Tab 3, ISA, at 15-18. The ISA informed applicants that the “Factors for Award” were capability statement, technical approach, and quality control plan, and provided the relative weights of these factors for determining awards. Id. at 18-19. With regard to cost or price, in response to questions posed by interested PHAs, HUD stated that the applicants’ proposed basic administrative fees “for the highest ranked Applications will be considered in the selection of the awardee[s].” HUD Request for Summary Dismissal on Prior Protests (B-405375.2 et al.), Tab 2, Questions and Answers, at 3.

HUD announced its “awards of the ACCs” under the ISA in July 2011. AR at 3. Our Office subsequently received 66 protests challenging the propriety of the awards of the ACCs for the performance of the contract administration services in 42 states.⁸ On August 10, HUD informed our Office and the parties that it would not “make an award of [ACCs] in the states subject to . . . protests,” and that HUD intended to “evaluate and revise its competitive award process for the selection of [PBCAs].” AR, Tab 7, HUD Corrective Action Letter, at BATES 311. Our Office dismissed the 66 protests as academic on August 11.

HUD’s 2012 NOFA

On March 9, 2012, HUD issued the NOFA that is the subject of this protest. The NOFA provides for the awards of performance-based ACCs to PHAs to serve as the PBCAs for the Project-Based Section 8 HAP contracts for each of the remaining 42 states.⁹ AR at 3. The ACCs to be awarded under the NOFA state that the “ACC is a contract between the PHA and HUD to administer project-based Section 8 Contracts as a PBCA,” and provide for a base term of 24 months, and for the unilateral extension of the ACC by HUD at HUD’s sole discretion. AR, Tab 3, ACC,

⁸ The 11 “states” with regard to which the awards of ACCs were not protested were: South Dakota, Iowa, Puerto Rico, Vermont, Minnesota, New Hampshire, Maine, North Dakota, Montana, Wyoming, and the United States Virgin Islands. AR, Tab 2, NOFA, at 1.

⁹ The NOFA “was published on www.grants.gov, the federal government’s electronic clearing house for grant award information, and applications were to be submitted only through that website.” AR at 3.

at BATES 190-91. The NOFA provides that the successful PHAs will be responsible for performing the following “Performance-Based Tasks” with regard to “the Section 8 assisted units” under the HAP contracts “assigned” to the PHA “for contract administration:”¹⁰

monitoring project owners for compliance in providing decent, safe, and sanitary housing to assisted residents; ensuring payments to property owners are calculated accurately and paid in a timely manner; submitting required documents to HUD (or a HUD-designated agent); and complying with applicable Federal law and regulations . . . as they exist at the time of ACC execution and as amended or otherwise issued.¹¹

AR, Tab 2, NOFA, at BATES 94; Tab 3, ACC, at BATES 186.

The ACCs to be awarded provide for HUD’s payment of an administrative fee to the PHA “to pay the operating expenses of the PHA to administer HAP contracts.”¹² AR, Tab 3, ACC, at BATES 193-94. The ACCs also provide that “HUD will make housing assistance payments to the PHAs for Covered Units in accordance with HUD requirements,” and direct that the PHAs “shall pay owners the amount of housing assistance payments due to owners under such HAP Contracts from the amount paid to the PHA by HUD for this purpose.”¹³ Id. at BATES 192-93. The

¹⁰ The NOFA, like HUD’s 1999 RFP and 2011 ISA, provides for the award of “Performance-Based” ACCs that include monetary incentives for performance that exceeds the acceptable level and assesses penalties for unsatisfactory performance. See AR, Tab 2, NOFA, at BATES 92; Tab 3, ACC, at BATES 185-87, 229-34.

¹¹ The tasks set forth in the NOFA are nearly identical to those included in HUD’s 1999 RFP, through which HUD conducted its first nationwide competition for these services, and HUD’s 2011 ISA, through which HUD attempted to conduct its second nationwide competition and ultimately awarded 11 ACCs. Compare AR, Tab 2, NOFA, at BATES 94 with JCAHC Protest (B-406783.3), Tab 1, Federal Register Notice/RFP, at 2; JCAHC Protest, Tab 3, ISA, at 4.

¹² During the performance of the ACC, the PHA “earns a monthly Basic Administrative Fee based on the Basic Administrative Fee Percentage approved by HUD,” as set forth in the PHA’s response to the NOFA, multiplied by the current fair market rate for a 2-Bedroom unit for each covered unit as of the first day of the month. AR, Tab 3, ACC, at BATES 229.

¹³ HUD estimates that it will pay PHAs approximately \$260 million for their contract administration services, and that HUD, through the PHAs, will distribute approximately \$9 billion in HAP payments to property owners. AR at 3 n.4.

