

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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.

BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES

STUART F. DELERY
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

KIRK T. MANHARDT
Assistant Director

OF COUNSEL:

JOSPEH A. PIXLEY

Trial Attorney
Civil Division
Commercial Litigation Branch
United States Department of Justice

DORIS S. FINNERMAN

Assistant General Counsel for
Assisted Housing and Civil Rights
Office of General Counsel
U.S. Department of Housing and
Urban Development
Washington, D.C.

KATHIE SOROKA

Special Assistant to the General Counsel
Office of General Counsel
U.S. Department of Housing and
Urban Development
Washington, D.C.

DOUGLAS K. MICKLE

Senior Trial Counsel
Commercial Litigation Branch
Civil Division
United States Department of Justice
PO Box 480
Washington, DC 20044
United States Department of Justice
Tel: (202) 307-0383
Fax: (202) 353-7988

Attorneys for Defendant-Appellee

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STATEMENT OF COUNSEL OF RELATED CASES

Pursuant to Rule 47.5, appellee's counsel state that we are unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title.

Appellee's counsel also state that we are unaware of any cases currently pending before this Court that will be affected by the Court's decision in this case.

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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.)

No. 2013-5093

BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims properly analyzed the enabling statutes for the housing assistance program at issue here, the United States Housing

Act of 1937, as amended (1937 Housing Act), 42 U.S.C. § 1437 *et seq.*, and the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA), Pub. L. No. 105-65, Title V, § 510 *et seq.*, 111 Stat. 1384 (Oct. 27, 1997), 42 U.S.C. § 1437f note, the implementing regulations, and the governing documents, and correctly concluded that HUD’s use of cooperative agreements with state-authorized public housing agencies (PHAs) to assign program administration responsibility and transfer funds to these PHAs so that they can assist in the implementation of these Federal housing assistance programs, was compliant with the Federal Grant and Cooperative Agreement Act (FGCAA), specifically 31 U.S.C. § 6305.

2. Whether the trial court, after correctly holding that HUD’s use of cooperative agreements with PHAs was proper, erred by not dismissing the appellants’ complaints for lack of jurisdiction because, pursuant to 28 U.S.C. § 1491(b), the trial court’s bid protest jurisdiction is limited to “procurements,” and Congress has distinguished “procurements” from “cooperative agreements.”

3. Assuming that the trial court did not err when it did not dismiss the complaints for lack of jurisdiction, whether the trial court correctly held that the terms of HUD’s Notice of Funding Availability were compliant with the FGCAA.

STATEMENT OF THE CASE

Appellants' Statement of the Case and Statement of Facts, App. Br. at 2-27,¹ contain allegations and characterizations with which the Government disagrees. Appellants' statements also omit relevant information. Accordingly, we provide additional information regarding the statements of the case and of the facts below.

This appeal is not a typical bid protest brought by a commercial entity to challenge a decision by a Federal agency acting in a commercial capacity by acquiring goods or services for its own benefit. Instead, the appellants are public housing agencies authorized by state laws "to engage in or assist in the development or operation of low-income housing under the [1937 Housing] Act." 24 C.F.R. § 5.100; *see also* 42 U.S.C. § 1437a(b)(6)(A); App. Br. at 21, n. 5. These PHAs are challenging the actions of the Department of Housing and Urban Development (HUD) acting in its sovereign role, fulfilling Congressional mandates regarding the administration of our nation's housing programs for low-income families. Specifically, the appellants are challenging the trial court's opinion that upheld HUD's decision to use cooperative agreements, referred to as Annual Contribution Contracts (ACCs), for assigning program administration authority and distributing funds to PHAs. For 39 years, HUD has implemented our nation's

¹ "App. Br. at ___" refers to page numbers in the appellants' brief filed on June 7, 2013 (Docket No. 49).

rental assistance programs by entering into assistance agreements, as they are defined in the FGCAA, with PHAs.

Contrary to appellants' implication in their Statement of the Case, during this 39-year history, HUD has *never* awarded an ACC as a procurement contract or applied the Federal Acquisition Regulation (FAR) when selecting a PHA. No ACCs during this 39-year period have ever been administered as Federal procurement contracts nor have they contained any contract clause required by the FAR. The Section 8 housing assistance programs at issue here have been administered by a program office, not a contracting officer. And because the ACC obligates the PHAs to perform all of their responsibilities in accordance with HUD's requirements, including any changes to those requirements, all statutory amendments and changes in policies or procedures have been implemented not through a FAR-mandated changes clause, but through notices, handbooks, and regulations. There is simply no basis for appellants' assertion in their Statement of the Case that HUD has treated or understood the ACCs to be procurement contracts.

STATEMENT OF FACTS AND STATUTORY BACKGROUND

Any review of the propriety of HUD's use of cooperative agreements must begin with the statutory underpinnings for the housing assistance programs at issue. Under the 1937 Housing Act, HUD is charged with implementing the

statutes that authorize the seven Section 8 project-based rental assistance programs at issue.² Although only project-based programs are at issue in this appeal, the statutory authority for the project-based programs does not exist in a vacuum. Nor was it created out of whole cloth. Rather, the program evolved as one constituent part of the framework of housing assistance programs created by the 1937 Housing Act.

I. Statutory Background Of Federal Housing Assistance Programs

A. Overview Of The Section 8 Programs

Pursuant to Section 8 of the 1937 Housing Act, as amended (42 U.S.C. § 1437f), the United States, acting through HUD, subsidizes the rent of low-income tenants of privately-owned dwellings. The rent subsidy is provided in one

² Those seven Section 8 programs, sometimes referred to collectively as the “project-based program,” for which HUD’s Office of Housing has oversight responsibility, are: (1) the Housing Assistance Payments (HAPs) Program for New Construction (24 C.F.R. Part 880), (2) 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 (7) the Housing Assistance Payments Program for Section 202 Projects (24 C.F.R. Part 891).

The remaining project-based Section 8 programs, which are not the subject of, but may be affected by, this lawsuit, are: (i) the Moderate Rehabilitation Program (24 C.F.R. Part 882 Subparts A – G), which HUD’s Office of Public and Indian Housing administers, and (ii) the Moderate Rehabilitation Single Room Occupancy Program for Homeless Individuals (24 C.F.R. Part 882 Subpart H), which HUD’s Office of Community and Planning Development administers.

of two ways: project-based assistance or tenant-based assistance. Project-based assistance is dedicated to specific units in privately-owned, multifamily residential rental buildings. When a Section 8-eligible tenant vacates a unit that is subsidized by project-based assistance, the subsidy remains available for the next eligible tenant to occupy the unit. *See* 42 U.S.C. § 1437f(f)(6). Tenant-based assistance comes in the form of a voucher (known as a “Housing Choice Voucher”), which is given to eligible tenants by PHAs. These vouchers are “portable,” which means that the subsidy stays with the tenant who may use it to move to any acceptable rental unit (*i.e.*, a unit meeting HUD-established standards for decent, safe, and sanitary housing and owned by a landlord willing to accept the voucher) in any state. *See* 42 U.S.C. §§ 1437f(f)(7) and (o); 24 C.F.R. § 982.1(b)(1).

All Section 8 programs are implemented through two contracts: the Annual Contributions Contract (ACC) and the Housing Assistance Payment (HAP) contract. The ACC is a financial assistance instrument that HUD enters into with the PHA. In turn, the PHA enters into a HAP contract with project owners, pursuant to which the rental subsidy is paid in exchange for, among other things, the owner’s obligation to maintain the subsidized rental units in decent, safe, and sanitary condition and to comply with applicable non-discrimination requirements. In some circumstances, statutory authority allows HUD instead to enter into HAP contracts directly with project owners. By law, HUD may only enter into an ACC

with a legal entity that qualifies as a PHA, defined 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. §§ 1437f(b), 1437a(b)(6)(A).

The ACC between HUD and a PHA is used to implement almost all of the 1937 Housing Act programs, including the Section 8 programs: it transfers funds and program administration responsibilities to PHAs, with the purpose of ensuring that the program is administered properly and efficiently. Joint Appendix (JA)300/AR1374. In the Section 8 programs, the ACC assigns to PHAs the responsibility to administer the HAP contracts, it provides funds to make housing assistance payments to the private landlords (the HAP contract payments), and it defrays the costs of PHAs in administering the program. JA300/AR119, 125-26, 128-29.

The PHAs have the responsibility and authority of a “contract administrator,” which, by regulation, is defined as “[t]he entity which enters into the [HAP] Contract with the owner and is responsible for monitoring performance by the owner.” 24 C.F.R. § 880.201. The PHAs are responsible for ensuring compliance with program requirements, which are not limited to the specific provisions of the ACCs and the HAP contracts but are set forth in the 1937

Housing Act and in HUD regulations, notices, and handbooks. *See* JA300/AR449 (“The PHA shall comply, and shall require owners of covered units to comply with” the 1937 Housing Act, other applicable Federal statutes, and all HUD regulations and requirements, including any changes in law or requirements).

