No. 14-781

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

CMS CONTRACT MANAGEMENT SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
ROBERT E. KIRSCHMAN, JR.
KIRK T. MANHARDT
DOUGLAS K. MICKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HELEN R. KANOVSKY
General Counsel
DORIS S. FINNERMAN
Attorney
Department of Housing and Urban Development
Washington, D.C. 20410

QUESTION PRESENTED

Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437f, authorizes the United States Department of Housing and Urban Development (HUD) to enter into agreements with state and local public housing agencies (PHAs) by which the parties jointly provide housing assistance to low-income families. The question presented is as follows:

Whether the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. 6301 *et seq.*, requires HUD to use procurement contracts rather than cooperative agreements as the legal instruments for conveying federal funds to the PHAs in connection with the Section 8 program.

PARTIES TO THE PROCEEDINGS

Petitioner, who was the defendant in the Court of Federal Claims (CFC) and the appellee in the court of appeals, is the United States of America.

Respondents are CMS Contract Management Services; the Housing Authority of the City of Bremerton; the Massachusetts Housing Finance Agency, National Housing Compliance; Assisted Housing Services Corp.; North Tampa Housing Development Corp.; California Affordable Housing Initiatives, Inc.; Southwest Housing Compliance Corporation; and Navigate Affordable Housing Partners.

Respondent Massachusetts Housing Finance Agency was an intervenor-plaintiff in the CFC and an appellee in the court of appeals. The other respondents were plaintiffs in the CFC and appellants in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 14-781

UNITED STATES OF AMERICA

v.

CMS CONTRACT MANAGEMENT SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 745 F.3d 1379. The opinion of the Court of Federal Claims (App., *infra*, 18a-83a) is reported at 110 Fed. Cl. 537. The recommendation of the Government Accountability Office (App., *infra*, 84a-109a) is not published but is available at 2012 WL 3341727.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2014. A petition for rehearing was denied on August 8, 2014 (App., *infra*, 15a-17a). On October 28, 2014, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including December 5, 2014. On November 25, 2014, the Chief Justice further extended the time to January 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 110a-120a.

STATEMENT

This case involves the proper classification under the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), 31 U.S.C. 6301 *et seq.*, of agreements between the United States Department of Housing and Urban Development (HUD) and state and local public housing agencies (PHAs). The agreements authorize the PHAs to oversee and administer approximately $9 billion in federal housing assistance to low-income families pursuant to Section 8 of the United States Housing Act of 1937 (Housing Act), as amended, 42 U.S.C. 1437f.[1] The Court of Federal Claims (CFC) upheld HUD's treatment of those agreements as "cooperative agreements" under the FGCAA, 31 U.S.C. 6305. App., *infra*, 82a. The court of appeals reversed, holding that the agreements are instead "procurement contracts" under 31 U.S.C. 6303 and therefore must be awarded in accordance with federal procurement laws. App., *infra*, 13a.

1. Every year, federal agencies disburse approximately $1 trillion in taxpayer funds to outside entities in the form of grant agreements, cooperative agree-

---

[1] See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. K, Tit. II, 128 Stat. 2742 (2015 Appropriations Act).

ments, and procurement contracts. See generally United States Gov't, *Total Federal Spending*, http://www.usaspending.gov/trends (last visited Dec. 29, 2014) (*Total Federal Spending*). Congress enacted the FGCAA in 1978 to establish criteria for agencies to apply when choosing which type of legal instrument to use in connection with particular disbursements. § 2, 92 Stat. 3.

The FGCAA requires an agency to 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 [g]overnment." 31 U.S.C. 6303. Procurement contracts are subject to the detailed requirements of federal procurement law, including the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (relevant portions codified in sections of Titles 10 and 41 of the United States Code), and the Federal Acquisition Regulation (FAR), 48 C.F.R. 1.000 to 53.303-WH-347.

An agency must use a "cooperative agreement" or "grant agreement" to disburse funds when "the principal purpose of the relationship is to transfer a thing of value" to the recipient in order "to carry out a public purpose of support or stimulation authorized by a law of the United States." 31 U.S.C. 6304(1), 6305(1). Cooperative agreements are appropriate when "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." 31 U.S.C. 6305(2). Grants must be used when no such involvement is expected. 31 U.S.C. 6304(2). Cooperative agreements and grants allow for

greater flexibility than procurement contracts and are not subject to the requirements of CICA or the FAR.[2]

Congress intended the FGCAA criteria to encourage agencies "to make disciplined choices and decisions on their roles and responsibilities and on the roles and responsibilities of recipients" with respect to federal funds. S. Rep. No. 449, 95th Cong., 1st Sess. 10 (1977) (1977 Senate Report). Congress also recognized, however, that agencies would retain "ample flexibility to decide what [type of instrument] is most appropriate in light of their purposes." *Id.* at 22; see *id.* at 10 (emphasizing agency's "flexibility" to choose between procurement and assistance agreements in light of "[t]he mission of the agency"). As the Senate Committee on Governmental Affairs emphasized at the time, "all that [the FGCAA] * * * require[s] is that the agency be able to reasonably justify its choice[] [of instrument]." *Id.* at 9.

2. This case involves HUD's efforts to help PHAs provide housing assistance to low-income families under the Housing Act, Pub. L. No. 75-412, 50 Stat. 888.[3]

a. The original Housing Act declared that "the policy of the United States" is to "employ[] its funds and credit * * * to assist the several States and

---

[2] Cooperative agreements and grants are sometimes collectively referred to as "assistance agreements," as distinct from procurement contracts. See, *e.g.*, Gov't Accountability Office, 2 *Principles of Federal Appropriations Law* 10-15 (3d ed. 2006).

[3] The Housing Act defines a PHA as a "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 42 U.S.C. 1437f(b).

their political subdivisions * * * to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income." § 1, 50 Stat. 888. In 1974, Congress amended the Housing Act to create the Section 8 programs for providing financial support to low-income families. Housing and Community Development Act of 1974, Pub. L. No. 93-383, Tit. II, § 201(a), 88 Stat. 662 (42 U.S.C. 1437f).

Under Section 8's project-based assistance program, HUD subsidizes rents for low-income families residing in particular housing units. See 42 U.S.C. 1437f(b)(1) and (f)(6). For many years, HUD provided such project-based assistance in either of two ways. Under one approach, HUD negotiated its own housing assistance payment (HAP) contracts directly with private owners of low-income housing. App., *infra*, 3a. The other approach was for HUD to enter into annual contribution contracts (ACCs) with state and local PHAs, which would then enter into HAP contracts with the private owners. *Ibid.* Under that approach, HUD would provide funds to the PHAs to enable the PHAs to fulfill their obligations under those HAP contracts. *Ibid.*[4]

---

[4] Since 1937, the Housing Act has also authorized HUD to enter into ACCs with PHAs in order to fund housing projects that the PHAs own and operate themselves. See 42 U.S.C 1437c(a) and (d). HUD also enters into ACCs with PHAs as part of the Section 8 tenant-based assistance program, under which tenants receive vouchers that can be used toward rent payments in housing units of their choice. 42 U.S.C. 1437f(b)(1), (f)(7) and (*o*). HUD administers the tenant-based program by entering into ACCs with PHAs, which then enter into separate HAP contracts with the landlords who accept the vouchers. See 42 U.S.C. 1437f(b)(1) and (*o*)(7)-(10).

By the mid-1990s, approximately 24,200 project-based Section 8 HAP contracts were in effect, approximately 20,000 of which HUD administered directly, and approximately 4200 of which were administered by PHAs. J.A. 300/A.R. (A.R.) 428. As those HAP contracts began to expire, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA), Pub. L. No. 105-65, Tit. V, 111 Stat. 1384, which authorized HUD to replace expiring HAP contracts with new contracts. §§ 512(12), 515(a)(1), 524(a)(1), 111 Stat. 1389, 1396-1397, 1408. Under changes that Congress had made to Section 8 in 1983, however, HUD lacked general authority to enter into new contracts directly with project owners.[5] Rather, HUD's only option was to enter into ACCs with PHAs, which would then enter into HAP contracts directly with owners and oversee the disbursement of the federal assistance funds provided by HUD. See 42 U.S.C. 1437f(b)(1).[6]

That approach to replacing the expiring contracts by working together with PHAs tracked the Housing Act's longstanding policy of using federal funds "to assist the several States and their political subdivisions" in providing housing to low-income families. § 1, 50 Stat. 888. It also implemented MAHRA's specific goal of "transfer[ing] and shar[ing] many of the loan and contract administration functions and responsibilities of the Secretary to and with capable

---

[5] See Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, Tit. II, § 209, 97 Stat. 1183.

[6] Section 1437f(b)(1) authorizes HUD to enter into a HAP directly with a project owner only "[i]n areas where no [PHA] has been organized or where [HUD] determines that a [PHA] is unable to implement the provisions of [Section 8]."

[s]tate, local, and other entities." § 511(a)(11)(C), 111 Stat. 1387.[7] In 1998, Congress amended the Housing Act to emphasize the national policy of "providing decent and affordable housing for all citizens through the efforts and encouragement of [f]ederal, [s]tate, and local governments." Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, Tit. V, Subtit. A, § 505; 112 Stat. 2523.

b. In 1999, HUD initiated a competition to award an ACC to a PHA in each of the 50 States (including two ACCs in California), along with the District of Columbia and Puerto Rico. App., *infra*, 5a. Under the ACCs, each selected PHA would assume responsibility for all of the HAP contracts within the State, including by (1) becoming the counterparty to HAP contracts that HUD had initially made directly with project owners, and (2) entering into new HAP contracts with project owners as the initial round of contracts expired. *Id.* at 5a, 35a-38a. The ACCs made clear that HUD would disburse federal funds to accounts administered by the PHAs, which would use those funds to execute the HAP contracts with individual project owners. A.R. 128. PHAs would earn both "basic" administrative fees and performance-based "incentive" fees. App., *infra*, 5a; see *id.* at 36a n.4. HUD's notice of the competition did not forbid PHAs from competing for ACCs outside their home States. The notice stated that "[t]his solicitation is not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR)." A.R. 428.

---

[7] See MAHRA § 511(b)(6), 111 Stat. 1387 (noting statute's purpose of promoting "cooperation" in administering HUD assistance programs with all "interested entities," including "[s]tate and local governments").

Between 1999 and 2005, HUD awarded an ACC to a PHA in every State. App., *infra*, 6a, 38a, 92a. Each of the respondents in this case was awarded one or more ACCs during this period. Resps. C.A. Br. 2. At the time, respondents did not object to HUD's process for making the awards. Nor did respondents challenge HUD's decision not to treat the ACCs as procurement contracts subject to the FAR.

c. In 2011, HUD decided to re-compete the ACCs. Many of the incumbent PHAs that had won ACCs in the 1999 competition opposed HUD's decision and, in the alternative, requested priority consideration in the new competition. HUD denied that request and awarded new ACCs to PHAs in all jurisdictions. App., *infra*, 6a.

In response, unsuccessful PHAs filed dozens of post-award protests with the Government Accountability Office (GAO) challenging the ACC awards made in 42 States. App., *infra*, 6a, 39a.[8] The unsuccessful PHAs asserted, *inter alia*, that the ACCs were procurement contracts under the FGCAA and that HUD had failed to comply with federal procurement laws. *Ibid.* HUD responded by withdrawing the ACC awards for 42 States and agreeing to "evaluate and revise" its process for selecting PHAs. A.R. 2843; see *id.* at 79; see also App., *infra*, 6a, 93a.

d. In March 2012, HUD launched a new competition for the ACCs in those 42 States by publicly releasing the notice of funding availability (NOFA) that

---

[8] Under CICA, bidders or other interested parties who wish to challenge the propriety of a contract award may file a bid protest with the GAO, which may then issue non-binding recommendations to the responsible agency. See 31 U.S.C. 3551-3556; *Kingdomware Techs., Inc.* v. *United States*, 754 F.3d 923, 929 (Fed. Cir. 2014).

is now at issue in this case. App., *infra*, 7a, 93a; A.R. 79-115. The 2012 NOFA stated that its "purpose" was to carry out the Housing Act's policy "of assisting States and their political subdivisions in addressing the shortage of affordable housing and of vesting the maximum amount of responsibility and flexibility in program administration in PHAs that perform well." A.R. 80. It explained that the NOFA would "effectuat[e] the authority explicitly provided under [S]ection 8(b)(1) of the 1937 Act [42 U.S.C. 1437f(b)(1)] for HUD to enter into ACCs with PHAs for the administration of Section 8 HAP contracts." A.R. 80.

The NOFA went on to state that the ACCs qualify as "cooperative agreements" under the FGCAA, 31 U.S.C. 6305. A.R. 85. It explained that, under Section 6305, a cooperative agreement is the appropriate legal instrument when (1) "the principal purpose of the relationship between the [f]ederal government and * * * the political subdivision of a State (e.g., a PHA), is the transfer of money and services in order to accomplish a public purpose of support authorized by [f]ederal statute," and (2) "substantial involvement is anticipated between HUD and the PHA during performance." *Ibid.* Here, the NOFA declared, a

> principal purpose of the ACC between HUD and the PHA is to transfer funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by [S]ections 2(a) and 8(b)(1) of the 1937 Act [42 U.S.C. 1437(a), 1437f(b)(1)].

A.R. 85.

Although most of the terms of the 2012 NOFA were similar to those set forth in the 1999 competition (see p. 7, *supra*), the 2012 NOFA announced that HUD would "consider applications from out-of-[s]tate [PHA] applicants *only* for States for which HUD does not receive an application from a legally qualified in-[s]tate applicant." A.R. 82. HUD adopted that new policy in part because many state Attorneys General had submitted letters indicating that out-of-state PHAs could not lawfully operate within their own States in accordance with state law. See 1:12-cv-00852-TCW, Docket entry (Docket entry) No. 21, at 40-41 (Jan. 4, 2013); Docket entry No. 47, at 29-33 (Jan. 30, 2013). The policy precluded many applicants, including respondents, from competing for ACCs outside their home States. App., *infra*, 7a.

3. In May 2012, various PHAs—including all but one of the respondents here—filed pre-award protests with the GAO alleging that HUD was improperly treating the ACCs as cooperative agreements instead of as procurement contracts under the FGCAA. App., *infra*, 7a, 42a & n.9. In August 2012, the GAO issued a decision recommending that HUD award the ACCs as procurement contracts. *Id.* at 84a-109a.

The GAO concluded that the funds transferred to PHAs are not "thing[s] of value" under the FGCAA, 31 U.S.C. 6305, because the PHAs are required to pass those funds along to private owners as rent subsidies. App., *infra*, 99a; see *id.* at 104a. Although the GAO recognized that the administrative fees paid to PHAs are "thing[s] of value," it found that the overarching purpose of the ACCs is not to assist PHAs in accomplishing their mission, but rather to acquire the PHAs' services as contract administrators for the

direct benefit of HUD. *Id.* at 104a. It therefore concluded that the FGCAA requires HUD to issue the ACCs as procurement contracts, see 31 U.S.C. 6303, and that the NOFA must comply with the requirements of both CICA and the FAR. App., *infra*, 107a-109a.

In December 2012, HUD announced that it was moving forward with the 2012 NOFA notwithstanding the GAO's views. App., *infra*, 9a. In a letter to the Comptroller General explaining that decision, HUD emphasized that (1) it had never awarded ACCs using procurement contracts throughout the entire 38-year history of the Section 8 housing program; (2) compliance with federal procurement law would require "numerous, significant programmatic changes" in the relationship between HUD and the PHAs that would inhibit the flexible operation of the program; and (3) CICA's requirement of open competition for procurement contracts might conflict with Section 8's requirement that ACCs be awarded to PHAs and with HUD's policy judgment that the ACCs should be administered by in-state entities. A.R. 7; see A.R. 6-8.

4. Respondents filed pre-award protests in the CFC, seeking an injunction to bar HUD from proceeding under the NOFA. App., *infra*, 10a. The CFC has jurisdiction over such protests under the Tucker Act, 28 U.S.C. 1491, which authorizes the court to set aside an agency's procurement-related decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706; see 28 U.S.C. 1491(b)(1) and (4) (requiring courts in such actions to apply the standard of review under the Administrative Procedure Act (APA) set forth in 5 U.S.C. 706). In April 2013, the CFC ruled in HUD's

favor, concluding that the ACCs "serv[e] as a mechanism through which HUD, in cooperation with the [S]tates, carries out the statutorily authorized goal of supporting affordable housing for low-income individuals and families." App., *infra*, 76a.

The CFC emphasized that "the consistent policy of the Housing Act has been for HUD (and its predecessor agencies) to implement federal housing goals through close cooperation and coordination with the [S]tates." App., *infra*, 78a. It noted that, although the ACCs would also help HUD to administer the Section 8 program more efficiently, there is "nothing inconsistent in HUD sharing greater responsibility for program administration with the [S]tates while at the same time achieving certain cost efficiencies." *Ibid.* The court also observed that limiting the award of ACCs to PHAs "would appear to make sense only if one conceives of [PHAs] as HUD's governmental partners in the administration of [the Section 8 program]," and not merely as outside contractors performing "ministerial" services. *Id.* at 79a.

5. The court of appeals reversed. App., *infra*, 1a-14a. The court emphasized three considerations supporting its conclusion that the ACCs are procurement contracts under the FGCAA, 31 U.S.C. 6303; App., *infra*, 13a.

a. Based on its own assessment of the record, the court of appeals found that "the primary purpose of the [ACCs] is to procure the services of the [PHAs] to support HUD's staff and provide assistance to HUD with the oversight and monitoring of Section 8 housing assistance." App., *infra*, 11a. The court emphasized various statements by HUD that using PHAs to administer the Section 8 HAP contracts would "im-

prove the oversight" of the financial assistance, "increase accountability for subsidy payments," and create other efficiencies. *Id.* at 11a-12a (quoting A.R. 258-259).

b. The court of appeals held that neither the housing assistance payments nor the administrative fees that HUD provides to PHAs constitute "thing[s] of value" for purposes of the FGCAA, 31 U.S.C. 6305. App., *infra*, 12a-13a. The court noted that HUD "has a legal obligation to provide project owners with housing assistance payments under the HAP contracts," and that the PHAs "have no rights to, or control over" such payments, which the PHAs must retransmit to the owners in accordance with the ACCs. *Ibid.* As for the fees, the court held that "money" qualifies as a "thing of value" under Section 6305 only "in certain circumstances," and that here the fees "appear[] only to cover the operating expenses of administering HAP contracts on behalf of HUD." *Id.* at 13a.

c. The court of appeals concluded that "HUD has merely created an intermediary relationship with the [PHAs]," and that the PHAs are "'not receiving assistance from [HUD] but [are] merely used to provide a service to another entity which is eligible for assistance.'" App., *infra*, 13a (second set of brackets in original) (quoting S. Rep. No. 180, 97th Cong. 1st Sess. 3 (1981) (1981 Senate Report)). The court declared that, "[i]n the case of an intermediary relationship, 'the proper instrument is a procurement contract.'" *Ibid.* (quoting 1981 Senate Report 3).

The court of appeals subsequently denied the government's petition for rehearing en banc. App., *infra*, 15a-17a.[9]

REASONS FOR GRANTING THE PETITION

The court of appeals held that HUD must use "procurement contract[s]," rather than "cooperative agreement[s]," when contracting with PHAs to administer the Section 8 project-based assistance program. That decision was erroneous. HUD may use cooperative agreements in this context because the principal purpose of the relationships is to carry out the Housing Act's core policy of helping PHAs provide housing assistance to low-income families within their States. The court of appeals erred by (1) second-guessing HUD's determination that the primary purpose of the ACCs is to help PHAs provide housing assistance to others, and not to obtain direct benefits for HUD; (2) concluding that the $9 billion in federal funds being transferred under the program is not a "thing of value"; and (3) attaching unwarranted significance to the PHAs' status as intermediaries that retransmit federal funds to project owners. App., *infra*, 11a-13a; see *id.* at 95a n.13.

