



Audit Report

District Inspector General for Audit
Rocky Mountain District

HUD Office of Native American Programs

Non-Competitive 1998 Rural Housing and Economic Development Grant Awards

00-DE-156-0001

March 31, 2000



Audit Report

District Inspector General for Audit Rocky Mountain District

Report: 00-DE-156-0001

Issued: March 31, 2000

TO: Harold Lucas, Assistant Secretary For Public and Indian Housing, P

Robert C. Gwin

FROM: Robert C. Gwin, District Inspector General for Audit, SAGA

SUBJECT: Office of Native American Programs Non-Competitive 1998 Rural Housing and Economic Development Grant Awards

We conducted an audit of the 1998 Community Development and Planning Rural Housing and Economic Development Grants.

This report contains one finding which identifies that HUD's Office of Native American Programs non-competitively awarded three Rural Housing and Economic Development grants totaling \$6 million, or 43 percent, of the grant dollars awarded in 1998. In making these awards, HUD acted contrary to the 1998 HUD Appropriations Act, the Community Development Act of 1974, as amended, and the HUD Reform Act of 1989. We are recommending that you notify appropriate Congressional Committees of the \$6 million awarded contrary to Congressional requirements and seek Legislative relief for these awards. We are also recommending you review current HUD procedures and take appropriate actions to strengthen procedures to ensure that future grant awards comply with Legislative requirements. These actions, at a minimum, should include creating administrative remedies for awarding grants without required competition.

We provided a draft copy of this report to you for written comments and received your comments on March 23, 2000. We included your entire response in Appendix 2. We believe the legal opinion provided, in your response, is in error and does not consider other pertinent part of the 1998 HUD Appropriations Act. More importantly, the legal opinion by the General Counsel did not fully consider the legislative history of the HUD Reform Act nor Congress's statutory language. Specifically, Title 42 of the United States Code Section 3545 (a)(1) and (2), which states that:

“The Secretary shall publish in the Federal Register notice of the availability of any assistance under any program or discretionary fund administered by the Secretary...The Secretary shall

publish in the Federal Register a description of the form and procedures by which application for the assistance may be made, and any deadlines relating to the award or allocation of the assistance. Such description shall be designed to help eligible applicants to apply for such assistance.”

On March 31, 2000 the HUD Office of General Counsel’s Acting Deputy General Counsel For Programs & Regulations provided us additional comments related to our draft report (see a full text of the response in Appendix 3). The Acting Deputy General Counsel advised that” **OIG’S UNFAIR REFUSAL TO AGREE TO THE BRIEF EXTENSION OF TIME REQUESTED BY HUD TO RESPOND TO OIG’S DRAFT AUDIT DEMONSTRATED A LACK OF PROFESSIONALISM.** Moreover, the Acting Deputy General Counsel advised that the Counsel to the Inspector General legal opinion is rife with mistakes of law, including inaccurate statutory construction. Given the tone of Deputy General’s response HUD and the Office of Inspector General are at an impasse as to the appropriate interpretation of the statutory provision cited in this report. Therefore, we will let the audit resolution process resolve these differences.

In addition, we wish to take firm exception to two points in the Deputy General Counsel’s response.

1. We strongly disagree that our Office has not worked in a professional manner in our dealing with the program officials and providing an opportunity to provide information related to this audit. We met with the Deputy Assistant Secretary, in early February, to discuss our audit results and our position that these grants need to be awarded on a competitive basis. We provided a draft report to the Assistant Secretary of Public and Indian Housing for his comments on March 1, 2000. On March 23, 2000 the Assistant Secretary provided his response to include a legal opinion. We reviewed that response and provided a revised draft report on March 24, 2000. According to the electronic mail receipt, the Assistant Secretary received the revised draft report on March 27, 2000. We provided ample time to respond to our revised draft report. The Deputy General Counsel did request additional time to respond to our report (see Appendix 4 for a copy of that request).
2. Our audit report does not state that individual HUD employees violated the HUD Reform Act. The report focuses on the fact that these awards were not competitively awarded as required by the various statutory provisions. Moreover our recommendations state that HUD needs to take appropriate actions to strengthen the procedures to ensure that future grant awards comply with statutory requirements.

Within 60 days please furnish to this office, for each recommendation in this report, a status report on: (1) the corrective action taken; (2) the proposed corrective action and the date to be completed; or (3) why action is considered unnecessary. Also, please furnish us copies of all correspondence or directives issued because of the audit.

We appreciate the courtesies and assistance extended by HUD’s Office of Native American Programs’ staff during the audit.

Should you have any questions, please call me or Ernest Kite, Assistant District Inspector General for Audit, at (303) 672-5452.

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Executive Summary

We performed an audit of HUD's 1998 awarding of \$14 million of Community Development and Planning Rural Housing and Economic Development grants. Our objective was to determine whether HUD awarded these funds consistent with Congressional requirements. We examined HUD's Federal Register Notices of Funding Availability, Award Notices and other HUD notices. We obtained a legal opinion from the Counsel to the HUD Inspector General, as to where these awards compiled with the HUD Reform Act of 1989. In addition, we reviewed HUD's Office of Native American Program grant applications, grant agreements, and pre-award planning documents and interviewed the Deputy Assistant Secretary of Native American Programs.

Our review identified that HUD's Office of Native American Programs awarded three grants totaling \$6 million, or 43 percent of the Rural Housing and Economic Development dollars awarded in 1998, contrary to the 1998 HUD Appropriations Act, the Community Development Act of 1974, as amended, and the HUD Reform Act of 1989. We are recommending that HUD notify appropriate Congressional Committees of the \$6 million awarded contrary to Congressional requirements and seek Congressional relief for these awards. We are also recommending that HUD officials review current HUD procedures and take appropriate actions to strengthen procedures to ensure that future grant awards comply with statutory requirements. These actions, at a minimum, should include creating administrative remedies for awarding grants without required competition.

In 1998 Congress provided \$25 million for Rural Housing and Economic Development

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, referred to as the 1998 HUD Appropriations Act, provided \$25 million, under the Community and Planning Development heading, for grants (not to exceed \$4 million each) to rural and tribal areas.

In 1998 HUD Appropriations Act required competition

The 1998 HUD Appropriations Act, under the heading Community and Planning Development, required that the Secretary select public and Indian housing agencies to receive assistance on a competitive basis.

HUD awarded \$8 million on a competitive basis and \$6 million on a non-competitive basis

Of the \$25 million provided, HUD awarded \$14 million, or 56 percent, of the dollars appropriated in 1998, and carried over the remaining \$11 million to its Fiscal Year 1999 Rural Housing Programs. Of the \$14 million awarded, HUD awarded \$8 million, or 57 percent, on a competitive basis, according to the Notices of Awards in the Federal Register, and \$6 million, or 43 percent, on a non-competitive basis.

HUD Reform Act of 1989 required HUD to award grants based on competition

On December 18, 1989, President George Bush signed into law the HUD Reform Act of 1989 (Public Law 101-235). Prior to the HUD Reform Act of 1989, HUD officials, not Federal statute, controlled the awarding of certain HUD dollars. Section 102 of the HUD Reform Act removed that control and required that HUD dollars be awarded on a competitive basis, unless the appropriation law provides for another method.

Moreover, with respect to Native American tribes, Section 702 of the HUD Reform Act amended Section 106 of the Housing and Community Development Act of 1974, among other things, to require that Community Development Block Grants to Native American tribes must be awarded competitively.

HUD's Office of Community Planning and Development administered the budget and accounting for the \$25 million in funds which was appropriated in the 1998 HUD Appropriations Act for rural and tribal areas. However, HUD's Office of Native American Programs managed the awarding and oversight of \$9 million of the \$14 million Rural Housing and Economic Development funds awarded in 1998.