B. Statutory History Of The Project-Based Section 8 Program

1. 1937 – 1974: The Statutory Precursors To Section 8 – HUD Implements Policy Through The States

Since 1937, it has been the policy of the United States Government to address the shortage of affordable housing in partnership with state and local public housing agencies. Specifically, Section 1, “Declaration of Policy,” United States Housing Act of 1937, states:

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 alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwelling 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, 891 (1937) (emphasis added).

The Preamble to the 1937 Housing Act provides: “To provide *financial assistance* to the 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, and

for the reduction of unemployment and the stimulation of business activity, to create a United States Housing Authority, and for other purposes.” *Id.* (emphasis added). Congress’s intent that state housing agencies be the primary recipients and facilitators for distributing 1937 Housing Act funds at the local level was evident from the outset.

The 1937 Housing Act authorized the newly created United States Housing Authority to “make *annual contributions* to *public housing agencies* to assist in achieving and maintaining the low-rent character of their housing projects. . . . *The Authority shall embody the provisions for such annual contributions in a contract* guaranteeing their payment over such fixed period.” *Id.*, § 10(a) (emphasis added). Further, “[a]nnual contributions shall be strictly limited to the amounts and periods necessary, in the determination of the Authority, to assure the low-rent character of the housing projects involved.” *Id.*, § 10(b).

In 1965, Congress added a precursor to today’s Section 8 programs by authorizing HUD to enter into ACCs with PHAs to provide subsidies to the private market, to increase the stock of affordable housing, and to provide an administrative fee to the PHAs. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, § 103(a), 79 Stat. 451, 455 (1965); *see also* § 103(a), 79 Stat. at 456 (requiring HUD to use “contracts for annual contributions” with the PHA and defining “annual contributions” to include an allocation for the difference in

rent and also an administrative fee for reasonable and necessary expenses incurred by the PHAs).

2. 1974: Enactment of Section 8 – Congress Gives Primary Responsibility To PHAs For Assistance To Existing Dwellings And Independent Authority To HUD For Assistance To Newly Constructed And Substantially Rehabilitated Housing

In 1974, Congress amended the 1937 Housing Act by, among other things, establishing Section 8 authority for rental assistance programs. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974). One of the fundamental features Congress carried over into Section 8 is the significant role of PHAs as contract administrator. As enacted, Section 8 read, in part:

(a) For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to **existing, newly constructed, and substantially rehabilitated** housing in accordance with the provisions of this section.

(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 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.

(b)(2) To the extent of annual contributions authorizations

under section 5(c) of this Act, the Secretary is authorized to make assistance payments to 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.

See 88 Stat. 662-63 (emphasis added).

3. 1983: Repeal of HUD’s Authority Granted By Section 8(b)(2) – And A Savings Provision For Any Funds Obligated For Viable Section 8 Projects

In 1983, Congress repealed authority for new construction and substantial rehabilitation programs. Section 8(b)(2), as well as the reference to “newly constructed, and substantially rehabilitated” in Section 8(a), were deleted. Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 209, 97 Stat. 1153, 1183 (1983). However, the repealed provisions *remained 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.* at § 209(b)(1). Accordingly, while funding for new HAP contracts associated with newly constructed or rehabilitated properties was substantially discontinued in 1983, funding was provided for existing contracts. HUD continued to administer those HAP contracts to which it was a party, and PHAs continued to administer the HAP contracts to which they were a party.

It is not disputed that the majority of the portfolio of HAP contracts involved in this case was authorized by Section 8(b)(2) for new construction and substantially rehabilitated housing and that, as of 1999, HUD was a party to, and contract administrator of, the vast majority of those HAP contracts. JA6-7, 30.

Since Congress did not repeal Section 8(b)(1), HUD's authority to enter into ACCs with PHAs for existing housing under Section 8(b)(1) of the Act remained intact, for both project-based and tenant-based programs.³ Housing and Community Development Act of 1992, 102 Pub. L. No. 550, § 146; 106 Stat. 3672 (1992).

It is important to note, however, that the existing Section 8(b)(1) has a different structure than former Section 8(b)(2). Unlike the repealed Section 8(b)(2), Section 8(b)(1) does not grant to HUD independent authority to enter into HAP contracts. The structure of Section 8(b)(1) provides that HUD enter into ACCs with PHAs, and that PHAs can then enter into HAP contracts with project

³ Congress amended the 1937 Housing Act in 1992 by adding to the definitional section, 42 U.S.C. § 1437f(f), the following provisions: “(6) the term ‘project-based assistance’ means rental assistance under subsection (b) that is attached to the structure pursuant to subsection (d)(2); and (7) the term ‘tenant-based assistance’ means rental assistance under subsection (b) or (o) that is not project-based assistance.” Housing and Community Development Act of 1992, 102 Pub. L. No. 550, § 146; 106 Stat. 3672 (1992). In 1998, the definition of “tenant-based assistance” was amended to delete the reference to subsection (b). Quality Housing and Work Responsibility Act of 1998, 105 P.L. 276, § 550(a)(5); 112 Stat. 2461 (1998). Accordingly, since 1992, Section 8(b)(1) has expressly referred to project-based assistance, and since 1998, Section 8(b)(1) refers *only* to project-based assistance.

owners: “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.” Only when HUD determines that no PHA is able to implement the program does HUD have the authority to enter into HAP contracts: “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.” Section 8(b)(1) therefore sets up PHAs as the primary administrators of the rental assistance programs for existing housing.

4. 1997: Statutory Authority Provides For Renewals Of Project-Based Section 8 Contracts – Congress Urges HUD To Transfer And Share Contract Administration Functions To State And Local Governments

The original HAP contracts for the projects at issue in this case were limited to terms of 20 to 40 years. Pub. L. No. 93-383, § 8(e)(1), 88 Stat. 633, 665 (1974) (20 years unless owned by or financed by a state or local agency). Although some of these original contracts are still in existence, most began to expire in the mid- to late-1990s. To address this problem, Congress first authorized limited demonstration programs providing for renewal of some project-based HAP contracts beginning in 1996. *See* Pub. L. No. 104-99, Title IV, § 405, 110 Stat. 44 (1996); Pub. L. No. 104-120, § 2(a), 110 Stat. 834 (1996); Pub. L. No. 104-204,

Title II, § 211, 110 Stat. 2895 (1996).

Then, in 1997, Congress permanently authorized the renewal of project-based rental assistance. MAHRA, Pub. L. No. 105-65, Title V, § 524, 111 Stat. 1384 (Oct. 27, 1997), 42 U.S.C. § 1437f note. The structure Congress established through MAHRA provided for new Renewal Contracts under the Section 8 rental assistance program upon the termination of the existing HAP contracts.⁴

MAHRA also addressed the ability of HUD to administer the program in light of recent agency-wide reforms. Four months prior to the enactment of MAHRA, in June 1997, then-HUD Secretary Andrew Cuomo announced an

⁴ Then-Section 524(a)(1) of MAHRA provided:

(a) Section 8 Contract Renewal Authority. -- (1) In general.-- . . . for fiscal year 1999 and henceforth, the 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 and notwithstanding section 8(v) of such Act for loan management 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.

42 U.S.C. § 1437f note (emphasis added). Critically, MAHRA also defined “Renewal” as “the replacement of an expiring Federal rental contract with a new contract under Section 8 of the United States Housing Act of 1937, consistent with the requirements of this subtitle.” MAHRA, § 512(12), 42 U.S.C. 1437f note. MAHRA defined “expiring contract” as “a project-based assistance contract that, by its terms, will expire.” *Id.* at §512(3). Thus, MAHRA authorized HUD, going forward, to enter into new project-based HAP contracts; they are not mere extensions of existing contracts.

agency-wide management reform plan, which included a reduction of HUD's staff by one-third, from 10,500 to 7,500, by the end of the year 2000 and establishing performance-based systems to evaluate HUD programs and operations.

JA300/AR2766-67.

In enacting MAHRA Congress included "Findings and Purposes." Congress found 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 found that these problems could best be served by "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) (emphasis added). Among the "Purposes" of MAHRA were to preserve affordable housing while reducing the costs of project-based assistance, to reform HUD's assistance programs to promote operating and cost efficiencies, to streamline project oversight and administration, and to resolve problems through cooperation among all interested entities, including the state and local governments. *Id.*, § 511(b).

5. 1998: Amendment Of Declaration Of Policy In 1937 Housing Act - Congress Emphasizes State Involvement

In 1998, Congress amended the policy statement of the 1937 Housing Act, further emphasizing the primary role the states and their political subdivisions play in administering Section 8 assistance. As amended, Section 2 of the 1937 Housing Act now reads, in pertinent part:

(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.