---

[9] During this litigation, HUD has maintained the project-based Section 8 housing program by extending 42 of the ACCs that were awarded pursuant to the 1999 competition. See Docket entry No. 113, at 1 (Sept. 2, 2014). Respondents are parties to 15 of those ACCs. See *Contract Administrators for Project-Based Section 8*, http://portal.hud.gov/hudportal/documents/huddoc?id=caomlist.pdf (last revised Oct. 9, 2014). In the other jurisdictions, HUD continues to implement the 11 ACCs that were awarded pursuant to the 2011 competition and were never challenged. See p. 8, *supra*.

If allowed to stand, the court of appeals' decision will require significant programmatic changes restricting HUD's flexibility in managing the $9 billion Section 8 project-based housing program. It may also affect the $15 billion tenant-based assistance program, which involves similar agreements with PHAs.[10] If extended to other contexts, the court of appeals' misinterpretation of the FGCAA could also jeopardize the validity of other federal programs that use cooperative agreements to achieve important government objectives. This Court's intervention is needed to clarify the meaning of the FGCAA and to ensure that federal agencies may continue to use cooperative agreements in appropriate circumstances.

A. HUD Properly Characterized The ACCs As "Cooperative Agreements" Under The FGCAA

Under the FGCAA, an agency's decision whether to use a cooperative agreement or a procurement contract to formalize a relationship with a State or local government turns on the "principal purpose" of that relationship. 31 U.S.C. 6303, 6305. A cooperative agreement is required if that purpose is "to transfer a thing of value to the State * * * [or] local government * * * to carry out a public purpose of support or stimulation authorized by a law of the United States." 31 U.S.C. 6305. Agencies must use a procurement contract if the principal purpose of the relationship is "to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States [g]overnment." 31 U.S.C. 6303.

---

[10] See 2015 Appropriations Act, Div. K, Tit. II, 128 Stat. 2730, 2742.

Applying those standards, both HUD and the CFC properly determined that the ACCs here are cooperative agreements. The ACCs undeniably involve the transfer of federal financial assistance (a "thing of value"), and they advance the Housing Act's core objective of helping state and local governments provide housing for their citizens. HUD's conclusion that this latter objective is the "principal purpose" of its relationship with the PHAs is both correct and entitled to judicial deference. In holding that the ACCs are procurement contracts, the court of appeals misconstrued the FGCAA and improperly second-guessed HUD's reasonable policy judgments.

1. The core function of the ACCs is to provide the legal mechanism by which HUD transfers nearly $9 billion each year to the PHAs. See App., *infra*, 95a n.13; A.R. 80-82, 85, 125, 128-129. That federal funding is a "thing of value" under the plain meaning of Section 6305. Money is intrinsically valuable, and PHAs use the federal funds to subsidize the rent paid by low-income families in exchange for housing, in accordance with the HAP contracts between the PHAs and individual project owners. See A.R. 1359-1362, 2271. PHAs would have no interest in receiving the funds, and project owners would not accept them in lieu of rent, if they were worthless.

The FGCAA's history confirms the common-sense conclusion that money is inherently a "thing of value" under Section 6305. As enacted in 1978, the original version of that provision required agencies to use cooperative agreements when the purpose of the relationship with a State or local government was "the transfer of *money*, property, services, or anything of

value" to the recipient. FGCAA, Pub. L. No. 95-224, § 6(1), 92 Stat. 5 (emphasis added).

In 1982, Congress reenacted the FGCAA as part of a broader recodification of Title 31. In doing so, it replaced the words "money, property, services, or anything of value" with the shorter phrase "a thing of value." Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 1004. The 1982 reenactment also declared, however, that it "may not be construed as making a substantive change" to any of the recodified provisions. § 4(a), 96 Stat. 1067. The House Report confirmed that "[t]he words 'money, property, services' are omitted [from Section 6305] as being included in 'a thing of value.'" H.R. Rep. No. 651, 97th Cong., 2d Sess. 181 (1982).[11]

2. The 2012 NOFA declares that HUD's "principal purpose" in entering the ACCs is "to transfer funds * * * to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by [the Housing Act]." A.R. 85. That statement of the ACCs' "principal purpose" establishes that the ACCs are cooperative agreements under Section 6305. For at least three overarching reasons, the court of appeals erred in adopting a different view of the agreements' primary purpose.

a. Section 6305's "principal purpose" inquiry turns first and foremost on the *statutory* goals that the agency intends the legal instrument to advance. Congress recognized that "[t]he mission of the agency will influence the agency's determination" whether to use a procurement contract or a cooperative agreement.

---

[11] For the same reasons, the administrative fees that HUD pays to PHAs under the ACCs also qualify as a "thing of value" under Section 6305.

1977 Senate Report 10. The FGCAA's primary sponsor emphasized that the law would "compel agencies to match the broad purpose of what they are doing to congressional intent in authorizing statutes." *Federal Grant and Cooperative Agreement Act of 1975: Hearings Before the Subcomms. of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 35 (1976) (statement of Sen. Chiles).

Shortly after the FGCAA became law, the Office of Management and Budget (OMB) issued interpretive guidance stating that the "agency mission and intent must be the guide" in selecting the choice of instrument. 43 Fed. Reg. 36,860 (Aug. 18, 1978); see 31 U.S.C. 6307 (authorizing OMB to issue guidance interpreting FGCAA). The GAO likewise stated that "it will be the four corners of the enabling law * * * which will establish the parameters of the relationship between [f]ederal and non-[f]ederal parties" for purposes of making that determination. Interpretation of Fed. Grant and Coop. Agreement Act of 1977, B-196872 O.M., 1980 U.S. Comp. Gen. LEXIS 3894, at *11 (1980) (GAO Interpretation).

Section 2 of the Housing Act makes clear that "the policy of the United States" is to work closely and collaboratively with state and local governments to ensure that all Americans have access to affordable housing. 42 U.S.C. 1437(a)(1). Specifically, the Act describes that policy as being to "employ[] the funds and credit of the Nation":

- "[T]o assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families";

- "[T]o assist [S]tates and political subdivisions of States to address the shortage of housing affordable to low-income families"; and
- "[To] promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of [f]ederal, [s]tate, and local governments."

42 U.S.C. 1437(a)(1)(A), (B) and (4).

Section 8 of the Housing Act empowers HUD to implement those broad goals of federal-state collaboration by "enter[ing] into annual contributions contracts [ACCs] with public housing agencies [PHAs] pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units." 42 U.S.C. 1437f(b)(1). The PHA counterparties to such agreements are by definition "State, county, municipality, or other governmental entit[ies] or public bod[ies] (or agenc[ies] or instrumentalit[ies] thereof)." 42 U.S.C. 1437a(b)(6)(A). ACCs under Section 8 also implement MAHRA's policy goal of "transfer[ring] and shar[ing] many of the loan and contract administration functions and responsibilities of the Secretary to and with capable [s]tate, local, and other entities." § 511(a)(11)(C), 111 Stat. 1387.

The 2012 NOFA clearly indicates that the core function of the ACCs is to "carry out [the] public purpose[s] of support or stimulation" that are set forth in the Housing Act and MAHRA. 31 U.S.C. 6305. As the NOFA declares, "[t]he purpose" of HUD's Section 8 project-based assistance program is

> to implement the policy of the United States, as established in [S]ection 2 of the [Housing Act, 42 U.S.C. 1437], of assisting States and their polit-

> ical subdivisions in addressing the shortage of affordable housing and of vesting the maximum amount of responsibility and flexibility in program administration in PHAs that perform well.

A.R. 80, 81-82.

The NOFA goes on to emphasize that the ACCs facilitate the federal-state cooperation that is at the core of United States housing policy. Specifically, they create the legal mechanism under which HUD "transfer[s] funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by [S]ections 2(a) and 8(b)(1) of the [Housing Act, 42 U.S.C. 1437(a) and 1437f(b)(1)]." A.R. 85. As explained above, the ACCs are necessary to perform this function because the Housing Act does not allow HUD to enter into new HAP contracts directly with project owners if a PHA is willing and able to take on that function. See pp. 6-7, *supra*.

Congress thus has expressed its policy judgment that, whenever possible, the Section 8 project-based assistance program should be carried out in collaboration with state and local government entities. Consistent with that statutory directive, the NOFA limits the competition for ACCs to entities that qualify as PHAs under federal law. A.R. 81-86. That limitation would serve no evident purpose if HUD were simply looking for intermediaries that could help HUD provide housing benefits directly to low-income families as cheaply and efficiently as possible. Rather, as the CFC pointed out, "the PHA-only rule would appear to make sense only if one conceives of these entities as HUD's governmental partners in the administration

of housing programs intended to convey a benefit to low-income families and individuals." App., *infra*, 79a. The role of ACCs in helping the PHAs perform their own (distinct but complementary) governmental functions reinforces HUD's conclusion that the contracts are "cooperative agreements" under Section 6305.

b. The 2012 NOFA requires that PHAs pass along to project owners the assistance funding they receive. See A.R. 129, 1363-1364. The court of appeals inferred from that requirement that the PHAs receive nothing of "value" from the ACCs, and that the ACCs therefore should be viewed as procurement contracts rather than cooperative agreements. App., *infra*, 12a-13a. In fact, this aspect of the NOFA highlights the difference between the ACCs and typical procurement contracts. No private contractor would enter into an ordinary procurement contract—such as a contract to produce fighter planes or submarines—if it were required to distribute to third parties all of the funds it received from the government. Because a private contractor derives no benefit from the government's ultimate possession of the plane or submarine, the deal is attractive only because the contractor can keep as profit some portion of the federal money it receives.

Here, by contrast, PHAs are willing to enter into ACCs—even though they must pass along the relevant funds—because the provision of housing to low-income families furthers the PHAs' own governmental objectives. That distinct motivation for partnering with HUD highlights the fact that the ACCs are arrangements between governmental units, each of which has a substantial policy interest in achievement of the Section 8 program's objectives. For this reason, "[w]here the recipient is a [s]tate or local government,

there will be a tendency [by federal agencies] to use assistance instruments." GAO Interpretation at *20.

c. To the extent that the principal purpose of the ACCs is otherwise in doubt, HUD's understanding of that purpose is entitled to judicial deference under both the FGCAA and the Tucker Act. No valid basis exists for second-guessing the agency's judgment.

When the FGCAA was under consideration in the late 1970s, the Executive Branch expressed concern that the statute might overly constrain the ability of agencies to choose the appropriate legal instrument in light of their purposes. See, *e.g.*, 1977 Senate Report 22, 28-29. In response, the FGCAA's drafters emphasized that the statute would not deprive agencies of such flexibility. For example, the 1977 Senate Report noted that "agencies do have the flexibility of determining whether a given transaction * * * is procurement or assistance." *Id.* at 10. It also declared that, under the FGCAA, "all that is required is that the agency be able to reasonably justify its choices." *Id.* at 9; see *id.* at 29 (noting that proposed FGCAA would "provide[] [agencies] with needed flexibility to select the proper instrument and determine its content," and that the statute would give them "ample flexibility to decide what is most appropriate in light of their purposes").

OMB and the GAO have long agreed that agency choices are entitled to deference under the FGCAA. OMB's 1978 guidance noted that the "determination[] of whether a program is principally one of procurement or assistance" is a "basic agency policy decision[]," and that "Congress intended the [FGCAA] to allow agencies flexibility to select the instrument that best suits each transaction." 43 Fed. Reg. at 36,863.

The GAO has consistently embraced that position as well, emphasizing that "[w]here program authority can justify a choice of instruments * * * , agencies have discretion" in deciding which type of instrument to use. GAO Interpretation at *20; see Environmental Prot. Agency Pub. Participation Program, 59 Comp. Gen. 424, 427-428 (1980) (noting that "[t]he [FGCAA] gives considerable weight to an agency's own characterization of the type of relationship it proposes to enter," and that the GAO "will not question [the agency's] determination unless it is clearly contrary to the statutory guidance in the [FGCAA]"); see also App., *infra*, 101a-102a.

Judicial deference to an agency's reasonable choice of legal instrument is also required by the Tucker Act, which is the source of the CFC's jurisdiction in this case. See 28 U.S.C. 1491(b); App., *infra*, 46a. As that court recognized, the Tucker Act expressly incorporates the APA standard of review set forth in 5 U.S.C. 706. App., *infra*, 47a-48a; see 28 U.S.C. 1491(b)(4).

Under that standard, because agencies "are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process," their procurement decisions are subject to "highly deferential rational basis review." *PAI Corp.* v. *United States*, 614 F.3d 1347, 1351 (Fed. Cir. 2010) (citations omitted). Such decisions must be sustained "unless the action does not evince[] rational reasoning and consideration of relevant factors." *Ibid.* (citation and internal quotation marks omitted, brackets in original). Here, although the question whether HUD has complied with the FGCAA is ultimately a legal issue, identifying the "principal purpose" of HUD's relationship with PHAs entails an "essentially factual

determination" that is subject to deference under the APA's "arbitrary and capricious" standard. *American Fed'n of Labor & Cong. of Indus. Orgs.* v. *Donovan*, 757 F.2d 330, 345-346 (D.C. Cir. 1985) (joined by Ginsburg, J.).[12]

HUD reasonably determined that the ACCs' principal purpose was to advance the Housing Act's objective of assisting States to provide low-income housing to their citizens. That determination tracks the statutory sources of HUD's authority, and it is consistent with the terms of both the NOFA and the ACCs themselves. See pp. 17-22, *supra*. The CFC correctly upheld HUD's decision to treat the ACCs as cooperative agreements under Section 6305.

3. In holding that the ACCs are procurement contracts under 31 U.S.C. 6303, the court of appeals mischaracterized HUD's objectives and misconstrued the FGCAA. All three of the court's asserted grounds for that holding are unfounded.

a. The court of appeals found that the ACCs' "primary purpose" is "to procure the services of the [PHAs] to support HUD's staff and provide assistance to HUD with the oversight and monitoring of Section 8 housing assistance." App., *infra*, 11a. The court's

---

[12] We have been unable to identify any appellate decision expressly analyzing the proper standard for reviewing an agency's determination of its "principal purpose" under the FGCAA. In *American Federation of Labor*, however, the D.C. Circuit held that an agency's determination of its "principal purpose" in entering a contract for purposes of the Service Contract Act of 1965, 41 U.S.C. 351 (1982), presents an "essentially factual determination" that is entitled to deference under the APA standard. 757 F.2d at 345-346; see *Ober United Travel Agency, Inc.* v. *United States Dep't of Labor*, 135 F.3d 822, 823-824 (D.C. Cir. 1998) (discussing *American Federation of Labor*).

method of reaching that determination was flawed. The court failed to apply the deferential review required by the FGCAA, the Tucker Act, and the APA. The court also ignored HUD's analysis of the Housing Act as well as the agency's explanation that the ACCs' core purpose is to implement the Act's policy of helping state and local governments to provide affordable housing to low-income families.

The factual analysis that the court of appeals did conduct was likewise flawed. The court highlighted statements reflecting HUD's belief that the ACCs would improve the efficiency of the Section 8 project-based assistance program. App., *infra*, 11a-12a. As the CFC explained, however, there is "nothing inconsistent in HUD sharing greater responsibility for program administration with the [S]tates while at the same time achieving certain cost efficiencies." *Id.* at 78a. The court of appeals was wrong to imply that those twin goals are somehow incompatible or mutually exclusive.

The court of appeals also appeared to assume that, whenever a state or local government performs functions that HUD might otherwise perform, those functions are necessarily acquired "for the direct benefit or use of the United States [g]overnment" and therefore require a procurement contract under Section 6303. 31 U.S.C. 6303; see App., *infra*, 11a-12a (repeatedly emphasizing that PHAs will administer and oversee the Section 8 program, thereby alleviating the burden on HUD staff). But it will almost invariably be true—under *any* type of federal-state relationship—that the responsibilities imposed on the non-federal entity could have been performed by federal employees instead. That factor therefore cannot control the

determination whether a procurement contract or cooperative agreement is the appropriate legal instrument for formalizing the federal-state relationship.

The FGCAA's "principal purpose" test does not turn on whether a federal agency's relationship with a non-federal entity is beneficial to the agency. Such benefits will *always* be present, since there would otherwise be no reason for the agency to enter the relationship or for federal funds to be expended. Rather, the "principal purpose" test turns on whether the agency's primary goal in entering the relationship is to assist the non-federal entity in "carry[ing] out a public purpose of support or stimulation authorized" by federal law. 31 U.S.C. 6305. The court of appeals erred in failing to defer to—or even consider—HUD's reasonable explanation that its chief purpose was to carry out the statutory objectives of the Housing Act and to assist PHAs in providing housing to low-income families.

b. The court of appeals also erred in concluding that the housing assistance payments and administrative fees that HUD provides to PHAs are not "thing[s] of value" under Section 6305. App., *infra*, 12a-13a. As explained above, money is *always* a thing of value. See pp. 16-17, *supra*. The court held otherwise because it concluded that (1) the PHAs are contractually obligated to pass along the assistance payments to project owners, and (2) the administrative fees merely cover the PHAs' operating costs. App., *infra*, 12a-13a. To the extent those observations are accurate, they do

not negate the intrinsic value of the federal funds at issue.[13]

The court of appeals' reasoning also ignores the fact that PHAs receive valuable benefits from ACCs, even though the ACCs require them to transfer the federal assistance payments to project owners. By increasing the availability of low-income housing in the relevant geographic area, the federal funding assists each recipient PHA in carrying out its own governmental mission. Although the PHAs must use Section 8 funds for defined purposes, the same is true of federal money provided under many other federal-state cooperative programs. The existence of such restrictions does not cause the money to be without "value" to its recipients.[14]

c. The court of appeals attached unwarranted significance to the PHAs' status as "intermediar[ies]" that provide housing assistance to low-income families. The court quoted the 1981 Senate Report for the proposition that, "[i]n the case of an intermediary relationship, 'the proper instrument is a procurement contract.'" App., *infra*, 13a (quoting 1981 Senate Report 3). The court misinterpreted both the FGCAA and the 1981 Senate Report.

---

[13] The court of appeals' observation was only partially correct as to the administrative fees. Although the basic purpose of those fees is to cover operating expenses, the ACCs authorize PHAs to use "for any purpose" any fees that exceed those expenses. A.R. 129.

[14] Along similar lines, a person who donates $1 million to an educational charity obviously provides that charity with a thing of value, even if the donation is earmarked for a particular purpose (such as providing college scholarships) that requires the charity to pass along the funds to a third party.

Section 6305's "principal purpose" test turns on whether the provision of federal funds or other things of value is intended to "carry out a public purpose" of "support[ing] or stimulati[ng]" the counterparty's own activities in a manner authorized by federal law. 31 U.S.C. 6305. The fact that the counterparty subsequently transmits the federal funds to a third party is not directly relevant to that inquiry. Nothing in the FGCAA's text suggests that the counterparty's intermediary status by itself requires the use of a procurement contract.

The court of appeals' reliance on the 1981 Senate Report was likewise misplaced. That report observes that a cooperative agreement is appropriately used to establish an intermediary relationship "if the government's principal purpose is *to assist the intermediary* to" "produc[e] a product or carry[ ] out a service that is then delivered to an assistance recipient." 1981 Senate Report 3 (emphasis added). That language precisely describes HUD's efforts to assist "intermediar[ies]" (the PHAs) in carrying out their public mission of delivering aid to "assistance recipient[s]" (the low-income families).