Auditee Comments

The Assistant Secretary for Public and Indian Housing advised, in his written response to our draft report, that the HUD Office of General Counsel provided a legal opinion on September 24, 1998. In the opinion, HUD's General Counsel advised grants awarded from the funding source, identified in the finding, did not have to be competitively awarded.

We disagree with General Counsel's legal opinion. In our opinion, the General Counsel opinion is based on a limited review of one Section of the 1998 HUD Appropriations Act and did not consider other relevant parts of the Appropriations Act or fully consider the HUD Reform Act of 1989. Based on the statutory language and our review of the 1998 HUD Appropriations Act, the Community Development Act of 1974 and the HUD Reform Act of 1989, these grants were required to be awarded on a competitive basis. More importantly, the legal opinion by the General Counsel did not fully consider the legislative history of the HUD Reform Act nor Congress's statutory language. Specifically, Title 42 of the United States Code Section 3545 (a)(1) and (2), which states that:

"The Secretary shall publish in the Federal Register notice of the availability of any assistance under any program or discretionary fund administered by the Secretary...The Secretary shall publish in the Federal Register a description of the form and procedures by

which application for the assistance may be made, and any deadlines relating to the award or allocation of the assistance. Such description shall be designed to help eligible applicants to apply for such assistance.”

We included in Appendix 2 the full text of the Assistant Secretary’s response to our draft report and the legal opinion from HUD’s General Counsel.

We also included in Appendix 1 the Counsel to the Inspector General’s legal opinion on the non-competitive awarding of these grants.

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Introduction

On December 18, 1989, President George Bush signed into law the HUD Reform Act of 1989 (Public Law 101-235). President Bush, in his signing statement, said:

“This legislation is intended to help eliminate the systemic flaws that have allowed a number of Housing and Urban Development (HUD) programs to be abused for political purposes or personal gain at the expense of those in need.....These reforms at HUD are a necessary part of this Administration’s effort to ensure that the highest standards of integrity, efficiency, and fair play will apply throughout the Federal Government.... In particular, the bill requires the allocation of housing funds through an open process based either on “fair sharing” or competition as well as public notification of funding decisions. It places strict limitations on the use of discretionary funds by HUD.”

Prior to the HUD Reform Act of 1989, HUD officials, not Federal statute, controlled the awarding of certain HUD dollars. Section 102 of the HUD Reform Act removed that control and required that HUD dollars be awarded on a competitive basis, unless the appropriation law provides for another method. Specifically, Section 102 of the HUD Reform Act of 1989, and its implementing regulations, requires HUD officials to:

- Issue a Notice of Funding Availability;
- Issue procedures for making an application;
- Issue objective selection criteria;
- Document funding decisions; and
- Publish, in the Federal Register, each of the above requirements for each award.

Moreover, with respect to Native American tribes, Section 702 of the HUD Reform Act amended Section 106 of the Housing and Community Development Act of 1974, among other things, to require that Community Development Block Grants to Native American tribes must be awarded competitively.

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, referred to as the 1998 HUD Appropriations Act (Pub. L. 105-65, 111 Stat. 1344, 1357; approved October 27, 1997) provided \$25 million under the Community and Planning Development heading, for grants (not to exceed \$4 million each) to rural and tribal areas. Specifically, the legislation provided:

“Of the amount made available under this heading, \$25,000,000 shall be available for the Secretary, in consultation with the Secretary of Agriculture, to make grants, not to exceed \$4,000,000 each, for rural and tribal areas, including at least one Native American area in Alaska and one rural area in each of the States of Iowa and Missouri, to test comprehensive approaches to developing a job base through economic development, developing affordable low- and moderate-income rental and homeownership housing, and increasing the investment of both private and nonprofit capital.”

The \$25 Million was appropriated for HUD's Community Planning and Development, HUD's Office of Community Planning and Development administered the budget and accounting for these funds.

Of the \$25 million provided, HUD awarded \$14 million, or 56 percent, of the dollars appropriated in 1998, and carried over the remaining \$11 million to its Fiscal Year 1999 Rural Housing Programs. Of the \$14 million awarded, HUD awarded \$8 million, or 57 percent, on a competitive basis, according to the Notices of Awards in the Federal Register. Specifically:

- On November 16, 1998, HUD announced to the public that it had competitively awarded \$5 million for the HUD Colonias Initiative. The Notice of Fund Availability for the \$5 million was announced in the Federal Register on July 15, 1998 (63 FR 38252) and amended on August 7, 1998 (63 FR 42550) extending the due date for the applications to September 8, 1998. The applications were rated and ranked based on need, commitment to improving the Colonias areas, and the expected benefit of the grant funds.
- On December 18, 1998, HUD's Office of Native American Programs announced to the public a single competitive grant award of \$3 million to a technical assistance provider. The grant funds would provide capacity building technical assistance to Indian tribes or Tribally Designated Housing Entities that received loan guarantees under Title VI of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.).

On December 18, 1998, HUD also announced that the Office of Native American Programs awarded two \$2 million grants in Alaska and a \$2 million grant in South Dakota (a total of \$6 million, or 43 percent, of the \$14 million awarded in 1998) on a basis other than competition. Specifically, the Office of Native American Programs' Notice of Award in the Federal Register announced that it awarded two grants in Alaska consistent with the requirements in the 1998 Appropriations Act, that at least \$4 million be awarded to the Native American area in Alaska. The Office of Native American Programs provided Rural Housing and Economic Development Grants of \$2 million each to the Alaska Native Heritage Center, Inc., located in Anchorage, Alaska and the Bristol Bay Housing Authority, located in Dillingham, Alaska. In addition, the Notice announced that the Office of Native American Programs provided a \$2 million Rural Housing and Economic Development Mortgage Funding Grant to the Oglala Sioux Lakota Tribe, located in Pine Ridge, South Dakota.

The three grantees' grant applications and/or agreements provided the following information about the planned use of these three \$2 million awards:

Alaska Native Heritage Center, Inc.

According to the June 19, 1998, grant application from the Alaska Native Heritage Center, its mission is to be a gathering place that celebrates, perpetuates and shares Alaska Native traditions. Their application states that the grant would be used to test comprehensive approaches to developing a job base through economic development for the statewide Alaska Native community, including both urban and rural Natives with varying levels of prior work experience. According to their grant application, over 100 jobs would be available at the Heritage Center, including 20 or more year round positions and 80 or more seasonal positions. Alaska Natives would hold at least 80 percent of both year round and seasonal jobs at the Center. The grant application budget identifies that the \$2 million would be combined with \$662,000 from other contributors. The majority of the funds would be used to purchase or build exhibits,

and at least \$1 million would be used to produce a film and to purchase theater equipment and parking shuttles. On September 4, 1998, HUD notified the Alaska Native Heritage Center of its \$2 million grant award.

Bristol Bay Housing Authority

The June 9, 1998 grant application from the Bristol Bay Housing Authority stated that grant funds would be used to reconstruct a United States Air Force dormitory and office facility into a vocational education center. The second phase of the project would use funds to either develop a modular housing plant or a on-site panel factory, depending on resources available and Air Force policy. On September 4, 1998, HUD notified the Bristol Bay Housing Authority of its \$2 million grant award.