Quality Housing and Work Responsibility Act of 1998, 105 Pub. L. No. 276, § 505; 112 Stat. 2461, 2522-23 (Oct. 21, 1998), 42 U.S.C. § 1437 (emphasis added).

The amended declaration reaffirms Congress's intent for HUD to provide Federal funds to assist states and their political subdivisions to address the shortage of affordable housing to low-income families, and it reinforces the 1937 Housing

Act's policy to vest program administration primarily in PHAs.

C. 1999 Competition: PHA Administration Expands To A Statewide Basis And Incorporates New Emphasis On A Performance-Based Structure

By 1997, when Congress, through the enactment of MAHRA, provided HUD with long-term authority to renew rental assistance under Section 8, and former Section 8(b)(2) had been repealed, the sole remaining authority for new project-based Section 8 assistance was Section 8(b)(1). Under that authority, HUD is statutorily precluded from administering HAP contracts unless there is no PHA able to do so.

Accordingly, on May 19, 1999, HUD initiated a nationwide competition to award an ACC in each of the 50 states (two ACCs were awarded in California), plus the District of Columbia and the Commonwealth of Puerto Rico. This was the first time that HUD held a competition to select qualified PHAs as contract administrators on a statewide basis. The 1999 Request for Proposals (RFP) stated 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.” JA300/AR429.

Prior to the competition, PHAs were administering approximately 4,200 project-based HAP contracts, and HUD was administering approximately 20,000 project-based HAP contracts. JA300/AR428. The intent of the competition was to

have PHAs “assume or enter into HAP Contracts with the owners of the Section 8 properties.” *See* JA300/AR428; 64 Fed. Reg. 27358. With respect to existing HAP contracts, HUD would assign such contracts to the PHA, and “[u]pon such assignment, the PHA assumes all contractual rights and responsibilities of HUD pursuant to such HAP contracts.” JA300/AR449. This assumption of rights and responsibilities was expressly reflected in the ACC. *Id.* The 1999 RFP contained no FAR-required solicitation provisions and stated explicitly that it was not a procurement within the meaning of the Federal Acquisition Regulations. JA300/AR428 (“Summary”).

Among the tasks to be performed by the PHAs was the execution of Renewal Contracts, after the PHA received confirmation of funding for the renewal from HUD. JA300/AR434. In almost all cases, the PHA, not HUD, is the governmental entity party to the Renewal Contract, although HUD does sign the contract because only HUD can obligate the expenditure of Federal funds for the HAP payment. *See* JA300/AR2020-2021. The PHA was also responsible for determining the proper rent adjustments owed to the owner, and for disbursing the Section 8 funds to the owners. JA300/AR430-432. The ACC also required the PHA to comply “with the United States Housing Act of 1937, applicable Federal statutes, and all HUD regulations and other requirements, including any amendments or changes in the law or HUD requirements.” JA300/AR449 (“PHA

Services”).⁵

At that time, HUD also changed the structure of the ACCs to a “performance-based” model, where the administrative fee provided to the PHAs would be based upon each PHA’s performance. The “performance-based” model resulted from the 1997 HUD reform plan and the 1998 amendment to the 1937 Housing Act, which established a national policy of “vest[ing] in public housing agencies *that perform well*, the maximum amount of responsibility and flexibility in program administration” 42 U.S.C. § 1437(a)(1)(C)(emphasis added). *See also* Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 502(b), 112 Stat. 2461, 2521 (1998) (one purpose is to “increase[] accountability and reward[] effective management of” PHAs).

Accordingly, the PHAs that entered into “performance-based” ACCs are referred to as “Performance-Based Contract Administrators” (PBCAs). PHAs that entered into ACCs with HUD prior to the 1999 competition are referred to as “Traditional Contract Administrators,” some of which are still administering HAP

⁵ The appellants cite to HUD’s FY2000 budget request to demonstrate that HUD was “outsourcing” the administration of HAP contracts. App. Br. at 8. For FY2000, Congress appropriated approximately \$11 billion for assistance under the 1937 Housing Act. Congress “further provided” “[t]hat amounts available under this heading may be made available for administrative fees and other expenses to cover the cost of administering” Section 8 rental assistance programs. Pub. L. No. 106-74, 113 Stat. 1055-56 (1999). By this appropriation, Congress demonstrated that the contract administration fees were an integral part of Section 8 rental assistance.

contracts. Currently, 42 ACCs associated with the 1999 competition remain in effect today, including ACCs with each of the appellants. App. Br. at 2.⁶

D. The 2011 Competition: HUD Acknowledges Need For Clarification In The Evaluation Process But Maintains Consistent Position That ACCs Are Not Procurement Contracts

On February 25, 2011, HUD held its second nationwide competition and issued an Invitation for Submission of Applications (2011 Invitation). Following HUD's award of 53 ACCs, protests were filed at the Government Accountability Office (GAO) over the ACCs awarded in 42 states.⁷ The protests generally alleged that the ACCs were procurement contracts and not properly awarded in accordance with Federal procurement law, and that HUD's evaluation of the applications was flawed. HUD filed a motion to dismiss those protests on the grounds that the ACCs were grants or cooperative agreements and not procurement contracts. HUD's motion was not ruled upon.

HUD maintained that the ACCs were not, and have never been, procurement contracts. JA300/AR115. However, in response to the allegations that HUD's evaluation procedures were flawed, HUD recognized some areas in which the 2011

⁶ HUD only awarded 37 ACCs under the 1999 competition. HUD held two additional competitions resulting in the award of 16 additional ACCs, so that there were PHAs in place in all 53 jurisdictions by 2005. JA300/AR642.

⁷ Appellants emphasize that 66 protests were filed, App. Br. at 53; however, the seven appellants neglect to mention that they were responsible for the vast majority of those protests.

Invitation could have been improved. JA300/AR1482. In some instances, descriptions of evaluation criteria were ambiguous and in some instances, the scoring framework used in evaluating certain criteria made consistent evaluation by multiple scoring teams challenging. In addition, HUD recognized that it had not been adequately transparent in its intended evaluation of applicants' proposed fee. HUD concluded that these imperfections failed to meet HUD's standards. JA300/AR591. However, in states where there had only been one applicant, the impact of these imperfections was minimal.

Therefore, on August 10, 2011, HUD announced that it would not award ACCs for the states that had received more than one applicant, and that, after evaluating and revising its competitive award process, HUD would issue a NOFA for the selection of PHAs. *See* JA300/AR1482. Based upon this information, GAO dismissed the protests. For the 11 states in which there was only one applicant, HUD awarded an ACC. These 11 ACCs are in effect today and are not subject to this protest.

Following these protests, HUD received letters from many states' attorneys general offering opinions as to whether their respective state law permits an out-of-state PHA to lawfully operate within their own state. These opinions asserted that their state laws regarding PHAs did not allow an out-of-state entity to act as a PHA within their state. *See*

[http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA%](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA%20NOFA)

[20NOFA](#).⁸

E. The 2012 Competition: HUD Acknowledges The Concerns Of The States

On March 9, 2012, HUD issued a “Fiscal Year 2012 Notice of Funding Availability for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts” (2012 NOFA) for the award of ACCs in the 42 remaining states.

JA300/AR1258. The ACCs were expressly described as cooperative agreements

JA300/AR1264.⁹ The 2012 NOFA invoked Section 8(b)(1) of the 1937 Housing

⁸ The trial court’s opinion noted that “HUD began receiving a deluge of correspondence” from the state attorneys general. JA14 (emphasis added). Appellants dispute this statement on the grounds that HUD received only six letters at the time the 2012 NOFA was published. App. Br. at 57-58. By the deadline for receipt of applications, however, HUD had received 18 such letters. Appellants also argue that some of the letters should have been discounted because they referred to “public housing authorities” instead of “public housing agencies,” the term used by the Housing Act. Appellants offer no authority for their contention that “public housing authorities” is “an entirely different legal term.” App. Br. at 58-59.

⁹ Appellants highlight the fact that HUD had not previously described the ACCs as cooperative agreements. App. Br. at 36-37. The ACCs awarded pursuant to the 1999 competition were never characterized as procurement contracts, were never challenged for failing to comply with CICA or the FAR, and the GAO never declared that they are procurement contracts. Indeed, the 1999 Request For Proposals stated that it “is not a formal procurement.” JA 30/AR428. Since 1937, when HUD began entering into ACCs with PHAs, HUD has never utilized a CICA and FAR-compliant procurement contract. JA300/AR2-4, 6. In its view, HUD did not need to characterize the ACCs as assistance agreements. HUD only needed to

Act as its authority for awarding the ACCs. JA300/AR1259, 1261. The 2012 NOFA also stated 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 section 2(a) and 8(b)(1) of the 1937 Act.” JA300/AR1264.

