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February 25, 2008

Mr. Michael Mirra
Executive Director
Tacoma Housing Authority
902 South "L" Street, Suite 2A
Tacoma, WA 98405-4037

Re: Alternative Procurement Contracting by PHAs

Dear Michael:

This letter is in response to your inquiry regarding the federal regulations applicable to alternative construction procurements (e.g. Design-Build and GC/CM contracting) undertaken by Public Housing Authorities (PHAs), and how attempting to comply with Washington state's procurement statutes would impact existing PHA procedures and eligibility for federal project funding. As discussed below, there are significant differences between the federal and state regulatory requirements for procurements of this type. Attempting to comply with both would likely prove impossible, and failing to comply with the federal standards would most certainly lead to an interruption or cancellation of federal funding for the PHA's projects.

Labor Standards

PHAs that receive federal funding for construction projects must comply with numerous federal regulations regarding labor standards, including Executive Orders 11246 and 11375 (Equal Employment Opportunity), 18 U.S.C. 874 (Anti-Kickback Act), 40 U.S.C. 267 (Davis-Bacon Wage Act), and 40 U.S.C. 327-330 (Contract Work Hours and Safety Standards Act). These federal statutes and Orders impose numerous requirements upon PHAs that often differ significantly from state requirements. There is regular scrutiny by the federal government of project labor issues, including mandatory reporting by PHAs of all labor and wage discrepancies that arise (see HUD Form 4710). Having recently worked on a matter where a PHA was issued an adverse finding by the federal Department of Labor for imposing state rather than federal wage standards, I can personally attest to the importance of ensuring strict compliance with federal regulations – and the diligence with which federal agencies enforce these requirements.

Project Approval and Oversight

In Washington, there is a new statutory regime for alternative contracting by public agencies. Originally known as SSHB 1506¹, these statutes set forth detailed requirements and processes municipalities must follow in order to receive approval for a Design-Build or GC/CM project. The first step in the process is the submission of a detailed application to the new

¹ This legislative bill has since been codified in several different sections of the Revised Code of Washington. For the sake of simplicity, the various sections will herein be considered as a whole and referred to as SSHB 1506.

Capital Projects Advisory Review Board (“CPARB”), which then holds a hearing to consider the application and provide specific project requirements that must be adhered to by the agency in order to receive approval. For PHAs, participating in this process would be duplicative of (and conceivably in conflict with) the federal approval processes with which they already must comply.

For alternative procurements undertaken by PHAs and funded in whole or part by the federal government, HUD has its own review standards that grant recipients must meet in order to receive approval for the project. The process begins with the PHA submitting a *Justification for Other Than Full and Open Competition* (HUD Form 24012), which sets forth the basis for and approach to be used in pursuing an alternate procurement. Once the project receives approval and funding, the federal government monitors progress through progress reporting (24 CFR 85.40), performance reviews (24 CFR 941.501), and audits (24 CFR 941.209).

Potential conflicts between HUD requirements for a project and requirements issued by CPARB (through its Project Review Committees (“PRCs”)) can be readily identified. We have appeared regularly before PRCs, seeking approval on behalf of municipal clients for alternative procurement projects. In these instances, and from our knowledge of other PRC proceedings, PRC approval was based or conditioned upon the municipality agreeing to maintain certain levels of staffing, funding, and scheduling that the PRC deemed necessary for successful project administration. It is entirely possible that such requirements issued by a PRC or CPARB could conflict with HUD requirements, particularly with regard to project funding levels and scheduling. It would of course be impossible for a PHA to comply with conflicting requirements of the two agencies. Under this scenario, it seems clear that the federal requirements would preempt those of the state body – and in any event, the PHA would have to comply with HUD requirements in order to maintain funding for the project.

Contracting Requirements

Washington’s new alternative procurement statutes provide detailed requirements for the contracts between the municipality and prime/subcontractors. These include contract prequalification criteria, substantive factors and procedures for selection of contractors and subcontractors, and specifications for how contract terms will be defined and dollar figures calculated.

While these statutory requirements are undoubtedly useful for municipalities that do not have a history of alternative procurement contracting or an existing procedural structure in place, PHAs are already operating under detailed contracting requirements from the federal government for such procurements. Examples include the incorporation of HUD’s own general and supplemental conditions to the contract for construction (see HUD Form 5370 and 2554), the requirement of HUD approval of change orders (see HUD Form 92437), and even the required language for contractor payment bonds (see HUD Form 92452-A). Furthermore, HUD specifically retains approval authority over all contracts issued by PHAs to program managers (e.g. GC/CMs) for the implementation of alternative procurements. See 24 CFR 941.205 (c)(3).

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PHAs face harsh sanctions for failing to comply with federal regulations in their alternative contracting. As detailed in 24 CFR 941.501, HUD monitors the performance of federally-funded PHA projects and takes corrective action in the event of contracting discrepancies. Sanctions for failure to comply with federal regulations include project takeover, termination of future funding, and recapture of funds already issued to the PHA.² In the event a PHA was forced to comply with state laws that were inconsistent with federal contracting requirements, the consequences for the PHA at the federal level would be drastic, and would have a significant negative impact on both the project at issue and future procurements.

Overall, PHAs are subject to more extensive third-party scrutiny of their contracting activities than perhaps any other municipal agency in the state. Washington's new alternative public works statutes essentially bring other municipalities to a level of oversight comparable to that which PHAs have been operating under for many years. Applying state regulations to PHA contracting activities would therefore provide little in the way of further assurance of project success, but would certainly create significant risk of conflict with federal requirements that could jeopardize a primary source of PHA capital project funding.

Sincerely,

W. Gregory Guedel

² See 24 CFR 941.501(f).