ACCs provide that HUD has the authority “unilaterally amend . . . [the ACC] from time to time to add and/or withdraw HAP contracts by giving the PHA written notice.” Id. at BATES 191. The ACCs further provide that “[t]he PHA shall take prompt and vigorous action, to HUD’s satisfaction, or as required and directed by HUD, to ensure owner compliance with the terms of HAP Contracts for Covered Units within the scope of the ACC.” Id. at BATES 193.

The NOFA includes relatively detailed instructions for PHAs, requiring, for example, that a PHA submit a “Technical Approach narrative,” a “Quality Control Plan” narrative, as well as its “Proposed Fee” for the performance of the tasks required. AR, Tab 2, NOFA, at BATES 108-09. The NOFA further includes evaluation factors and subfactors, such as “Capability of the Applicant and Relevant Organizational Experience” and “Soundness of Approach,” as well as a rating scheme for the evaluation of the PHA’s proposed “Basic Administrative Fee.” Id. at BATES 111-19.

The NOFA states that the ACCs will be awarded to the “highest rated application by State,” provided that the application meets certain threshold requirements set forth in the NOFA. Id. The agency advised PHAs that “[i]f there is no qualified applicant for any jurisdiction, HUD will administer the HAP contracts for that state internally, in accordance with past practice and the United States Housing Act of 1937.” AR, Tab 2, NOFA Questions and Answers, at BATES 152. Of particular relevance here, the NOFA differed from HUD’s 1999 RFP and 2011 ISA, by expressly providing that the “[t]he ACCs that HUD seeks to award via this NOFA are cooperative agreements.”¹⁴ AR, Tab 2, NOFA, at BATES 95.

These protests, challenging HUD’s use of the NOFA, rather than a procurement contract, were filed prior to the due date set for responses to the NOFA.

DISCUSSION

The protesters each raise various arguments about the terms and conditions of the NOFA. All of the protesters argue that HUD’s use of a NOFA, and the characterization of the ACCs that HUD seeks to award via this NOFA as cooperative agreements, are improper. The protesters contend that HUD is seeking contract administration services that must be solicited through a procurement instrument that results in the award of contracts.

The question of whether HUD is properly using a NOFA, rather than a procurement contract, involves our bid protest jurisdiction. As set forth more fully below, if HUD may properly use a cooperative agreement in this instance, we have no jurisdiction

¹⁴ Neither the 1999 RFP nor 2011 ISA stated that the awards of ACCs to PHAs for the contract administration services were considered by HUD to be the award of cooperative agreements rather than contracts.

under the Competition in Contracting Act of 1984 (CICA) to hear disputes about these agreements. On the other hand, if the use of a procurement instrument is required, we have jurisdiction, and will consider whether HUD has complied with applicable procurement laws and regulations.

Under CICA and our Bid Protest Regulations, our Office reviews protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R. § 21.2(a) (2012). We generally do not review protests of the award, or protests of solicitations for the award, of cooperative agreements or other non-procurement instruments, because they do not involve the award of a procurement contract, and are thus beyond our jurisdiction. Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121 at 2. However, we will review a timely protest asserting that an agency is improperly using a cooperative agreement or other non-procurement instrument, where a procurement contract is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. Id.

Our Office has noted that the identification of the appropriate funding instrument (grant/cooperative agreement or contract) is important because procurement contracts are subject to a variety of statutory and regulatory requirements that generally do not apply to grants or cooperative agreements. As noted above, the misidentification of a procurement contract as a cooperative agreement could be used to evade competition and other legal requirements applicable to procurement contracts. Conversely, a legitimate assistance arrangement, such as a cooperative agreement, should not be burdened by the formalities of procurement contracts. GAO, Principles of Federal Appropriations Law, vol. II, at 10-18 (3rd ed. 2006).

The Federal Grant and Cooperative Agreement Act (FGCAA) establishes the general criteria that agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a state, locality or other recipient for an authorized purpose. 31 U.S.C. §§ 6301-6308 (2006). In this regard, the FGCAA provides that an agency must use a procurement contract when “the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government;” or the agency otherwise “decides in a specific instance that the use of a procurement contract is appropriate.”¹⁵ 31 U.S.C. § 6303.

¹⁵ The FAR similarly provides that “Contracts shall be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government.” FAR § 35.003(a).

The FGCAA further provides that an “agency shall use a cooperative agreement” when the principal purpose of the relationship “is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government,” and “substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.”¹⁶ 31 U.S.C. § 6305.