For fiscal year 2012, these ACCs were to transfer to PHAs authority over HAP contracts worth approximately \$9 billion in HAP payments to be paid to project owners and up to approximately \$289 million in administrative fees. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, Div. C, Title II, 125 Stat. 552, 686 (2011). These monies fund approximately 17,500 HAP contracts, which benefit nearly 1.2 million families. JA300/AR1963. The portfolio of project-based HAP contracts subject to the 2012 NOFA consists of approximately 15,500 HAP contracts currently administered by PBCAs, including the appellants, approximately 1,500 HAP contracts currently administered by traditional contract administrators, and approximately 400 HAP

characterize the ACCs being awarded in 2012 as cooperative agreements in response to the *post-award* bid protests of the 2011 competition, when the appellants, all of whom “have been performing” under performance-based ACCs “for many years,” App. Br. at 2, alleged for the first time that the ACCs were procurement contracts.

contracts currently administered by HUD. *See* JA6536-37.¹⁰

In response to the questions of applicant eligibility raised by the state attorney general letters received since the protest of the 2011 Invitation, the 2012 NOFA stated that, to the greatest extent possible, HUD intended to award an ACC for each state to a PHA created by and acting within the same state.

JA300/AR1261. With respect to each state, if HUD received an application from a legally qualified, “in-State” applicant, HUD would not consider applications from “out-of-State” applicants. *Id.*

The 2012 NOFA was reviewed and cleared by the Office of Management and Budget (OMB) prior to its publication. *See* JA300/AR1480 (Email from Emily Askew, OMB). *See also* JA300/AR1470, 1472 and 1478 (correspondence between HUD and OMB discussing various aspects of the NOFA and Section 8 programs and applicable requirements).

F. The 2012 GAO Protest

After HUD issued the 2012 NOFA, seven protestors filed bid protests at GAO, making substantially similar claims as they make in the present case.¹¹ On

¹⁰ It has been HUD’s intention since 1999 that the Section 8 project-based portfolio administered by PBCAs includes the entirety of the Section 8 project-based rental assistance inventory with as few exceptions as possible.

¹¹ Appellants aver that “all 42 [ACCs] covered by the NOFA were protested at the GAO.” App. Br. at 53. Since the protest was pre-award, it necessarily included all the contracts to be awarded.

August 15, 2012, GAO sustained the protests and recommended that HUD cancel the 2012 NOFA, award ACCs through a procurement process, and consider the protestors' other concerns. JA300/AR2838, 2852.

After due consideration, HUD decided to reject the GAO recommendation and to proceed with the awards pursuant to the NOFA. JA300/AR1-5. In HUD's view, the GAO's decision was not consistent with either the express language or the intent of the 1937 Housing Act, and that, at a minimum, GAO should have deferred to HUD's interpretation of its enabling statute. HUD also recognized that compliance with procurement laws and regulations would require significant changes "not only to the structure of the competition awarding ACCs but also to the entire administration of the program." JA300/AR3. Among the consequences would be the potential requirement to negotiate every "change" or amendment to the program with every PHA and the resulting lack of uniformity among the 53 jurisdictions. Also importantly, the administration and oversight of this program would shift, at least in some significant part, from HUD's Office of Housing to HUD's Office of the Chief Procurement Officer, which, to date, has had no involvement in the administration of any Section 8 program. JA300/AR3-4.

SUMMARY OF THE ARGUMENT

The trial court properly considered the enabling statutes for the housing assistance programs at issue, their implementing regulations, the governing

documents, and the plain language in section 6305 of Title 31, when it correctly determined that Congress intended for HUD to enter into cooperative agreements with PHAs to transfer funds and program administration responsibilities to the PHAs, so that the PHAs can “engage in or assist in the development or operation of public housing.” 42 U.S.C. §§ 1437f(b)(1), 1437a(b)(6)(A). The principal purpose of these ACCs is clearly “to transfer a thing of value” to an entity to “carry out a public purpose of support or stimulation authorized by a law of the United States.” 31 U.S.C. § 6305. The fact that HUD is involved in monitoring, oversight, and control of a PHA’s administration of the HAP contracts does not affect this conclusion because cooperative agreements are intended to accommodate “substantial involvement” between HUD and the PHAs. 31 U.S.C. § 6305(2).

On appeal, appellants ignore the enabling statutes, legislative history, and HUD’s implementing regulations, which the trial court painstakingly analyzed to reach the holdings that are now on appeal. This omission is the result of appellants’ decision to abandon a primary argument they raised below, which was that HUD itself was obligated to administer the project-based Section 8 portfolio. Further, by failing to address the 1937 Housing Act and MAHRA, appellants concede the trial court’s findings on these matters. These concessions are fatal to this appeal because appellants thus fail to show where the trial court committed

legal error. If appellants take no issue with the trial court's analysis of the authorizing statutes and implementing regulations, and further fail to identify any controlling precedent that makes unlawful HUD's use of cooperative agreements, then how could HUD's use of cooperative agreements be arbitrary, capricious, or contrary to law?

Instead of focusing on the statutory and regulatory bases for HUD's actions, appellants simply argue that HUD benefits from the ACC arrangement with the state-approved PHAs, and, therefore, the ACC must be a procurement contract. Here, the appellants' argument is without merit because it not only ignores specific Congressional mandates regarding the administration of the program but it also is based upon faulty descriptions of the ACCs and HAP contracts. This Court should reject appellants' arguments as the trial court did below.

Nevertheless, while we agree with the trial court's conclusion that the 2012 "NOFA properly characterizes PBCACCs as cooperative agreements" and that the 2012 "NOFA is compliant with the FGCAA," we respectfully disagree that, after making this finding, the trial court possessed jurisdiction to reach the merits of HUD's decision to implement the NOFA. The Court of Federal Claims only possesses jurisdiction to entertain challenges to procurements, which cooperative agreements are not. Thus, once it determined that the challenged instruments are cooperative agreements, the trial court lacked jurisdiction to entertain any

challenge to the 2012 NOFA as arbitrary, capricious, or in violation of law.

Finally, even assuming that the trial court possessed jurisdiction to consider the merits of the 2012 NOFA, the record clearly establishes that HUD's decision to prefer qualified, in-state PHAs was not arbitrary and capricious or in violation of law. On appeal appellants allege no violation of law other than a bare violation of the FGCAA.

ARGUMENT

I. Standard Of Review

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); *Bannum, Inc. v. United States*, 404 F.3d 1346, 1354 (Fed. Cir. 2005).

II. The ACCs Are Cooperative Agreements

A. The FGCAA -- Consideration of HUD's Statutory Authority Is Essential In Determining Whether The ACCs Are Cooperative Agreements Or Procurement Contracts

The Federal Grant and Cooperative Agreement Act of 1997 (FGCAA), 31 U.S.C. §§ 6301-6308, establishes criteria for Federal agencies' use of grants, cooperative agreements, and procurement contracts. However, the decision as to which legal instrument is appropriate depends upon the agency's statutory authority and its statutory obligations.

The FGCAA provides that an agency shall use a procurement contract if “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(1) (emphasis added). In contrast, grants or cooperative agreements must be used if “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.* . . .” 31 U.S.C. §§ 6304(1), 6305(1) (emphasis added).¹² A cooperative agreement shall be used instead of a grant 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).

Reinforcing the observation of the trial court that the FGCAA does “not provide hard-and-fast, one-size-fits-all rules,” JA20, the FGCAA also directed the Office of Management and Budget to provide guidance. 31 U.S.C. § 6307. In a section entitled “Agency Decision Structure For Selection Of Instruments,” the OMB states:

The *determination* of whether a program is principally one of procurement or assistance, and whether substantial Federal

¹² It is customary to describe both grants and cooperative agreements as “assistance relationships.” *Council on Environmental Quality and Office of Environmental Quality*, B-218816, 65 Comp. Gen. 605 (1986). *See also* App. Br. at 34.

involvement in performance will normally occur *are basic agency policy decisions. . . . Congress intended the Act to allow agencies flexibility to select the instrument that best suits each transaction.*

Implementation of Federal Grant and Cooperative Agreement Act of 1977, 43 Fed. Reg. 36860, 36863 (Aug. 18, 1978) (“Final OMB Guidance”) (emphasis added).¹³

The GAO also provided guidance on the interpretation of the FGCAA.

Notably, the GAO recognized that the agency’s statutory authority, not the FGCAA, defined the relationship between the parties.

[I]n each case, it will be the four corners of the enabling law, and not the FGCAA, which will establish the parameters of the relationship between Federal and non-Federal parties. The FGCAA may then be utilized so that the law can be implemented without regard to ill-defined nomenclature in the enabling law which may, for that reason alone, hamper an agency’s ability to give effect to Congress’ intent.

Interpretation of Federal Grant and Cooperative Agreement Act of 1977, B-196872-O.M., 1980 U.S. Comp. Gen. LEXIS 3894 *11 (1980) (“GAO Guidance”) (citation omitted).