The GAO's analysis of intermediary relationships reinforces that conclusion. The *GAO Redbook* explains that, "if the [agency's] program purpose contemplates support to certain types of intermediaries to provide * * * specified services to third parties," the agency may use a cooperative agreement as its "preferred funding vehicle." GAO, 2 *Principles of Federal Appropriations Law* 10-20 (3d ed. 2006) (citing Burgos & Assocs., 58 Comp. Gen. 785 (1979)). In the GAO's view, the FGCAA requires a procurement contract only "if the intermediary is not itself a mem-

ber of a class eligible to receive assistance from the government." *Id.* at 10-19.

PHAs are state and local government entities that the Housing Act expressly makes eligible for federal support. See, *e.g.*, 42 U.S.C. 1437(a)(1) and (b)(1). HUD therefore acted properly in using cooperative agreements to establish intermediary relationships with the recipient PHAs. The court of appeals' contrary holding should be rejected.

B. The Federal Circuit's Decision Will Impair The Operation Of HUD's Section 8 Program And Could Jeopardize Cooperative Agreements In Other Contexts

If allowed to stand, the court of appeals' decision in this case will have significant adverse consequences for HUD's operation of its Section 8 housing assistance program. By requiring HUD to use procurement contracts instead of cooperative agreements, that decision subjects the program—for the first time in its nearly 40-year existence—to the demanding requirements of federal procurement law, including CICA and the FAR. The court's restrictive understanding of what qualifies as a cooperative agreement, and its apparent unwillingness to defer to federal agencies when analyzing that question, may also hamper the government's ability to implement such agreements in other contexts. The federal government typically disburses more than $580 billion through cooperative agreements and grant agreements each year. See generally *Total Federal Spending*. This Court should grant review to facilitate the proper treatment of those agreements in accordance with the FGCAA.

1. The determination whether an agency's agreement with a non-federal entity is a "procurement

contract" or a "cooperative agreement" under the FGCAA, 31 U.S.C. 6303, 6305, has important legal and practical consequences. Whereas cooperative agreements are governed by flexible OMB guidance documents and agency regulations, procurement contracts must comply with the strictures of federal procurement law.

Most importantly, nearly every federal procurement for property or services is governed by CICA and the FAR. CICA's basic purpose is to ensure that the government "obtain[s] the best products for the best prices," and it proceeds from the assumption that "economy and efficiency must be the cornerstone of the [f]ederal procurement system." H.R. Rep. No. 1157, 98th Cong., 2d Sess. 18 (1984). To implement that goal, CICA generally requires agencies to award procurement contracts using "full and open competition" in which "all responsible sources" are permitted to compete. 41 U.S.C. 107, 3301; but see 41 U.S.C. 3301(a), 3304(a) (recognizing limited exceptions).

CICA and the FAR govern agency actions with respect to soliciting bids for procurement contracts, making awards, and administering contracts. See generally 41 U.S.C. 3101-4712; 48 C.F.R. 1.000 to 53.303-WH-347. The FAR takes up nearly 1700 pages of the Code of Federal Regulations, and it includes detailed requirements for, *inter alia*, acquisition planning (48 C.F.R. Pts. 5-12); contracting methods and types (48 C.F.R. Pts. 13-18); applicable socioeconomic programs (48 C.F.R. Pts. 19-26); general contract financing requirements (48 C.F.R. Pts. 27-32); protests, disputes, and appeals (48 C.F.R. Pt. 33); and contract management (48 C.F.R. Pts. 42-51). Federal contractors and unsuccessful bidders can and often do invoke CICA

and the FAR in suits against the government pursuant to the Tucker Act. See 28 U.S.C. 1491(a)-(b) (vesting CFC with jurisdiction over contract disputes and bid protests).

Unlike procurement contracts, cooperative agreements are not subject to CICA or the FAR, and they need not be awarded based on "full and open competition." 41 U.S.C. 3301; see 31 U.S.C. 6301(3) (noting that purpose of FGCAA is to "*maximize* competition in making procurement contracts," but only to "*encourage* competition in making * * * cooperative agreements") (emphasis added). Instead, cooperative agreements are governed by OMB guidance and agency regulations that grant agencies far greater flexibility in designing, entering into, administering, and terminating such agreements than they enjoy under federal procurement law. See, *e.g.*, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Pt. 200.

2. The court of appeals' decision subjects the ACCs used to implement the Section 8 program to the demanding requirements of both CICA and the FAR. That holding would force HUD to announce a new competition that complies with those requirements. It would also require HUD to comply with hundreds of other statutory and regulatory requirements when granting and administering the ACCs.

Under the decision below, for example, it is not clear whether HUD would be permitted to limit a new competition to PHAs. CICA and the FAR authorize departures from the "full and open competition" requirement for procurement contracts only in certain circumstances. See, *e.g.*, 41 U.S.C. 3301(a), 3304(a)(5). Although the Housing Act requires HUD to adminis-

ter the Section 8 program through ACCs with PHAs, see 42 U.S.C. 1437f(b)(1), respondents argued below that, if the ACCs are procurement contracts, the FGCAA would prohibit HUD from limiting the competition exclusively to PHAs. Resp. C.A. Br. 53 (stating that "all [respondents] acknowledge that a consequence of a finding that the [ACCs] are procurement contracts is that HUD will likely be required to use full and open competition [that is not limited to PHAs]"); see App., *infra*, 79a (indicating that "the [CFC] does not see how [the Housing Act's PHA-only] restriction would apply" if the PHAs were providing "ministerial" services for HUD's own direct benefit). That approach would prevent HUD from following the Housing Act's express directive that the Section 8 program be implemented jointly with PHAs.

If the ACCs are procurement contracts, HUD would also be required to negotiate (and, if necessary, to litigate) any subsequent changes to the PHAs' responsibilities under those agreements individually with each PHA. See generally 48 C.F.R. Subpt. 43.2 (detailing procedures to be followed when government initiates a change to a procurement contract). The PHA would typically be entitled to compensation for any change. See 48 C.F.R. 43.204, 52.243-1(b). If the PHA could establish that the proposed change is a "cardinal change" that is "outside the scope" of the original ACC, HUD would be required to offer the new task separately to the marketplace for competition. *AT&T Commc'ns, Inc.* v. *Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993); see generally *Allied Materials & Equip. Co.* v. *United States*, 569 F.2d 562, 563-564 (Ct. Cl. 1978) (per curiam).

By contrast, the current version of the ACCs allows Congress and HUD to impose new requirements on PHAs at any time during their performance of the contract. A.R. 1360-1361 (emphasizing that PHAs must comply with federal law, "including any amendments to or changes in such laws," and with HUD requirements "as amended or revised from time to time"). That clause gives Congress and HUD the flexibility to make changes to the Section 8 program while ensuring that the changes will apply uniformly nationwide. Although PHAs may terminate their ACCs under federal regulations governing cooperative agreements, see 2 C.F.R. 200.339(a)(4), they do not have the right to receive additional payment or to challenge the new term in court as an impermissible cardinal change, as they would under federal procurement law.

Treating the ACCs as procurement contracts would also require HUD to re-compete the ACCs on a regular basis. The FAR generally limits procurement contracts (including extensions) to a maximum term of five years. 48 C.F.R. 17.204(e). By contrast, the 2012 NOFA establishes that each ACC has a two-year term that may be "extended at the sole election of HUD," without any five-year restriction. A.R. 85; see A.R. 126 ("HUD may unilaterally elect to extend the ACC at HUD's sole discretion.").

3. The court of appeals' decision would appear to have significant implications not only for HUD's $9 billion Section 8 project-based assistance program, but also for its $15 billion tenant-based program. Like the project-based program that is directly at issue here, the tenant-based program relies on collaboration between HUD and PHAs, formalized through ACCs,

to provide housing assistance payments to project owners in accordance with HAP contracts. See p. 5 n.4, *supra*.

Although it may be possible to distinguish the project- and tenant-based programs in various ways, the court of appeals' analysis likely would apply equally to both. Indeed, to the extent the court rested its decision on the view that (1) the funds provided by HUD to PHAs are not "thing[s] of value" and (2) the establishment of an intermediary relationship inherently requires a procurement contract, App., *infra*, 12a-13a, the same analysis would indicate that the ACCs between HUD and PHAs in the tenant-based program are procurement contracts as well. At a minimum, the court's decision raises significant questions about the continued viability of the Section 8 tenant-based assistance program in its current form.

4. Finally, given the breadth of the court of appeals' analysis, the decision below is likely to affect cooperative agreements implemented in other contexts. Neither the court's unwillingness to defer to HUD's determination of the ACCs' principal purpose, its restrictive understanding of what counts as a "thing of value" under Section 6305, nor its reliance on the PHAs' status as intermediaries is limited to the Section 8 context. See pp. 15-29, *supra*.

If the decision below stands, federal agencies may be reluctant to employ cooperative agreements in the future, even in contexts (like HUD's Section 8 program) where they have used such agreements for decades. The CFC will be bound to apply the court of appeals' analysis when exercising its exclusive Tucker Act jurisdiction over bid protests in future cases. See 28 U.S.C. 1491(b)(1); *Emery Worldwide Airlines, Inc.*

v. *United States*, 264 F.3d 1071, 1080 (Fed. Cir. 2001); see also 28 U.S.C. 1295(a)(3) (granting the Federal Circuit exclusive appellate jurisdiction over such cases). Indeed, the CFC has already relied on the Federal Circuit's analysis in this case to invalidate the Department of Interior's decades-long practice of using cooperative agreements to administer the National Wildlife Refuge System. See *Hymas* v. *United States*, 117 Fed. Cl. 466, 486-487, 500-501 (2014).

The decision below threatens to disrupt the ability of HUD and other federal agencies to use cooperative agreements to achieve important federal objectives in appropriate circumstances. In light of the large potential impact of the decision on the management of government programs involving hundreds of billions of dollars in federal funds, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
ROBERT E. KIRSCHMAN, JR.
KIRK T. MANHARDT
DOUGLAS K. MICKLE
Attorneys

HELEN R. KANOVSKY
General Counsel
DORIS S. FINNERMAN
Attorney
Department of Housing and Urban Development

JANUARY 2015

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2013-5093

CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON, NATIONAL HOUSING COMPLIANCE, ASSISTED HOUSING SERVICES CORP., NORTH TAMPA HOUSING DEVELOPMENT CORP., CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC., SOUTHWEST HOUSING COMPLIANCE CORPORATION, AND NAVIGATE AFFORDABLE HOUSING PARTNERS (FORMERLY KNOWN AS JEFFERSON COUNTY ASSISTED HOUSING CORPORATION), PLAINTIFFS-APPELLANTS

v.

MASSACHUSETTS HOUSING FINANCE AGENCY, PLAINTIFF-APPELLEE

v.

UNITED STATES, DEFENDANT-APPELLEE

Mar. 25, 2014

Before: RADER, Chief Judge, LOURIE, and MOORE, Circuit Judges.

RADER, Chief Judge.

The Court of Federal Claims denied CMS Management Services et al.'s (Appellants) request to set aside as unlawful the Department of Housing and Urban Development's (HUD) solicitation and award of contract

administration services related to Section 8 of the Housing Act. Because the Performance-Based Annual Contribution Contracts (PBACCs) are procurement contracts, not cooperative agreements, this court reverses.

I.

The Federal Grant and Cooperative Agreement Act (FGCAA) sets forth the type of legal instrument an executive agency must use when awarding a federal grant or contract. 31 U.S.C. § 6301. In pertinent part, "[a]n executive agency shall use a procurement contract as the legal instrument . . . 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." 31 U.S.C. § 6303. When using a procurement contract, an agency must adhere to federal procurement laws, including the Competition in Contracting Act (CICA), 41 U.S.C. § 3301, as well as the Federal Acquisition Regulation (FAR).

In contrast, an "agency shall use a cooperative agreement as the legal instrument . . . when . . . the principal purpose of the relationship is to transfer a thing of value to the [recipient] to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring . . . property or services." 31 U.S.C. § 6305. The FGCAA notes that "substantial involvement is expected between the executive agency and the [recipient] when carrying out the activity contemplated in the [cooperative] agreement." 31 U.S.C. § 6305(2).

When using a cooperative agreement, agencies escape the requirements of federal procurement law.

II.

Section 8 of the Housing Act of 1937 authorized HUD to provide rental assistance benefits to low-income families and individuals. These benefits included payments to owners of privately-owned dwellings (project owners) to subsidize the cost of rent. Traditionally, HUD entered into Housing Assistance Program contracts (HAP contracts) directly with project owners and paid the subsidies directly. However, the 1974 amendment to the Housing Act gave HUD a second option—to enter into an Annual Contributions contract (ACC) with a Public Housing Agency (PHA). The PHA would then enter into HAP contracts with project owners. HUD provided the PHAs funds to pay the subsidies to the project owners. A PHA is a "State, county, municipality, or other governmental entity or public body . . . authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. § 1437a(b)(6)(A). The parties agree that Appellants are PHAs.

Under the 1974 amendment, HUD entered into approximately 21,000 HAP contracts directly with project owners and 4,200 ACCs with PHAs. J.A. 300/ A.R. 428. However, in 1983, a new Act repealed HUD's authority to enter into new HAP contracts (either directly with project owners or through PHAs) for new constructions of dwellings or substantial rehabilitations. Pub. L. No. 98-181, § 209, 97 Stat. 1153, 1183 (1983). HUD retained authority to administer existing HAP contracts, as well as enter into new HAP

contracts for existing Section 8 dwellings. However, to enter into a new HAP contract, HUD had to engage a PHA unless "no [PHA] has been organized or [if] the Secretary determines that a [PHA] is unable to [implement the Section 8 program]." 42 U.S.C. § 1437f(b)(1). If no PHAs were available, HUD could then contract directly with project owners. *Id.*

In 1997, when many of the HAP contracts under the 1974 amendment were beginning to expire, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act (MAHRA), which permitted HUD to renew existing HAP contracts. MAHRA defined "renewal" as the "replacement of an expiring Federal rental contract with a new contract." MAHRA § 512(12); *CMS Contract Mgmt. Servs. v. United States,* 110 Fed. Cl. 537, 556 (2013). MAHRA was enacted at a time when HUD was facing extensive budget cuts. It had just announced a plan to reduce staff by one-third by the end 2000. J.A. 300/A.R. 2766-67. MAHRA's "Findings and Purposes" noted that HUD "lacks the ability to ensure the continued economic and physical well-being of the stock of federally insured and assisted multifamily housing projects." MAHRA § 511(10). Thus the 1997 Act addressed this problem through "reforms that transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities." MAHRA § 511(11)(C).

Accordingly, HUD began to outsource certain contract administration services. In its budget request for the fiscal year 2000, HUD sought an additional

$209 million in federal funding to pay for this outsourcing program. J.A. 300/A.R. 256. HUD noted that outsourcing contract administration services will "improve the oversight of HUD's project-based program" and that it "plans to procure the services of contract administrators to assume many of these specific duties, in order to release HUD staff for those duties that only government can perform and to increase accountability for subsidy payments." J.A. 300/A.R. 259. While outsourcing these services, HUD still had the obligation under the 1983 amendment to engage a PHA for any new HAP contracts.

Thus, on May 19, 1999, HUD initiated a nationwide competition to award an ACC to a PHA in each of the 50 States (California was allotted two ACCs), plus the District of Columbia and the Commonwealth of Puerto Rico. The ACCs were performance-based; that is, in addition to "basic" administrative fees, PHAs could earn "incentive" fees by entering into HAP contracts beyond the number specified in their contract. J.A. 300/A.R. 435-36. With existing HAP contracts, HUD's Request for Proposals (RFP) stated that it would assign such contracts to the PHA, and that "the PHA [would] assume[] all contractual rights and responsibilities of HUD pursuant to such HAP contracts." J.A. 300/A.R. 449. The RFP also specified that HUD would evaluate proposals "to determine which offerors represent the best overall value, including administrative efficiency, to the Department." J.A. 300/A.R. 442. Lastly, the RFP stated that "[t]his solicitation is not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR) but will follow many of those principles." J.A. 300/A.R. 428.

In response to the 1999 competition, HUD awarded 37 of the PBACCs. PBACCs were awarded in the remaining jurisdictions through later competitions. PHAs administering these PBACCs assumed the title of Performance-Based Contract Administrators (PBCAs).

On February 25, 2011, HUD chose to recompete the PBACCs to ensure that the "Government was getting the best value." J.A. 300/A.R. 676. Many PBCAs adamantly opposed HUD's decision to re-compete and requested that, at a minimum, incumbent PBCAs get priority consideration. HUD denied this request on the ground that stricter competition would lead to greater savings for the government. J.A. 300/A.R. 676. In July 2011, HUD announced awards for all jurisdictions and stated that its decision to recompete the PBACCs saved HUD more than $100 million per year. J.A. 6222.

Appellants were awarded multiple contracts in multiple states; however, a number of other PBCAs and PHAs were not as fortunate. This led to a total of 66 post-award protests being filed with the Government Accountability Office (GAO). Among other things, protestors argued that the PBACCs were procurement contracts and that HUD had not complied with federal procurement laws. *CMS*, 110 Fed. Cl. at 548-50. In response, HUD notified the GAO that it was going to withdraw the awards for the protested contracts and "evaluate and revise its competitive award process for the selection of [PBCAs]." J.A. 300/A.R. 2843. Accordingly, the GAO dismissed the protests as moot. *Id.*

On March 9, 2012, HUD re-issued its solicitation for competition. However, for the first time, HUD expressly characterized the PBACCs as cooperative agreements, and thus, outside the scope of federal procurement law. J.A. 300/A.R. 85. In particular, HUD labeled the solicitation as a "Notice of Funding Availability" (NOFA), *id.*, a term typically reserved for cooperative agreements. HUD also announced that it was choosing not to allow PBCAs (including Appellants) to compete for PBACCs outside their home states:

> HUD will consider applications from out-of-State applicants only for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that State.

J.A. 300/A.R. 82.

This change in policy excluded from consideration many applicants, including Appellants, who HUD previously determined in 2011 provided the government the best value. HUD acknowledged that "nothing in the 1937 [Housing] Act prohibits [Appellants] . . . from acting as a PHA in a foreign state." *Id.* Appellants observed that no change in law or in program requirements required HUD to revise its practice. Thus, in May 2012, Appellants filed pre-award protests with the GAO, arguing that the PBACCs under the NOFA are procurement contracts and thus subject to federal procurement laws, and that the NOFA's anti-

competitive provisions are unreasonable. J.A. 300/ A.R. 2852.

III.

The GAO agreed with Appellants that the PBACCs are procurement contracts. It rejected HUD's argument that the PBACCs "transfer a thing of value" under 31 U.S.C. § 6305 merely because HUD is required to provide funds to the PHAs to make subsidy payments to project owners. The GAO found that, although the payments are made through a depository account to the PBCAs, the PBCAs have no rights to, or control over, the payments and that any excess funds and interest earned on those funds must be remitted to HUD or invested on its behalf. J.A. 300/A.R. 2849.

The GAO also rejected HUD's argument that the administrative fees paid to the PBCAs qualify as a "transfer [of] a thing of value." The GAO found that the purpose of the fee was not to assist the PHAs in carrying out a public purpose. "Rather, . . . the administrative fees are paid to the PHAs as compensation for . . . administering the HAP contracts." J.A. 300/A.R. 2849-50. In other words, the fees merely cover the PHAs' operating expenses.

The GAO determined that "the circumstances here most closely resemble the intermediary or third party situation," J.A. 300/A.R. 2850, "where the recipient of an award [i.e., a PBCA] is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance." S. Rep. No. 97-180, at 5 (1981), 1982 U.S.C.C.A.N. 3, 5; J.A. 300/A.R. 2850. "The 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 5 (1981), 1982 U.S.C.C.A.N. 3, 5. In this regard, the GAO concluded:

> [T]he 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.