Oglala Sioux Lakota Tribe

The third grantee, the Oglala Sioux Lakota Tribe, received a \$2 million Rural Housing and Economic Development Mortgage Funding Grant. According to the grant agreement, dated September 30, 1998, the Tribe would form a non-profit entity which planned to become the principal funding source of the Shared Vision Initiative on the Pine Ridge Reservation. The grant agreement stated that the funding would be used for homeownership counseling and other related services. Also, the grant agreement stated that \$1.1 million would be used to establish a Federal Housing Administration Loan Correspondent Corporation for: providing home mortgage loans and direct lending for home improvement loans; non-conforming loans; construction contingency reserves; and interest rate reduction services. In addition, \$50,000 would remain in liquid assets to meet FHA Loan Correspondent approval for net worth and \$500,000 for loan loss reserves for loss mitigation and tribal repurchases.

Audit Objective and Methodology

Audit objective and methodology

The objective of our review was to determine if HUD awarded Community Planning and Development Rural Housing and Economic Development funds consistent with Legislative requirements.

We examined HUD's Notices of Funding Availability, Notices of Awards, and other notices published in the Federal Register. In addition, we reviewed HUD Office of Native American Program grant applications, grant agreements, and pre-award documents. We also interviewed HUD's Office of Native American Program senior officials.

Scope

Our audit covered the \$14 million identified in the November 16, 1998 and the December 18, 1998 Federal Register Notices of Funding Awards for the 1998 Rural Housing and Economic Development grants. We performed our field work during January and February 2000.

Generally Accepted
Government Auditing
Standards

We conducted the audit in accordance with generally accepted government auditing standards.

Finding

HUD Awarded Three Rural Housing And Economic Development Grants Totaling \$6 Million, Or 43 Percent of the 1998 Grant Funds, Without Required Competition

Contrary to the 1998 HUD Appropriations Act, the Community Development Act of 1974, as amended, and the HUD Reform Act of 1989, HUD's Office of Native American Program non-competitively awarded Rural Housing and Economic Development grants totaling \$6 million, or 43 percent of the dollars awarded in 1998, to three grantees. The Deputy Assistant Secretary of Native American Programs and another Office of Native American Programs senior official advised that the awards were consistent with the 1998 Appropriations Act. In our opinion, statutory requirements clearly mandated HUD to award these funds on a competitive basis. More importantly, at least 765 other Native American tribes and a significant number of non-profit organizations were not given an opportunity to compete for these limited Federal dollars.

HUD awarded \$6 million in Rural Housing and Economic Development Grants non-competitively

The 1998 HUD Appropriations Act provided HUD \$25 million for grants to rural and tribal areas. On November 16, 1998 and December 18, 1998, HUD announced that it awarded \$14 million in Rural Housing and Economic Development grants and carried over the remaining \$11 million to Fiscal Year 1999 Rural Housing programs. Of the \$14 million awarded in 1998, HUD awarded \$8 million on a competitive basis and \$6 million on a non-competitive basis. We question the \$6 million in non-competitive awards which do not comply with Legislative requirements.

The 1998 Appropriations Act provided up to \$25 million for Rural Housing and Economic Development

Congress in the 1998 HUD Appropriations Act, under the heading Community and Planning Development, provided \$25 million, for grants (not to exceed \$4 million each) to rural and tribal areas. The Act required that at least one of these grants go to a Native American area in Alaska (111 STAT. 1357). The 1998 HUD Appropriations Act, under the heading Community and Planning Development, required that the Secretary select public and Indian housing agencies to receive assistance on a competitive basis.

The Legislative statutory language required these grants be awarded on a competitive basis

As stated above, the 1998 Appropriations Act required HUD to award Community and Planning Development grant funds to **"public and Indian housing agencies.., on a competitive basis."**(Pub. Law 105-65, 111 Stat. at 1357). Moreover, with respect to Native American tribes, Section 702 of the HUD Reform Act of 1989 amended Section 106 of the Housing and Community Development Act of 1974 (Pub. Law 93-383, 88 Stat. 633, Aug. 22, 1974), among other things, **to require that Community Development Block Grant account grants to Native American tribes must be awarded competitively** (42 U.S.C. § 5306(a)(1)). See Counsel to Inspector General's legal opinion on the applicability of the HUD Reform Act of 1989, in Appendix 1.

In addition, the HUD Reform Act of 1989, Section 102 (Pub. Law 101-235) and its implementing regulations (24 Code of Federal Regulations, Part 4) require HUD program officials to award grants on a competitive basis, unless Congressional legislation prescribes another method of distributing funds. Specifically, HUD officials must:

- Issue a Notice of Funding Availability;
- Issue procedures for making an application;
- Issue objective selection criteria;
- Document funding decisions; and
- Publish, in the Federal Register, each of the above requirements for each award.

The HUD Reform Act does provide for an emergency exception to the competitive award. However, within 30 days after allowing the emergency exception, the Secretary has to publish in the Federal Register the reasons for the allowance. We reviewed the Federal Registers, for the twenty-two month period of March 1998 through December 1999, and did not identify a notice of emergency exceptions related to these grants.

In our opinion, the statutory language of the 1998 HUD Appropriation Act, the Community Development Act of 1974, as amended, and the HUD Reform Act of 1989 clearly mandated HUD officials to award these grants on a competitive basis. Moreover, nothing in the 1998 HUD Appropriations Act relieved HUD officials of their responsibility for complying with these statutory requirements, nor did HUD utilize the emergency exception allowed for in the HUD Reform Act of 1989.

HUD uses the Notice of Fund Availability process to competitively award grants

The customary process for awarding funds on competitive basis is the Notice of Fund Availability. HUD publishes the Notice of Fund Availability in the Federal Register. The Notice includes information about the funds being awarded, a written application process, and the selection criteria for awarding the funds. The written application must be received prior to the deadline and is to provide the information requested in the Notice of Fund Availability in sufficient detail to allow for the rating and ranking of the applications.

The HUD Reform Act also requires that HUD officials maintain at least five years records on the rating and ranking of the applications to support the awards. Also, the public is to be notified of awards via the Federal Register. The notification is to include the following elements for each funding decision:

- the name and address of each funding recipient;
- the dollar amount; and
- the criteria under which the funding decision was made.

HUD awarded \$14 of the \$25 million

Of the \$25 million Rural Housing and Economic Development funds provided for in the 1998 HUD Appropriations Act, \$14 million, or 56 percent, were awarded in 1998. Of the \$14 million awarded, \$8 million, or 57 percent, was awarded on a competitive basis, according to HUD's Notice of Fund Awards in the Federal Register. Also, according to HUD's Notice of Fund Awards, HUD awarded \$6 million, or 43 percent, based on a process other than competition. Our review did not include the actual ranking and rating process for the competitive awards.

No Notice of Fund Availability for the \$6 million awarded non-competitively

We could not locate a Notice of Fund Availability for the \$6 million awarded on a basis other than competition. Therefore, we requested that the Office of Native American Programs provide us with all pre-award documents for these three grants. The Office of Native American Programs provided us with grant applications and their subsequent grant agreement for the two Alaska grants. Our review of the applications and grant agreements noted that the needs identified in the applications were consistent with grant awards and the grant agreements.

No application for the Oglala Sioux Lakota Tribe grant

The Office of Native American Programs did not have an application from the Oglala Sioux Lakota Tribe. Therefore, we could not determine a specific need for the funds or if the grant agreement was consistent with the needs identified. However, our review did identify, from other Office of Native American Program documents, that HUD staff were making plans for the use of these funds prior to HUD's official notice of grant award on September 30, 1998.

Specifically, on August 6, 1998, the Secretary visited the Pine Ridge Reservation, home of the Oglala Sioux Lakota Tribe. During this visit,

the Secretary announced that the Sioux Tribes, including the Oglala Sioux Lakota Tribe, were approved to receive financial assistance. Internal HUD documents indicate that senior HUD officials and the Office of Native American Program officials were developing a plan for the Shared Vision Initiative as early as September 21, 1998, approximately nine days before the actual award and approximately three months before the Notice of Award in the Federal Register.

