

**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,**

**and**

**MASSACHUSETTS HOUSING FINANCE AGENCY,**

**Plaintiff-Appellee,**

**v.**

**UNITED STATES,**

**Defendant-Appellee.**

**Appeal from the United States Court of Federal Claims in consolidated case  
Nos. 12-CV-0852, 12-CV-0853, 12-CV-0862, 12-CV-0864, and 12-CV-0869,  
Judge Thomas C. Wheeler.**

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**BRIEF OF PLAINTIFF-APPELLEE,  
MASSACHUSETTS HOUSING FINANCE AGENCY**

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July 22, 2013

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

CMS CONTRACT MANAGEMENT SERVICES v. UNITED STATES

No. 2013-5093

**CERTIFICATE OF INTEREST**

Counsel for the Appellee Massachusetts Housing Finance Agency certifies the following (use “None” if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Massachusetts Housing Finance Agency

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Massachusetts Housing Finance Agency

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Gabriel E. Kennon—Cohen Mohr LLP  
Andrew Mohr—Cohen Mohr LLP

July 22, 2013  
Date

/s/ Gabriel E. Kennon  
Signature of counsel

Gabriel E. Kennon  
Printed name of counsel

Please Note: All questions must be answered

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## **STATEMENT OF RELATED CASES**

Pursuant to Federal Rule 47.5, counsel for Plaintiff-Appellee, Massachusetts Housing Finance Agency, states that no other appeal in or from this action was previously before this or any other appellate court.

Additionally, Plaintiff-Appellee's counsel is unaware of any other appeal that will directly affect or be directly affected by this Court's decision in this appeal.

## SUMMARY OF ARGUMENT

Appellants challenged the Notice of Funding Availability ("NOFA") on the basis that the award should be issued as a procurement contract rather than a cooperative agreement and that the NOFA includes provisions unreasonably restricting competition.<sup>1</sup> To the extent the Court determines that the NOFA should be issued as a procurement contract rather than a cooperative agreement, the Court should decline to rule on whether the NOFA's provisions are unduly restrictive because such a ruling would be advisory. However, if the Court determines the NOFA was properly issued as a cooperative agreement, the Court should find that the provisions Appellants challenged as "restrictive" were reasonably required to advance the Department of Housing and Urban Development's ("HUD's") legitimate interests.

Appellants are entitled to relief only if they can demonstrate that HUD's actions were arbitrary, capricious, or contrary to law. 5 U.S.C. § 706(2)(A). Pursuant to the Federal Grants and Cooperative Agreements Act ("FGCAA"), 31 U.S.C. §§ 6301-6308, HUD is not legally obligated to seek competition to the maximum extent practicable when making a cooperative agreement award because the FGCAA only states in general that one of its purposes is to "encourage

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<sup>1</sup> Massachusetts Housing Finance Agency ("MassHousing") takes no position regarding the lower court's ruling that HUD properly anticipated awarding cooperative agreements as a result of the NOFA competition.

competition in making grants and cooperative agreements." 31 U.S.C. § 6301. The lower court properly determined that the FGCAA language was "precatory" and does not mandate the Competition in Contracting Act's ("CICA's") requirement for "full and open competition." JA 38-39 (citing 41 U.S.C. § 3301(a)(1)). Accordingly, there can be no violation of law based on precatory language, and Appellants must instead demonstrate that the NOFA's out-of-state restrictions are so beyond the bounds of rational agency action that the restrictions amount to an arbitrary and capricious exercise of discretion.

Appellants cannot make such a showing, however, because the NOFA restrictions were reasonably designed to meet HUD's legitimate needs of ensuring that awards are made to qualified entities, decreasing the risk of litigation and programmatic delays, and advancing HUD's purpose of providing affordable and safe housing. Additionally, the NOFA restrictions do not irrationally extend beyond what is necessary for HUD to ensure that its legitimate needs are met. Accordingly, the NOFA restrictions are not arbitrary and capricious and must be upheld.