J.A. 300/A.R. 2851.

Thus, the GAO held that the PBACCs are procurement contracts. Specifically, these agreements procure the contract administration services of the PBCAs. Because HUD conceded that it did not adhere to federal procurement laws, the GAO recommended that HUD cancel the NOFA and properly re-solicit the contract administration services. J.A. 300/A.R. 2852.

However, on December 3, 2012, HUD announced on its website that "[t]he Department has decided to move forward with the 2012 PBCA NOFA and plans to announce awards on December 14, 2012." J.A. 300/A.R. 9. An agency's decision to disregard a GAO recommendation is exceedingly rare. The Court of Federal Claims has explained that it "give[s] due weight and deference" to GAO recommendations "given the GAO's long experience and special expertise in

such bid protest matters." *Baird Corp. v. United States,* 1 Cl. Ct. 662, 668 (1983). Appellants cite evidence that from 1997-2012, the GAO issued 5,703 merit decisions and sustained 1099 protests; during that period, an agency disregarded the GAO's recommendation only ten times. Appellant Br. 26 n.6.

Soon after HUD's announcement, Appellants filed pre-award protests in the Court of Federal Claims asking it to enjoin HUD from proceeding with the NOFA. Appellants argued that the PBACCs under the NOFA are procurement contracts, and that, even if the PBACCs are cooperative agreements, the NOFA's anticompetitive provisions are arbitrary and capricious under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 706(2)(A).

The Court of Federal Claims ruled in favor of HUD. It reasoned that HUD was "unburdened by any statutory or regulatory obligation to maintain [HAP contracts] going forward in perpetuity," and that "[c]onsistent with the policy goals set forth in the Housing Act, HUD . . . enlisted the states and their political subdivisions, the PHAs, to take on greater program responsibility." *CMS,* 110 Fed. Cl. at 563. The trial court also held that the fact that "HUD achieved certain cost savings in so doing does not convert the PBCA program into a procurement process that primarily benefits HUD, as opposed to the recipients of the Section 8 assistance." *Id.* The Court of Federal Claims did not address Appellants' argument that the NOFA's anticompetitive provisions are arbitrary and capricious under the APA.

Appellants appealed. This court has jurisdiction under 28 U.S.C. § 1295(a)(3).

IV.

This court reviews the trial court's legal determinations de novo and its factual determinations for clear error. *PAI Corp. v. United States*, 614 F.3d 1347, 1351 (Fed. Cir. 2010). Whether a contract is a procurement contract or a cooperative agreement is a question of law. *Maint. Eng'rs v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984). On appeal, Appellants argue that the Court of Federal Claims erred in holding that the PBACCs at issue are cooperative agreements, as opposed to procurement contracts. They also argue that, in any event, the trial court erred by failing to address whether the NOFA's anti-competitive provisions are arbitrary and capricious under the APA.

With respect to Appellants' first argument, this court agrees with Appellants that the PBAACs are procurement contracts and not cooperative agreements. Based on this record, the primary purpose of the PBACCs is to procure the services of the PBCAs to support HUD's staff and provide assistance to HUD with the oversight and monitoring of Section 8 housing assistance. For example, the PBCA outsourcing program was created in response to federal budget restraints and sought to "improve the oversight of HUD's project-based program." J.A. 300/A.R. 253. HUD acknowledged its intention "to *procure* the services of contract administrators to assume many of these specific duties, in order to release HUD staff for those duties that only government can perform and to

increase accountability for subsidy payments." J.A. 300/A.R. 259 (emphasis added). HUD also acknowledged that due to "major staff downsizing . . . HUD sought new ways to conduct *its* business[,] such as the Request for Proposals for outside contractors to administer HUD's portfolio of Section 8 contract[s]." J.A. 300/A.R. 3764 (emphasis added).

The record in this case also shows that HUD's 1999 RFP, which contains substantially similar terms as the 2011 and 2012 competitions, stated that it "pays billions of dollars annually to [project owners and] seeks to improve its performance of the management and operations of this function through this RFP." J.A. 300/A.R. 428. The RFP added that it would evaluate the proposals "to determine which offerors represent the best overall value . . . *to the Department.*" J.A. 300/A.R. 442 (emphasis added). And, as recently as 2013, HUD has acknowledged that "PBCAs have helped make HUD a leader among Federal agencies in reducing improper payments," J.A. 300/A.R. 1963, and that "PBCAs are integral to the Department's efforts to be more effective and efficient in the oversight and monitoring of this program." J.A. 300/A.R. 1960. HUD has also consistently described the role of the PBCAs as "support" for HUD's Field Staff. J.A. 300/A.R. 1964 ("Field Staff perform the following functions, with support from PBCA's, to administer the [program]. . . . ").

The record belies HUD's argument that the housing assistance payments it makes to the PBCAs are a "thing of a value" within the ambit of 31 U.S.C. § 6305. HUD has a legal obligation to provide project owners

with housing assistance payments under the HAP contracts. *See* J.A. 300/A.R. 2276. Transferring funds to the PBCAs to transfer to the project owners is not conferring anything of value on the PBCAs, especially where the PBCAs have no rights to, or control over, those funds. Moreover, the PBCAs must remit any excess funds and interest earned back to HUD. J.A. 300/A.R. 2849.

Likewise, the administrative fee paid to the PBCAs do not constitute a "thing of value" either. While money can be a "thing of value" under 31 U.S.C. § 6305 in certain circumstances, the administrative fee here appears only to cover the operating expenses of administering HAP contracts on behalf of HUD.

At most, HUD has merely created an intermediary relationship with the PBCAs "[w]here the [PBCAs are] not receiving assistance from the federal agency but [are] merely used to provide a service to another entity which is eligible for assistance." S. Rep. No. 97-180, at 5 (1981), 1982 U.S.C.C.A.N. 3, 5. "The fact that the product or service produced by the intermediary may benefit another party is irrelevant." *Id.* In the case of an intermediary relationship, "the proper instrument is a procurement contract." *Id.*

V.

Because the PBACCs at issue are procurement contracts, and because HUD concedes it did not comply with federal procurement laws, the decision of the Court of Federal Claims must be reversed and remanded for disposition consistent with this opinion. This court does not reach Appellants' argument that

the PBACC's anticompetitive requirements are arbitrary and capricious under the APA.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2013-5093

CMS CONTRACT MANAGEMENT SERVICES, THE HOUSING AUTHORITY OF THE CITY OF BREMERTON, NATIONAL HOUSING COMPLIANCE, ASSISTED HOUSING SERVICES CORP., NORTH TAMPA HOUSING DEVELOPMENT CORP., CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC., SOUTHWEST HOUSING COMPLIANCE CORPORATION, AND NAVIGATE AFFORDABLE HOUSING PARTNERS (FORMERLY KNOWN AS JEFFERSON COUNTY ASSISTED HOUSING CORPORATION), PLAINTIFFS-APPELLANTS

v.

MASSACHUSETTS HOUSING FINANCE AGENCY, PLAINTIFF-APPELLEE

v.

UNITED STATES, DEFENDANT-APPELLEE

Aug. 8, 2014

Appeal from the United States Court of Federal Claims
in consolidated Nos. 12-CV-0852, 12-CV-0853,
12-CV-0862, 12-CV-0864, and 12-CV-0869

ON PETITION FOR PANEL REHEARING AND

REHEARING EN BANC

Before: PROST,[*] *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, Circuit Judges.[**]

PER CURIAM.

ORDER

Appellee United States filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by the Appellants. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on August 15, 2014.

---

[*] Sharon Prost assumed the position of Chief Judge on May 31, 2014.

[**] Randall R. Radar, who retired from the position of Circuit Judge on June 30, 2014, did not participate in this decision. Circuit Judge Hughes did not participate.

Aug. 8, 2014
Date

FOR THE COURT

/s/ DANIEL E. O'TOOLE
DANIEL E. O'TOOLE
Clerk of Court

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 12-852C, 12-853C, 12-862C, 12-864C, & 12-869C

CMS CONTRACT MANAGEMENT SERVICES; THE HOUSING AUTHORITY OF THE CITY OF BREMERTON; NATIONAL HOUSING COMPLIANCE; ASSISTED HOUSING SERVICES CORP.; NORTH TAMPA HOUSING DEVELOPMENT CORP.; CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC.; NAVIGATE AFFORDABLE HOUSING PARTNERS; SOUTHWEST HOUSING COMPLIANCE CORP.; AND MASSACHUSETTS HOUSING FINANCE AGENCY, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

Filed: Apr. 19, 2013

OPINION AND ORDER

WHEELER, Judge.

This consolidated bid protest involves five substantially equivalent suits challenging a 2012 Notice of Funding Availability ("NOFA") issued by the U.S. Department of Housing and Urban Development ("HUD"). The purpose of the NOFA is to fund HUD's Performance-Based Contract Administrator ("PBCA") Program for

the administration of Project-Based Section 8 Housing Assistance Payment Contracts. HUD plans to award 53 state-wide contracts to Public Housing Authorities ("PHAs") for the oversight and administration of certain housing subsidy contracts with the private owners of multifamily housing projects. Plaintiffs are Public Housing Authorities and their nonprofit subsidiaries and they allege that certain terms of the NOFA, in particular a preference given to instate applicants, are in violation of the Competition in Contracting Act and the Federal Acquisition Regulation. The Government voluntarily has refrained from awarding the contracts pending the issuance of the Court's decision in this protest.

HUD does not dispute that the NOFA fails to meet the competitive requirements mandated by federal procurement laws and regulations. Instead, it argues that these requirements are inapplicable to the contracts it plans to award under the NOFA because they are not "procurement" contracts at all, but rather are assistance agreements outside the domain of procurement law. Based on this position, the Government moves to dismiss Plaintiffs' claims for lack of subject matter jurisdiction and, in the alternative, for judgment on the administrative record. The Plaintiffs oppose both of these motions and cross-move for judgment on the administrative record.

Reaching a decision in this matter has required the Court's review of a morass of arcane housing assistance statutes and regulations. After performing this review, and for the reasons explained below, the Court finds that the Government is entitled to judgment on

the administrative record because the contracts in question are properly classified as cooperative agreements, not procurement contracts.

Background

In 1974, Congress amended the Housing Act of 1937 ("1937 Act" or "1937 Housing Act") to create what is known as the Section 8 Housing Program ("Section 8 Program"). *See* 42 U.S.C. § 1437f *et seq*; Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974). Created "[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing," 42 U.S.C. § 1437f(a), the Section 8 Program provides federally-subsidized housing to millions of low-income families and individuals through a range of rental assistance programs, both tenant- and project-based. Under all types of Section 8 programs, tenants make rental payments based upon their income and ability to pay, and HUD then provides, under various delivery mechanisms, "assistance payments" to private landlords to make up the difference between the tenant's contribution and the agreed-upon "contract rent." 42 U.S.C. § 1437f *et seq.*; *see also, e.g.*, *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust,* 636 F.3d 1150, 1152 (9th Cir. 2011) (describing the program); *Park Props. Assocs., L.P. v. United States,* 82 Fed. Cl. 162, 164 (2008) (same).

The tenant-based Section 8 program, which is perhaps the better known of the two types of assistance, involves HUD's provision of a limited number of "Housing Choice Vouchers" to local PHAs throughout

the country. The PHAs distribute the vouchers to eligible low-income individuals and families who may use the vouchers to help them obtain eligible private-market rental units of their choice,[2] within certain cost parameters. Generally, these vouchers are portable, in that the tenant may carry the benefit of the voucher to a new rental unit should he or she decide to move. 24 C.F.R. Part 982; *see also, e.g.*, *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 380 (6th Cir. 2007) (Merritt, J. concurring) (explaining operation of tenant-based program); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 45 (1st Cir. 2000) (same).

The dispute in this case involves the second, lesser-known type of Section 8 assistance, which is project-based. Like the voucher holders, beneficiaries of project-based Section 8 programs[3] make income-based

---

[2] Eligible units are those that meet HUD-established standards for decent, safe, and sanitary housing and that are owned by a landlord willing to accept the voucher. *See* 42 U.S.C. § 1437f(f)(7) and (*o*); 24 C.F.R. § 982.1(b)(1).

[3] HUD asserts, and Plaintiffs do not contest, that there are seven separate project-based Section 8 programs directly at issue in this bid protest: (1) the Housing Assistance Payments ("HAPs") Program for New Construction (24 C.F.R. Part 880); the HAPs Program for Substantial Rehabilitation (24 C.F.R. Part 881); (3) the HAPs Program for State Housing Agencies (24 C.F.R. Part 883); (4) the HAPs Program for New Construction Set-Aside for Section 515 Rural Rental Housing Projects (24 C.F.R. Part 884); (5) the Loan Management Set-Aside Program (24 C.F.R. Part 886 Subpart A); (6) the Housing Assistance Program for the Disposition of HUD-Owned Projects (24 C.F.R. Part 886 Subpart C); and

rental payments, with the difference between that payment and the contract rent made up by the program. However, as the name of this program suggests, project-based rental assistance is attached to specific units or buildings owned by private-sector landlords. Thus, project-based assistance is not portable, and when a tenant vacates a subsidized unit, the benefit becomes available to the unit's next occupant. *See* 42 U.S.C. § 1437f(f)(6).

The Section 8 Program has undergone many statutory revisions since its enactment in 1974, and a close examination of the revisions, as well as HUD's responses to the same, is necessary to the resolution of the issues now before this Court. Accordingly, the Court will outline the most significant portions of this statutory and program history below.

---

(7) the HAPs Program for Section 202 Projects (24 C.F.R. Part 891). *See* HUD Mem. at 5 n.4.

In addition, HUD asserts, and Plaintiffs do not contest, that two other project-based Section 8 programs, while not directly at issue in this case, bear the potential to be affected by its outcome: the Moderate Rehabilitation Program (24 C.F.R. Part 882 Subparts A-G); and the Moderate Rehabilitation Single Room Occupancy Program for Homeless Individuals (24 C.F.R. Part 882 Subpart H). These programs are administered by HUD's Office of Public and Indian Housing and Office of Community Planning and Development, respectively. *See* HUD Mem. at 5 n.4.

In the interest of simplicity, however, the Court will refer throughout this opinion to all of these programs collectively, and in the singular, as the "project-based Section 8 program."

I. *The Pertinent Statutes*

A. *The Housing and Community Development Act of 1974*

As noted above, the Section 8 Program first came into being with the enactment of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974) ("1974 Housing Act" or "1974 Act"), which amended certain provisions of the 1937 Housing Act. At the time it was enacted, and as relevant to this case, Section 8, subsection (a) of this Act provided that "[rental] assistance payments may be made with respect to" three categories of housing: "[(1)] existing, [(2)] newly constructed, and [(3)] substantially rehabilitated housing." 88 Stat. 662-63, codified at 42 U.S.C. § 1437f(a)(1). Section 8, subsection (b), in turn, distinguished the proper administration of the program according to the type of housing in question, as follows:

> (1) The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of *existing* dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

> (2) To the extent of annual contributions authorizations under section 5(c) of this Act, the Secretary is authorized to make assistance payments pursuant to contracts with *owners or prospective owners who agree to construct or substantially rehabilitate housing* in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners or prospective owners.

88 Stat. 662-63 (emphasis added).

Thus, subsection (b)(1), which remains in effect as initially enacted, governs *existing* housing, and provides that in administering this segment of the Section 8 Program, HUD is, whenever possible, to enter into "annual contributions contracts" ("ACCs") with PHAs holding jurisdiction over the locality in question. The PHAs, in turn, contract with owners of private housing "to make assistance payments . . . in accordance with this section." This second contract, to which the owner is a party and through which that entity receives the assistance payment, is known as the Housing Assistance Payment ("HAP") contract. 24 C.F.R. § 880.201. Under the terms of the ACC, HUD provides the PHA with funds to cover (1) the housing assistance payments that the PHA, through the HAP, makes to owners, and (2) the costs of the PHA's administrative services related to the program. 24

C.F.R. § 982.151(a)(1). Importantly, under subsection (b)(1) HUD is authorized to bypass the PHA and enter directly into a HAP contract with an owner of existing housing *only* in jurisdictions where no qualified local PHA exists.

In contrast, subsection (b)(2), which has since been repealed—but which as explained below has enjoyed a rather complicated afterlife—governed both *new* and *substantially rehabilitated* housing. Under subsection (b)(2), HUD could subsidize low-income housing by *either* (i) entering into HAP contracts directly with owners or prospective owners of multifamily housing, including, in some instances, PHAs that themselves built or rehabilitated qualifying housing ("sentence one" projects), *or* (ii) establishing ACCs with local PHAs, pursuant to which the PHAs would, in turn, enter into HAP contracts with the owners or prospective owners of multifamily housing ("sentence two" projects). Thus, subsection (b)(2) authorized three possible, and non-exclusive, program designs: (1) private-owner / HUD projects, (2) PHA-owner / HUD projects, and (3) private-owner / PHA projects. *See, e.g.*, 24 C.F.R. § 880.201 (noting these configurations).

At its inception, subsection 8(b)(1) was primarily intended to support tenant-based programs. In 1998, however, the Quality Housing Work Responsibility Act ("QHWRA"), Pub. L. No. 105-276, §§ 545, 550, relocated the authority for tenant-based programs to Section 8(*o*), codified at 42 U.S.C. § 1437f(*o*). However, subsection (b)(1) has also supported certain specific project-based programs.

With respect to subsection (b)(2), in the approximate decade following the enactment of the 1974 Act, HUD implemented its authority in, broadly speaking, two ways. First, under its "sentence one" authority, HUD entered into approximately 21,000 HAP contracts with owners who either constructed or substantially rehabilitated qualifying housing. Although HUD was authorized to enter into such contracts with both private owners and PHA-owners, as a matter of practice the vast majority of these "sentence one" HAP contracts were with private owners. *See* AR 1418, 53 Fed. Reg. 8050 (March 11, 1988) (noting that less than 10 percent of HUD's project-based HAP contracts were for PHA-owner / HUD projects). Pursuant to program regulations, HUD served as the "Contract Administrator" for all of these HAP contracts, the terms of which were generally 20 to 40 years. 24 C.F.R. § 880.201; 88 Stat. 665 (limiting HAP contracts to these terms unless owned or financed by a state or local agency); AR 1702 (HUD Occupancy Handbook).

Second, pursuant to its "sentence two" authority, HUD entered into ACCs with PHAs, which in turn entered into HAP contracts with private owners. Approximately 4,200 such HAP contracts originated in this manner. AR 428 (1999 Request for Proposals, discussed below); HUD Supp. Mem. at 9-10. The PHAs served as the Contract Administrator for these HAP contracts. 24 C.F.R. § 880.201.

B. *The Housing and Urban-Rural Recovery Act of 1983*

In 1983, Congress repealed the portion of Section 8 that provided ongoing authority for the inclusion of

newly constructed and substantially rehabilitated housing within the program. Specifically, Section 209(a) of the Housing and Urban-Rural Recovery Act of 1983 ("HURRA") made two revisions to Section 8. First, it deleted the reference to "newly constructed, and substantially rehabilitated" housing in 42 U.S.C. § 1437f(a)(1). Second, it repealed entirely the then-existing version of 42 U.S.C. § 1437f(b)(2). Pub. L. No. 98-181, § 209(a)(1)-(2), 97 Stat. 1153, 1183 (1983).

However, while HURRA repealed HUD's authority to enter into any *additional* HAP contracts with owners or prospective owners of new or substantially rehabilitated housing (or to enter into ACCs with PHAs to do the same), it also included a savings provision that expressly preserved HUD's ability to continue funding the HAP contracts entered into pursuant to (b)(2) authority prior to the close of 1984. Specifically, Section 209(b) of HURRA provided that: "[t]he amendments made by subsection (a) shall take effect on October 1, 1983, except that the provisions repealed shall remain in effect . . . with respect to any funds obligated for a viable project under section 8 of the United States Housing Act of 1937 prior to January 1, 1984[.]" *Id.* § 209(b).