Put differently, the use of a grant or cooperative agreement is appropriate if the principal purpose of the agreement is to provide assistance to the recipient to accomplish a public objective authorized by law. In contrast, if the federal agency’s principal purpose is to acquire goods or services for the direct benefit or use of the federal government, then a procurement contract must be used.

Our Office has recognized that it is often difficult to draw fine lines between the types of arrangements that require the use of procurement contracts and those that do not. Environmental Protection Agency--Inspector General--Cooperative Agreement--Procurement, B-262110, Mar. 19, 1997, 97-1 CPD ¶ 131 at 4. The principal purpose of the relationship between the federal government and the state, local government, or other entity is not always clear, and we have recognized that this can be particularly so where the federal government provides assistance to specified recipients by using an intermediary. GAO, Principles of Federal Appropriations Law, vol. II, at 10-20 (3rd ed. 2006); see 360Training.com, Inc. v. United States, 2012 U.S. Claims LEXIS 502 at *11-12 (Fed. Cl. Apr. 26, 2012). The intermediary or third party situation arises where an assistance relationship, such as a grant or cooperative agreement, is authorized to specified recipients, but the Federal grantor delivers the assistance to the authorized recipients by utilizing another party. GAO, Principles of Federal Appropriations Law, Vol. II, at 10-19. In such circumstances, “[t]he choice of instrument for an intermediary relationship depends solely on the principal federal purpose in the relationship with the intermediary.” S. Rep. No. 97-180, at 3 (1981) quoted in GAO, Principles of Federal Appropriations Law, vol. II, at 10-20.

In this regard, where the government’s principal purpose is to “acquire” an intermediary’s services, which ultimately may be delivered to an authorized recipient, or if the agency otherwise would have to use its own staff to provide the services offered by the intermediary to the beneficiaries, then a procurement contract is the proper instrument. Id; 360Training.com v. United States, Inc., supra;

¹⁶ In contrast, a “grant agreement,” rather than a cooperative agreement, shall be used where “substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.” (Emphasis added). 31 U.S.C § 6304.

Civic Action Institute, B-206272, Sept. 24, 1982, 82-2 CPD ¶ 270 at 4, aff'd, Civil Action Institute--Recon., B-206272.2, Nov. 2, 1982, 82-2 CPD ¶ 399. On the other hand, where the Government's principal purpose is to "assist" the intermediary in providing goods or services to the authorized recipient, the use of an assistance instrument, such as a cooperative agreement, is proper. GAO, Principles of Federal Appropriations Law, vol. II, at 10-20.

The FGCAA gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and our Office will not question such determinations unless it appears that the agency acted unreasonably, disregarded statutory and regulatory guidance, or lacked authority to enter into a particular relationship. Civic Action Institute, supra, at 3. In determining whether an agency's selection and proposed use of a grant or cooperative agreement, rather than a contract, is reasonably based and consistent with statutory and regulatory guidance, our analysis of the nature of the contemplated relationship between the federal agency and the other party includes the consideration of the substance of the proposed agreement based upon the surrounding circumstances. B-257430, Sept. 12, 1994.

In contending that the instruments at issue here are properly designated cooperative agreements, HUD points out that The Housing Act of 1937, as amended and codified, provides that it "is the policy of the United States . . . to assist states and political subdivisions of States to address the shortage of housing affordable to low-income families." 42 U.S.C. § 1437(a)(B); AR at 11; Supp. AR at 2. HUD maintains that the NOFA, which will result in the issuance of cooperative agreements, is in furtherance of the Act's stated policy to provide assistance to states and political subdivisions of states. HUD specifically argues here that the "principal purpose of the ACCs between HUD and the PHAs is to assist the states and local governments by having PHAs, which are governmental entities, administer [HAP] contracts with property owners in order to serve the federal, state, and PHAs' public purpose of promoting affordable housing for low-income families." AR at 11.

Referencing the FGCAA criteria for cooperative agreements, HUD further explains that through the ACCs, HUD transfers a "thing of value" to the PHAs, by providing the PHAs with the funds necessary to make payments under the HAP contracts, as well as by paying the PHAs an "administrative fee" that compensates the PHAs for its services.¹⁷ AR at 12. HUD notes here that under the ACC, a PHA may use the

¹⁷ HUD appears to argue that because PHAs are "member[s] of a class eligible to receive assistance" under The Housing Act of 1937, and because HUD, under the ACCs, provides the PHAs with the funds necessary to make payments under the HAP contracts and administrative fees for their services, PHAs cannot be considered "intermediaries." AR at 14; Supp. AR at 14-15.

