

DECISION

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

FILE: B-206272**DATE:** September 24, 1982**MATTER OF:** Civic Action Institute**DIGEST:**

1. GAO will review propriety of assistance awards when there appears to be a conflict of interest or when there is a showing that an agency is using a grant or cooperative agreement to avoid statutory and regulatory requirements for competition.
2. Federal Grant and Cooperative Agreement Act gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and GAO will not question determinations unless it appears that an agency has disregarded statutory and regulatory guidance or lacked program authority to enter into a particular relationship.
3. When an agency's principal purpose is to acquire the services of an organization that ultimately will assist the authorized recipient of a grant or cooperative agreement, a contract should be used, unless the agency's program legislation specifically permits it to make grants to intermediaries.

The Civic Action Institute complains of the Department of Housing and Urban Development's award of a cooperative agreement to the National Citizens Participation Council (NCPC), a non-profit membership organization. The latter group, as a result of HUD's acceptance of its unsolicited proposal, will provide technical assistance to Community Development Block Grant recipients on the use of volunteers to supplement grant funds in carrying out their programs. We sustain the complaint.

Background:

In its initial complaint to our Office in February 1982, the Institute stated that it objected to possible "sole source" awards to either NCPC or the National Urban Coalition. All three organizations (the Institute under the name of the Center for Governmental Studies) had been providing similar services under cooperative agreements that expired in October 1981. The Institute indicated that it had submitted two unsolicited proposals for continued services and that HUD had rejected the first. During development of the complaint, HUD also rejected the second and, on March 2, 1982, entered into a cooperative agreement with NCPC to provide technical assistance on a cost-reimbursement basis up to \$281,476.

The Institute's allegations are several: that HUD's use of a cooperative agreement was improper, avoiding application of procurement regulations; that the award was based on political considerations, not merit, since the Institute is uniquely qualified to provide technical assistance on use of volunteers; and that the award is contrary to HUD's 1982 Technical Assistance Strategy, which gives priority to working with States and local governments, rather than directly with citizen organizations.

Use of a Cooperative Agreement:

The Institute argues that the Federal Grant and Cooperative Agreement Act, which states that contracts are to be used to acquire goods or services for the "direct benefit" of the Government, mandates use of a contract in this case. According to the Institute, HUD is the direct beneficiary of NCPC's services, since the organization is providing technical assistance which HUD itself otherwise would be required to provide under the Housing and Community Development Act of 1974, as amended, 42 U.S.C. §§ 5301 - 5320 (Supp. IV 1980).

In support of its arguments, the Institute cites a report by our Office entitled "Agencies Need Better Guidance for Choosing among Contracts, Grants, and Cooperative Agreements," GGD 81-88, September 4, 1981, which states that when an organization is not one that an agency is statutorily authorized to assist, but is merely being used to provide services to another entity which is eligible for assistance, in our opinion the proper instrument is a procurement contract.

HUD responds that our Office should not consider this complaint at all, because it concerns the propriety of an assistance award and because we previously have stated that we will not interfere with the functions and responsibilities of grantor agencies in making such awards. In addition, HUD interprets the Federal Grant and Cooperative Agreement Act as permitting any agency which otherwise may enter into contracts, grants, or cooperative agreements to choose among these, depending on the purpose that it seeks to accomplish. HUD cites our decisions in Burges & Associates, 53 Comp. Gen. 785 (1979), 79-2 CPD 194, and Bloomsbury West, Inc., B-194229, September 20, 1979, 79-2 CPD 205, as approving use of grants or cooperative agreements when, as here, the agency's principal purpose is to transfer services to States and local governments.

GAO Analysis:

There are two exceptions to our policy of not reviewing the propriety of assistance awards: when there appears to be a conflict of interest (not alleged here) or when there is a showing that an agency is using a grant or cooperative agreement to avoid the statutory and regulatory requirements for competition that would apply to a procurement. At a minimum, the latter requires a clear demonstration that a particular project or undertaking properly should have been the subject of a procurement. Electronic Space Systems Corporation, B-207112, May 28, 1982, 61 Comp. Gen. ____, 82-1 CPD 505. The Federal Grant and Cooperative Agreement Act gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and we will not question such determinations unless it appears that the agency disregarded statutory and regulatory guidance or lacked authority to enter into a particular relationship. Id.