## ARGUMENT

### **I. IF THE COURT DETERMINES THAT THE NOFA IS A PROCUREMENT CONTRACT, THE OUT-OF-STATE RESTRICTION ISSUE IS RENDERED NON-JUSTICIABLE.**

If the Court determines that the NOFA is a procurement contract, Appellants' challenge to the out-of-state restrictions included in the NOFA becomes non-justiciable. HUD has made clear that the NOFA does not comply with procurement laws. *See* JA 300/AR1150; JA300/AR2851-52. Accordingly, if the Court determines that the NOFA is properly a procurement contract, HUD would have to rewrite the NOFA to ensure it complied with all applicable procurement laws, and the rewritten NOFA may not include the same out-of-state restrictions. A ruling on the out-of-state restrictions would therefore be advisory, and the Court should decline to address whether the restrictions would be permissible in a future NOFA that is not yet written. *See Strategic Hous. Fin. Corp. of Travis Cnty. v. United States*, 608 F.3d 1317, 1332 (Fed. Cir. 2010) ("Federal courts are not in the business of rendering advisory opinions.") (quoting *C&H Nationwide, Inc. v. Norwest Bank Tex. NA*, 208 F.3d 490, 493 (5th Cir. 2000)).

**II. THE NOFA RESTRICTIONS MUST BE UPHELD BECAUSE THEY ARE NOT CONTRARY TO LAW AND ARE REASONABLY DESIGNED TO MEET HUD'S LEGITIMATE NEEDS.**

Appellants challenged certain restrictions in the NOFA on the basis that the restrictions limit the ability of out-of-state public housing agencies ("PHAs") to compete for awards in other states. Pl.-Appellants' Opening Br. Corrected at 55-62 (docket entry 59, July 15, 2013) ("Appellants Br."). The NOFA requires in-state applicants to submit a reasoned legal opinion ("RLO") that the applicant is a PHA with authority to operate throughout the entire state. In addition, the NOFA requires out-of-state applicants to submit both a RLO and a Supplemental Letter demonstrating that nothing in the relevant state's law prohibits an out-of-state entity from operating as a PHA. JA300/AR1263-64. The NOFA also provides that out-of-state applicants will only be considered for states "for which HUD does not receive an application from a legally qualified in-State applicant." JA300/AR1261. Appellants assert that these NOFA restrictions unreasonably limit competition in violation of the APA and that the lower court failed to adequately address the legality of such restrictions. Appellants Br. at 55-56.

The NOFA restrictions must be upheld, however, because the restrictions are not arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 706(2)(A). FGCAA does not mandate competition or set standards for competition, and therefore the NOFA restrictions cannot be contrary to law. Furthermore, HUD has a legitimate

need to ensure that it is making awards to qualified entities that can perform the contracts without undue interference, and the NOFA restrictions are reasonably tailored to ensure that HUD meets such needs. Accordingly, the appeal must be denied.

**A. The NOFA Restrictions Cannot Violate Any Law Because the FGCAA Does Not Establish Any Legal Standard for Competition.**

The FGCAA does not mandate competition or incorporate any standard of competition into the issuance of cooperative agreement, but merely "encourages" agencies to use competition. Furthermore, Congress has specifically required agencies to compete grants in other instances, but the relevant HUD statutes do not incorporate any similar competition requirement.

Even if the FGCAA or HUD statutes mandated or incorporated standards of competition similar to the standards required by CICA and the Federal Acquisition Regulations ("FAR"), the NOFA restrictions would still be permissible because procurement law permits agencies to incorporate restrictions in competition that are necessary to meet agency needs. Accordingly, the Court should find that the NOFA restrictions are not contrary to law.