\$2 million may have been awarded on a predetermined basis

In our opinion, based on the lack of an Oglala Sioux Lakota Tribe application and the internal HUD documents, the \$2 million may have been awarded on a predetermined basis.

Due to the lack of pre-award documents, we asked the Deputy Assistant Secretary of Native American Programs and a Office of Native American Programs senior official why grant funds totaling \$6 million were not awarded on a competitive basis.

The Deputy Assistant Secretary stated that the Appropriation Act required that at least \$4 million be awarded to Alaska and the two grants awarded to Alaska complied with this requirement. The Deputy Assistant Secretary also advised that the Appropriation Act did not specifically require competition for these funds. The Deputy Assistant Secretary for Native American Programs emphasized that the three awards were made with the advisement and consultation of members of Congress and the HUD administration.

HUD officials did not comply with statutory requirements

HUD officials did not comply with statutory requirements in awarding these three grants totaling \$6 million. Whether to seek recovery of these awards from the grantees is a decision for HUD management. However, at a minimum, HUD management needs to pursue legislative relief from Congress for these dollars.

At least 235 entities not given an opportunity to compete

The 1998 HUD Appropriations Act provided a limited amount of dollars to be competitively awarded to tribes and non-profits in Alaska. At least 235 Tribally Designated Housing Entities in Alaska and a number of non-profits also were eligible to receive these limited dollars. Therefore, at least 233 Alaskan Tribally Designated Housing Entities and non-profits were not given the opportunity to compete for these limited federal dollar

At least 530 tribes not given an opportunity to compete

The \$2 million Rural Housing and Economic Development Mortgage Funding Grant non-competitively awarded to the Oglala Sioux Lakota Tribe also came from limited Federal dollars. HUD provides funding to 531 Tribally Designated Housing Entities, under the Native American Housing and Self Determination Act. Therefore, 530 Tribally Designated Housing Entities were not given the opportunity to compete for the \$2 million.

Over 700 applicants applied for the Fiscal Year 1999 Rural Housing and Economic Development grants

In 1999, HUD competitively awarded about \$25 million in Rural Housing and Economic Development funds. According to HUD's press release for these awards, over 700 applicants, including Native American tribes, rural non-profits and others, applied for these limited Federal dollars. Based on the response to the 1999 Notice of Funds Availability, we must conclude that in 1998 a significant number of Native American tribes and non-profits would have applied for these limited Federal dollars, had they been given an opportunity.

No administrative remedies for non-compliance with this section of the HUD Reform Act

Neither the HUD Reform Act nor HUD regulations provide administrative remedies for non-compliance with the statutory requirement of competitively awarding limited HUD dollars. In our opinion, the lack of administrative remedies and general oversight of the funding process, provides insufficient safeguards to ensure limited Federal dollars are awarded in accordance with Legislative mandates.

Our report does not challenge the needs of the grantees

Our report does not challenge the needs of the grantees who received these non-competitive awards. However, we question HUD's method for awarding these limited Federal dollars, given the statutory mandates requiring funds be awarded on a competitive basis. As illustrated in HUD's 1999 Rural Housing and Economic Development awards, over 700 applicants expressed a need for these limited Federal dollars.

Auditee Comments

The Assistant Secretary for Public and Indian Housing advised in his written response to our draft report that the HUD Office of General Counsel provided a legal opinion on September 24, 1998. In the opinion, the HUD's General Counsel advised grants awarded from the funding source, identified in the finding, did not have to be competitively awarded.

We disagree with General Counsel's legal opinion. In our opinion, the General Counsel opinion is based on a limited review of one Section of the 1998 HUD Appropriations Act and did not consider other relevant parts of the Appropriations Act or the HUD Reform Act of 1989. More importantly, the legal opinion by the General Counsel did not fully consider the legislative history of the HUD Reform Act nor Congress's statutory language. Specifically, Title 42 of the United States Code Section 3545 (a)(1) and (2), which states that:

“The Secretary shall publish in the Federal Register notice of the availability of any assistance under any program or discretionary fund administered by the Secretary...The Secretary shall publish in the Federal Register a description of the form and procedures by which application for the assistance may be made, and any deadlines relating to the award or allocation of the

assistance. Such description shall be designed to help eligible applicants to apply for such assistance.”

Based on statutory language and our review of the 1998 HUD Appropriations Act, the Community Development Act of 1974 and the HUD Reform Act of 1989, these grants were required to be awarded on a competitive basis.

We included in Appendix 2 the full text of the Assistant Secretary’s response to our draft report and the Legal Opinion from HUD’s General Counsel.

We also included in Appendix 1 the Counsel to the Inspector General’s legal opinion on the non-competitive awarding of these grants.

Recommendations

We recommend that the Assistant Secretary for Public and Indian Housing:

- 1A. Notify appropriate Congressional Committees of the \$6 million awarded contrary to statutory requirements and seek Congressional relief for these awards.
- 1B. Review current HUD procedures and take appropriate actions to strengthen the procedures to ensure that future grant awards comply with statutory requirements. At a minimum, HUD should create administrative remedies for awarding grants without required competition.

Management Controls

In planning and performing our audit, we obtained an understanding of the management controls that were relevant to our audit. Management is responsible for establishing effective management controls. Management controls, in the broadest sense, include the plan of organization, methods, and procedures adopted by management to ensure that its goals are met. Management controls include the processes for planning, organizing, directing, and controlling program operations. They include systems for measuring, reporting, and monitoring program performance.

Management controls assessed

We determined that the management controls for the Office of Native American Programs' awarding of Rural Housing and Economic Development grants were relevant to our audit objective.

Assessment procedures

The following audit procedures were used to evaluate the management controls:

- Review of the Office of Native American Programs' 1998 Rural Housing and Economic Development grant applications; other pre-award documents; and grant agreements; and
- Interviews with the Office of Native American Programs' senior management.

Significant weakness

A significant weakness exists if management controls do not give reasonable assurance that resource use is consistent with laws, regulations, and policies; that resources are safeguarded against waste, loss, and misuse; and that reliable data is obtained and maintained, and fairly disclosed in reports. Based on our audit, we identified the following significant weakness:

- The Office of Native American Programs awarded Rural Housing and Economic Development grants on a non-competitive basis contrary to statutory requirements (see finding).

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Appendices

Appendix 1: Counsel to the Inspector General Legal Opinion



U.S. Department of Housing and Urban Development
Office of Inspector General
451 7th St., S.W.
Washington, D.C. 20410

SEP - 9 1999

**DO NOT VOLUNTARILY RELEASE:
ATTORNEY-CLIENT PRIVILEGE AND DELIBERATIVE PROCESS
MATERIAL**

MEMORANDUM FOR: Robert C. Gwin, District Inspector General
for Audit, 8AGA

FROM: *Bryan Saddler*
Bryan Saddler, Acting Counsel to the Inspector General, GC

SUBJECT: Rural/Tribal Development Grants¹

This responds to the request of Frank Rokosz, Senior Auditor, for guidance concerning \$2,000,000 that HUD awarded to the Ogala Sioux Lakota Tribe of the Pine Ridge Reservation in South Dakota ("Pine Ridge"). In connection with his request, Mr. Rokosz explained that, as part of HUD's fiscal year 1998 appropriation, Congress earmarked \$25,000,000 for grants to rural and tribal areas to develop local job bases and affordable housing. On July 23, 1998, HUD announced that it would award competitively \$4,000,000 of the \$25,000,000 appropriated for rural and tribal areas to develop their job base and affordable housing. On December 18, 1998, HUD announced that it had awarded \$9,000,000 of the \$25,000,000 appropriated for grants to rural and tribal areas to develop their job base and affordable housing. This \$9,000,000 included \$2,000,000 for Pine Ridge.

