

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



B-114860

MAR 15 1978

The Honorable Thomas P. Eagleton
United States Senate

Dear Senator Eagleton:

This is in further response to your letters of November 22, and December 19, 1977, requesting our legal opinion on several aspects of the Department of Housing and Urban Development's (HUD) determination to convert the National Flood Insurance Program to a Part B Government-operated program. By letter dated December 9, 1977, we advised that we could not comment on the matters you raised due to then pending litigation. However, as you are aware, the litigation has now been concluded and we are responding to your inquiries.

In addition to other matters you asked us to consider the following:

--Legal requirements of the Part B Takeover

Determine whether the flood insurance program reached that "last resort" where it no longer can be carried out under Part A and would be "assisted materially" by the Government's assumption of operational responsibility?

--Electronic Data System (EDS) as Fiscal agent

Evaluate whether EDS qualifies as a fiscal agent under section 1340(a) of the National Flood Insurance Act of 1968, 42 U.S.C. §4071(a). ✓

--Implementation of Part B

Assess whether HUD's contract with EDS authorizing the reimbursement of acquisition costs for space, personnel, and hardware "reasonably necessary to operate a Part B program" is implementation of Part B or, as HUD contends, "activities preliminary to implementation," during the 30-day period reserved for congressional review. 42 U.S.C. §4071(b). ✓

B-114860

Our December 9 letter explained the background of this matter as follows:

"The National Flood Insurance Act of 1968 (Act), 42 U.S.C. 4001 et seq., enacted a comprehensive blueprint for the establishment of a national flood insurance program. The Act authorized the Secretary of HUD to implement an industry-operated flood insurance program with Federal assistance in accordance with Part A, 42 U.S.C. 4051, and, if the Secretary makes the determination required under section 1340(a) of the Act, 42 U.S.C. 4071(a), a Government operated program with industry assistance under part B of the Act, 42 U.S.C. 4041. In June 1969, HUD, acting through the National Flood Insurance Association (NFIA), an association of insurance companies formed to provide flood insurance under Part A of the Act, signed an agreement establishing the industry-Government relationship that enabled the flood insurance program to be implemented under Part A. This relationship has continued until recently. On November 2, 1977, the Secretary of HUD determined that the operation of the flood insurance program would be materially assisted by the Government's assumption of the operational responsibility for the flood insurance program. This determination and HUD's report to Congress on the reasons for the program change are reprinted at 42 Fed. Reg. 58569 (November 10, 1977)."

As we stated in our previous letter, two of the questions you asked were in issue in National Flood Insurers Association v. Harris, Civil Action No. 77-2028 (D.D.C. decided December 9, 1977), namely, the legal requirements for conversion to a Part B Government-operated flood insurance program and EDS qualifications as a fiscal agent under Part B of the Act. With regard to the legal requirements for a conversion to a Part B program, we observe that the authority of the Secretary of

8-114860

HUD to convert to a Part B program is not limited by a requirement that the Part A industry-operated flood insurance program reach such a "last resort" that a Part A program can no longer be successfully carried out. Rather, the Act expressly empowers the Secretary of HUD to convert to a Government-operated flood insurance program should she determine that such a conversion would "assist materially" the operation of the program. 42 U.S.C. §4071(a).X

Indeed, this was the conclusion of the Court in National Flood Insurers Association v. Harris:

"The crux of this lawsuit is whether the Secretary's determination to convert to a part B program comports with 42 U.S.C. §4071(a). The Court is persuaded that it does. The Court is aware of the strong Congressional preference for a Part A program. However, §4071(a) allows the Secretary to convert from part A if the Secretary determines that operation of the flood insurance program as provided for in part A 'cannot be carried out, or that such operation, in itself, would be assisted materially by the Federal Government's assumption' of operational responsibility. While NFIA emphasizes the first clause of §4071(a) and points to ostensible success of the NFI program under its management, what is crucial in this case is the second clause of §4071(a) and the 'materially assist' provision. On these facts this Court cannot say that the Secretary's determination that conversion to part B would 'materially assist' the NFI program is clearly erroneous or without a rational basis.* * *

Also at issue in National Flood Insurers Association v. Harris was whether EDS qualified as a fiscal agent under section 1340(a) of the Act, 42 U.S.C. §4071(a).X The Act provides that once the Secretary decides to convert to a Part B Government-operated program, she shall promptly make necessary arrangements to implement the Part B program, utilizing as fiscal agents of the United States, for purposes of providing flood insurance coverage, employees of HUD and other executive

B-114860

agencies, or insurance companies and other insurers, insurance agents and brokers, or both. 42 U.S.C. §4071(a). Upon making her determination to operate the national flood insurance program under Part B of the Act, the Secretary reported that although a fiscal agent would be utilized in place of the Part A pooling arrangement, no material diminution in the use of insurance agents and brokers and insurance adjustment organizations in the program would result by virtue of the transition to a Government-operated program. Rather, EDS will perform data processing and other administrative functions essential to the continued operation of the program.