“excess funds generated by the ACC to provide additional housing services” under other programs supported by the PHA, and that HUD is therefore supporting “the PHA’s public purpose.” Id.

HUD further maintains that it “is not assigning work to PHAs that it is otherwise required to do,” based upon its view that HUD “is not obligated to administer the HAP contracts itself.” AR at 13. HUD argues here that “[t]here is nothing in the United States Housing Act of 1937, or, more specifically, Section 8 of that Act, that obligates HUD to administer HAP contracts.” Supp. AR at 10. HUD also explains that the cognizant PHAs, rather than HUD, are listed as contract administrators on the majority of HAP contracts currently in effect, and that because of this, HUD is not obligated to serve as a contract administrator. Id. HUD thus concludes that its issuance of a NOFA providing for the issuance of cooperative agreements for the administration by PHAs of Project-Based Section 8 HAP contracts was reasonable and consistent with applicable statutes and regulations.

In addressing HUD’s arguments, we begin with the agency’s assertion that the principal purpose of the ACCs to be awarded under the NOFA--consistent with The Housing Act of 1937--is to “assist” PHAs “to address the shortage of housing affordable to low-income families” by providing a thing of value, that is, money, to the PHAs. See 42 U.S.C § 1437(a)(B); AR at 11; Supp. AR at 2. In this regard, we find unpersuasive HUD’s argument that its payments to property owners in accordance with the terms of its HAP contracts can properly be considered as the transfer of a thing of value to the PHAs. As set forth above, although the HAP contract payments are made through the PHAs in accordance with their obligations under the ACCs to administer the HAP contracts, the PHAs themselves have no rights to the payments (or control over them) once HUD authorizes the payments and transfers the funds to the PHAs for distribution. The PHAs, consistent with their roles as contract administrators, act only as a “conduit” for the payments. See AR, Tab 4, 53 Fed. Reg. 8050 (1988), at BATES 247 (HUD’s explanation as to why it views its Section 8 housing assistance payments as “outside the scope” of Office of Management and Budget’s Circular A-102 that governs grants and cooperative agreements with state and local governments). That is, and as described above, the PHAs have no right to retain or use for other purposes any of the funds it receives for payment to the property owners. In fact, the ACCs require that the funds, once received by the PHAs from HUD, be promptly transferred to the property owners, and require that any excess funds and interest earned on HAP funds by the PHAs be remitted to HUD or invested in accordance with HUD requirements. AR, Tab 3, ACC, at BATES 194.

Next, although we agree that HUD is clearly providing “a thing of value” to the PHAs through HUD’s payment of an administrative fee, we do not agree that the principal purpose of HUD’s payment of administrative fees to the PHAs is to “assist” the PHAs in the performance of their mission. Rather, as evidenced by the record, the administrative fees are paid to the PHAs as compensation for their provision of

service--i.e., administering the HAP contracts. This arrangement, that is, the payment of fees by HUD for the PHAs' services as contract administrators, is provided for by the NOFA and ACCs to be awarded. See AR, Tab 3, ACC, at BATES 194 ("The PHA shall use Administrative Fees to pay the operating expenses of the PHA to administer HAP Contracts").

We also disagree with HUD's assertion that it is under no obligation to administer the HAP contracts because the PHAs, and not HUD, are listed as the contract administrators on most HAP contracts.¹⁸ In this regard, the "HUD Occupancy Handbook" acknowledges, in the context of the Project-Based Section 8 rental assistance program, that "HUD has primary responsibility for contract administration but has assigned portions of these responsibilities" to PHAs whose "responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts." Supp. AR, Tab 17, HUD Occupancy Handbook 4350.3 REV-1, at BATES 533. Further, the Project-Based Section 8 HAP "Basic Renewal Contract" provided by HUD specifically obligates HUD, and not the contract administrator, to provide the housing assistance payments. Supp. AR, Tab 18, Project-Based Section 8 HAP Basic Renewal Contract, at BATES 546. HUD's HAP Basic Renewal Contract notes elsewhere that "HUD shall take any action HUD determines necessary for the continuation of housing assistance payments to the Owner in accordance with the Renewal Contract" where a PHA, serving as the contract administrator, fails to transfer the housing assistance payments to the property owner as required under the relevant HAP contract. Id. at BATES 551.

Accordingly, we agree with the protesters that the circumstances here most closely resemble the intermediary or third party situation, which we described on page 10, infra. As applied here, HUD is providing assistance to low-income households, in the form of a rental subsidy paid to property owners, pursuant to the terms of HAP contracts. Rather than administering the program through which this assistance is provided, that is, the Project-Based Section 8 Rental Assistance Program--as HUD has in the past and continues to do in limited circumstances--HUD has retained, through its 1999 RFP and 2011 ISA, and is seeking to retain through this NOFA, the services of PHAs to perform the HAP contract administration services.