The GAO also addressed “agency discretion:”

Where program authority can justify a choice of instruments and it is difficult to say that assistance or procurement is the principal purpose of the transaction, agencies have discretion and should exercise the discipline noted in the

¹³ The GAO Redbook notes that the OMB guidance is still in effect. 2 General Accounting Office, *Principles of Federal Appropriations Law* 10-15 (3d Ed. 2004) (GAO Redbook).

legislative history of the FGCA in their choice of instruments. Similar considerations must go into the choice of grant or cooperative agreement based on the extent of grantor involvement.

It can be assumed that choices of instruments will be made that rest on considerations that include pre-FGCA grant assumptions and other considerations not explicitly recognized by the Act. Where the recipient is a State or local government, there will be a tendency to use assistance instruments.

Id. at *20-*21 (emphasis added). *See also Environmental Protection Agency Public Participation Program*, B-197100, 59 Comp. Gen. 424 (1980) (“The [FGCAA] gives considerable weight to an agency's own characterization of the type of relationship it proposes to enter . . .”).

The most exhaustive discussion of the FGCAA is found in the GAO Redbook. As the GAO notes, grants are a form of Federal financial assistance, 80 percent of which go to state and local governments, and “typically are governed by detailed legislation and even more detailed regulations.” GAO Redbook at 10-3 – 10-5. Commenting on the significance of Congressional intent, the GAO said, “Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.” GAO Redbook at 10-9 -- 10-10 (quoting *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (U.S. 1985)).

Accordingly, “[i]n determining the correct funding instrument to use, the threshold question to consider is whether the agency has statutory authority to

engage in assistance transactions at all.” GAO Redbook at 10-17. The GAO

Redbook explains:

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, that is, to give away the government’s money or property, either directly or by the release of vested rights, to benefit someone other than the government. *Therefore, the relevant legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions.*

GAO Redbook at 10-17 (emphasis added).

Relying upon this guidance, the trial court properly explained that “the FGCAA standards must be applied *within the context of the agency’s specific statutory mandate* in entering into the contractual relationship in question.” JA20 (emphasis added). Thus, the trial court first correctly determined the “precise statutory obligations” contained in the 1937 Housing Act, and then examined those obligations “in light of the standards delineated by the FGCAA.” JA21.

Taking a very different approach, and ignoring OPM and its own Redbook guidance, the GAO’s recommendation in this matter, upon which appellants here rely so heavily, oddly concluded that it “need not decide” whether HUD has statutory authority to enter into the challenged cooperative agreements.

JA300/AR2851-52, n. 20. As a result, the GAO did not consider the circumstances

and conditions under which HUD was authorized to enter into cooperative agreements with the PHAs under Section 8 of the 1937 Housing Act.

Because the GAO failed to apply the criteria of FGCAA within the context of the 1937 Housing Act, the GAO incorrectly concluded that the ACC was for HUD's direct benefit and use. JA300/AR2851. However, relevant case law makes clear that agency's statutory obligations, or the absence thereof, bear directly upon the question of whether the agreement at issue benefits the government or serves a public purpose.

For example, in a recent case where an agency's decision to use a cooperative agreement was placed before the Court of Federal Claims, the court noted:

Where an agency, pursuant to a statutory directive, is distributing funds or providing assistance to service providers to ensure a service's availability, it is not conducting a procurement. However, where an agency has a statutory mandate to provide a service, and the agency decides to use a cooperative agreement to obtain the provision of that service, that agency has engaged in a procurement process

360Training.com, Inc. v. United States, 104 Fed. Cl. 575, 577-78 (2012).

The decision in *360Training.com* made clear that the agency's statutory mandate to provide a service is directly relevant to the question of whether the agency has engaged in a procurement. *See, e.g.*, 104 Fed. Cl. at 579 ("this Court's decision depends on the precise statutory obligation that OSHA has to provide

training courses”), at 584 (“OHSA was attempting to obtain services from third parties to satisfy its duty” under the statute), at 585 (comparing the enabling statutes at issue in *R&D Dynamics Corp. v. United States*, 80 Fed. Cl. 715 (2007) and *Rick’s Mushroom Service, Inc. v. United States*, 521 F.3d 1338 (Fed. Cir. 2008), with OSHA’s statutory mandate).

In reference to the use of an intermediary, the *360Training.com* decision also referred to the statutory mandate, stating:

if the agency uses an intermediary to provide a service that the agency is required to provide to beneficiaries, then the services are for the agency's benefit. ***However, an agency is obtaining services for a public purpose if the agency is charged with providing support or assistance to intermediaries as opposed to the final beneficiaries.*** When an agency supports those intermediaries in providing a service to third parties, an assistance agreement can be the appropriate instrument.

Id. at 580 (emphasis added). Ultimately, the Court held that the agency had engaged in a procurement because it acquired the services of a third party to provide a service that the agency had a statutory mandate to provide. *Id.* at 584-85.

Similarly, in *In re: Letter to the Honorable Eleanor Holmes Norton*, B-257430 (Sept. 12, 1994), the GAO concluded that an agreement entered into by the OPM should have been structured as a procurement contract because the services that were the subject matter of the agreement “are essentially the same purposes OPM is itself required to accomplish under the FEHBP statute.” Therefore, the GAO concluded, OPM was obtaining services for its own direct benefit and use.

See also Capital Health Services, Inc., B-281439.3 et al., 99-1 C.P.D. ¶ 63 (1999) (“we look to the authorizing statute” for resource sharing agreements to see if agency should have used procurement instead).

These authorities make clear that a key distinction between cooperative agreements and procurements can be found in the agency’s statutory authority and any statutory obligations that such authority imposes on the agency. It is not, as appellants contend, “merely” a “threshold question” to be answered and then ignored. App. Br. at 27, 31.

HUD’s Statutory Authority To Enter Into Cooperative Agreements With PHAs Is Not Disputed

Before the trial court, HUD relied upon MAHRA, which authorizes HUD to renew expiring contracts for project-based assistance “under Section 8” of the 1937 Housing Act. MAHRA, § 524(a)(1). Because the only existing provision for project-based assistance is Section 8(b)(1) assistance for existing housing, HUD construes these statutes to authorize it to enter into assistance agreements with PHAs under Section 8(b)(1). The trial court rejected HUD’s interpretation. Instead, it agreed with the appellants who argued that Congress “‘grandfathered’ HUD’s expired (b)(2) authority through many statutory revisions.”¹⁴ JA22, 24.

¹⁴ Specifically, the court relied upon 42 U.S.C. § 1437f(d)(2)(B)(i) and MAHRA, § 512(2)(B)(i). JA23-24. These provisions define “project-based assistance” as including rental assistance under former Section 8(b)(2). The fact that Congress recognized that projects were still being funded pursuant to Section (b)(2)

Accordingly, the trial court found that former Section 8(b)(2) continued to govern the HAP contracts at issue and that Section 8(b)(2) authorized HUD to use cooperative agreements with PHAs to provide assistance to the affected projects. Op. at 26-35.

In this appeal, the appellants do not challenge this finding of statutory authority to use cooperative agreements, nor could they. *See* App. Br. at 4 (appealing “this aspect” of the court’s decision: the trial court’s “cursory evaluation of the . . . principal purpose test”). First, all of the appellants “agree[d] that ‘(b)(1)’ ACCs between HUD and PHAs are properly considered cooperative agreements.” JA9, 22 (same). Second, all of the appellants agreed that the second sentence of former Section 8(b)(2), being identical to the first sentence in Section (b)(1), gave HUD the authority to enter into cooperative agreements with PHAs. JA6468, 6481-84, 6496, 6506, 6517-19.

Given this admission, that HUD had statutory authority and had properly entered into cooperative agreements/ACCs with PHAs since the inception of Section 8, the GAO’s determination not to consider HUD’s statutory authority resulted in a decision that provided no framework or rationale to distinguish

authority, however, does not compel the conclusion that Congress intended for “new” contract renewals, authorized by MAHRA, to also be governed by Section 8(b)(2).

Section 8(b)(1) ACCs conceded to be lawful cooperative agreements from the Section 8(b)(2) ACCs at issue here.¹⁵

C. HUD Has No Statutory Or Regulatory Obligation To Administer HAP Contracts

HAP contracts are the vehicle that drive Section 8 programs, including the project-based programs. Currently, there are approximately 17,500 project-based HAP contracts that provide affordable housing to 1.2 million low-income families. JA300/AR1963. The 1937 Housing Act and MAHRA make clear that it is PHAs, not HUD, that are intended to administer these contracts. *See* 42 U.S.C. §§ 1437, 1437f(b); MAHRA, § 511(a)(11)(C) (one purpose of program reform is to “transfer and share . . . contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities”).