Moreover, under section 1346(a) of the Act, 42 U.S.C. §4082(a), HUD has the authority to enter into contracts with any private organization to perform a variety of responsibilities, including estimating payments to be made under the program, disbursing and accounting for funds, auditing the records of any insurance company to assure that program payments have been made, and "otherwise assisting in such manner as the contract may provide to further the purposes of this chapter." Again this issue was resolved by the Court as follows:

"Finally, this Court is not convinced that the proposed contract with EDS violates the terms of either 42 U.S.C. §4071 or §4082. HUD proposes to utilize only government employees or insurance entities with respect to the insurance aspects of the Part B program and proposes to employ EDS in a ministerial capacity. The court is satisfied with these representations and any challenge to the functions which EDS performs appears premature."

Finally, you asked us to assess whether HUD's contract with EDS authorizing the reimbursement of acquisition costs for space, personnel, and hardware "reasonably necessary to operate a Part B program" is implementation of Part B or, as HUD contends, "activities preliminary to implementation." Your concern arises from the fact that upon making the determination to convert to a Part B Government-operated insurance program, the Secretary, "at least 30 days prior to implementing the program" under Part B, must report her determination,

B-114860

supported by her reasons and pertinent findings, to the Congress. 42 U.S.C. §4071(b). During this 30-day period, the Secretary cannot implement the Government-operated program. See H.R. Rep. No. 90-1585, (1968), reprinted at 1968 U.S. Code Cong. and Adm. News, p. 2972.

As noted previously, the Secretary reported her determination pursuant to 42 U.S.C. §4071(b) on November 2, 1977. On November 4, 1977, HUD entered into a letter contract with EDS. The letter contract authorized EDS to incur obligations up to \$2 million dollars for the "reasonable costs incurred by the Contractor * * * for space, personnel and hardware reasonably necessary to operate a Part B Government Program * * *." In pertinent parts, the letter contract provided as follows:

"(1) Government as Insurer

The Contractor understands that a Part B-Government Program with the Secretary as insurer utilizing the Contractor will not be implemented prior to December 3, 1977.

"(2) Definitization

(a) It is agreed that negotiations for a Cost Reimbursement type definitive contract will result from this letter contract but that no definitive contract for services for implementation of a Part B program will be executed prior to December 3, 1977. Such negotiations shall be in accordance with the RFP and the response."

By memorandum dated November 8, 1977, the HUD General Counsel concluded that the letter contract does not constitute "implementing the program" within the meaning of section 1340(b) of the Act, 42 U.S.C. 4071(b). Rather HUD's General Counsel concluded that since the language of sections 1340(b) and 1346(d) of Part B of the Act, 42 U.S.C. 4071(b) and 4082(d), distinguishes between the execution of a contract and the implementation of a Part B flood insurance program, "implementing the program" means the actual operation of a Part B

B-114860

flood insurance program as opposed to the execution of a contract with EDS to perform certain tasks preliminary to implementation.

An examination of the Act and its legislative history offers little guidance in determining the precise meaning intended to be given the words "implementing the program." However, we do not believe that the letter contract is tantamount to "implementing the program" as that phrase is used in section 1340(b) of the Act. In general terms the tasks required to be performed by EDS under the letter contract are necessary antecedents to the assumption of data processing and other administrative responsibilities by EDS in the operation of a flood insurance program. Moreover, the first paragraph of the letter contract states that no implementation of the Part B program would take place prior to December 3, 1977. Similarly, paragraph 2(a) clearly provides that while negotiations for a definitive contract would result from the letter contract, no definitive contract for services for implementation of a Part B program would be executed, if ever, before December 3, 1977.

Admittedly, the line separating acts preparatory to the implementation of a Part B program and the actual implementation is a fine one. However, we do not believe HUD's view of the letter contract of November 4, 1977, with EDS as involving "activities preliminary to implementation" is either clearly erroneous or without a rational basis.

A separate letter report will be issued at a later date covering your requests on other aspects of the program conversion.

Sincerely yours,

R.F.KELLER

Deputy | Comptroller General
of the United States

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