Given our view, as set forth above, that HUD is legally obligated to pay the property owners under the terms of the HAP contracts, and HUD's recognition that it has primary responsibility for contract administration but has assigned portions of these responsibilities to PHAs, we also find that HUD's principal purpose for its relationship with the PHAs as contemplated by the NOFA and set forth in the ACC,

¹⁸ Although the PHAs are sometimes signatories, as the "Contract Administrator," on the HAP contracts, HUD is also a signatory on these contracts. Supp. AR at 10; Supp. AR, Tab 18, Project-Based Section 8 HAP Basic Renewal Contract, at BATES 553.

is to acquire the PHAs' services as contract administrators. In this regard, the asserted "public purpose" provided by the PHAs under the NOFA--the administration of HAP contracts--is essentially the same purpose HUD is required to accomplish under the terms of its HAP contracts, wherein HUD is ultimately obligated to the property owners. As such, the principal purpose of the NOFA and ACCs to be awarded under the NOFA is for HUD's direct benefit and use.¹⁹ B-257430, Sept. 12, 1994, at 4. Again, the NOFA provides, and HUD's past practices demonstrate, that if a PHA is unable to provide contract administration services for the Project-Based Section 8 rental assistance program, HUD staff has provided and will provide such services. See 360Training.com v. United States, Inc., supra (an agency is acquiring the intermediary's services for its own direct benefit or use if the agency otherwise would have to use its own staff to provide the services offered by the intermediary); see also GAO, Principles of Federal Appropriations Law, Vol. II, at 10-20.

For the reasons set forth above, we conclude that HUD's issuance of a NOFA providing for the award of cooperative agreements was unreasonable and in disregard of applicable statutory guidance. We also conclude that HUD is required to use a procurement instrument that results in a contract in order to obtain the provision of contract administration services by PHAs for the Project-Based Section 8 HAP contracts. Finally, given our conclusion that HUD should use a procurement instrument that results in the award of contracts, rather than a notice that results in the execution of cooperative agreements, these protests fall squarely within the jurisdiction of our Office. See Energy Conversion Devices, Inc., supra.

The protesters also argue that certain terms of the NOFA are inconsistent with procurement statute and regulation, including the FAR, and are otherwise improper. We need not address these concerns.²⁰ In this regard, HUD "admits that it did not

¹⁹ Contrary to HUD's arguments, as indicated above, the PHAs' general function as state or local entities responsible for public housing and their receipt of administrative fees under the ACC cannot be considered to be the primary purpose of the ACC.

²⁰ The protesters also argue that HUD is without authority to enter into cooperative agreements with PHAs with regard to the Project-Based Section 8 rental assistance program. In this regard, our Office has long recognized that while federal agencies generally have "inherent" authority to enter into contracts to procure goods or services for their own use, there is no comparable inherent authority to enter into assistance relationships (i.e., cooperative agreements or grants) to give away the government's money or property to benefit someone other than the government. 65 Comp. Gen. 605, 607 (1986); GAO, Principles of Federal Appropriations Law, Vol. II, at 10-17. Given our determination that HUD should solicit the contract administration services here through a procurement instrument that results in a contract, rather than a cooperative agreement, we need not decide whether HUD is

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follow the requirements in CICA or the FAR” in preparing its NOFA, and that it “would expect the protests to be sustained” should our Office determine, as we have, that the protests are within GAO’s jurisdiction.²¹ HUD Response to Protesters’ Requests for Documents (June 12, 2012) at 2. As a result, the protests are sustained.

RECOMMENDATION

We recommend that HUD cancel the NOFA, and solicit the contract administration services for the Project-Based Section 8 rental assistance program through a procurement instrument that will result in the award of contracts. In so doing, the agency should address the other concerns expressed by the protesters to the extent appropriate. We also recommend that the agency reimburse the protesters their costs of filing and pursuing the protests. 4 C.F.R. § 21.8(d)(1). The protesters’ certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(d)(1).

The protests are sustained.

Lynn H. Gibson
General Counsel

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otherwise authorized to enter into cooperative agreements with regard to the Project-Based Section 8 rental assistance program.

²¹ In light of HUD’s concession, during the development of the protest record, we agreed with HUD that it need not provide documents or arguments responding to the protesters’ assertions that certain aspects of the NOFA, if considered as a solicitation that will result in a contract, fail to comply with CICA, the FAR, or other applicable procurement statutes or regulations.