Mr. Rokosz specifically asked: (1) whether the grant made to Pine Ridge is consistent with HUD's fiscal year 1998 appropriation for rural and tribal areas to develop their job base and affordable housing; and (2) to the extent that the awards announced on December 18, 1998 exceed \$4,000,000, whether such

¹ This is an opinion of the Counsel to the Inspector General and does not represent the official legal position of the Department of Housing and Urban Development ("HUD"). The Office of General Counsel ("OGC") is responsible for issuing opinions that set forth HUD's official legal position.

awards violated the HUD Reform Act of 1989, Pub. Law 101-235, 103 Stat. 1987 (Dec. 15, 1989). We do not believe that the stated purposes of the \$2,000,000 grant to Pine Ridge are unauthorized under HUD's fiscal year 1998 appropriation, but it does appear to us that HUD violated section 102 of the HUD Reform Act because HUD failed to notify the public of the availability of the majority of the \$9,000,000 that it awarded, and it failed to award competitively \$6,000,000.

I. The Activities for Which the Grant Was Made Are Reasonably Permissible Under the Appropriation

According to the HUD's December 18, 1998 notice of grant awards, Pine Ridge received a grant of \$2,000,000,

for the provision of homeownership counseling and other related services. The grantee shall use these funds to establish a Federal Housing Administration Loan Correspondent Corporation which shall provide for home mortgage loans, direct lending for home improvement loans, non-conforming loans, construction contingency reserves and interest rate reduction services. This action also enhances economic development through job creation to staff the organization for a period of two years.

63 Fed. Reg. 70154, 70155 (Dec. 18, 1998). These purposes do not appear to conflict with the uses authorized in HUD's fiscal year 1998 appropriation.

Under the heading "Community Development Block Grants," The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1998 in relevant part states:

For grants to States and units of general local government and for related expenses, not otherwise provided for, to carry out a community development grants program as authorized by title I of the Housing and Community Development Act of 1974 . . . \$4,675,000,000, to remain available until September 30, 2000

. . . Provided further, That the Secretary shall select public and Indian housing agencies to receive assistance under this heading on a competitive basis

Of the amount made available under this heading, \$25,000,000 shall be available for the Secretary, in consultation with the Secretary of Agriculture, to make grants, not to exceed \$4,000,000 each, for rural and tribal areas, including at least one Native American area in Alaska and one rural area in each of the States of Iowa and Missouri, to test comprehensive approaches to developing a job base through economic development, developing affordable low- and moderate-income rental and homeownership housing, and increasing the investment of both private and nonprofit capital.

Pub. Law 105-65, 111 Stat. 1344, 1357 (Oct. 27, 1998) (emphases added). Establishing a loan correspondent that provides for home mortgage loans, home improvement loans, non-conforming loans, construction contingency reserves and interest rate reduction services, and creating jobs do not readily appear to be inconsistent with developing low- and moderate-income housing and improving the job base as authorized under the appropriation.

Although it appears that the plain language of The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1998 permits grants for purposes like those to be undertaken at Pine Ridge,²

Legislative history is always relevant in the sense that it is never “wrong” to look at it. Thus, most cases purporting to apply the plain meaning rule also review legislative history—TVA v. Hill, 437 U.S. 153 (1978)] being one good example—if for no other reason than to establish that nothing in that history contradicts the court’s view of what the plain meaning is.

GAO, Principles of Federal Appropriations Law, Vol. 1, Ch. 2, ¶ D(3)(a) (July 1991). Here, the legislative history does not contradict the conclusion that the plain language of the appropriation can reasonably be interpreted as permitting grants for purposes like those to be undertaken at Pine Ridge. Indeed, the legislative history at best merely reiterates the language included in the

² Courts have instructed that when trying to decipher the intent of Congress with respect to a specific piece of legislation, the starting point is the plain language or meaning of the statute itself. See Mallard v. United States District Court, 490 U.S. 296, 300 (1989). The plain language or meaning is the ordinary, everyday meaning of a word, phrase or clause. Id. at 301.

appropriation. The House Conference Report accompanying the appropriation merely stated that “a new rural economic development program” would be funded at the \$25,000,000 level instead of the \$42,000,000 level that the Senate proposed, and that “HUD is required to target up to \$4,000,000 each to areas in Alaska, Missouri, and Iowa.” See H. Conf. Rep. No. 297, 105th Cong., 1st Sess. 102 (Oct. 6, 1997). The House Bill from which the appropriation was derived, H.R. 2158, did not provide for a new rural/tribal development program. See also, H. Rep. No. 175, 105th Cong., 1st Sess. (July 11, 1997). Rather, the new rural/tribal development program originated in the competing Senate Bill, S. 1034, and was described as follows:

This legislation includes a new rural housing and rural economic development demonstration of \$42,000,000 within the CDBG program. Under this demonstration, HUD is to select various sites in rural and tribal areas, including at least one tribal area in Alaska, to test out comprehensive approaches to leverage additional private and public capital, develop a job base through economic revitalization and develop affordable low- and moderate-income housing. The Committee is especially concerned over the lack of private capital and affordability of housing in rural areas. There have been reports that the cost of building housing exceeds the appraised value of housing.

S. Rep. No. 53, 105th Cong., 1st Sess. 35 (July 17, 1997). Establishing a loan correspondent that provides for home mortgage loans, home improvement loans, non-conforming loans, construction contingency reserves and interest rate reduction services, and creating jobs do not appear to be inconsistent with the Senate’s vision of testing approaches to developing a job base and low- and moderate-income housing.

II. \$6,000,000 of the Grants Announced in December 1998 Appear to Have Been Made in Violation of the HUD Reform Act

Although it does not appear that the stated purposes of the \$2,000,000 award to Pine Ridge are unauthorized under HUD’s fiscal year 1998 appropriation, it does appear that \$6,000,000 of the \$9,000,000 in grant awards announced by HUD on December 18, 1998, was awarded in violation of section 102 of the HUD Reform Act. In that regard, HUD announced the availability of only \$4,000,000 of the \$9,000,000 awarded, and HUD failed to competitively award \$6,000,000 of the \$9,000,000 awarded. In relevant part, section 102(a) of

the HUD Reform Act requires that HUD must apprise the public of all assistance that it makes available, and must publish any objective procedures required by statute, as follows:

(1) Publication of notice of availability. The Secretary shall publish in the Federal Register notice of the availability of any assistance under any program or discretionary fund administered by the Secretary.

(3) Publication of selection criteria. Not less than 30 days before any deadline by which applications or requests for assistance under any program or discretionary fund administered by the Secretary must be submitted, the Secretary shall publish in the Federal Register the criteria by which selection for the assistance will be made. Subject to section 1439 of this title, such criteria shall include any objective measures of housing need, project merit, or efficient use of resources that the Secretary determines are appropriate and consistent with the statute under which the assistance is made available.