**1. The FGCAA Does Not Incorporate Any Standard of Competition for Grants and Cooperative Agreements.**

In outlining the various types of instruments agencies may use, the FGCAA neither requires competition nor establishes any standards for competition. The

preamble to the FGCAA merely states that one of the statute's purposes is to "encourage competition in making grants and cooperative agreements." 31 U.S.C. § 6301. Therefore, in enacting the FGCAA, Congress did not mandate that competition be used in awarding grants and cooperative agreements, and also did not establish any standards for such competition. Instead, Congress merely stated that the purpose of the FGCAA was to "encourage" competition.

The lower court recognized the lack of competition requirement by stating that the FGCAA language was "precatory" and did not mandate the CICA requirement for "full and open competition." JA 38-39 (citing 41 U.S.C. § 3301(a)(1)). Other courts likewise have noted that, "Congress recognized that certain provisions and procedures used in traditional procurement agreements, *such as those involving requirements for competitive bidding*, are not appropriate for grant agreements, and vice versa." *Thermalon Indus., Ltd. v. United States*, 34 Fed. Cl. 411, 418 (1995) (emphasis added).

Furthermore, FGCAA's goal of encouraging competition does not create an enforceable right because "[p]reambles to statutes do not impose substantive rights, duties or obligations." *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 773 (11th Cir. 1983), *unrelated holding abrogated by Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989); *see also Ass'n of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) ("A preamble . . . is not an operative part of the statute and it does

not enlarge or confer powers on administrative agencies or officers." In *National Wildlife Federation*, 721 F.2d 767, the statute stated that its primary objective was to "expand [] economic opportunities, principally for persons of low- and moderate-income." *Id.* at 774 (citing 42 U.S.C. § 5301(c)). The Court held, "While it seems anomalous that the requirement of the statute would allow authorization of grants that do not satisfy the primary objective of the statute" to provide opportunities for persons of low- and moderate- incomes, "Congress did not intend for that goal to be met absolutely by every funded project." *Id.* at 779.

Similarly here, the FGCAA incorporates a goal of encouraging competition, but the statute does not require it in all circumstances. The FGCAA's preamble language that sets forth the purposes of the statute does not create a substantive right for Appellants to force HUD to use competition to the maximum extent practicable. Accordingly, Appellants' argument that the NOFA restrictions violate the FGCAA's requirement for competition is meritless. *See* Appellants Br. at 61. Simply put, the NOFA restrictions cannot violate FGCAA's "encourage[ment]" of competition, and therefore the restrictions are not contrary to law.

## **2. The Relevant Statute Authorizing HUD to Award Grants Under the NOFA Does Not Require Competition or a Standard of Competition.**

When Congress has intended an agency to utilize competitive procedures for entering into a grant or cooperative agreement award, Congress has plainly

incorporated a competition requirement into the statute. In contrast, no competition requirements exist with respect to HUD's Section 8 authority, and therefore HUD is under no obligation to utilize competitive procedures in making an award.

Congress has required agencies to utilize competitive procedures when making awards under other statutes. For example, Department of Defense grants issued to colleges or universities for research and development are statutorily required to be competed. 10 U.S.C. § 2361(a)(1) ("The Secretary of Defense may not make a grant . . . to a college or university for the performance of research and development . . . unless . . . the grant is made using competitive procedures.") Similarly, in establishing a manufacturing engineering education grant program, Congress required that the Department of Defense consider any applications for grants "on the basis of merit pursuant to competitive procedures." 10 U.S.C. § 2196; *see also* 10 U.S.C. § 2374 (requiring merit-based selection for awards of grants for research and development).

In contrast, no such competitive requirement exists with respect to HUD's decision to enter into cooperative agreements with PHAs. *See generally*, 42 U.S.C. § 1437f; Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974); Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 209(a)(1)-(2), 97 Stat. 1153, 1183 (1983); Multifamily

Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, Title V, § 524, 111 Stat. 1384, 1408 (1997); *see also Department of Veterans Affairs and Housing and Urban Development Appropriations Act of 2000*, Pub. L. No. 106-74, Title IV, Subtitle C, § 531(a), 113 Stat. 1047, 1109-10 (1999). Although in this appeal MassHousing does not take a position regarding the statutory basis that authorizes HUD to enter into cooperative agreements, none of the statutes at issue require a level of competition that is similar to that which Congress has required other agencies to use in awarding certain cooperative agreements. Accordingly, the lack of a competition requirement in any of HUD's authorizing statutes indicates that Congress did not intend to require HUD to utilize competition when awarding contracts pursuant to the NOFA. *See Boumediene v. Bush*, 553 U.S. 723, 776 (2008) ("When interpreting a statute, we examine related provisions in other parts of the U.S. Code.").