As is plain from the above, and as all parties agree, HURRA had no effect on HUD's authority to enter into ACCs with PHAs for existing housing pursuant to Section (b)(1) of the 1937 Act, and indeed, this authority remains intact today. 42 U.S.C. § 1437f(b)(1); *see also* HUD Mem. at 11. The parties further agree that HURRA did not—or at least not immediately—affect HUD's ability to continue its administration of the

existing HAP contracts that HUD had entered into pursuant its now-expired (b)(2) authority. *See* HUD Mem. at 11 (following the enactment of HURRA, "HUD and PHAs under ACCs with HUD continued to have authority to administer existing HAP contracts that had been previously entered into for newly constructed and substantially rehabilitated housing"). Thus, in the aftermath of HURRA, "HUD . . . continued to administer those contracts to which it was a party, and PHAs continued to administer those contracts to which they were a party." HUD Reply at 10.

However, as discussed below, the parties sharply disagree as to HURRA's longer-term effect on the programmatic design of project-based Section 8 assistance.

C. *The Multifamily Assisted Housing Reform and Affordability Act of 1997*

Pursuant to former Section 8(e)(1) of the 1974 Act, new construction and substantial rehabilitation HAP contracts (the "(b)(2)" contracts) were limited to terms of 20 to 40 years. Pub. L. No. 93-383, 88 Stat. 633, 665. Although some of these original contracts are still in existence today, most of them, with the passage of time, began to expire in the mid- to late-1990s. To address this problem, in 1996 Congress authorized a handful of limited demonstration programs providing for the renewal of certain project-based HAP contracts. *See* Pub. L. No. 104-99, Title IV, § 405, 110 Stat. 26 (1996); Pub. L. No. 104-120, § 2(a), 110 Stat. 834 (1996); Pub. L. No. 104-204, Title II, § 211, 110 Stat. 2874 (1996).

Then, in 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA") in order to, *inter alia,* provide a permanent and generalized mechanism by which HUD could renew the expiring contracts. Pub. L. No. 105-65, Title V, § 524, 111 Stat. 1384, 1408 (1997), 42 U.S.C. § 1437f note (Supp. III 1997). As relevant to this case, § 524(a)(1) of MAHRA, entitled "Section 8 Contract Renewal Authority," provided that:

> [F]or fiscal year 1999 and henceforth, the Secretary may use amounts available for the renewal of assistance under section 8 or the United States Housing Act of 1937, upon termination or expiration of a contract for assistance under section 8 (other than a contract for tenant-based assistance . . .) to provide assistance under section 8 of such Act at rent levels that do not exceed comparable market rents for the market area. The assistance shall be provided in accordance with terms and conditions prescribed by the Secretary.

("Section 524"). In 1999, Congress replaced this language with a provision stating that:

> [HUD's] Secretary shall, at the request of the owner of the project and to the extent sufficient amounts are made available in appropriation Acts, use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project. The assistance shall be provided under a contract having such terms and conditions as the Secretary considers appropriate, subject to the requirements of this section.

Pub. L. No. 106-74, Title IV, Subtitle C, § 531(a), 113 Stat. 1047, 1109-10, 42 U.S.C. § 1437f note (2006).

Although certain other statutory provisions and amendments are relevant to this case, it is fair to say that the parties' basic dispute boils down to their competing interpretations of HURRA and MAHRA—or more specifically, to their competing interpretations of how these two statutes interact with one another and the remainder of the 1937 Act.

HUD, for its part, makes two different arguments regarding this statutory overlay. Its first and primary argument begins with the premise that after HURRA's repeal of subsection 8(b)(2) in 1983, the agency's "statutory authority to enter into *new* rental assistance agreements survived only in Section 8(b)(1) of the Housing Act." HUD Reply at 7 (emphasis added). HUD further argues here that when HUD renewed the expiring (b)(2) contract pursuant to MAHRA, the renewal contracts were necessarily "'*new*' contracts for *existing* projects"—*i.e.*, executed pursuant to HUD's (b)(1) authority—as opposed to "mere 'extensions' of [the] HAP contracts" the agency originally had executed under its now-expired (b)(2) authority. *Id.* at 10 (emphasis added). In support of this theory, HUD offers various textual arguments, which the Court will discuss and analyze below. In the main, however, HUD's argument is that by the time it renewed the assistance for the projects initiated under subsection 8(b)(2), such projects had "been in existence for more than twenty years," and "common sense" therefore counsels that they were "'existing

dwelling units,' as that phrase is used in Section 8(b)(1)." HUD Reply at 11-12.

The import of this argument derives from the fact that subsection (b)(1) instructs HUD to enter into ACCs with PHAs, which in turn enter into HAP contracts to provide assistance payments to owners. Under this provision, HUD is permitted to enter into a HAP contract directly with a project owner *only* when no qualified local PHA exists for a given jurisdiction. Thus, in HUD's words, "[i]f the Renewal contracts are new contracts under Section 8 of the 1937 Act, that Section 8 authority can only come from Section 8(b)(1), and as such, HAP contract administration lies only with a PHA." *Id.* at 12. Since all parties agree that "(b)(1)" ACCs between HUD and PHAs are properly considered cooperative agreements, this result would foreclose the Plaintiffs' claim that HUD must abide by procurement standards in its actions that are the subject of this suit.

The Plaintiffs offer various legal theories in opposition to this argument, but all agree on two central points. First, with respect to HURRA's repeal of subsection 8(b)(2), the Plaintiffs contend that "[t]here is nothing in the statutory language or legislative history at the time of th[is] repeal . . . or thereafter to indicate that Congress made any attempt to move any of HUD's repealed authority under the repealed [sub]section 8(b)(2) to [sub]section 8(b)(1), or that Congress ever repealed the savings clause." NHC Mem. At 5. Second, they argue that MAHRA neither "effect[ed] a transformation of projects established under [sub]section (b)(2) into 'existing housing' under

[sub]section (b)(1)," nor "otherwise compel[led] HUD to solicit cooperative agreements to obtain HAP contract administration services." AHSC Reply at 7. To the contrary, the Plaintiffs contend that "HUD remained responsible [under subsection (b)(2)] for ensuring that HAP contract administration was performed, either by itself or by contracting with a third party." *Id.*

HUD, however, also makes a second, alternative argument, to the effect that even if the Plaintiffs are correct that the contracts that are the subject of this suit are governed by (b)(2), nothing in that provision requires HUD to directly administer the renewal HAP contracts. As explained above, subsection (b)(2) consists of two sentences: the first grants HUD authority to enter into HAP contracts directly with project owners, and the second—which, it is worth noting, is effectively identical to subsection (b)(1)—grants HUD authority to enter into ACCs with local PHAs, which in turn enter into HAP contracts with project owners. Here, HUD contends that:

> even if HUD was a contract administrator under the initial [HAP] contract, the 1937 Act does not mandate that either HUD or a PHA enter into a HAP contract, and it does not mandate that either HUD or a PHA administer the HAP contract. [subs]ection (b)(2) provide[s] that either HUD or PHAs [may] be contract administrators. . . . Therefore, for contracts already in existence, HUD had discretion to choose between direct administration of HAP contracts and assignment of HAP contracts to PHAs for administration.

HUD Reply at 12.

The Plaintiffs, unsurprisingly, disagree, though their reasoning varies considerably from party to party. In the main, the Plaintiffs contend that MAHRA "commands HUD to enter into HAP renewals," CMS Reply at 11, and therefore obliges HUD to act as the contract administrator for the renewal contracts. As such, in contracting out this responsibility to the PHAs, Plaintiffs contend that HUD "is receiving a direct benefit" in the form of "services that HUD itself is otherwise required to perform," and is therefore engaged in a procurement activity under the standards of the Federal Grant & Cooperative Agreement Act, 31 U.S.C. §§ 6301-6308 ("FGCAA"). NHC Mem. at 24. The Court will analyze these arguments below, but first turns to the program and procedural history underlying this bid protest.

II. *Factual and Procedural History*

A. *"HUD 2020" Reforms and the 1999 Request for Proposals*

On June 26, 1997, then-HUD Secretary Andrew Cuomo announced an agency-wide management reform plan called "HUD 2020." AR 2766. Among the key reforms announced in this plan was a commitment to cut HUD's staff by nearly one-third, "from the current 10,500 to 7,500 by the end of the year 2000." *Id.* Four months later, on October 27, 1997, Congress enacted MAHRA, instituting (among other reforms) the renewal authority for project-based Section 8 assistance outlined above. Consistent with Secretary Cuomo's "HUD 2020" reform plan, MAHRA's "Find-

ings and Purposes" observed that "due to Federal budget constraints, the downsizing of [HUD], and diminished administrative capacity, the Department lacks the ability to ensure the continued economic and physical well-being of the stock of federally insured and assisted multifamily housing projects." MAHRA § 511(10). Congress further stated that MAHRA was intended to address such problems by introducing "reforms that transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities." *Id.* § 511(11)(C).

In March 1998, HUD's Office of Inspector General ("OIG") informed Congress that as part of its "extensive reorganization under [the] HUD 2020 Management Plan," the agency would issue a "Request for Proposals for outside contractors to administer HUD's portfolio of Section 8 contracts." AR 2763 (internal Advisory Report on Section 8 Contract Administration, issued October 26, 1998, summarizing the March 1998 OIG Semiannual Report to Congress). Thereafter, HUD's Fiscal Year 2000 Budget Request included a request for $209 million to fund an initiative to assign contract administration of its project-based HAP contracts to state-based governmental agencies. AR 256, 258-59. The Budget Request stated that HUD "plan[ned] to procure the services of contract administrators to assume [contract administration] duties, in order to release HUD staff for those duties that only government can perform and to increase accountability for subsidy payments." *Id.* at 259. The Budget Request further stated:

> The Department would solicit for competitive proposals from eligible public agencies to assume these contract administration duties. . . . The solicitation would specify exact duties, performance measures, and the method of selection and award. The evaluation would be based upon the respondent's capabilities and proposed contract prices.

Id.

True to its word, on May 3, 1999, HUD issued a Request for Proposals ("RFP") for "Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts" ("1999 RFP"). AR 428 *et seq.*, 64 Fed. Reg. 27,358 (May 19, 1999). The 1999 RFP stated that "[t]his solicitation is not a formal procurement within the meaning of the Federal Acquisition Regulations (FAR) but will follow many of those principles," and sought proposals "to provide contract administration services" for "most of" the approximately 20,000 project-based Section 8 HAP contracts that HUD was, at that time, administering (*i.e.*, the (b)(2) "sentence one" projects). *Id.* Although the RFP was initially limited to the "sentence one" projects, it expressly noted the existence of an additional 4,200 projects that were being administered by PHAs (*i.e.*, the (b)(2) "sentence two" projects). The RFP stated that PHAs "will generally continue to administer these HAP Contracts until expiration. . . . [but] [w]hen HUD renews [these contracts] . . . HUD generally expects to transfer contract administration of the renewed HAP Contracts to the Contract Administrator (CA) it selects through this RFP

for the service area where the property is located." *Id.*

The RFP specified that the contract administration duties would be performed pursuant to a performance-based ACC ("PBACC"[4]) entered into with HUD, that "[b]y law, HUD may only enter into an ACC with a legal entity that qualifies as a "public housing agency" (PHA) as defined in the United States Housing Act of 1937 (42 U.S.C. [§] 1437 *et seq.*),"[5] and that responsive

---

[4] The 1999 RFP does not expressly use the term "performance-based ACC," nor, as far as the Court can determine, does any HUD document related to this protest adopt the abbreviation "PBACC" in reference to these ACCs. However, the 1999 RFP did state that "[f]or work performed under ACCs awarded in response to this RFP, HUD will use Performance-Based Service Contracting (PBSC)," defined as a contracting method that utilizes "measurable, mission-related [goals and] established performance standards and review methods to ensure quality assurance[,] [and which] . . . assigns incentives to reward performance that exceeds the minimally acceptable and assesses penalties for unsatisfactory performance." AR 430, 64 Fed. Reg. at 27,360. Moreover, later relevant HUD documents refer to the Contract Administrators for these ACCs by the more specific term Performance-Based Contract Administrators ("PBCAs").

As the 1999 RFP clearly demonstrates, and no party contests, since the ACCs in question in this bid protest have been performance-based since the 1999 RFP, the Court will use the term "PBCAAs" throughout the remainder of this opinion.

[5] As HUD noted in the 1999 RFP, the 1937 Housing Act defines a "public housing authority" as a "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 low-income housing." 42 U.S.C. § 1437a(b)(6)(A); *see* AR 429, 64 Fed. Reg. at 27,359.

proposals would "cover an area no smaller than an individual State (or U.S. Territory)." AR 428-29, 64 Fed. Reg. at 27,358-59.

The RFP further provided that:

> successful offerors under this RFP will oversee HAP Contracts, in accordance with HUD regulations and requirements. . . . After execution of the ACC, the CA [*i.e.,* Contract Administrator] will subsequently assume or enter into HAP Contracts with the owners of the Section 8 properties. The Contract Administrator will monitor and enforce the compliance of each property owner with the terms of the HAP Contract and HUD regulations and requirements.

AR 428, 64 Fed. Reg. at 27,358. Further:

> [t]he major tasks of the Contract Administrator under the ACC and this RFP include, but are not limited to:
>
> — Monitor[ing] project owners' compliance with their obligation to provide decent, safe, and sanitary housing to assisted residents.
>
> — Pay[ing] property owners accurately and timely.
>
> — Submit required documents accurately and timely to HUD (or a HUD designated agent).

However, the 1999 RFP also expressly provided that this limitation 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 under the ACC between the PHA and HUD." *Id.*

— Comply with HUD regulations and requirements, both current and as amended in the future, governing administration of Section 8 HAP contracts.

AR 429, 64 Fed. Reg. at 27,359.

Finally, although the 1999 RFP did not mention "staff downsizing," it stated 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. HUD seeks to improve its performance of the management and operations of this function through this RFP." *Id.* 428, 64 Fed. Reg. at 27,358. The RFP was silent regarding any statutory amendments or directives mandating that HUD issue the RFP or use ACCs to shift its HAP contract administration duties to PHAs.

As a result of the 1999 RFP, HUD ultimately awarded 37 PBACCs. AR 271. Between 2001 and 2003, HUD then awarded seven more PBACCs under a separate, substantially equivalent, RFP. Finally, between 2003 and 2005, it awarded nine additional PBACCs under a related invitation for the submission of applications.[6] *Id.* At some point not clearly established in the record, HUD received approval to extend the contracts for an additional ten years. *Id.* 272.

---

[6] The 1999 RFP, as well as the 2011 and 2012 notices discussed below, covered 53 "states"—the 50 states of this country, plus the District of Columbia, Puerto Rico, and the Virgin Islands.

B. *The 2011 Invitation for Submission of Applications*

On February 25, 2011, HUD issued an "Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments Contracts" ("2011 Invitation" or "Invitation"). AR 522-43. The Invitation was for the purpose of receiving new applications from PHAs to administer the Project-Based Section 8 Housing Assistance Payments Contracts as Performance-Based Contract Administrators ("PBCAs"). As relevant to this bid protest, the terms of the 2011 Invitation largely tracked those of the 1999 RFP.

After HUD awarded PBACCs under the 2011 Invitation for each of the covered jurisdictions, some of the disappointed PHAs filed protests at the Government Accountability Office ("GAO"), contesting the award of 42 PBACCs. AR 2843 (GAO Decision). The protests generally alleged that the PBACCs were procurement contracts and not properly awarded in accordance with federal procurement law, that out-of-state PHAs were not legally qualified to administer the Section 8 program within a given state, and that HUD's evaluation of the applications was flawed. Immediately thereafter, HUD began receiving a deluge of correspondence from various State Attorney Generals, offering opinions on whether their respective state law permits an out-of-state PHA to operate lawfully within its jurisdiction. In every case, the Attorney General opined

that his or her state's law did not permit such operation.[7]

On August 10, 2011, HUD awarded PBACCs for the 11 "states" for which it had received only one application from a qualified PBCA. AR 220. These ACCs remain in effect today, and are not involved in this litigation. On the same date, HUD announced that it would not, at that time, award PBACCs in the remaining 42 jurisdictions, but would instead evaluate and revise its award process for these contracts. *Id.* 2843. Accordingly, GAO dismissed the protests to allow HUD to take corrective action. *Id.*

C. *The 2012 Notice of Funding Availability*

On March 9, 2012, HUD issued a "Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts" ("2012 NOFA"), the document that is the subject of this litigation. AR 551-89. The terms of the 2012 NOFA differ in four material ways from the 1999 RFP and 2011 Invitation. First, the 2012 NOFA expressly invokes subsection (b)(1) as it authority for awarding the ACCs, stating, "[t]he PBCA program . . . effectuates the authority explicitly provided under section 8(b)(1) of the 1937 Act for HUD to enter into an ACC with a PHA [as defined by the Act]." AR

[7] Links to these various state attorney general opinions transmitted to HUD can be found at: *http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA%20NOFA* (last visited April 17, 2013).

552. Second, the NOFA expressly states that the "ACCs HUD seeks to award are cooperative agreements," and that:

> a principal purpose of the ACC between HUD and the PHA is to transfer funds (project-based Section 8 subsidy and performance-based contract administrator fees, as appropriated by Congress) to enable PHAs to carry out the public purposes of supporting affordable housing as authorized by sections 2(a) and 8(b)(1) of the 1937 Act.

Id. 557.

Third, the NOFA establishes a preference for in-state applicants, stating that although "HUD believes that nothing in the 1937 Act prohibits" a PHA "from acting as a PHA in a foreign State:"

> HUD will consider applications from out-of-state applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications HUD receives from an out-of-State applicant for that state.

Id. at 554 (emphasis added).[8] Finally, in the Question and Answer section of the NOFA, the NOFA effectively creates an additional preference for a particular type of PHA—namely, a state Housing Finance Au-

---

[8] The NOFA further provides that, if no qualified applicant applies "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 608.

thority ("HFA"). In this section, HUD confirms that where the Attorney General of a given state submits a letter to HUD concluding that under that state's law, the state HFA alone possesses statewide jurisdiction as a PHA, HUD will award the ACC for the state to the HFA. AR 617, 618, 622 (NOFA Q & As 163, 170, 191).

D. *2012 GAO Protest*

In May 2012, prior to the due date for the submission of applications under the 2012 NOFA, seven protesters[9] filed bid protests at the GAO, making substantially similar arguments as they make here—namely that the NOFA's preference for in-State PHAs, as well as its effective preference for state HFAs in particular, violated the terms of the Competition in Contracting Act, 41 U.S.C § 3301, ("CICA") as well as the terms of the Federal Acquisition Regulation ("FAR").

On August 15, 2012, the GAO issued a decision sustaining the protests. AR 2838-52. The GAO decision did not consider the complex statutory history outlined above, but instead focused on (1) the stand-alone terms of the 1999 RFP, 2011 Invitation, and 2012 NOFA, and (2) the standards distinguishing procurement contracts, grants, and cooperative agreements under the FGCAA, 31 U.S.C. §§ 6301-6308.

Summarizing the FGCAA standards, the GAO stated that HUD could properly characterize the

---

[9] The GAO protesters included all of the Plaintiffs here, with the exception of California Affordable Housing Initiatives, Inc., which has protested the 2012 NOFA solely in this venue.