42 U.S.C. § 3545(a).

A. HUD Failed to Publish the Availability of All Assistance Awarded

On July 23, 1998, HUD notified the public that it would award up to \$4,000,000 of the \$25,000,000 included in HUD's fiscal year 1998 appropriation for "one or more technical assistance providers that will use the grant funds to provide capacity-building technical assistance to Indian tribes . . ." 63 Fed. Reg. 39686 (July 23, 1998). Further, HUD stated that funds would be "competitively awarded." *Id.*

On December 18, 1998, HUD notified the public that of the "\$25 million made available by the FY 1998 HUD Appropriations Act, HUD has awarded \$9 million for economic and affordable housing activities in Native American areas. . . ." ³ 63 Fed. Reg. at 70154. HUD further described the \$9,000,000 in

³ Based upon a HUD notice of funding availability published on March 17, 1999, it appears that HUD awarded an additional \$13,000,000 of the \$25,000,000. See 64 Fed. Reg. 11246 (Mar. 8, 1999) (indicating that HUD's fiscal year 1999 appropriation stated that all unobligated rural/tribal development programs funds remaining from HUD's fiscal year 1998 appropriation shall be transferred to and supplement HUD's fiscal year 1999 appropriation for

awards as: (1) \$4,000,000 in Rural Housing and Economic Development Grants for the Alaska Native Heritage Center, Inc. (\$2,000,000) and the Bristol Bay (Alaska) Housing Authority (\$2,000,000); (2) a \$2,000,000 Rural Housing and Economic Development Mortgage Funding Grant for Pine Ridge; and (3) a \$3,000,000 Loan Guaranty Capacity Building Grant for IHA Management Systems, Inc. See 63 Fed. Reg. at 70155. HUD's grant award notice referred to the \$3,000,000 Loan Guaranty Capacity Building Grant as the only award to have been the subject of a prior notice and competitive award procedures. See 63 Fed. Reg. at 70154. Further, consistent with the representations in HUD's notice, we were unable to locate notices of funding availability associated with the \$4,000,000 in Rural Housing and Economic Development Grants that was awarded or the \$2,000,000 that was awarded to Pine Ridge. The failure to publish a notice of the availability for these funds is a violation of section 102(a)(1) of the HUD Reform Act, 42 U.S.C. § 3545(a)(1).⁴

B. HUD Failed to Award \$6,000,000 Competitively

As stated above, The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1998 required HUD to award Community Development Block Grant account funds to "public and Indian housing agencies . . . on a competitive basis." See Pub. Law 105-65, 111 Stat. at 1357.⁵ Moreover, with respect to Native American tribes in

the same purpose, see Pub. Law 105-276, 112 Stat. 2461, 2475 (Oct. 21, 1998)). These funds are also subject to the HUD Reform Act provisions discussed herein.

Further, you may find it helpful to probe not only the details of the additional \$13,000,000 in awards but also the timing of all of the \$22,000,000 in awards. In that regard, effective October 21, 1998—at the latest—all funds that had not been awarded were no longer available for award, except pursuant to new (*i.e.*, post-October 21, 1998) notices of funding availability and competitive procedures. See Pub. Law 105-276, 112 Stat. at 2475.

⁴ Although Congress earmarked \$4,000,000 of the \$25,000,000 for Alaskan Native American areas, nothing in HUD's fiscal year 1998 appropriation indicated that the notice and competitive provisions of the HUD Reform Act—and the appropriation itself—were inapplicable to the earmarked funds. See generally, Pub. Law 105-65, 111 Stat. at 1344. In other words, although Congress instructed HUD to award \$4,000,000 to Alaskan Native American areas, Congress did not release HUD from its responsibility to apprise those areas of the availability of the funds and to require such areas to compete in order to receive them.

⁵ As part of The Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriation Act of 1999, Congress made the rural/tribal development program a separate and distinct program (*i.e.*, non-Community Development Block Grant

particular, section 702 of the HUD Reform Act amended section 106 of the Housing and Community Development Act of 1974, Pub. Law 93-383, 88 Stat. 633 (Aug. 22, 1974), among other things, to require that Community Development Block Grant account grants to Native American tribes must be awarded competitively. See 42 U.S.C. § 5306(a)(1). However, HUD's December 18, 1998 award notice does not indicate that the \$6,000,000 that was awarded to the Alaska Native Heritage Center, Inc., the Bristol Bay (Alaska) Housing Authority, and Pine Ridge was awarded competitively. We also have been unable to locate anything indicating that this \$6,000,000 was awarded competitively. The failure to award the funds competitively is a violation of section 102(a)(3) of the HUD Reform Act, 42 U.S.C. § 3545(a)(3).⁶

Please contact me at (202) 708-1613, if you have any questions concerning this memorandum.

account program), and required that "all grants [awarded under the program] shall be awarded on a competitive basis as specified in section 102 of the HUD Reform Act." See Pub. Law 105-276, 112 Stat. at 2475.

⁶ See footnote 4.

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Appendix 2 Auditee Comments



U. S. Department of Housing and Urban Development
Washington, D.C. 20410-5000

OFFICE OF THE ASSISTANT SECRETARY
FOR PUBLIC AND INDIAN HOUSING

MEMORANDUM FOR: Robert C. Gwin, District Inspector General for Audit, 8AGA

FROM: Harold Lucas, Assistant Secretary, Public and Indian Housing P 

SUBJECT: Official Draft Audit Report on the Office of Native American Programs
Awarding of 1998 Rural Housing and Economic Development Program
Funds

This is in response to your March 1, 2000, memorandum which enclosed a copy of your office's preliminary official draft audit report concerning your review of the Office of Native American Programs (ONAP) 1998 Rural Housing and Economic Development Grants (RH&ED).

I have attached a memorandum dated September 24, 1998, from Gail Laster, HUD General Counsel to Ms. Jacquie Lawing, HUD's Deputy Chief of Staff for Programs and Policy. It is not clear from your report whether you had the benefit of reviewing this memorandum. HUD's General Counsel has concluded the RH&ED funds need not be awarded competitively and that this conclusion is entirely consistent with both the HUD Reform Act and the rural initiative appropriation. I assume that the OIG will wish to substantially revise its preliminary draft conclusions in light of this memorandum and to withdraw its central finding. I would appreciate the opportunity to review and respond to such a revised report at the earliest opportunity.

If you have any further questions or concerns, please contact
Ms. Jacqueline Johnson, Deputy Assistant Secretary for ONAP at (202)401-7914.

Attachment



U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

September 24, 1998

OFFICE OF GENERAL COUNSEL

MEMORANDUM FOR: Jacquie Lawing, Deputy Chief of Staff
for Programs and Policy, S

FROM: *Gail W. Laster*
Gail W. Laster, General Counsel, C

SUBJECT: Rural Initiative Grants

This is in response to your request for a legal opinion as to whether grants must be competed under the fifth paragraph of the "Community Development Block Grants" head of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998.

The appropriation in question provides that:

"Of the [\$4,675,000,000] made available under this heading \$25,000,000 shall be available for the Secretary, in consultation with the Secretary of Agriculture, to make grants, not to exceed \$4,000,000 each for rural and tribal areas, including at least one Native American area in Alaska and one rural area in each of the States in Iowa and Missouri, to test comprehensive approaches to developing a job base through economic development, developing affordable low- and moderate-income rental and homeownership housing, and increasing the investment of both private and nonprofit capital."

CONCLUSIONS

Under this authority the Department is required to follow the funding caps, to make grants in the identified geographic States, to limit grants to rural and tribal areas, and to award the grants within the comprehensive approaches testing borders of the appropriation.

But none of this funding is required to be made pursuant to a competition, either under this or other legislation.

ANALYSIS

I understand that my staff had so advised you of these conclusions during consideration of funding options under this

appropriation, including program set-asides for Colonias and for capacity-building in connection with loan guarantee assistance under title VI of the Native American Housing Assistance and Self-Determination Act of 1996. The Department determined to make both funding opportunities available on a competitive basis for Colonias (63 FR 38252; July 15, 1998) and for title VI capacity-building (63 FR 39686; July 23, 1998) as a matter of administrative discretion.

HUD Reform Act

I note first that no requirement for a competition inheres in section 102 of the Department of Housing and Urban Development Reform Act of 1989 (the Reform Act).