**3. Even if the FGCAA Incorporated a Level of Competition Similar to CICA, the NOFA Restrictions Would Meet the Higher Standards of Competition.**

Even under the more stringent CICA competition requirements, agencies are permitted to include restrictive provisions "to the extent necessary to satisfy the needs of the agency or as authorized by law." FAR 11.002(a)(1)(ii); *accord Savantage Fin. Servs., Inc. v. United States*, 86 Fed. Cl. 700, 704 (2009) , *aff'd*, 595 F.3d 1282 (Fed. Cir. 2010); *ASC Grp., Inc.*, B-407136, Nov. 15, 2012, 2012

CPD ¶ 318 at 3. When challenging a provision as unduly restrictive, the protester has the burden of demonstrating that the agency's decision lacked a rational basis. *Savantage*, 86 Fed. Cl. at 704; *Wit Assocs., Inc. v. United States*, 62 Fed. Cl. 657, 662 n.6 (2004).

The GAO has repeatedly upheld state-specific licensing requirements on the basis that such licensing requirements ensure that a contract will be timely performed without interference from a state or local government's enforcement attempts. *Lifeline Ambulance Servs., Inc.*, B-277415, Sept. 22, 1997, 97-2 CPD ¶ 83 at 2 (ambulatory service permit); *H.V. Allen Co., Inc.*, B-225326, *et al.*, Mar. 6, 1987, 87-1 CPD ¶ 260 at 3 (fire sprinkler contractor license); *William B. Jolley*, B-208443, Nov. 17, 1982, 82-2 CPD ¶ 455 at 2 (state security guard services license); *United Sec. Servs., Inc.*, B-175203, *et al.*, July 30, 1973, 73 CPD ¶ 82 at 2 (state security guard services license); *see also Blue Dot Energy Co. v. United States*, 179 Fed. Appx. 40, 45 (Fed. Cir. 2006) (holding that the agency's requirement that bidders have a state license was a reasonable restriction because it went to the offerors' responsibility). Furthermore, the GAO has recognized that even if state-specific licensing restrictions cause out-of-state bidders to be excluded, such restrictions are not unduly restrictive because the agency has a legitimate interest in avoiding any delay in contract performance that may be "due

to the state's effort to enforce compliance with the licensing requirement." *H.V. Allen Co., Inc.*, B-225326, *et al.*, Mar. 6, 1987, 87-1 CPD ¶ 260 at 3.

In this respect, the NOFA restrictions are permissible even under the stricter competition standards required by CICA. The NOFA merely requires that any applicant submit a RLO that the applicant is a PHA with authority to operate throughout the entire state. JA300/AR1263. An out-of-state applicant must also submit an additional Supplemental Letter demonstrating that nothing in the relevant state's law prohibits an out-of-state entity from operating as a PHA. JA300/AR1263-64. Such restrictions are permissible because they enable HUD to ensure that an entity will be able to perform any award without undue interference.

Additionally, despite Appellants' contention that the NOFA restrictions severely limit competition, HUD has received applications that offer significant cost savings of approximately \$70 million a year. *See* Def.-Appellee's Resp. to Pl.-Appellants' Mot. for Temp. Stay and for Stay Pending Appeal at 18 (noting that the new contracts awarded pursuant to the NOFA offer HUD a cost savings of approximately \$6 million per month) (docket entry 45-1, May 31, 2013). Accordingly, the NOFA restrictions have not stifled competition because applicants have offered HUD competitive prices in order to effectively compete for award.