Accordingly, in finding statutory authority to enter into cooperative agreements, the trial court examined whether HUD had any statutory obligation to provide a service to beneficiaries. *See 360Training.com*, 104 Fed. Cl. at 580 (“if

¹⁵ HUD disagreed with the GAO’s decision, in part, because of this failure to explain how a single statute provided for two different funding mechanisms when the statute itself makes no such distinction. There is simply no evidence that Congress intended for tenant-based programs to be implemented by “assistance agreements” and project-based programs to be implemented by a “procurement.” Such an inconsistency is not found in the statute, and the Court should not endorse this attempt to create one. *See American Tobacco Company v. Patterson*, 456 U.S. 63, 71 (1981) (“Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.”); *General Motors Corp. v. Darling’s*, 444 F.3d 98, 108 (1st Cir. 2006) (Courts should “avoid statutory constructions that create absurd, illogical or inconsistent results.”).

the agency uses an intermediary to provide a service that the agency is required to provide to beneficiaries, then the services are for the agency's benefit”).

Under HUD’s regulations, a HAP contract is defined as “[t]he Contract entered into by the owner and the contract administrator” 24 C.F.R. § 880.201. Similarly, the Contract Administrator is defined as “[t]he entity which enters into the [HAP] Contract with the owner and is responsible for monitoring performance by the owner. . . .” *Id.* Thus, if the statute mandates that the PHA enter into the HAP contract, such as under Section 8(b)(1), then the PHA has the obligation to administer the contract. Similarly, if the statute mandates that HUD enter into the HAP contract, then HUD has the obligation to administer the contract.

Pursuant to either Section 8(b)(1) or former Section 8(b)(2), there is *no* circumstance in which HUD is required to enter into a HAP contract, and, accordingly, there is no circumstance in which HUD is statutorily obligated to administer a HAP contract. JA28-30, 36.

In reaching this conclusion, the trial court properly considered MAHRA, as enacted on October 27, 1997, and as amended on October 20, 1999. As originally enacted, MAHRA provided that HUD “*may* use amounts available for the renewal of assistance under section 8.” Pub. L. No. 105-65, Title V, § 524 (emphasis added). As amended, the statute provides that HUD “shall. . . 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(a) (emphasis added). Thus, while HUD may have been required to provide assistance pursuant to former Section 8(b)(2), that section “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.” JA29 (emphasis in original). In other words, HUD has the discretion to choose between direct administration of HAP contracts or assignment of HAP contracts to PHAs for administration pursuant to an ACC. Thus, Section 524 of MAHRA did not mandate that HUD enter into HAP Renewal Contracts, as the appellants had alleged. *Id.* The appellants do not challenge this conclusion by the trial court.

The trial court did not end its analysis with the enabling statutes. Following its observation that the FGCAA did not provide a “one-size-fits-all” rule, JA20, the trial court also considered HUD’s regulations.

Before the trial court, the appellants argued that while HUD could “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,” citing 24 C.F.R. § 880.505(a). JA30 (citation omitted). The trial court rejected that argument, relying upon subsection (c) of that regulation, which provides that “[a]ny project may be converted” from one arrangement where HUD

is the contract administrator to one where a PHA is the contract administrator. 24 C.F.R. § 880.505(c). Instead, the trial court properly concluded that HUD's initiation of the PBCA program pursuant to the 1999 RFP, the subsequent execution of ACCs with the selected PBCAs, and the execution of HAP Renewal Contracts by the PHAs demonstrate that the requirements of section 880.505(c) were met. JA32. The trial court did not err when it concluded that HUD can, and has, transferred responsibility of HAP contract administration to PHAs. The appellants do not challenge this conclusion.

Thus, notwithstanding appellants' arguments to the contrary, the trial court found no statutory or regulatory mandate that HUD enter into HAP contracts and no statutory or regulatory mandate that HUD administer HAP contracts. JA28-32.

D. PHAs, Not HUD, Are Obligated To Make HAP Payments To Project Owners

In this appeal, appellants argue that HUD is a party to the HAP Renewal Contract and, pursuant to that contract, HUD has the "primary obligation" to make the housing assistance payment to the project owner. App. Br. at 13-16, 46-47, 51. Their corollary to this argument is that the ACC does not transfer the assistance payment to the PHAs. App. Br. at 14, 47. According to appellants, "[t]he HAP contract and the payment it provides are separate from and not dependent on the existence of the [ACCs]." App. Br. at 15. Appellants support this argument with HUD's 2013 budget request, in which HUD allegedly sought funding for housing

assistance payments and “separately requested funding” for contract administration fees. App. Br. at 16.

As a threshold matter, this argument is a red herring. The issue is not whether HUD is obligated to ensure that the housing assistance payment is made to the project owner. The issue is whether HUD is obligated to administer, on a day-to-day basis, the HAP contracts that are the foundation of the Section 8 program.

There is no dispute that project-based Section 8 programs are grant programs that subsidize the rent of low-income families by making assistance payments to the project owners who provide affordable housing. Clearly, the Federal Government, through HUD, is obligated to provide funding for PHAs to make HAP payments pursuant to HAP contracts between owners and PHAs, to the extent that Congress makes sufficient appropriations available.

Notwithstanding the Federal role in providing funding for Section 8 projects, appellants’ argument that this aspect of Federal participation renders the ACCs procurement contracts is not supported by the governing documents. To the contrary, it is the PHAs that receive Federal funds and then make assistance payments to project owners.

The project-based Section 8 programs at issue are implemented like all other programs under the 1937 Housing Act: HUD enters into ACCs with PHAs pursuant to which PHAs enter into HAP contracts with project owners. Pursuant

to the specific ACCs at issue, “The PHA shall pay owners the amount of housing assistance payments due the owners under such HAP contracts from the amount paid to the PHA by HUD for this purpose.” JA300/1361. *See also* JA300/AR1362 (“HUD will make housing assistance payments to the PHA for Covered Units.”). Pursuant to the HAP contracts, where a PHA is the contract administrator (which it currently is in almost all instances), “the Contract Administrator shall make housing assistance payments to the Owner. . . .” JA300/AR2271.

The HAP contract further provides that if a PHA is acting as the Contract Administrator, and if HUD determines that the PHA is in breach of its “obligation, as Contract Administrator, to make housing assistance payments to the Owner in accordance with the provisions of the Renewal Contract,” then “HUD shall take any action HUD determines necessary for the continuation of housing assistance payments to the Owner in accordance with the Renewal Contract.”

JA300/AR2276. This provision, “PHA default,” has been included in every project-based HAP contract since the inception of the program. *See, e.g.*, 40 Fed. Reg. 18902, 18943 (1975).¹⁶ Contrary to appellants’ assertions, the HAP contract

¹⁶ Other terms of the Renewal HAP contract also refute appellants’ contention that HUD is a party to the HAP contract: First, the parties to the Renewal Contract are identified as the Contract Administrator and the Owner. JA300/AR2268. Second, “HAP Contract” is defined as “[a] housing assistance payments contract between the contract administrator and the Owner.” JA300/AR2269. Third, the contract provides that “[t]he Renewal Contract is a housing assistance payments contract (“HAP Contract”) between the Contract Administrator and the Owner of the

imposes upon the PHAs as contract administrators, not HUD, the “primary obligation” to make the housing assistance payment to the project owner.¹⁷ *See* App. Br. at 16, 51.

Further, the appropriations made by Congress to fund the project-based programs reflect its intent that administrative fees paid to PHAs are a part of the total assistance provided for this program. For example, for FY2012, Congress appropriated almost \$9 billion for “Project-Based Rental Assistance.” That same line item further provided that “of the total amounts provided under this heading, not to exceed \$289,000,000 shall be available for performance-based contract administrators for section 8 project based assistance.” Pub. L. No. 112-55, 125

Project.” JA300/AR2270. Finally, “[i]f the Contract Administrator is a PHA acting as a Contract Administrator pursuant to an annual contributions contract (“ACC”) between the PHA and HUD, the Contract Administrator is not the agent of HUD. . . .” JA300/AR2276.

¹⁷ In this regard, the HAP contracts at issue are no different than the “turnkey contract” at issue in *New Era Construction v. United States*, 890 F.2d 1152 (Fed. Cir. 1989). Although the contract there was between a contractor and an Indian housing authority, the contractor alleged that HUD was a party to the contract because, among other reasons, the contract contained a clause obligating HUD to “cure” the default of the Housing Authority. This Court concluded that HUD was not a party to the turnkey contract. 890 F.2d at 1154 (“The only contract to which HUD was a party was the contributions contract.”). Further, because the contingencies giving rise to HUD’s obligation had not occurred, the contractor could not seek relief from HUD. 890 F.2d at 1156-57. An alternative basis for dismissing the contractor’s claim was the Court’s finding that the ACC with the Housing authority was not a procurement contract: it was “not designed to enable HUD to procure real property but to facilitate the procurement of such property by the Housing Authority.” 890 F.2d at 1157.

Stat. 641, 686 (2011). Thus, the funding for the administrative fee paid to PHAs was not separate from, but was a part of, the funds for housing assistance payments.