ACCs at issue as cooperative agreements only if "the principal purpose of the[se] agreement[s] is to provide assistance to the recipient [*i.e.*, the PHA] to accomplish a public objective authorized by law." AR 2847. "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." *Id.* In particular, the GAO further opined that "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.*

Applying these criteria, the GAO concluded that the purpose of the ACCs in question was not to "assist" PHAs because, *inter alia*, the PHAs served as mere "conduits" for the HAP payments from HUD to property owners, and certain statements made by HUD in advance of the 1999 RFP indicated that HUD saw its principal purpose in awarding the ACCs as facilitating a staff reduction. AR 2850-51.

HUD decided to disregard the GAO decision and proceed with the NOFA. The Plaintiffs then filed their respective actions challenging HUD's determination in this Court, again alleging that the ACCs in question are procurement contracts, and that the NOFA's preference for in-State PHAs, and for the statewide HFAs in particular, violated CICA and the FAR. On December 13, 2012, the Court consolidated the judicial actions and established a briefing schedule on the cross-motions regarding subject matter jurisdiction and for judgment on the administrative record.

On February 19, 2013, the Court heard oral argument on the parties' respective motions.

The Plaintiffs in this case are as follows, and will be referred to by the abbreviations herein: CMS Contract Management Services and the Housing Authority of the City of Bremerton (collectively, "CMS"); Assisted Housing Services Corp., North Tampa Housing Development Corp., and California Affordable Housing Initiatives, Inc. (collectively, "AHSC"); Southwest Housing Compliance Corporation ("SHCC"); Navigate Affordable Housing Partners ("NAHP"); National Housing Compliance ("NHC"); and Intervenor Plaintiff Massachusetts Housing Finance Agency ("MHFA"). All Plaintiffs are PHAs within the meaning of the 1937 Housing Act. In addition, the Court permitted the *amicus* participation of the National Council of State Housing Authorities ("NCSHA").

Analysis

HUD does not dispute that the 2012 NOFA fails to comply with CICA and the FAR, AR 1151, but instead argues that these statutory and regulatory requirements have no applicability to its actions here, as the contracts to be awarded under the NOFA are cooperative agreements, not procurement contracts. Accordingly, the Government has moved, pursuant to Rule of the Court of Federal Claims ("RCFC") 12(b)(1), to dismiss all of the Plaintiffs' challenges to the propriety of the 2012 NOFA for lack of subject matter jurisdiction. In the alternative, the Government moves pursuant to RCFC 52.1(c) for judgment on the administrative record. The Plaintiffs have opposed these motions and cross-moved under RCFC 52.1(c) for

judgment on the administrative record. However, the Plaintiffs have, for the most part, made these motions separately, and offered somewhat divergent arguments supporting their respective positions.

The Court will address the Government's motion to dismiss for lack of subject matter jurisdiction, and the parties' cross-motions for judgment on the administrative record, in turn below.

I. *Subject Matter Jurisdiction*

A defendant may raise either a facial or a factual challenge to a plaintiff's assertion that a court possesses subject matter jurisdiction over its claims. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993). In a facial challenge, where a defendant challenges the sufficiency of the facts alleged in the complaint to establish jurisdiction, the Court must accept the plaintiff's well-pleaded factual allegations as true, and draw all reasonable inferences in the plaintiff's favor. *Id.* at 1583 (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). However, where, as here, "the Rule 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction . . . the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion." *Id.* (internal citations omitted); *Shoshone Indian Tribe of Wind River Reservation v. United States,* 672 F.3d 1021, 1030 (Fed. Cir. 2012). In such a case, "[i]n resolving [any] disputed predicate jurisdiction facts, 'a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings.'" *Shoshone Indian Tribe,*

672 F.3d at 1030 (quoting *Cedars-Sinai Med. Ctr.*, 11 F.3d at 1584). In addition, it is the plaintiff's burden to establish any challenged jurisdictional facts by a preponderance of the evidence. *Sci. Applications Int'l Corp. v. United States,* 102 Fed. Cl. 644, 651 (Fed. Cl. 2011).

The Plaintiffs assert jurisdiction under the Tucker Act, which grants this Court jurisdiction to render judgment on "an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). The Tucker Act does not itself define "procurement," *Resource Conservation Group, LLC v. United States,* 597 F.3d 1238, 1244 (Fed. Cir. 2010). However, in determining the scope of § 1491(b)(1), the Federal Circuit has adopted the definition of "procurement" contained in 41 U.S.C. § 403(2), which has been reorganized into 41 U.S.C. § 111. *Distributed Solutions, Inc. v. United States,* 539 F.3d 1340, 1345 (Fed. Cir. 2008). Section 111, in turn, provides that the term "'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with a contract completion and closeout."

The Government opposes the Plaintiffs' assertions of jurisdiction, arguing that this Court lacks the authority to adjudicate this case on the merits "because HUD's award of a cooperative agreement in the form

of [an] ACC is not a 'procurement' within the meaning of the Tucker Act." HUD Mem. at 21. However, although the parties jointly conceptualize the jurisdictional question in this case to be whether the PBACCs awarded by HUD under the 2012 NOFA are "procurement contracts" within the meaning of section 1491(b)(1) (or rather cooperative agreements), the Court finds that this issue is properly considered on the merits.

That is, the Court finds under the Tucker Act, it has jurisdiction to review a party's contention that a particular government contract is a procurement contract and therefore subject to CICA. *See 360Training.com, Inc. v. United States*, 104 Fed. Cl. 575, 588 (2012) (holding that "the definition of 'procurement' under the Tucker Act is broader than the definition of 'procurement contract' in the FGCAA," such that "an agency can engage in a procurement process [for the purposes of the Tucker Act] even though it is using a cooperative agreement, instead of a procurement contract, to memorialize the parties' agreement"). Because the Plaintiffs have raised exactly such a claim, jurisdiction is proper, and the Court will analyze the question of whether the PBACCs are procurement contracts or cooperative agreements on the merits.

II. *Cross-Motions for Judgment on the Administrative Record*

A. *Standard of Review*

In a bid protest, a court reviews an agency's procurement-related actions under the standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which provides that a reviewing court

shall set aside the agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.*; *see also, e.g.*, *Banknote Corp. of Am., Inc. v. United States,* 365 F.3d 1345, 1350-51 (Fed. Cir. 2004) (internal citation omitted). Under this standard, "[a] bid protest proceeds in two steps." *Bannum, Inc. v. United States,* 404 F.3d 1346, 1351 (Fed. Cir. 2005). First, the Court determines whether a procurement-related decision either (a) lacked a rational basis, or (b) involved a violation of a statute or regulation. *Axiom Res. Mgmt., Inc. v. United States,* 564 F.3d 1374, 1381 (Fed. Cir. 2009). "A court evaluating a challenge on the first ground must determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion. When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations." *Id.* (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States,* 238 F.3d 1324, 1332-33 (Fed. Cir. 2001)).

The inquiry at this first step is "highly deferential," *Advanced Data Concepts, Inc. v. United States,* 216 F.3d 1054, 1058 (Fed. Cir. 2000), and *de minimis* errors in a procurement-related process do not justify relief, *Grumman Data Sys. Corp. v. Dalton,* 88 F.3d 990, 1000 (Fed. Cir. 1996) (citing *Andersen Consulting v. United States,* 959 F.2d 929, 932-33, 935 (Fed. Cir. 1992)). If the Court finds that the agency acted without a rational basis or contrary to law, it must then, at the second step, "determine . . . if the bid protester was prejudiced by that conduct." *Bannum, Inc. v. United States,* 404 F.3d 1346, 1351 (Fed. Cir.

2005). "Prejudice is a question of fact," which the plaintiff again bears the burden of establishing. *Id.* at 1353, 1358.

Moreover, in reviewing a motion for judgment on the administrative record made pursuant to RCFC 52.1(c), the court determines "whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." *Afghan Am. Army Servs. Corp. v. United States,* 90 Fed. Cl. 341, 355 (Fed. Cl. 2009). The existence of a material issue of fact, however, does not prohibit the Court from granting a motion for judgment on the administrative record, nor is the court required to conduct an evidentiary proceeding. *Id.* ("In a manner 'akin to an expedited trial on the paper record,' the court will make findings of fact where necessary.") (quoting *CHE Consulting, Inc. v. United States,* 78 Fed. Cl. 380, 387 (Fed. Cl. 2007)). Thus, as relevant to this case, in order to prevail on the merits, Plaintiffs must demonstrate, by a preponderance of the evidence, (1) that the terms of the NOFA were unlawful, and (2) that such terms caused them to suffer "a non-trivial competitive injury which can be addressed by judicial relief." *Weeks Marine v. United States,* 575 F.3d 1352, 1362 (Fed. Cir. 2009).

B. *Discussion*

As presented, HUD's argument on the merits is that if the NOFA is a procurement and therefore subject to CICA, the agency's decision to forego a CICA-compliant process is nonetheless lawful under the CICA exception that applies where there exist alternate "procurement procedures . . . expressly

authorized by statute." HUD Mem. at 39 (citing 41 U.S.C. § 3301(a)). For their part, the Plaintiffs argue variously that HUD may not invoke this exception because the agency did not certify its applicability as required under the relevant regulations, *see* CMS Mem. at 36 (citing 48 C.F.R. §§ 6.301-1; 6.304); that HUD's characterization of the PBACCs as cooperative agreements violates the FGCAA, *see* NAHP Mem. at 35; and that the NOFA—and in particular, its in-state preference—violates CICA's mandate of "full and open completion" in government contracting, *see id.* at 42 (citing 41 U.S.C. § 3301).

For the reasons explained below, however, the Court finds that it need not resolve many of these questions in order to dispose of this case. Having found jurisdiction to determine whether the PBACCs are procurement contracts or cooperative agreements, the Court must now proceed to analyze this question on the merits. If, following such an analysis, the Court finds that the PBACCs are procurement contracts, CICA would apply, and further related analysis would become necessary. However, because the Court does not reach this conclusion, but instead finds that HUD has properly classified the PBACCs as cooperative agreements, it need not reach any CICA-related issues raised by the parties.

Accordingly, the Court will explain why, after examining the Housing Act of 1937, as amended, and in light of the standards set forth in the FGCAA, it has determined that the PBACCs are best classified as cooperative agreements rather than procurement contracts.

1. *FGCAA Standards*

The Federal Grant and Cooperative Agreement Act of 1977, or FGCAA, "provides guidance to executive agencies in determining which legal instrument to use when forming a [contractual] relationship" between the agency and another party. *360Training.com*, 104 Fed. Cl. at 579; 31 U.S.C. §§ 6301-6308. The FGCAA establishes what is sometimes referred to as the "principal purpose" test, providing that "[a]n executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government" and a recipient when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services *for the direct benefit of the United States Government*[.]" 31 U.S.C. § 6303 (emphasis added). Conversely, the FGCAA counsels that "[a]n executive agency shall use a cooperative agreement . . . when (1) "the principal purpose of the relationship is to *transfer a thing of value*" to the recipient in order "*to carry out a public purpose of support or stimulation authorized by a law* of the United States," and (2) "*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." *Id.* § 6305 (emphasis added).

The FGCAA standards are expressed in mandatory, not precatory, terms. Nonetheless, as HUD and at least some of the Plaintiffs recognize, these standards do not provide hard-and-fast, one-size-fits-all rules. Rather, because every agency has inherent authority to enter into procurement contracts, but must be spe-

cifically authorized by statute to enter into assistance agreements, the FGCAA standards must be applied within the context of the agency's specific statutory mandate in entering into the contractual relationship in question. U.S. Government Accountability Office, Principles of Federal Appropriations Law, Vol. II, p. 10-17 (2006) ("GAO Redbook") ("[T]he relevant legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions."); *see also* HUD Mem. at 26 ("Although Congress enacted the FGCAA . . . to establish criteria for Federal agency use of grants, cooperative agreements, and procurement contracts, the decision as to which legal instrument is appropriate depends, in the initial analysis, on the agency's statutory authority."); NHC Mem. at 39 ("There are two steps involved in conducting an FGCAA analysis, and we do not disagree that the first step in determining the correct funding instrument" is to examine "'whether the agency has statutory authority to engage in assistance transactions at all'") (quoting GAO Redbook at 10-17); AHSC Mem. at 37 (similar).

In order to determine whether the PBACCs are procurement contracts or cooperative agreements, the Court will therefore begin with a close examination of the "precise statutory obligations" underlying these contracts,[10] as contained in the 1937 Housing Act, as

---

[10] Plaintiff NHC attempts to make much of the fact that the PBACCs were awarded, and have always been treated, as contracts with HUD. NHC Mem. at 17-18. However, as HUD correctly points out, this fact is of no moment, because "[a] grant agreement is an enforceable contract in this court." HUD Reply at 25 (quot-

amended. *360Training.com*, 104 Fed. Cl. at 579. Once the nature of these obligations has been determined, the Court will then examine them in light of the standards delineated by the FGCAA. *See* GAO Redbook at 10-17 ("[D]eterminations of whether an agency has authority to enter into [cooperative agreements] in the first instance must be based on the agency's authorizing or program legislation. Once the necessary underlying authority is found, the legal instrument . . . that fits the arrangement as contemplated must be used, using the [FGCAA] definitions for guidance as to which instrument is appropriate.").

2. *The PBACCs are Cooperative Agreements*

HUD essentially offers two theories of its case. The first of these is based primarily on subsection 8(b)(1) and the second, on subsection 8(b)(2). The Court will address each of these arguments in turn below.

---

ing *Knight v. United States,* 52 Fed. Cl. 243, 251 (2002), *rev'd on other grounds,* 65 Fed. Appx. 286 (Fed. Cir. 2003)). Thus, the relevant issue here is not whether the PBACCs are "contracts," but rather what *type* of contractual relationship they represent with the Government. The Court will therefore sometimes refer to the PBACCs as "contracts," but this term is without legal significance in its analysis.

- *Subsection 8(b)(1) Does Not Govern the ACCs for the New Construction and Substantial Rehabilitation Projects*

HUD readily concedes that, pursuant to subsection (b)(2), it was the party that originally entered into, and was responsible for contract administration of, the HAP contracts in question. HUD Reply at 9. However, HUD argues that taken together, HURRA's repeal of Subsection 8(b)(2) and MAHRA's enactment of renewal authority for expiring project-based HAP contracts create a result where the renewal contracts (of which the HAPs at issue here are a subset) are necessarily "'*new*' contracts for *existing* projects," and hence governed by HUD's authority under Section 8(b)(1) of the Housing Act. HUD Reply at 7. Again, Subsection (b)(1) instructs HUD to enter into ACCs with PHAs, which in turn enter into HAP contracts to provide assistance payments to owners. Under this provision, *only* when no qualified local PHA exists for a given jurisdiction is HUD permitted to enter into a HAP contract directly with a project owner. Moreover, all parties agree that "traditional" ACCs under subsection (b)(1) are properly considered assistance agreements, not procurement contracts. *See, e.g.*, CMS Reply at 2; AHSC Mem. at 35. Thus, the import of this argument is that, in HUD's words, "[i]f the Renewal contracts are new contracts under Section 8 of the 1937 Act, that Section 8 authority can only come from Section 8(b)(1), and as such, HAP contract administration lies only with a PHA." HUD Reply at 12. And, if HAP contract administration lies with the PHAs (as opposed to HUD), then under the FGCAA standards HUD is not "outsourcing" these tasks for its

own benefit, and the PBACCs therefore are not procurement contracts.

HUD's argument here proceeds in two steps. First, HUD maintains that "[a]fter [HURRA's] repeal of Section 8(b)(2) in 1983, [HUD's] statutory authority to enter into new rental assistance agreements survived only in Section 8(b)(1) of the Housing Act." Id. at 7. Second, HUD argues that when MAHRA gave the agency authority to renew the expiring (b)(2) contracts, it effectively mandated that such renewals be made pursuant to subsection (b)(1), as "new" contracts for "existing" housing. *Id.* Although these arguments are ultimately very closely linked, the Court will address them separately and in turn below. As the Court will explain, it finds that this argument is fatally flawed by several strained constructions of the relevant statutory language.

• *HURRA*

In 1983 Congress in HURRA repealed HUD's ongoing authority under Subsection 8(b)(2) to support privately owned new or substantially rehabilitated housing projects pursuant to either a HAP contract with the owner, or an ACC with a PHA (which in turn would enter into a HAP with the owner). However, HURRA also enacted a savings clause, which provides in relevant part that "the provisions repealed shall remain in effect . . . with respect to any funds obligated for a viable project under section 8 of the United States Housing Act of 1937 prior to January 1, 1984[.]" HURRA § 209(b). HUD contends that "[p]rior to January 1, 1984, no funds were obligated for a project beyond the term of the original HAP con-

tract," and that therefore the savings clause carried legal force with respect to a particular HAP contract only for the length of the original term of that contract. HUD Supp. Mem. at 1 n.1.

Plaintiffs, on the other hand, argue that HUD has identified no statute that ever fully repealed subsection (b)(2)—and, more importantly, that the subsequent statutory history of the Housing Act indicates that Congress has repeatedly and expressly "grandfathered" HUD's expired (b)(2) authority through many statutory revisions. The first relevant amendment that Plaintiffs point to is the Community Housing and Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (the "1992 Act" or "1992 Housing Act"). Although the 1992 Act implemented many reforms, its relevance to this case lies in its addition of a single definition to the 1937 Act—to wit, that of "project-based assistance." The 1992 Act defined this term as "rental assistance under section (b) of this section [*i.e.,* Section 8] that is attached to the structure pursuant to subsection (d)(2). . . . " *Id.* § 146, codified at 42 U.S.C. § 1437f(f)(6).[11] Subsection (d)(2), also an addition of the 1992 Act, states, in turn:

---

[11] In full, 42 U.S.C. § 1437f(f)(6) currently defines "project-based assistance" as "rental assistance under section (b) of this section that is attached to the structure pursuant to subsection (d)(2) *or (o)(13)* of this section." (emphasis added). Subsection (*o*)(13) applies only to the tenant-based Section 8 program, and provides that a PHA may, subject to certain conditions, divert up to 20 percent of the funding the PHA receives from HUD for its tenant-based program to fund project-based tenant subsidies attached to existing, newly constructed, or rehabilitated housing. As subsec-

> In determining the amount of assistance provided under [either (i)] an assistance contract for project-based assistance under this paragraph or [(ii)] *a contract for assistance for housing constructed or substantially rehabilitated pursuant to assistance provided under subsection (b)(2) of this section (as such subsection existed immediately before October 1, 1983*), the Secretary may consider and annually adjust, with respect to such project, [for the cost of service coordinators for residents who are elderly or disabled].

Id. § 674, currently codified at 42 U.S.C. § 1437f(d)(2)(B)(i) (emphasis added).

HUD denies that these provisions are evidence of its authority under subsection (b)(2) continuing to be grandfathered into the 1937 Housing Act. In making this argument, it emphasizes the first portion of the definition added by section 146 of the 1992 Act: *i.e.*, that "project-based assistance" is "rental assistance *under subsection [8](b)*" (emphasis added). In HUD's interpretation, because by 1992 the agency's "statutory authority to enter into new rental assistance agreements survived only in [subs]ection 8(b)(1) of the Housing Act," HUD Reply at 7, the new definition of "project-based housing" did nothing more than make "explicit" the fact that, post-HURRA, "HUD's authority to enter into ACCs with PHAs for existing housing under [subs]ection 8(b)(1) . . . remained intact, for *both* project-based and tenant-based programs."

---

tion (*o*)(13) is not relevant here, the Court will exclude it from its analysis.