Because the restrictions are not contrary to law even under a procurement competition standard that is much higher than the "encouragement" standard required by the FGCAA, the standards are lawful and must be upheld.

**B. HUD Has Legitimate Interests That Necessitate Restricting Competition to Qualified Entities, and the NOFA Restrictions Reasonably Ensure Such Interests Are Met.**

**1. The NOFA Restrictions Are Necessary to Ensure Qualified Entities Perform the Work, to Avoid Programmatic Disruptions, and to Advance the Benefits of Public Housing.**

HUD has a significant interest in ensuring that awards can be successfully performed. To further that interest, HUD has incorporated the NOFA restrictions in order to: (1) ensure that awards are made to qualified entities; (2) avoid costly delays that could significantly interfere with programmatic goals; and (3) ensure that HUD's goal of providing affordable and safe housing is advanced. Each reason alone is more than sufficient to justify the NOFA restrictions, but when considered in the aggregate, HUD's decision to include the restrictions was clearly rational.

**a. HUD Has a Legitimate Need to Ensure That Awards Are Being Made to Qualified Entities.**

HUD reasonably limited the awards to PHAs and deferred to the states regarding what type of entities would be qualified under each state's laws to act as a PHA. In the far stricter context of a federal procurement, an agency may restrict a competition to entities that are state-licensed or authorized to perform certain

work. In *Petchem, Inc.*, B-235653, Sept. 7, 1989, 89-2 CPD ¶ 222 at 2, the GAO denied a protest challenging the agency's decision to contract only with state-authorized tug and towing companies on the basis that the restrictions imposed by an entity other than the contracting agency do not violate CICA even when the result is a sole-source award.<sup>2</sup> See also *Mobile Medic Ambulance Servs., Inc.-Recon.*, B-245445, *et al.*, Jan. 7, 1992, 92-1 CPD ¶ 31 at 2 (dismissing a challenge to a solicitation that required bidders to comply with all applicable laws when certain counties in the state had higher restrictions for authorization to provide ambulance services that protester could not meet).

Although Appellants argued that such restrictions are arbitrary and capricious in view of the FGCAA's general encouragement of competition, HUD has a legitimate interest in ensuring that awards are made to entities that may properly operate as PHAs within the awarded state. HUD ensures entities are qualified as PHAs by relying on the RLO and Supplemental Letter. Therefore, the NOFA's requirements are not arbitrary and capricious because they are rationally

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<sup>2</sup> In the earlier protest for the same procurement, the GAO noted that the protester's real complaint was with the state agency that would only authorize one company. *Petchem, Inc.*, B-222958, July 11, 1986, 86-2 CPD ¶ 63 at 2. Similarly in this case, Appellants' concerns about the out-of-state restrictions should be properly categorized as complaints against states that only authorize one PHA. The APA does not provide relief for complaints that are better directed towards state legislatures.

designed to ensure that applicants may operate as a PHA in any state for which an application is submitted.

**b. HUD Has an Interest in Ensuring That Awardees Can Proceed Without Litigation and Undue Interference With Programmatic Goals.**

HUD also has a legitimate and significant interest in ensuring that contract performance will not suffer from interference or undue delay as the result of a state's or third-party's attempts to have an out-of-state applicant declared an unauthorized PHA. After the 2011 Invitation, a number of PHAs protested the awards at GAO on the basis that HUD made awards to out-of-state entities that were not legally qualified to operate in the protesters' state. *See* JA300/AR1074. Around the same time, HUD began to receive letters from various state attorneys general regarding the legality of out-of-state PHAs operating as PHAs in their respective states. *See also* JA6596; JA6602; JA6606; JA6624; JA6658; JA6671. Both the 2011 Invitation protests and the opinions from various state attorneys general created a significant and legitimate concern for HUD that a failure to include an out-of-state restriction would result in substantial programmatic risk from lawsuits challenging the viability of the out-of-state awardees to operate as PHAs.