Here, it is clear that HUD has basic authority to provide technical assistance to Community Development Block Grant recipients. Since the 1977 amendments to the Housing and Community Development Act, funds have been appropriated yearly for a:

"special discretionary fund for use by the Secretary in making grants

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to States, units of general local government, Indian tribes, or areawide planning organizations for the purpose of providing

technical assistance in planning, developing, and administering assistance * * *."

In addition, under the 1978 amendments to the Act, the Secretary may provide:

"directly or through contracts, technical assistance * * * to such governmental units, or to a group designated by such a governmental unit for the purpose of assisting that governmental unit to carry out its Community Development Program." 42 U.S.C. § 5307(a)(8) (Supp. IV 1980) (current version at 42 U.S.C.A. § 5307(b)(4) (Dec. 1981)).

We agree with HUD that the references to "grants" and "contracts" in this section do not necessarily limit it to these particular instruments, since under the Federal Grant and Cooperative Agreement Act, the agency's purpose should determine which of these is appropriate. But, in our opinion, the Act does not give HUD discretion to use a grant or cooperative agreement when third parties, such as NCPC, actually will be providing the technical assistance to authorized recipients, i.e., units of State and local government and/or their designees.

As we indicated in our September 1981 report, the "direct benefit" language of the Federal Grant and Cooperative Agreement Act does not necessarily resolve the question of which instrument should be used. When third parties are involved, in our opinion the choice depends upon whether the Government's principal purpose is to "acquire" an intermediary's services, which ultimately may be delivered to an authorized recipient, or whether the Government's purpose is to "assist" the intermediary in providing goods or services to the authorized recipient. In the former situation, we believe a procurement contract, rather than an assistance relationship, is proper. See GGD 81-88, supra, at 10, 21 (emphasis original); see also S. Rep. No. 97-180, 97th Cong. 1st Sess. 3 (1981), in which the Senate Committee on Governmental Affairs, commenting on a bill to amend the Federal Grant and Cooperative Agreement Act, concurs in this view.

The bid protest decisions cited by HUD do not deal with the question of assistance to third parties. In Burgos & Associates, the Commerce Department's Office of Minority Business Enterprise awarded a grant to an intermediary to provide management and technical assistance to minority business firms. Use of a grant in that case was proper because Executive Order No. 11625, October 13, 1971, authorized the agency to assist public and private organizations which in turn would assist minority business enterprise. In Bloomsbury West, however, the (then) Department of Health, Education, and Welfare, through a grant, funded an intermediary which provided technical assistance on desegregation to public schools. The agency's authority to provide such assistance through grants to third parties was less clear, since the enabling legislation, 42 U.S.C. § 2000c-2, did not specify the form of assistance, but merely authorized making available--to school boards and other governmental units legally responsible for operating public schools--personnel of the Office of Education or "other persons specially equipped to advise and assist them in coping with [desegregation] problems."

In this case, there is no provision in the Housing and Community Development Act that authorizes HUD to make grants to third parties (other than designees) in order to deliver technical assistance to Community Development Block Grant recipients. In our opinion, since HUD's principal purpose was to acquire the services of NCPC to aid in the delivery of technical assistance, a contract should have been used. In view of this finding, we do not believe it is necessary for us to review the Institute's other allegations regarding HUD's choice among unsolicited proposals for a cooperative agreement.

The complaint is sustained.

We are not, however, recommending remedial action here. As we acknowledged in our September 1981 report, the distinction between assisting an intermediary and acquiring the services of an intermediary are not always clear. GGD 81-88, supra at 11. HUD has been among the agencies disagreeing with our interpretation of the Federal Grant and Cooperative Agreement Act, noting the absence of guidance from the Office of Management and Budget, which has responsibility for interpreting and implementing the Act. Id. at 80. In addition, our decisions in Burgos & Associates and

Bloomsbury West, as noted above, approved the use of grants to third parties without discussing the circumstances under which such assistance would be improper. Moreover, the Civic Action Institute itself attempted to obtain a cooperative agreement, and did not complain to our Office about this form of assistance until it appeared that HUD would not continue to fund both the Institute and NCPC as technical assistance providers.

In view of all these circumstances, we will apply our holding requiring the use of contracts in third party situations such as this one only prospectively. By letter of today, we are advising the Secretary of HUD that in the future, a contract should be used unless the agency has statutory authority--other than the Federal Grant and Cooperative Agreement Act--to award grants or cooperative agreements to intermediaries.

W. J. ...
Comptroller General
of the United States