HUD Mem. at 11 (emphasis added). In other words, according to HUD, by defining "project-based assistance" as "rental assistance under section [8](b)," section 146 of the 1992 Act simply confirmed that, notwithstanding the repeal of subsection (b)(2), HUD's remaining (b)(1) authority encompassed the authority to enter into "new" rental assistance agreements for (existing) project-based housing.[12]

Some of the Plaintiffs, however, read these clauses very differently. Plaintiff AHSC summarizes the alternative reading of these amendments most succinctly, as follows:

> [Through subsection (d)(2),] Congress acknowledged that there were project-based programs not only 'under this paragraph,' *i.e.*[,] under the surviving (b)(1), but *also* under contracts 'for assistance for housing constructed or substantially rehabilitated pursuant to assistance provided under subsection (b)(2) of this section (as such subsection existed immediately before October 1, 1983).' In other words[,] Congress specifically recognized that the projects for new construction and substantial rehabilitation entered into before [the close of] 1983 continued to exist[, albeit] in a special category. They were not within Section 8(b)(1), and, there-

---

[12] HUD's only substantive attempt to deal with the entirety of subsection (d)(2) is an argument that "[t]he fact that subsection (d)(2) identifies several categories or projects, including 'existing housing' and new construction and substantially rehabilitated projects, is immaterial; they are all included within the scope of subsection (d)(2)." HUD Reply at 12 n.9. If there is any logic in or point to this statement, the Court fails to perceive it.

> fore, not subject to [the] provisions for [the preferred] use of PHAs [established by Section] 8(b)(1)[.]

AHSC Mem. at 44-45; NHC Mem. at 5-6.

The Court agrees with the Plaintiffs on this point. By making express reference to housing funded under the expired subsection (b)(2) and including it within its definition of "project-based assistance," the 1992 Act "confirmed" nothing more than that HUD's authority under this provision continued to be grandfathered into the 1937 Act, its repeal notwithstanding.

Moreover, other more recently enacted statutes confirm this reading. MAHRA, for example, defines "project-based assistance" as "rental assistance described in paragraph (2)(B) of this section that is attached to a multifamily housing project." MAHRA § 512(11). Paragraph (2)(B) of section 512, in turn, defines "eligible multifamily housing projects" as inclusive of, *inter alia*, properties "that [are] covered in whole or in part by a contract for project-based assistance under . . . the new construction or substantial rehabilitation program under section (b)(2) of the United States Housing Act of 1937 (as in effect before October 1, 1983)." *Id.* § 512(2)(B)(i); *see also* 24 C.F.R. § 402.2 (MAHRA regulations, providing that "[p]roject-based assistance means the types of assistance listed in section 512(2)(B) of MAHRA, or a project-based assistance contract under the Section 8 program renewed under section 524 of MAHRA."). Similarly, a year later QHWRA defined "project-based assistance" as including, *inter alia*, "the new construction and substantial rehabilitation program under

section 8(b)(2) (as in effect before October 1, 1983)." Pub. L. No. 105-276 § 513, 112 Stat. 2461, 2546.

Thus, HUD's interpretation of HURRA's savings clause is strongly belied by the subsequent statutory history of the Housing Act, in which Congress repeatedly recognized the continued existence and viability of "(b)(2)" projects entered into before the close of 1983.

• *MAHRA*

The second prong of HUD's "(b)(1)" argument is that when MAHRA gave the agency authority to renew the expiring (b)(2) contracts, it effectively mandated that such renewals be made pursuant to subsection (b)(1).

Again, MAHRA was enacted in 1997 in order to, *inter alia,* provide a permanent and generalized mechanism by which HUD could renew expiring project-based HAP contracts—which, when originally authorized, carried terms of 20 to 40 years. Pub. L. No. 105-65, Title V, § 524, 111 Stat. 1384, 1408 (1997), 42 U.S.C. § 1437f note (Supp. III 1997). As relevant to this case, section 524(a)(1) of MAHRA, entitled "Section 8 Contract Renewal Authority," provided that:

> [HUD's] Secretary may use amounts available for the renewal of assistance under section 8 of the United States Housing Act of 1937, upon termination or expiration of a contract for assistance under section 8 (other than a contract for tenant-based assistance . . .) to provide assistance under section 8 of such Act at rent levels that do not ex-

> ceed comparable market rents for the market area. The assistance shall be provided in accordance with terms and conditions prescribed by the Secretary.

Id. In 1999, Congress replaced this language with a provision stating that:

> [HUD's] Secretary shall, at the request of the owner of the project and to the extent sufficient amounts are made available in appropriation Acts, use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project. The assistance shall be provided under a contract having such terms and conditions as the Secretary considers appropriate, subject to the requirements of this section.

Pub. L. No. 106-74, Title IV, Subtitle C, § 531, 113 Stat. 1047, 1109-10, 42 U.S.C. § 1437f note (2006).

At this step of its argument, HUD points out that by the time, pursuant to section 524 of MAHRA, that it renewed its assistance for the projects it had initiated under subsection 8(b)(2), such projects had "been in existence for more than twenty years[.]" HUD Reply at 11-12. According to HUD, "common sense" therefore counsels that these projects consisted of "'existing dwelling units,' as that phrase is used in [subs]ection 8(b)(1)." *Id.* In addition, HUD points to two definitional provisions of MAHRA, as well as a clause in the HAP renewal contracts. Specifically, HUD points out that under MAHRA, (i) "[r]enewal" is defined as "the *replacement* of an *expiring* . . . *contract* with a *new* contract under Section 8 of the [1937 Act] . . . ," and (ii) that an "expiring contract," in turn,

is defined as "a project-based assistance contract that, by its terms, *will expire*." 42 U.S.C. § 1437f note (MAHRA § 512(12), (3), respectively) (emphasis added); *see* HUD Reply at 11. Additionally, the post-MAHRA renewal contracts themselves contain the following clause:

> Previously, the Contract Administrator and the Owner had entered into a HAP Contract ("expiring contract") to make Section 8 housing assistance payments to the Owner for eligible families living in the Project. The term of the expiring contract will end prior to the beginning of the term of the Renewal Contract.

AR 2270-71 (Renewal Contract). On the basis of these provisions, HUD contends that MAHRA thus "provide[d] for the expiring contracts *actually to expire* before new renewal contracts take effect." HUD Reply at 11 (emphasis added).

However, as the Plaintiffs point out, the renewal contracts also state that the "[t]he purpose of the Renewal Contract is to *renew the expiring contract for an additional term,*" AR 2271 (emphasis added). And, an attachment to these contracts further provides that "[t]he Renewal Contract *must be entered [into] before expiration of the Expiring Contract*." AR 2282 (emphasis added). That is, MAHRA does not define "expiring contract" as a contract that has expired; rather, it states that such a contract is one that will, at some point in the future, reach the end of its term. Pursuant to the terms of the renewal contracts themselves, all such contracts were expressly required to be executed *prior* to the expiration of the contracts they

replaced. Moreover, as Plaintiffs note, "[n]owhere in MAHRA does Congress say that the expiring Section (b)(2) HAP contracts will be replaced with new contracts under Section (b)(1)." SHCC Reply at 5. To the contrary, as discussed above, MAHRA expressly includes properties "that [are] covered in whole or in part by a contract for project-based assistance under . . . the new construction or substantial rehabilitation program under section (b)(2) of the United States Housing Act of 1937 (as in effect before October 1, 1983)" as among those eligible for renewal assistance under its terms. MAHRA § 512(2)(B)(i).

Thus, while HUD is correct that the renewal contracts were "new" contracts (as, indeed they could only have been, having come into existence only upon their execution), it simply does not follow from this fact that these contracts were somehow executed pursuant to subsection 8(b)(1), notwithstanding their origin under subsection 8(b)(2). The Court therefore agrees with the Plaintiffs that the renewal contracts, true to their titles, simply renewed the assistance that "(b)(2)" projects had been receiving since their inception, and did so under the same subsection (if not necessarily under the exact same terms) as that under which such projects were originally authorized. That is, the Court finds that notwithstanding its repeal, subsection 8(b)(2) continues to govern the various contracts for the housing projects that were originally authorized and supported pursuant to the subsection's terms.

This conclusion does not, however, end the Court's analysis. Rather, the question now becomes whether, under the expired but grandfathered subsection 8(b)(2),

HUD is given the authority or discretion to use cooperative agreements in providing the renewal assistance in question. The Court will now turn to that issue.

• *Section 8(b)(2) Authorizes HUD to Use Cooperative Agreements with PHAs to Provide Assistance to the New Construction and Substantial Rehabilitation Projects.*

Again, the full text of Subsection 8(b)(2) of the Housing Act reads:

> To the extent of annual contributions authorizations under section 5(c) of this Act, the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners or prospective owners.

88 Stat. 662-63.

The first sentence of subsection (b)(2) permitted HUD to subsidize low-income housing by entering into HAP contracts directly with owners or prospective owners of multifamily housing. Alternatively, the second sentence of this provision, which is effectively identical to the authority conveyed by subsection 8(b)(1), allowed HUD, at its option, to enter into ACCs with PHAs, which, in turn, enter into HAP contracts

with owners. *Compare id. with* 42 U.S.C. § 1437f(b)(1) ("The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners . . . ").

HUD's "(b)(2)" argument is that even if the HAP contracts at issue remain subject to subsection 8(b)(2), nothing in that provision *requires* HUD to directly administer the renewal of HAP contracts. HUD readily concedes that it provided support to the vast majority of the housing projects now at issue pursuant to sentence one of this subsection, and thus that, as the Plaintiffs emphasize, "[t]he [PBACCs that] were awarded under the 1999 RFP were for contract administration services that had previously been performed by HUD itself." NHC Mem. at 17. Nonetheless, HUD argues that because it:

> is not, and has never been, *obligated* [under subsection 8(b)(2)] to act as the contract administrator for the projects at issue, contract administration services [for the relevant HAP contracts] are not, and cannot reasonably be construed as being, for HUD's benefit. . . . A cooperative agreement is the appropriate instrument [through which] to implement the second sentence of [subs]ection 8(b)(2).

HUD Supp. Mem. at 5-6 (emphasis added).

In other words, HUD's "(b)(2)" argument is that, having initiated support for certain projects under sentence one of this subsection, nothing in the relevant statutes or regulations required that, when the agency

renewed such assistance, it continue to do so under the "sentence one" model, wherein HUD enters into a HAP contract directly with the owner, without the intermediation of a PHA. The import of this argument is that, as HUD admits, "if the statute mandates that HUD enter into the HAP contract, then HUD has the obligation to administer the contract." HUD Reply at 9 n.7. Under the standards set forth by the FGCAA, HUD further concedes that in such circumstances, the PBACCs would be for HUD's benefit, and thus properly classified as procurement contracts. However, HUD maintains that because no such mandate exists, it is free to use cooperative agreements to continue its "(b)(2)" assistance, and that the PBACCs at issue in the 2012 NOFA are, in fact, such agreements.

The Plaintiffs disagree, for reasons that are divergent and that, in several cases, have evolved over the course of this litigation. Essentially, however, they contend that if the Court were to determine "the [subsection 8] (b)(2) authority currently applies to the newly constructed and substantially rehabilitated housing HAP contracts at issue here, then the Government has responsibility to administer them, and as such, is receiving a direct benefit from the PBCA[']s . . . [performance of] services that HUD itself is otherwise required to perform." NHC Mem. at 23-24. Their specific arguments in support of this position, broadly speaking, fall into two categories. First, Plaintiffs argue that MAHRA "commands HUD to enter into HAP renewals and, therefore . . . [gives] HUD . . . the obligation to administer the contract." CMS Reply at 11. Second, Plaintiffs

argue that a variety of regulatory provisions confirm this conclusion. The Court will address each set of issues below.

• *MAHRA Mandates Only That HUD Provide Assistance.*

The Court has twice reproduced substantial portions of both the first and the second versions of MAHRA § 524, above, and will not repeat this text verbatim again here. Briefly, however, the relevant section of the earlier-enacted version of MAHRA stated only that HUD "may" use certain specified funds to provide renewal assistance for, *inter alia*, the expiring "(b)(2)" contracts. 42 U.S.C. § 1437f note; *see, e.g.*, AHSC Mem. at 11 n.10 (noting permissive language in first iteration of § 524).[13] As some Plaintiffs note, however, in 1999 Congress revised this lan-

[13] Plaintiff CMS misleadingly cites to a separate provision of MAHRA, § 524(a)(2), entitled "Exception Projects," which provides that, "notwithstanding [the permissive language in] paragraph (1)," for certain specified categories of multifamily housing (and these categories *only*) HUD was required, "upon request of the owner," to "renew an expiring contract in accordance with the terms and conditions prescribed by the Secretary[.]" Pub. L. No. 105-65, Title V, § 524(a)(2); *see* CMS Mem. at 11. While a few of the categories of housing listed in this subsection appear to be programs at issue in this litigation, the list falls far short of including all such programs—a distinction conveniently omitted by CMS. In any event, as explained above, the Court finds that the latter-enacted version of § 524 is the one relevant here, both because it remains in effect today and because it was enacted prior to the award of the PBCAAs under the 1999 RFP. *See* AR 1704. Accordingly, the Court finds the mandatory language in the 1997 version of § 524(a)(2) wholly irrelevant to this case.

guage to state that HUD's "Secretary shall, at the request of the owner . . . use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project." Pub. L. No. 106-74, Title IV, Subtitle C, § 531, 42 U.S.C. § 1437f note. Plaintiffs employ this language to make two primary arguments, both of which prove unavailing.

First, Plaintiffs seize on the mandatory phrasing of section 524—and in particular, its use of the word "shall"—to argue that pursuant to this provision, "upon request of a project owner, HUD *must renew the HAP contract* using Section 8 funds." AHSC Reply at 9 (emphasis added). While superficially appealing, the problem with this argument is that, carefully read, section 524 is simply not so specific. Rather, Section 524 provides only that the "Secretary shall . . . *provide* . . . *assistance*" for qualifying projects. Pub. L. No. 106-74, Title IV, Subtitle C, § 531, 42 U.S.C. § 1437f note (emphasis added). As explained above, subsection (b)(2) provides *two* mechanisms by which HUD may provide assistance to covered projects, only one of which is directly through a HAP contract between HUD and the owner. Thus, while Section 524 makes the renewal of assistance mandatory for any owner who so requests it (subject to the availability of funds), it does not, as Plaintiffs claim, specify the mechanism through which HUD must provide the assistance.

Second, Plaintiffs emphasize the responsibility that Section 524 places on the HUD Secretary (as opposed to the PHAs) in initiating the provision of the renewal

assistance. *See* NAHP Reply at 5 ("MAHRA unequivocally put[] the obligation on 'the Secretary' to extend HAP contracts with owners who request it."); AHSC Reply at 9-10 ("[I]t is noteworthy that this central renewal language provides that it is *the Secretary* who shall renew these contracts.") (emphasis in original). The Plaintiffs' point appears to be that "[i]f Congress had intended for local housing agencies to renew HUD's HAP Contracts, it would have stated '*local housing authorities* shall renew an expiring contract.'" CMS Reply at 8 (emphasis in original).

Again, the Court finds that this argument falls well short of establishing that HUD cannot, pursuant to the second sentence of subsection (b)(2), use assistance agreements to provide renewal assistance. As a preliminary matter, Section 8 is a federal program (albeit one run largely in cooperation with the states). As such, the Secretary is necessarily involved in its administration, even for those portions of the program which the Plaintiffs concede operate pursuant to cooperative agreements. Second, it is a matter of established fact, contested by no party, that HUD was the original counterparty to, and contract administrator of, the vast majority of projects authorized under subsection 8(b)(2). As the Plaintiffs themselves are at great pains to emphasize, until such time as HUD entered into the PBACCs pursuant to the 1999 RFP, PHAs were simply not involved, in any capacity, in such "HUD / private owner" projects. Against this backdrop, however, Plaintiffs fail to explain how Congress could possibly have effected an intention to provide for more programmatic involvement on the part of the states (and their political subdivisions, the PHAs)

by directing that the PHAs "renew" HAP contracts to which they were not a party in the first instance.

• *Program Regulations and Other Design Features Confirm That HUD May Use Assistance Agreements to Provide Renewal Assistance.*

Finally, Plaintiffs point to various regulations and HUD guidance documents in support of two related, but slightly different arguments. The first of these arguments is that HUD has, at a minimum, a regulatory duty to administer itself the HAP contracts in the NOFA portfolio. Here, Plaintiffs cite two regulations naming HUD as the "Contract Administrator." First, 24 C.F.R. § 880.201 defines a project-based Section 8 "Contract Administrator" as "[t]he entity which enters into the [HAP] Contract with the owner and is responsible for monitoring performance by the owner. The contract administrator is a PHA in the case of private-owner/PHA projects, and HUD in private-owner/HUD and PHA-owner/HUD projects." Second, 24 C.F.R. § 880.505(a) provides:

> Contract administration. For private-owner/PHA projects, the PHA is primarily responsible for administration of the Contract, subject to review and audit by HUD. For private-owner/HUD and PHA-owner/HUD projects, HUD is responsible for administration of the Contract. The PHA or HUD may contract with another entity for the performance of some or all of its contract administration functions.

Taken together, Plaintiffs argue that these regulations establish HUD as the Contract Administrator of

the HAP contracts in the 2012 NOFA profile, such that "while . . . HUD may contract out performance of its contract administration function to another entity, it cannot shed its responsibility to administer contracts for the projects in the NOFA portfolio." AHSC Reply at 5-6.

HUD, for its part, counters that under the terms of the PBACCs as well as the Renewal Contracts, the PHAs are clearly designated as the "Contract Administrators" and that, under applicable MAHRA regulations, these contract terms override any contradictory regulations stating that HUD carries this role. Specifically, HUD cites 24 C.F.R. § 402.3 ("Contract provisions"), which provides that "[t]he renewal HAP contract shall be construed and administered in accordance with all statutory requirements, and with all HUD regulations and other requirements, including changes in HUD regulations and other requirements during the term of the renewal HAP contract, *unless the contract provides otherwise*." (emphasis added). In light of this provision, HUD argues that "[b]ecause the Renewal HAP contract explicitly provides that the PHA, not HUD, is the contract administrator, any regulation to the contrary does not apply." HUD Reply at 18.

The Plaintiffs do not contest that the renewal contracts in fact designate the PHA, and not HUD, as the Contract Administrator. However, they counter that this nomenclature is without meaning, because as a matter of general principle the terms of the renewal contract cannot trump those of regulations which HUD has promulgated itself and is bound to follow. SHCC

Reply at 9; AHSC Reply at 13; CMS Reply at 15. Thus, according to the Plaintiffs:

> the fact that the PHA is named as the contract administrator on a HAP contract means nothing more than that HUD outsourced its ultimate authority as the contract administrator to the PHA in accordance with applicable statutes and regulations. The PHA's role as a contract administrator on a HAP contract does not relieve HUD of its obligation to administer the HAP contracts and provide project-based housing assistance.

SHCC Reply at 9.

What the Plaintiffs miss, however, is that HUD is *not* arguing in general terms that a contract term can trump a regulation, but rather is pointing to a *specific* regulation expressly stating that the terms of the renewal contracts, in particular, take precedence over any conflicting regulations or other program requirements governing the Section 8 program.[14] *See* 24 C.F.R. § 402.3. The Court therefore agrees with HUD that the Renewal Contracts' designation of the PHAs as the Contract Administrator is legally meaningful, and overrides the regulations cited by Plaintiffs insofar as they state to the contrary.

---

[14] Plaintiff AHSC attempts to argue that the phrase "unless the contract provides otherwise," as it is used in 24 C.F.R. § 402.3, applies only to subsequently enacted regulations and requirements. *See* AHSC Reply at 14. The Court finds this interpretation to contravene the plain language of the regulation.