After HUD took corrective action in response to the 2011 Invitation protests, HUD began to receive feedback from various groups and applicants regarding the

new NOFA that would be issued. The feedback reiterated the need for HUD to make awards to qualified entities that can properly operate as PHAs in the state for which a contract is awarded. For example, The National Council of State Housing Agencies ("NCSHA")<sup>3</sup> specifically recommended that:

HUD require PHA applicants to certify and support with a reasoned legal opinion (RLO) their authority to conduct the work in the states in which they are applying to serve as PBCAs. Once the application deadline has passed, we ask that HUD publish the names of all PHA applicants, so that any challenges to their legal authority can be brought to HUD before it makes its decisions. We ask that HUD carefully and thoroughly consider RLOs and any challenges to them.

JA300/AR1461.

In addition, NCSHA asked HUD the following question regarding the qualification of PHAs:

How will HUD evaluate the eligibility of the PHA applicant to perform the work? In the first competition, NCSHA believes HUD selected some PHAs that had no legal jurisdiction to serve as PBCAs in the areas for which they were selected to do the work. For example, some local PHAs were selected to perform the work statewide and out-of-state PHAs were selected to do the work in some states.

JA300/AR1464-65. HUD responded that the issue was under consideration and would be "clearly defined in the NOFA." JA300/AR1465.

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<sup>3</sup> MassHousing is a member of NCSHA.

After the GAO issued its decision determining that the NOFA was a procurement contract, HUD continued to stress the importance of ensuring that the awarding instrument would be able to avoid unnecessary litigation risks and programmatic delays. In HUD's letter to the GAO regarding the GAO's recommendation, HUD explained:

A PHA's authority to operate is established under state law. HUD has received opinions from a substantial number of state Attorneys General stating that only in-state PHAs may act as a PHA within a state. Taking these opinions into account, HUD made the decision that, program-wide, it would award ACCs for each state only to in-state applicants, unless there was no in-state applicant. In its most recent NOFA, HUD revisited and reiterated the primacy of in-state applicants, which it believes provides the greatest stability for the program in the long-run, but HUD is now in the process of determining whether this policy choice is reconcilable with the Recommendations.

JA300/AR 7-8; *see also* JA300/AR4 (memorandum from Carol J. Galante, Acting Assistant Secretary for Housing to HUD Secretary Shaun Donovan explaining the same litigation risks).

Accordingly, the above-described sequence of events led HUD to rationally conclude that certain restrictions were necessary in order to avoid programmatic delays due to litigation regarding whether an awarded entity could properly operate as a PHA. These events led HUD to reasonably include the restrictions in this

NOFA in order to ensure that any awarded entity could begin performance without significant litigation risk and undue interference with HUD's programmatic goals.

Appellants attempted to minimize the associated litigation risk by applying a hypercritical reading to the various letters proffered by the state attorneys general and arguing that: (1) HUD had received only six such letters at the time the NOFA was issued; (2) the opinions are not binding; and (3) the letters failed to affirmatively state that out-of-state entities could not perform in the state if awarded a contract.<sup>4</sup> Appellants Br. at 57-58. However, HUD sought to protect interests that are much broader and more significant than Appellants appreciate.

Appellants' argument misses the forest for the trees because HUD's focus was not on whether six attorneys general letters created a critical mass of concern regarding litigation risk, whether the opinions were binding, or whether the letters were definitive enough in their determination that an out-of-state entity could perform in the state. The letters provided enough evidence for HUD to determine that there was a substantial risk involved with possibly awarding to an unqualified

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<sup>4</sup> With respect to the argument that administrative review should be limited to the attorneys general letters received prior to the issuance of the NOFA, the argument fails for lack of prejudice because even if the Court found that the initial letters were insufficient to justify the out-of-state restrictions, HUD now has several additional state attorneys general letters that provide more than enough justification for the restrictions. *See* JA6596-694. The additional letters only buttress HUD's conclusion that the requirements were needed to minimize risk to HUD's programmatic goals.

entity and that HUD would therefore need to incorporate certain restrictions to ensure that the awardee could perform the contract.