Section 102 prescribes specific requirements in furtherance of notice regarding program assistance under any program or discretionary fund administered by the Secretary.¹ These include publication of a NOFA, publication of application procedures, publication of selection criteria, and documentation of decisions. From the time of enactment of section 102, it was clear that not every program administered by the Department falls conveniently within this typology of requirements. Accordingly, the regulations implementing section 102 recognized these intrinsic limits. The proposed preamble to the rule published by the Department on June 19, 1990 (55 FR 25036) stated that sections 102(a)(1) through (4)(B) and (E) and (5):

"apply to 'assistance under any program or discretionary fund administered by the Secretary.' The term is undefined, and requires an interpretation to establish its coverage. Based on an analysis of the relevant provisions of section 102, the Department believes that this term should be limited to discretionary authorities administered by the Department that provide assistance on a competitive basis.

"It is true that use of the phrase, 'any program or discretionary fund,' is very broad, potentially covering any HUD program that provides 'assistance.' In its widest interpretation, the phrase could apply to discretionary, competitive programs, as well as those authorizing formula grants, FHA mortgage insurance, and GNMA guarantees. In the Department's view, however, the context of section 102 compels a more restrictive reading." *Id.* at 25038.

¹Section 102 does not define the terms "program" or "discretionary fund" although subsection (m)(4) does define "assistance within the jurisdiction of the Department" to include any contract, grant, loan, cooperative agreement, or other form of assistance, including the insurance or guarantee of a loan, mortgage, or pool of mortgages.

The Department revisited the issue in the final rule, in response to public comment, concluding that HUD "believes that the approach adopted in the proposed rule is the best reading of the statute and accurately reflects congressional intent." 56 FR 11032, 11033 (Mar. 14, 1991). The only change made was to require that when HUD awards "assistance on a discretionary (non-formula, non-'demand') basis [that does] not use a competitive selection process," HUD would publish in the Federal Register a notice of the "winners" of these awards. Ibid.

Thus, HUD's implementation of the section 102 NOFA procedures has consistently applied to "any assistance, under any program administered by the Department, that provides by statute, regulation, or otherwise, for the competitive distribution of the assistance" (emphasis added). 24 CFR 4.3. The lodestar for mandatory application of the section 102 procedures has therefore been whether something external to section 102 itself -- a statute, regulation, or other requirement -- provides for the competitive distribution of the funding. If no such predicate exists, then section 102 does not apply. This interpretation has been applied uniformly and consistently by the Department.

Rural Initiative

Application of the foregoing principles to the program under review demonstrates that no legal requirement of competitive selection adheres to that program under the HUD Reform Act.

The rural initiative appropriation does not compel a competitive selection.² It is silent on competition. It calls only for the Secretary "to make grants." No statutory duty to compete ensues. There is therefore no need to refer to legislative history. Nonetheless, we have examined the sparse history that does exist and find nothing that curtails HUD's discretion to administer the program noncompetitively. The Senate Report on the rural initiative stated that "HUD is to

²It is interesting to note that other provisions under the same appropriation head obviously call for varying results in this regard. The largest portion of the appropriation is the community development block grant program itself, a formula grant which obviously cannot be administered competitively. At the other end of the continuum is the fifth proviso under the third paragraph which expressly requires that with respect to EDSS grants "the Secretary shall select public and Indian housing agencies to receive assistance under this head on a competitive basis" (emphasis added). The resounding implication is that grants to other eligible applicants (nonprofit corporations, and other appropriate entities for a supportive services program) under that paragraph may, but need not, be administered on a competitive basis.

select various sites in rural and tribal areas, including at least one tribal area in Alaska, to test out comprehensive approaches. S. Rep. No. 105-53 (July 17, 1997), at 35 (emphasis added). No guidance as to the mode of selection is furnished. The Conference Report states in pertinent part only that "HUD is required to target up to \$4,000,000 each to areas in Alaska, Missouri, and Iowa." H.R. Rep. No. 105-297 (Oct. 6, 1997) at 102.³

As for the second branch of coverage under section 102 of the Reform Act, there is no regulatory competition required because there are no regulations for this one-time-only set-aside.

Finally, no otherwise applicable requirement of competition applies to the set-aside. The test of whether section 102 is triggered will be whether HUD decides to distribute the funds competitively through a NOFA or not to do so. As noted above, the Department has competed \$4,000,000 each for Colonias and for the title VI loan guarantee capacity-building. Of the mandatory \$12,000,000 pegged geographically to three specific States in the appropriation, the first \$8,000,000 has been granted noncompetitively. Both approaches are consistent with the authority in this appropriation and with HUD's longstanding interpretation of section 102. Nothing in statute, regulations, or elsewhere mandates uniformity in this respect for the initiative.

³We understand that the Department has already made grants noncompetitively to areas in Alaska and Iowa. Note the much more substantial noncompetitive distribution of \$100,000,000 for "Economic Development Initiative (EDI)" grants for 120 pre-selected purposes under the sixth paragraph of the same appropriation's head and identified in the Conference Report (H.R. Rep. 105-297) at 96-101. (HUD is competing the remaining \$38,000,000 of standard EDI grants; see SuperNOFA for Economic Development and Empowerment Programs, 63 FR 23876, 23897 (Apr. 30, 1998).)

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Appendix 3

Acting Deputy General Counsel For Programs and Regulations Comments Related To Our Draft Report

HUD'S INITIAL RESPONSE TO OFFICE OF INSPECTOR GENERAL'S AUDIT OF 1998 RURAL HOUSING AND ECONOMIC DEVELOPMENT GRANT AWARDS

INTRODUCTION

In October of 1997, Congress appropriated \$25 million for the Secretary, in consultation with the Secretary of Agriculture, to make grants, not to exceed \$4,000,000 each, "for rural and tribal areas, including at least one Native American area in Alaska and one rural area in each of the States of Iowa and Missouri to test comprehensive approaches to developing a job base through economic development, developing affordable low- and moderate-income rental and homeownership housing, and increasing the investment of both private and nonprofit capital." P.L. 105-65, 111 STAT. 1344, 1357 (Oct. 27, 1997). In a legal memo dated September 24, 1998, HUD General Counsel Gail Laster concluded that there was no statutory requirement that these funds be awarded competitively.

OIG'S UNFAIR REFUSAL TO AGREE TO THE BRIEF EXTENSION OF TIME REQUESTED BY HUD TO RESPOND TO OIG'S DRAFT AUDIT DEMONSTRATED A LACK OF PROFESSIONALISM

In March 2000, the Office of Inspector General (OIG) presented to HUD a draft audit concerning the 1988 Rural Housing and Economic Development Grant Awards. This audit contained a single finding that HUD had violated the 1998 HUD Appropriations Act, the Community Development Act of 1974, as amended, and the HUD Reform Act of 1989 by non-competitively awarding three Rural Housing and Economic Development grants totaling \$6 million.

It was apparent from the conclusion of the report that OIG had not seen the September 24, 1998 memo from HUD General Counsel concluding that competition was not required for the awarding of grants under this program. Accordingly, Assistant Secretary Lucas provided the General Counsel's memo to OIG accompanied by a transmittal memo which stated as follows: "I assume that the OIG will wish to substantially revise its preliminary draft conclusions in light of this memorandum and to withdraw its central finding. I would appreciate the opportunity to review and respond to such a revised report at the earliest opportunity." HUD's response at that time was intended merely as a preliminary response based on the reasonable expectation that the report's conclusions would change once OIG had the opportunity to review our legal analysis.

On Friday, March 25, OIG e-mailed the revised memo to Assistant Secretary Lucas and Deputy Assistant Secretary Jacqueline Johnson, who has been the primary point of contact throughout the audit. DAS Johnson was out on travel the following week and, as a result, did not have an opportunity to retrieve and circulate the revised report until Thursday, March 30. This revised memo, to the surprise of HUD management, continued to maintain that the awards had been improperly awarded non-competitively. In addition, for the first time, the draft audit report included as an exhibit a legal memo written by OIG counsel Bryan Saddler and dated September 9, 1999 that concluded that the awards at issue were required to be awarded competitively. Mr. Saddler's memo is rife with mistakes of law, including inaccurate statutory construction.