Citing 24 C.F.R. § 880.505(c), HUD also contends that this transfer of contract administration duties is legally permissible. That regulation provides:

> Conversion of Projects from one Ownership/ Contractual arrangement to another. Any project may be converted from one ownership/contractual arrangement to another (for example, from a private-owner/HUD to a private-owner/PHA project) if:
>
> (1) The owner, the PHA and HUD agree,
>
> (2) HUD determines that conversion would be in the best interest of the project, and
>
> (3) In the case of conversion from a private-owner/HUD to a private-owner/PHA project, contract authority is available to cover the PHA fee for administering the Contract.

24 C.F.R. § 880.505(c).

Here, HUD argues that "[b]y executing the Renewal Contracts at issue in the NOFA, the owner, the PHA, and HUD expressly agree that the PHA will act as contract administrator." HUD Supp. Mem. at 4 (citing AR 2268, 2270, 2271, 2278); *see also id.* at 4-5 (noting that under related regulations, a project "conversion" consists of "the transfer of the responsibility of administering the Contract") (citing 40 Fed. Reg. 18682, 18683 ¶ 15 (Apr. 29, 1975)). Plaintiffs counter that 24 C.F.R. § 880.505(c) calls for a more formalized conversion process which HUD has not followed, and is therefore irrelevant to this bid protest. AHSC Supp. Mem. at 5-6. Although the Court finds that section 880.505(c) is somewhat ambiguous on this point, it agrees with HUD that the agency's initiation of the

PBCA program pursuant to the 1999 RFP, and subsequent execution of the PBACCs with chosen PHAs, were sufficiently formalized mechanisms that met the requirements of subsections (1)-(3) of this regulation. At any rate, the Court holds that, at a minimum, Plaintiffs have failed to demonstrate that HUD's procedure here was a "clear and prejudicial violation of applicable . . . regulations," as required under this Court's standard of review for bid protests. *See Axiom Res. Mgmt.*, 564 F.3d at 1381.

Finally, Plaintiffs' argue that "[u]nlike a traditional ACC, a PBACC does not actually provide assistance to PHAs or owners. Instead, it provides a fee to contractors to administer the assistance that HUD is already obligated to provide." CMS Reply at 4-5. In essence, Plaintiffs' argument is that, in practice, the role of the PBCAs in administering the HAP contract is merely "ministerial," and therefore primarily for HUD's benefit—and, by extension, necessarily a procurement contract under the standards of the FGCAA. In support of this argument, Plaintiffs repeatedly cite Section 4350.3 of the HUD Handbook ("Occupancy Requirements of Subsidized Multifamily Housing Programs"), subsection 1-4(B) of which provides:

> HUD has primary responsibility for contract administration but has assigned portions of these responsibilities to other organizations that act as Contract Administrators for HUD. . . . There are two types of Contract Administrators that assist HUD in performing contract administration functions.

1. *Traditional Contract Administrators*. These Contract Administrators have been used for over 20 years and have Annual Contribution Contracts (ACCs) with HUD. Under their ACCs, Traditional Contract Administrators are responsible for asset management functions and HAP contract compliance and monitoring functions. They are paid a fee by HUD for their services.

2. *Performance-Based Contract Administrators (PBCAs)*. The use of PBCAs began as an initiative in 2000. Under a performance-based ACC, the scope of responsibilities is more limited than that of a Traditional Contract Administrator. A PBCA's responsibilities focus on the day-to-day monitoring and servicing of Section 8 HAP contracts. PBCAs are generally required to administer contracts on a state-wide basis and have strict performance standards and reporting requirements as outlined in their ACC.

AR 2492.

The "Traditional Contract Administrators" ("TCAs") referred to here are PHAs that, pursuant to either subsection 8(b)(1) or sentence two of subsection 8(b)(2), entered into ACCs with HUD and, concurrently, HAP contracts with project owners. As the Handbook indicates, and as Plaintiffs stress in their briefs, the authority retained by the TCAs is somewhat more expansive than that held by the PBCAs pursuant to the PBACCs. For example, under the PBACCs, HUD retains the responsibility to determine when project

owners are in default, 24 C.F.R. § 880.506(a); AR 20201, and is the only party capable of terminating a HAP contract, 24 C.F.R. § 880.506(b). In addition, although the PBCAs sign the HAP contracts as the Contract Administrator on HUD's behalf, since 2007 HUD has also signed every renewal HAP contract because, in the determination of HUD counsel, these contracts "represent the official point of obligation of federal funds." *See* Docket No. 57-2 at 3 (email from Lanier Hylton dated November 20, 2007); *see also* Order dated February 19, 2013 (granting motions to supplement the administrative record, including with the Hylton email).

The Court acknowledges the limitations on the authority of the PBCAs and HUD's continued oversight role in the administration of the PBCA program. However, in light of the statutory and regulatory scheme analyzed above, the Court finds that such limitations fall well short of establishing that the PBCA program primarily benefits HUD, rather than serving as a mechanism through which H U D, in cooperation with the states, carries out the statutorily authorized goal of supporting affordable housing for low-income individuals and families.

First, as HUD points out, since its enactment in 1937, the stated policy of the Housing Act has been for HUD and its predecessor agencies to work cooperatively with states and their political subdivisions to promote various housing and community development-related goals. As originally enacted, the Housing Act's "Declaration of Policy" provided that:

> It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to *assist the several states and their political subdivisions* to . . . remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.

Pub. L. No. 75-412, 50 Stat. 888 (1937) (emphasis added); *see also id.* (preamble, stating the purpose of the Act to be the provision of "*financial assistance to States and political subdivisions thereof* for the elimination of unsafe and insanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income. . . .") (emphasis added).

In 1998 Congress somewhat modified this policy statement. It currently reads:

> (a) Declaration of Policy—It is the policy of the United States—
>
> (1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this Act—
>
> (A) *to assist States and political subdivisions of States* to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families;

> (B) *to assist States and political subdivisions of States* to address the shortage of housing affordable to low-income families; and
>
> (C) Consistent with the objectives of this title, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public.

QHWRA, 112 Stat. 2461, 2522-23 (1998), codified at 42 U.S.C. § 1437 (emphasis added).

HUD contends, and the Court agrees, that these revisions serve to reiterate and "further emphasiz[e] the primary role the states and their political subdivisions are to play" in implementing the federal government's housing policies. HUD Mem. at 14. More important, however, is the fact that the consistent policy of the Housing Act has been for HUD (and its predecessor agencies) to implement federal housing goals through close cooperation and coordination with the states. Moreover, although the Plaintiffs attempt to make much of HUD's various statements throughout the years regarding the cost-saving effects of the PBCA program, *see* NHC Mem. at 2; SHCC Mem. at 9, the Court finds nothing inconsistent in HUD sharing greater responsibility for program administration with the states while at the same time achieving certain cost efficiencies. Indeed, as HUD points out, such twin goals were expressly set forth in MAHRA, which called on HUD to address "Federal budget constraints . . . and diminished administrative capacity"

through "reforms that transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities." MAHRA § 511(10), (11)(C).

In addition, as HUD correctly points out, it has always limited the award of the PBACCs to PHAs, and has done so under the express reasoning that "[b]y law, HUD may only enter into an ACC with a legal entity that qualifies as a 'public housing agency' (PHA) as defined in the United States Housing Act of 1937." AR 428-29, 64 Fed. Reg. at 27,358-59. Were HUD obtaining the services of the PBCAs strictly for its own "ministerial" convenience, the Court does not see how such a restriction would apply—and, indeed, HUD has stated that were the Court to find that it must issue the PBACCs as procurement contracts, HUD does not believe it would be in the agency's self-interest to continue the restriction going forward. *See* HUD Supp. Mem. at 8. Thus, the PHA-only rule would appear to make sense only if one conceives of these entities as HUD's governmental partners in the administration of housing programs intended to convey a benefit to low-income families and individuals. And, as HUD notes, consistent with such a design, the PBCA program is in fact "administered by a program office, not a contracting officer . . . . [and] all statutory amendments and changes in policies or procedures [to the program] have been implemented not through a FAR-mandated changes clause, but through notices, handbooks, and regulations." HUD Mem. at 20.

• *The PBACCs are Consistent With the Standards for Cooperative Agreements Set Forth in the FGCAA.*

As explained above, the FGCAA establishes a "principal purpose" test for the determination of whether a particular governmental contract is properly categorized as a procurement contract or a cooperative agreement. When "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services *for the direct benefit of the United States Government,*" an agency must use a procurement contract. 31 U.S.C. § 6303 (emphasis added). Conversely, when (1) "the principal purpose of the relationship is to *transfer a thing of value*" to the recipient in order "*to carry out a public purpose of support or stimulation authorized by a law* of the United States," and (2) "*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," the agency may use an assistance agreement. *Id.* § 6305 (emphasis added).

Citing these standards, the Government argues that the contracts in question hew much more closely to the latter definition. Specifically, HUD posits that it "has not and is not acquiring any services when it grants administrative authority and transfers funds to PHAs via the ACCs," but "[r]ather . . . is engaged in a core statutory duty of providing funding assistance to state-sponsored PHAs[.]" HUD Mem at 22. Moreover, HUD argues that it "has retained authority to make certain decisions [and] to control the administra-

tion of the program . . . to ensure that Federal funds are spent in strict accordance with the terms of the HAP contracts and Federal law," which dovetails with the FGCAA's instruction that "substantial involvement" on the part of the Government is indicative of a cooperative agreement, not a procurement contract. *Id.* at 32.

The Court agrees with HUD that the PBACCs are properly categorized as cooperative agreements under the standards set forth in the FGCAA. Notwithstanding the fact that HUD originally directly administered the majority of the HAP contracts in the 2012 NOFA portfolio, it is unburdened by any statutory or regulatory obligation to maintain this responsibility in going forward in perpetuity. When MAHRA authorized HUD to renew the expiring HAP contracts, it did not specify any particular model for HUD to use in providing the renewal assistance. Consistent with the policy goals set forth in the Housing Act, HUD instituted the PBCA program and, in so doing, enlisted the states and their political subdivisions, the PHAs, to take on greater program responsibility. That HUD achieved certain cost savings in so doing does not convert the PBCA program into a procurement process that primarily benefits HUD, as opposed to the recipients of the Section 8 assistance.

III. *Motions to Supplement the Administrative Record*

Finally, the Court will briefly address two post-argument motions to supplement the administrative record, made by Plaintiffs NHC and AHSC. Each of these Plaintiffs seeks to have the Court admit a two-

page February 7, 2007 HUD memorandum outlining certain procedures in HUD's transfer of HAP contracts from the PHAs that had originally (or "traditionally") administered them, to the PHA that was serving as the PBCA with jurisdiction for the geographic area in which certain projects were located. *See* Docket Entry 90-2 (the February 7, 2007 memorandum). HUD opposes these motions, arguing that they are untimely; that the memorandum is not "necessary to permit meaningful judicial review," per the standard established in *Axiom Resource Management, Inc. v. United States,* 564 F.3d 1374, 1379 (Fed. Cir. 2009); and that, in any event, the memorandum actually supports its position.

The Court agrees with HUD that, in a case as extensively briefed and with an administrative record as large as this one, the February 7, 2007 memorandum cannot meet the *Axiom* standard for supplementation. It also agrees with HUD that, for the reasons the Court will not belabor but which follow from its above analysis, the memorandum neither undermines nor contradicts the Government's position in this case. The Court therefore DENIES these motions.

Conclusion

For the reasons stated herein, the Court finds that the 2012 NOFA properly characterizes the PBACCs as cooperative agreements. The NOFA is compliant with the FGCAA, and is not subject to CICA. Accordingly, the Court DENIES HUD's motion to dismiss for lack of subject matter jurisdiction; DENIES the Plaintiffs' respective motions for judgment on the administrative record; and GRANTS HUD's motion

for judgment on the administrative record. In addition, the Court DENIES Plaintiffs NHC and AHSC's motions to supplement the administrative record.

No costs.

IT IS SO ORDERED.

APPENDIX D

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

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
Date:	Aug. 15, 2012

Neil H. O'Donnell, Esq., Dennis J. Callahan, Esq., and Jeffery M. Chiow, Esq., Rogers Joseph O'Donnell, Lawrence F. Feheley, Esq., and Allen Handlan, Esq., Kegler, Brown, Hill & Ritter, and Ricardo L. Gilmore, Esq., Saxon, Gilmore, Carraway & Gibbons, for Assisted Housing Services Corporation and North Tampa Housing Development Corporation; Robert K. Tompkins, Esq., Elizabeth M. Gill, Esq., and Trevor J. Tullius, Esq., Patton Boggs LLP, for The Jefferson

County Assisted Housing Corporation; Michael R. Golden, Esq., Michael A. Hordell, Esq., Blair L. Schiff, Esq., Heather Kilgore Weiner, Esq., and Samuel W. Jack, Esq., Pepper Hamilton LLP, for National Housing Compliance; Richard J. Vacura, Esq., K. Alyse Latour, Esq., and Susan J. Borschel, Esq., Morrison Foerster, for Southwest Housing Compliance Corporation; Colm P. Nelson, Esq., and Kathryn Carder McCoy, Esq., Foster Pepper, PLLV, for CMS Contract Management Services and the Housing Authority of the City of Bremerton; and Andrew Mohr, Esq., John J. O'Brien, Esq., and Gabriel E. Kennon, Esq., Cohen Mohr LLP, for Massachusetts Housing Finance Agency, the protesters.

Kasey Podzius, Esq., and Blythe Rodgers, Esq., Department of Housing and Urban Development, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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

---

[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.

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 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,"

---

[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.

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

---

[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).

these HUD administered contracts."[4] Id. The solicitation informed offerors that "[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 sani-

---

[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 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.

tary 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 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

---

[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).

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 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.

---

[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.

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

---

[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.

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, 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

---

[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.

[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.

> 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

---

[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 provid-

ing 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 under the Competition in Contacting 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.

---

[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 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.

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.

---

[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).

[16] In contrast, a "grant agreement," rather than a cooperative agreement, shall be used where "substantial involvement is not

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.

---

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.

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;/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 com-

pensates the PHAs for its services.[17] AR at 12. HUD notes here that under the ACC, a PHA may use the "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

---

[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.

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

---

[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.

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, 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 dis-

---

[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.

regard 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 follow the requirements in CICA or the FAR" in preparing its NOFA, and that it "would expect the protests to be

---

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

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

---

[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.

APPENDIX E

1. 31 U.S.C. 6301 provides:

Purposes

The purposes of this chapter are to—

(1) promote a better understanding of United States Government expenditures and help eliminate unnecessary administrative requirements on recipients of Government awards by characterizing the relationship between executive agencies and contractors, States, local governments, and other recipients in acquiring property and services and in providing United States Government assistance;

(2) prescribe criteria for executive agencies in selecting appropriate legal instruments to achieve—

(A) uniformity in their use by executive agencies;

(B) a clear definition of the relationships they reflect; and

(C) a better understanding of the responsibilities of the parties to them; and

(3) promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements.

2. 31 U.S.C. 6302 provides:

Definitions

In this chapter—

(1) "executive agency" does not include a mixed-ownership Government corporation.

(2) "grant agreement" and "cooperative agreement" do not include an agreement under which is provided only—

(A) direct United States Government cash assistance to an individual;

(B) a subsidy;

(C) a loan;

(D) a loan guarantee; or

(E) insurance.

(3) "local government" means a unit of government in a State, a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, an interstate entity, or another instrumentality of a local government.

(4) "other recipient" means a person or recipient (except a State or local government) authorized to receive United States Government assistance or procurement contracts and includes a charitable or educational institution.

(5) "State" means a State of the United States, the District of Columbia, a territory or possession of the United States, an agency or instrumentality of a State,

and a multi-State, regional, or interstate entity having governmental duties and powers.

3. 31 U.S.C. 6303 provides:

Using procurement contracts

An executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) 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

(2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

4. 31 U.S.C. 6304 provides:

Using grant agreements

An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a

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

(2) 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.

5. 31 U.S.C. 6305 provides:

Using cooperative agreements

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) 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 a 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

(2) 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.

6. 31 U.S.C. 6307 provides:

Interpretative guidelines and exemptions

The Director of the Office of Management and Budget may—

(1) issue supplementary interpretative guidelines to promote consistent and efficient use of procurement contracts, grant agreements, and cooperative agreements; and

(2) exempt a transaction or program of an executive agency from this chapter.

7. 42 U.S.C. 1437 provides:

Declaration of policy and public housing agency organization

(a) Declaration of policy

It is the policy of the United States—

(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this chapter—

(A) to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families;

(B) to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families; and

(C) consistent with the objectives of this subchapter, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public;

(2) that the Federal Government cannot through its direct action alone provide for the housing of every American citizen, or even a majority of its citizens, but it is the responsibility of the Government to promote and protect the independent and collective actions of private citizens to develop housing and strengthen their own neighborhoods;

(3) that the Federal Government should act where there is a serious need that private citizens or groups cannot or are not addressing responsibly; and

(4) that our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector.

(b) Public housing agency organization

(1) Required membership

Except as provided in paragraph (2), the membership of the board of directors or similar governing body of each public housing agency shall contain not less than 1 member—

(A) who is directly assisted by the public housing agency; and

(B) who may, if provided for in the public housing agency plan, be elected by the residents directly assisted by the public housing agency.

(2) Exception

Paragraph (1) shall not apply to any public housing agency—

(A) that is located in a State that requires the members of the board of directors or similar governing body of a public housing agency to be salaried and to serve on a fulltime basis; or

(B) with less than 300 public housing units, if—

(i) the agency has provided reasonable notice to the resident advisory board of the opportunity of not less than 1 resident described in paragraph (1) to serve on the board of directors or similar governing body of the public housing agency pursuant to such paragraph; and

(ii) within a reasonable time after receipt by the resident advisory board established by the agency pursuant to section 1437c-1(e) of this title of notice under clause (i), the public housing agency has not been notified of the intention of any resident to participate on the board of directors.

(3) Nondiscrimination

No person shall be prohibited from serving on the board of directors or similar governing body of a public housing agency because of the residence of that person in a public housing project or status as assisted under section 1437f of this title.

8. 42 U.S.C. 1437a(b)(6) provides:

Rental payments

* * * * *

(b) Definition of terms under this chapter

* * * * *

(6) PUBLIC HOUSING AGENCY.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "public housing agency" means 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.

(B) SECTION 1437f PROGRAM.—For purposes of the program for tenant-based assistance under section 1437f of this title, such term includes—

(i) a consortia of public housing agencies that the Secretary determines has the capacity and capability to administer a pro-

gram for assistance under such section in an efficient manner;

(ii) any other public or private nonprofit entity that, upon the effective date under section 503(a) of the Quality Housing and Work Responsibility Act of 1998, was administering any program for tenant-based assistance under section 1437f of this title (as in effect before the effective date of such Act), pursuant to a contract with the Secretary or a public housing agency; and

(iii) with respect to any area in which no public housing agency has been organized or where the Secretary determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance[4] section 1437f of this title, or is not performing effectively—

(I) the Secretary or another public or private nonprofit entity that by contract agrees to receive assistance amounts under section 1437f of this title and enter into housing assistance payments contracts with owners and perform the other functions of public housing agency under section 1437f of this title; or

(II) notwithstanding any provision of State or local law, a public housing agency for another area that contracts with

---

[4] So in original. Probably should be "assistance under".

the Secretary to administer a program for housing assistance under section 1437f of this title, without regard to any otherwise applicable limitations on its area of operation.

9. 42 U.S.C. 1437f provides:

Low-income housing assistance

(a) Authorization for assistance payments

For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section.

(b) Other existing housing programs

(1) IN GENERAL.—The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

(2) The Secretary is authorized to enter into annual contributions contracts with public housing agencies for the purpose of replacing public housing transferred in accordance with subchapter II-A

of this chapter. Each contract entered into under this subsection shall be for a term of not more than 60 months.

* * * * *