In fact, Appellants conceded that Oregon's attorney general letter definitively stated that an out-of-state PHA could not perform in Oregon.<sup>5</sup> Appellants Br. at 59 (citing JA6667; JA6671). The Oregon letter is more than sufficient for HUD to contemplate that there could be substantial risk in awarding to a non-qualified entity in Oregon as well as in other states and to therefore incorporate reasonable restrictions to ensure that there is minimal risk from litigation and performance delays. In context of the history of the procurement, the attorneys general letters provided more than sufficient basis for HUD to be concerned about real and substantial litigation risks and programmatic delays, and therefore the NOFA restrictions are reasonable on this basis as well.

**c. HUD Has an Interest in Advancing Its Statutory Goal of Providing Safe, Affordable Public Housing.**

Finally, HUD has a legitimate interest in advancing the interests of state public housing agencies to further state public housing goals such as providing safe

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<sup>5</sup> Furthermore, the risk of awarding to an entity that cannot perform as a PHA in the awarded state is real. For example, pursuant to Massachusetts law, public bodies are created by Acts of the Legislature granting such powers to fulfill their public purposes in Massachusetts. Accordingly, the NOFA must include restrictions on out-of-state PHAs because HUD would have no reasonable basis to conclude that an out-of-state PHA, created under a foreign state's laws, would be vested with the authority to act on behalf of the Commonwealth of Massachusetts as a Massachusetts PHA.

dwellings for low-income families. *See* 42 U.S.C. § 1437(a)(1)(A), (B). Before the GAO, HUD emphasized that the state PHAs were able to use funds and experience provided by the Section 8 program to develop successful synergies with other state housing programs. JA300/AR1164 (noting that Connecticut uses the funds to preserve affordable housing, Wisconsin uses the funds to preserve Section 8 housing in Wisconsin, and Colorado uses the funds to further its homeless and low-income housing assistance programs). Furthermore, in-state applicants have a significant understanding of the local market, in-state staff to provide local assistance, and long-term experience in the state's affordable housing programs.

Accordingly, the NOFA restrictions give a preference to in-state applicants, but do so to ensure that the funds and experience can remain in that state. For example, a Virginia-based PHA running the Section 8 program in Massachusetts would be able to take the funds and benefits developed and transfer them back to Virginia while depriving Massachusetts of the same benefit.<sup>6</sup> Therefore, the NOFA restrictions further both HUD's and state PHA's goals by ensuring that the benefits of providing the Section 8 services can remain in the awarded state and further the goals of public housing.

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<sup>6</sup> The same loss of in-state benefits would not be applicable when there is no qualified in-state PHA and thus the NOFA permits out-of-state PHAs to compete for awards in such states.

The NOFA restrictions were necessary so that HUD could ensure that awards were made to qualified entities, that litigation risk and programmatic disruptions were minimized, and that HUD could further advance its purpose of providing affordable and safe housing, in this case through the states. These are legitimate purposes for HUD to pursue, and therefore the NOFA restrictions are reasonable and must be upheld.

**2. Appellants Overstate the Extent to Which the NOFA Restrictions Limit Competition.**

Not only are the NOFA restrictions rationally related to legitimate HUD needs, but Appellant has failed to demonstrate that the restrictions exceed what HUD determined was reasonably necessary to achieve such needs. Appellants argued that the out-of-state restrictions were arbitrary and capricious because the restrictions "eliminate competition" by sole-sourcing awards to the in-state PHAs and precluding PHAs that had been operating across state lines from continuing to do so. Appellants Br. at 61. Both readings are contrary to the plain language of the restrictions and therefore cannot provide a basis on which to find that the out-of-state restrictions unreasonably eliminate competition.