On that same day, DAS Johnson asked Frank Rokosz, the lead auditor for the OIG, for a brief extension of time to respond. This request was refused and HUD was advised that a response was expected by 4:00 p.m. *the following day*. That same afternoon, Kevin Simpson, Deputy General Counsel for Programs and Regulations, sent an e-mail to Kathryn Kuhl-Inclan, Assistant Inspector General for Audit, setting forth the above facts, outlining how the agency's interests would be harmed by a short response time and requesting that HUD be permitted to respond on the following Wednesday, April 5. (Attachment 1). The following day, Deputy General Counsel Simpson left a voice-mail message with AIGI Kuhl-Inclan reiterating the agency's request for an extension of time. At approximately 2:30, Deputy General Counsel Simpson telephone Mr. Rokosz about the agency's request for an extension of time to respond and was advised that Kathryn Kuhl-Inclan knew of the request and would respond. Mr. Rokosz, however, refused to communicate the OIG's position on this issue.

OIG never responded to management's request for an extension of time before the deadline of 4:00 p.m. on Friday, March 31. OIG's conduct was not only unprofessional and discourteous, but it appears designed to seriously prejudice the agency's ability to respond to the OIG report findings. HUD has not had sufficient time to fully describe the misleading character of the OIG's legal opinion. Moreover, the OIG audit suggests that individual HUD employees have violated the HUD Reform Act – a serious allegation to which HUD was not permitted sufficient time to fairly respond. OIG's unreasoning inflexibility on this issue demonstrates a lack of cooperation that is unwarranted and non-constructive.

HUD is providing this response in order to preserve its procedural objections. HUD will continue to work on a more fulsome reply that explains the numerous mistakes in the OIG's legal analysis. Upon completion of this response, we will renew our request that OIG include the full HUD response as part of its audit report so that the reader will not be fundamentally misled by the OIG's inaccurate conclusions of law.

Appendix 4

Acting, Deputy General Counsel For Programs and Regulations, Electronic Request for Extension

To: Kathryn M. Kuhl-Inclan/IG/HHQ/HUD@HUD
cc: Saul Ramirez/SECY/HHQ/HUD@HUD, Harold Lucas/PIH/HHQ/HUD@HUD, Jacqueline Johnson/PIH/HHQ/HUD@HUD
Subject: Draft Audit on 1998 Rural Housing and Economic Development Grants

Kathy, I am writing to ask for additional time to respond to the draft audit on the 1988 Rural Housing and Economic Development Grants (I understand that Mr. Rokosz has advised Karen Garner-Wing that we can have only until 4:00 tomorrow, but that is not sufficient). Under the circumstances, we are effectively only being provided a day and a half to respond to this draft report and that is not enough time to address the serious issues raised in the draft report.

When we originally received the draft audit, it was apparent from the conclusion of the report that OIG had not seen a legal memo from HUD General Counsel concluding that competition was not required for the awarding of grants under this program. Sometime last week, AS Lucas provided the General Counsel memo to Mr. Rokosz and stated as follows: "I assume that the OIG will wish to substantially revise its preliminary draft conclusions in light of this memorandum and to withdraw its central finding. I would appreciate the opportunity to review and respond to such a revised report at the earliest opportunity." Our response was intended merely as a preliminary response based on our expectation that the report's conclusions would change once OIG had the opportunity to review our legal analysis.

Last Friday, Mr. Rokosz e-mailed the revised memo to AS Lucas and DAS Jacqueline Johnson, who has been the primary point of contact throughout the audit. DAS Johnson was out on travel all this week and, as a result, did not have an opportunity to retrieve this e-mail until today. Consequently, neither ONAP nor OGC was apprised of the results of the revised audit report until today nor have we had any opportunity to marshal a response. In addition, the revised draft audit report is the first time that we have been provided with a copy of Mr. Saddler's legal memo, upon which the central conclusion of the draft audit report is based. We believe the OIG's legal conclusion is not only mistaken, but sets a troubling and unworkable precedent for the interpretation of HUD's statutory competition requirements. In addition, the draft report concludes that HUD employees violated the HUD Reform Act. These issues are serious and we would like to have sufficient time to present a considered response.

For all of these reasons, I request that we be permitted to provide a response by cob on Wednesday, April 5. Please let me know if this is acceptable to you. Thank you.

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Appendix 5

Audit Distribution List

Deputy Assistant Secretary for Native American Programs, PI, Room 4128
Assistant Secretary for Community Planning and Development, D, Room 7100
Deputy Secretary, SD, Room 10100
Chief of Staff, S, Room 10000
Inspector General, G, Room 8256
Office of Administration, S, Room 10110
Assistant Secretary for Congressional and Intergovernmental Relations, J, Room 10120
Senior Advisor to the Secretary, Office of Public Affairs, S, Room 10132
Special Assistant to the Deputy Secretary for Program Management, SD, Room 10100
Deputy Assistant Secretary for Public Affairs, W, Room 10222
Deputy Chief of Staff, S, Room 10226
Deputy Chief of Staff for Operations, S, Room 10226
Deputy Chief of Staff for Program and Policy, S, Room 10226
Deputy General Counsel, CB, Room 10220
Deputy Chief Financial Officer for Operations, FF, Room 10166
Director, Enforcement Center, V, 200 Portals Building
Director, Real Estate Assessment Center, X, 1280 Maryland Ave., SW, Suite 800
Director, Office of Budget, FO, Room 3270
Director, Office of Information Technology, AMI, Room 160
Director, Office of Department Operations and Coordination, I, Room 2124
Director of Scheduling and Advance, AL, Room 10158
Chief Procurement Officer, N, Room 5184
Chief Information Officer, Q, Room 3152
Chief Financial Officer, F, Room 2202
General Counsel, C, Room 10214
Counselor to the Secretary, S, Room 10234
Office of Policy Development and Research, R, Room 8100
Assistant Deputy Secretary for Field Policy and Management, SDF, Room 7106
Departmental Audit Liaison Officer, FM, Room 2206
Headquarters Audit Liaison Officer, Housing, HF, Room 9116
Acquisitions Librarian, Library, AS, Room 8141
The Honorable Fred Thompson, Chairman, Committee on Governmental Affairs, 340 Dirksen
Senate Office Building, United States Senate, Washington, DC 20510
The Honorable Joseph Lieberman, Ranking Member, Committee on Governmental Affairs, 706
Hart Senate Office Building, United States Senate, Washington, DC 20510
Honorable Dan Burton, Chairman, Committee on Governmental Reform, 2185 Rayburn Bldg.,
House of Representatives, Washington, DC 20515

Henry A. Waxman, Ranking Member, Committee on Governmental Reform, 2204 Rayburn Bldg.,
House of Representatives, Washington, DC 20515

Ms. Cindy Fogleman, Subcommittee on Oversight and Investigations, Room 212, O'Neil House
Office Building, Washington, DC 20515

Director, Housing and Community Development Issue Area, United States General Accounting
Office, 441 G Street, NW, Room 2474, Washington, DC 20548 (Attention: Judy England-
Joseph)

Deputy Staff Director, Counsel, Subcommittee on Criminal justice, Drug policy and Urban
Resources, B373 Rayburn house Office Building, Washington, DC 20515

Steve Redburn, Chief, Housing Branch, Office of Management and Budget, 725 17th Street, NW,
Room 9226, New Executive Office Building, Washington, DC 20503