E. The Principal Purpose Of The ACCs Is To Implement Statutorily Authorized Support Of Public Housing Agencies In Providing Affordable Housing To Low-Income Families

1. The ACCs Are Not For HUD's Direct Benefit Because HUD Is Not Obligated To Administer HAP Contracts

“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.” JA300/AR557 (2012 NOFA).

In the court below, the appellants argued that, pursuant to MAHRA and HUD regulations, HUD was obligated to administer HAP contracts and, therefore, contract administration services were for HUD's direct benefit. *See* JA28. As noted above, appellants have abandoned these arguments.

In this appeal, in addition to their argument that HUD is obligated to the project owner for the housing assistance payment, appellants argue that the ACCs are primarily for HUD's benefit because HUD previously administered HAP contracts with its own staff and because PBCAs provide “routine administrative services” with “very little discretion or authority,” while HUD has retained

authority to take enforcement action against the owners. App. Br. at 8-9, 11-13, 36-41. According to appellants, that the principal purpose of the ACCs is for HUD's direct benefit is true not only for the 2012 NOFA but for all performance-based ACCs since their "inception" in 1999. App. Br. at 37. Appellants note that PBCAs have helped to improve the oversight and monitoring of the program. App. Br. at 16-17, 40.

This argument is without merit. The trial court correctly noted that MAHRA addressed the very issues appellants raised:

[T]he 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(a)(10), (a)(11)(C).

JA35. *See also Electronic Space Systems Corp.*, B-207112, 82-1 C.P.D. ¶ 505 (1982) (the "benefit" is not dispositive; rather, the type of instrument is determined by "the purpose of the proposed activity"). Again, however, appellants' failure to address MAHRA, which was enacted 19 months before HUD published the 1999 RFP, is glaring and demonstrates the hollowness of their argument.

2. HUD's Participation And Role In The Section 8 Programs Is Consistent With The Criteria For A Cooperative Agreement

According to appellants, the fact that PHAs under the ACCs at issue are providing “services” but have “little to no discretion or enforcement authority,” App. Br. at 12, demonstrates that the ACCs are for HUD’s benefit and, therefore, procurement contracts. App. Br. at 35-36.

Appellants’ argument has no merit. To the extent that HUD has retained authority to make certain decisions or to control the administration of the program or to ensure that Federal funds are spent in strict accordance with the terms of the HAP contracts and Federal law, this oversight is consistent with the very definition of a cooperative agreement. The FGCAA provides that an agency shall use a cooperative agreement 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). *See also* Final OMB Guidance, 43 Fed. Reg. at 36863 (“substantial involvement” includes “[h]ighly prescriptive agency requirements prior to award limiting recipient discretion . . . coupled with close agency monitoring or operational involvement during performance”).

The lack of PHA enforcement authority is also consistent with the structure of the program since its inception. HUD regulations define a “contract

administrator” as “[t]he entity which enters into the Contract with the owner and is responsible *for monitoring performance by the owner.*” 24 C.F.R. § 880.201 (first codified at 44 Fed. Reg. 59408, 59412 (1979)).

The trial court also addressed the issue of the PBCA’s “limited authority.” “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.” JA30.

The trial court recognized that Traditional Contract Administrators had “somewhat more expansive” authority than the PBCAs, and it noted that only HUD could declare a project owner in default or terminate a HAP contract. JA33.

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 HUD, in cooperation with the states, carries out the statutorily authorized goal of supporting affordable housing for low-income individuals and families.

JA33-34.

This conclusion is supported by the original Declaration of Policy of the 1937 Housing Act, which declared that it was the policy of the United States “to assist the several states and their political subdivisions,” the preamble to the 1937

Housing Act, which identified the purpose of the Act as providing “financial assistance to States and political subdivisions thereof,” the 1998 version of the Declaration of Policy, and MAHRA.

[T]hese revisions serve to reiterate and further emphasize the primary role the states and their political subdivisions are to play in implementing the federal government's housing policies. 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.

JA35. *See also James v. Valtierra*, 402 U.S. 137, 138 (1971) (the 1937 Housing Act “established a federal housing agency authorized to make loans and grants to state agencies for slum clearance and low-rent housing projects”).

3. The ACCs Transfers Funds, A “Thing Of Value,” To The PHAs

The appellants also contend that ACCs are not assistance agreements because they do not “transfer a thing of value.” According to appellants, the only “thing of value” is the housing assistance payment, which is HUD’s obligation under the HAP contract. App. Br. at 46.

Pursuant to the ACC, HUD transfers to the PHAs the housing assistance payments for Section 8 units under HAP contracts assigned to the PHA and an administrative fee, both of which are a “thing of value.” JA300/AR1362. PHAs, including appellants, are public housing agencies, entities created by state to

promote affordable housing in their communities. *See, e.g.,* <http://www.navigatehousing.com/about-us/> (“Mission: To develop and enhance safe, decent, sanitary, and affordable housing by providing courteous, professional and accurate services.”); <http://www.nhcinc.org/About/MissionStatement.aspx> (“The mission of National Housing Compliance is to provide high quality services to the affordable housing industry that benefit residents and communities by striving to improve & ensure decent, safe, & affordable housing.”). The project-based rental assistance program helps them do so in partnership with the Federal government. HUD transfers to PHAs significant funds to pay the rental subsidies to project owners and to pay the costs of administering the program that would otherwise be borne by the PHAs. Without these significant funds, the PHAs’ mission would be less effective, at a minimum.

To the extent that appellants argue that the administrative fee is not a thing a value because it is in exchange for the PHAs’ services, or “consideration,” this argument makes no sense. Grants and cooperative agreements are contracts. *See, e.g., McGee v. Mathis*, 71 U.S. 143, 155 (1866) (“It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract.”); *Knight v. United States*, 52 Fed. Cl. 243, 251 (2002), *rev’d on other grounds*, 65 Fed. Appx. 286 (Fed. Cir. 2003) (“A grant agreement is an enforceable contract in this court.”). And a contract does not exist without consideration. *See Massie v. United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999)

(any agreement can be a contract provided that it meets the requirements for a contract: mutual intent to contract including an offer and acceptance and consideration). Thus, it is irrelevant to the question of whether there is thing of value that the thing of value is offered as consideration.

Moreover, to the extent appellants argue that it cannot be a thing of value if it is compensation for services rendered, that argument is illogical. By that reasoning, the housing assistance payment to the project owner would not be a “thing of value” because it defrays the owners’ costs of providing affordable housing. The assistance payment is “in exchange for” the project owner’s agreement to provide decent, safe, and sanitary housing.

4. HUD Would Not Need To Limit Competition To PHAs If The ACCs Were For HUD’s Direct Benefit And Use

HUD has always limited the award of ACCs to PHAs, and it has done so in accordance with its interpretation of the 1937 Housing Act: “[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.”

JA300/AR428-29. HUD stated before the trial court that it did not know how to reconcile the provisions of 1937 Housing Act with a determination that the ACCs are procurement contracts. JA6535. If the ACCs are not fulfilling a statutory mandate to assist PHAs but are rather for HUD’s benefit, a limitation on

competition to PHAs seems to be against HUD's self-interest and inconsistent with the CICA.

Before this Court, the appellants, without reference to the 1937 Housing Act, "all 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." App. Br. at 53. This is not the position that appellants took before the trial court. Every appellant alleged that HUD could legally limit competition for these ACCs to PHAs because they were "responsible sources" that had "specialized knowledge and experience." JA6475, 6486-88, 6503, 6511-12, 6522-23.

The trial court agreed with HUD, concluding that "[w]ere HUD obtaining the services of the PBCAs strictly for its own 'ministerial' convenience, the Court does not see how such a restriction would apply. . . . [T]he 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." JA35.

III. Once The Trial Court Determined That HUD Was Properly Using Cooperative Agreements, The Trial Court Should Have Dismissed The Complaints For Lack Of Jurisdiction

"[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986)

(citation omitted). The trial court held that the ACCs were properly characterized as cooperative agreements, and it determined by implication that HUD was not conducting a procurement. Accordingly, the trial court should have dismissed the complaints for lack of jurisdiction.

The trial court only possesses “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). In this case, the trial court agreed that HUD was properly using of cooperative agreements, but it disagreed that it lacked jurisdiction, finding that it “has jurisdiction to review a party’s contention that a particular government contract is a procurement contract and therefore subject to CICA.” JA18.

Once the trial court determined that the ACCs were not procurement contracts, the trial court should have dismissed the complaints for lack of jurisdiction. “Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

The term “procurement” is not defined in 28 U.S.C. § 1491 but this Court applied the definition of “procurement” found in 41 U.S.C. § 111. *See Distributed*

Solutions, Inc. v. United States, 539 F.3d 1340, 1345-46 (Fed. Cir. 2008).