First, the NOFA restrictions do not amount to a sole-source award to an in-state PHA. The NOFA required that all applicants submit a RLO that demonstrates it was "created under a statute that confers power that qualify the

entity as a PHA" and that an instrumentality submit a RLO that demonstrates that both the parent and instrumentality entity "were created under laws that confer powers that qualify the parent entity . . . and the instrumentality entity as a PHA." JA300/AR1266-67.

Despite Appellants' contention that the NOFA requirements establish a scheme in which HUD can sole-source an award to "only one entity, the in-state HFA," the scheme does little more than require a definitive showing that the entity is legally endowed by the state to operate as a PHA. *See* Appellants Br. at 61. HUD has no control over whether state laws create no PHAs, one PHA, or multiple PHAs. The RLO ensures that any entity competing for award can demonstrate that the entity may properly operate as a PHA, and therefore the restrictions do not unreasonably "eliminate competition."

Appellants also argued that the restrictions preclude PHAs from operating across state lines and limit PHAs to their home state. Appellants Br. at 61. This argument is without merit because nothing in the NOFA prohibits any out-of-state applicant from submitting a response to any state. Out-of-state PHAs must provide a Supplemental Letter that demonstrates nothing in the law of the state for which the out-of-state PHA is applying prohibits an out-of-state PHA from operating within the state's borders, the PHA is registered to do business in the state, and all conditions have been met for the out-of-state PHA to act as a PHA.

JA300/AR1269. Accordingly, the NOFA explicitly permits out-of-state entities to apply for awards in states other than the applicant's state of creation.

Furthermore, the NOFA's preference for in-state applicants does not "eliminate competition" for out-of-state applicants. The NOFA establishes only that an out-of-state applicant will not be considered if HUD receives a response from a "*legally qualified* in-State applicant." JA300/AR1261 (emphasis added). Based on the NOFA language, applicants will be excluded from operating out-of-state only if an in-state applicant applies for the award and HUD determines the in-state applicant is a legally-qualified PHA able to perform.<sup>7</sup> Such an argument cannot demonstrate that the out-of-state restrictions are unduly restrictive *as written* because the NOFA provides out-of-state applicants the opportunity to compete for award and only gives preference to in-state applicants after HUD determines such applicants are legally qualified.

Accordingly, Appellants have failed to demonstrate that the out-of-state restrictions eliminate competition by going beyond what is needed for HUD to adequately ensure that its legitimate are met. The NOFA restrictions are designed to ensure that any award made is to a qualified entity by requiring that the entity proffer a RLO along with a Supplemental Letter if needed in order to demonstrate

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<sup>7</sup> Because neither of these necessary predicates has yet occurred in this pre-award protest, Appellants' argument is entirely speculative and not ripe for review.

that the entity can perform as a PHA in the state for which an application is submitted. Such restrictions are not arbitrary and capricious and must accordingly be upheld.

## **CONCLUSION**

The NOFA cannot violate the competition requirements of the FGCAA because the FGCAA merely "encourages" competition without requiring competition or establishing a specific level of competition. Furthermore, the relevant HUD statutes do not require competition for grants even though Congress has established such requirements in other instances. Even if the FGCAA or HUD statutes established a competition requirement, the NOFA restrictions meet the stricter competition requirements set forth in CICA and the FAR because the restrictions are reasonably tailored to meet a legitimate agency need.

Furthermore, the NOFA restrictions are not arbitrary and capricious because HUD has legitimate interests in making awards to legally qualified entities, minimizing the risk of performance due to litigation, and furthering the goals of providing affordable and safe housing through the states. The NOFA restrictions are reasonably written to ensure HUD's interest in achieving such goals. Accordingly, the Court should deny the appeal and affirm the lower court's

determination that the out-of-state restrictions are lawful, reasonable, and not unduly restrictive.

Respectfully submitted,

Date: July 22, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2013, a copy of the foregoing BRIEF OF PLAINTIFF-APPELLE was filed electronically and was served to all parties via the Court's electronic filing system.

/s/ Gabriel E. Kennon  
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