However, *Distributed Solutions* does not extend the jurisdiction of the Court beyond the facts at issue there – a challenge to an agency’s initial determination of its own needs for acquiring goods or services. *See id.* at 1346. *Distributed Solutions* had no occasion to consider the distinctions between a procurement and cooperative agreement set forth in the FGCAA. Reading the Tucker Act in conjunction with 41 U.S.C.A. § 111 and the FGCAA, which also defines a “procurement,” HUD is not engaged in a pre-procurement decision. HUD is not acquiring goods or services in a commercial capacity. HUD is implementing a Congressional mandate to fund PHAs in order to administer a Federal program. *See Kania v. United States*, 227 Ct. Cl. 458, 650 F.2d 264, 268 (1981) (Congress’s consent to be sued is limited to the instances “where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves.”); *United States v. Citizens & Southern National bank*, 889 F.2d 1067, 1069 (Fed. Cir. 1989).

At bottom, after it correctly determined that HUD’s implementation of the 1937 Housing Act by using cooperative agreements was compliant with the FGCAA, the trial court should have dismissed the case for lack of jurisdiction. *Resource Conservation Group, LLC v. United States*, 597 F.3d 1238, 1245 (Fed.

Cir. 2010) (“it is clear . . . that 1491(b)(1) in its entirety is exclusively concerned with procurement solicitations and contracts.”).

IV. The Trial Court Correctly Found That The 2012 NOFA Was Compliant With The Law

The appellants contend that, even if the ACCs are properly characterized as cooperative agreements, the trial court erred by not scrutinizing the terms of the 2012 NOFA under the terms of the Administrative Procedure Act. App Br. at 59-60. Appellants’ argument is premised upon its assumption that, because the trial court did not address in detail certain aspects of the NOFA, that the trial court’s review was somehow deficient. Appellants’ argument here fails for several reasons.¹⁸

First, as a matter of law, appellants’ argument ignores the well-settled precedent that there is a “presum[ption] that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise.” *Medtronic v. Daig Corp.*, 789 F.2d 903, 906 (Fed. Cir. 1986); *see Len-Ron Mfg. Co., Inc. v. United States*, 334 F.3d 1304, n.5 (Fed. Cir. 2003).

Second, the trial court did consider the legality of the terms of the NOFA as evidenced by its conclusion that the:

Court finds that the 2012 NOFA properly characterizes the

¹⁸ As explained above, once the trial court concluded that the ACCs at issue were not procurement contracts, the trial court did not have jurisdiction to consider an APA claim. *Martinez v. United States*, 333 F.3d 1295, 1313 (Fed. Cir. 2003).

PBACCs as cooperative agreements. The NOFA is compliant with the FGCAA, and is not subject to CICA.

JA387. If there was any doubt of that fact, the trial court's order denying CMS's motion for reconsideration alleviated this issue.

CMS appears to seek clarification as to whether the Court's holding that the NOFA "is compliant with the FGCAA" applies to a provision in the NOFA that creates an in-state preference for the award of the contracts at issue in this case. It does. The FGCAA establishes only a precatory goal that agencies "encourage competition in making grants and cooperative agreements"; nothing in this Act mandates, as does the CICA, "full and open competition." 41 U.S.C. § 3301(a)(1).

JA38. That the trial court might not have specifically mentioned or discussed in detail the preference given to in-state applicants in the 2012 NOFA in its opinion does not give rise to an assumption that the trial court did not consider a matter, nor does it make the decision inadequate.¹⁹ *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 901 (Fed. Cir.1984); *see also Bernklau v. Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002) (citation omitted) (A "litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised.")).

¹⁹ Indeed, given that the argument pressed here, that the trial court should have applied an APA standard to the 2012 NOFA even if it was not a procurement, was not central to the appellants' case below, the trial court may not have written on this issue in detail because it "merely concluded, for various reasons, that discussion of the issue was neither necessary nor appropriate." *Hartman v. Mansfield*, 483 F.3d 1311, 1315 (Fed Cir 2007).

Finally, even if the Court determines the trial court should have provided a more detailed analysis of this issue, the record clearly establishes that HUD's decision to give a preference for legally qualified, "in-State" applicants when awarding ACCs was rational and consistent with the 1937 Housing Act.²⁰ Appellants allege no violation of law other than a violation of the FGCAA.

HUD is authorized by the 1937 Act to enter into ACCs with PHAs, defined 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). Clearly, a PHA is an entity not only created by state law but also authorized by state law to engage in or assist in the operation of low-income housing.

HUD looks to state law to determine a PHA's legal authority for all 1937 Act programs.²¹ *See* JA300/AR1319 (#99). In each program, HUD defers to the legal authorities in the states. Where HUD was presented a letter by a state's attorney general (AG), HUD deferred to his or her analysis of that state's laws as the top legal authority (barring any direction from the state's supreme court) in that

²⁰ This Court may affirm the trial court's judgment based upon "any ground the law and the record will support," so long as it does not enlarge the relief granted. *Glaxo Grp. v. Torpharm, Inc.*, 153 F.3d 1366, 1371 (Fed. Cir. 1998); *see also Bruno Indep. Living Aids v. Acorn Mobility Servs.*, 394 F.3d 1348, 1354 (Fed. Cir. 2005) (noting that this Court reviews "judgments, not opinions") (citation omitted).

²¹ *See* 24 C.F.R. §982.51 (show of authority required by tenant-based regulations); 24 C.F.R. § 941.201 (show of authority required by public housing regulations).

state. JA300/AR1330 (#163), 1331(##169-170), 1343 (#237). This policy continues HUD's long-standing policy of deferring to states on matters of state law, and that state, not Federal, law governs the ability of a PHA to administer HUD programs. *See, e.g., Lauderhill Housing Authority v. Donovan*, 818 F. Supp. 2d 185 (D.D.C. 2011) (HUD maintained that in a PHA dispute the Florida Attorney General's opinion controls).

Since 1999, when HUD held its first competition requiring a single PHA having state-wide jurisdiction to administer the program state-wide, PHAs have requested the ability to cross state lines, and they have been permitted to do so, but only when they have provided a legal opinion stating that they had the requisite authority. JA300/AR429. After HUD issued the 2011 NOFA, however, HUD received AG opinions from various states indicating otherwise, and HUD reflected the existence of those opinions in its definition of eligible applicants.

As a Federal actor, HUD has no intrinsic interest in these disputes beyond their ability to cause interruptions in the administration of the Section 8 program. That is to say, while a PHA may provide to HUD a legal opinion that the PHA had authority to act as a PHA in a particular state, if that legal opinion is challenged with supporting authority from an AG opinion, HUD would defer to the AG opinion and it would terminate the ACC with the PHA, if required to do so. In order to avoid such program disruption, HUD concluded that the most reasonable

course was to provide a preference for in-state applicants in the 2012 NOFA.

JA300/AR1318 (#96).

In sum, HUD is not trying to judge whose analysis of any particular state's law is superior; HUD simply is trying to avoid the programmatic delays that result when there is a conflict. It is reasonable for HUD to award the ACC to an entity that HUD is absolutely certain is legally qualified and free from challenge. *See United Security Services, Inc.*, 53 Comp. Gen. 51, 53 (1973) (*internal citation omitted*). It is equally reasonable for HUD to be concerned with potential litigation and to set a policy to minimize such disruptions. Indeed, HUD has a "responsibility to assess risks and avoid them before they become a historical fact" and HUD "need not suffer" a stoppage or even decrement of housing services "in order to substantiate its assessment of risks." *See CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1355 (Fed. Cir. 2008). The record clearly establishes that HUD's decision to prefer qualified, in-state PHAs was not arbitrary and capricious.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the judgment of the Court of Federal Claims.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Kirk T. Manhardt
KIRK T. MANHARDT
Assistant Director

s/ Douglas K. Mickle
DOUGLAS K. MICKLE
Senior Trial Counsel
Civil Division
Commercial Litigation Branch
Civil Division
United States Department of Justice
PO Box 480
Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-0383
Fax: (202) 353-7988

OF COUNSEL:

JOSEPH A. PIXLEY
Trial Attorney
Civil Division
Commercial Litigation Branch
United States Department of Justice

DORIE FINNERMAN
Assistant General Counsel for
Assisted Housing and Civil Rights
Litigation
Office of General Counsel
U.S. Department of Housing and
Urban Development
Washington, D.C.

KATHIE SOROKA
Special Assistant to the General Counsel
Office of General Counsel
U.S. Department of Housing and
Urban Development
Washington, D.C.

Attorneys for Defendant-Appellee

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I, Douglas K. Mickle, in reliance upon the word count of the word processing system used to prepare this brief, certify, that the “BRIEF FOR DEFENDANT-APPELLEE, THE UNITED STATES” (the “brief”), excluding the statement of counsel and the tables of contents and authorities, contains no more than 14,000 (13,928) words as calculated by the word processing system used to prepare this brief. This brief was prepared using Microsoft Word.

Dated: July 19, 2013

s/ Douglas K. Mickle