FOSTER PEPPER PLLC

Memorandum

To: Tom Tierney, Association of Washington Housing Authorities

From: W. Gregory Guedel

Date: January 9, 2008

Subject: SSHB 1506 and Applicability to Public Housing Authorities

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I. INTRODUCTION AND SUMMARY

This memorandum outlines relevant legal authority for the position that public housing authorities ("PHAs") are exempt from the Project Review Committee submission requirements of the new alternative public contracting statute, originally known as SSHB 1506[1]. In our analysis we reference standards of statutory construction and Attorney General opinion authority confirming that housing authorities are not required to comply with most public contracting statutes unless a specific statute identifies housing authorities as being covered. The primary issue immediately confronting public housing authorities is whether they must submit Design-Build and GC/CM projects for approval to the newly-formed Capital Projects Advisory Review Board ("CPARB"), which would add time and expense to the procurement process for PHAs. The applicable legal authority strongly indicates that the CPARB process does not apply to PHAs. In addition, alternative forms of oversight that govern PHAs make CPARB review unnecessary, and unsuitable.

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[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.

II. PUBLIC HOUSING AUTHORITIES

The Washington Legislature created housing authorities based upon a detailed legislative finding that the lack of affordable housing is one of the most fundamental problems plaguing our state. See RCW 35.82.010. To promote affordable rents for the neediest, the Legislature accordingly imposed on housing authorities the following statutory mandate:

> It is hereby declared to be the policy of this state that each Housing Authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for low-income dwelling accommodations at the **lowest possible rates** consistent with its providing decent, safe and sanitary dwelling accommodations . . .

RCW 35.82.080 (emphasis added).

The legislature granted housing authorities very broad powers to enable them to carry out their mission. RCW 35.82.070 provides:

> An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having **all the powers necessary or convenient** to carry out and effectuate the purposes and provisions of this chapter, including the following powers in addition to others herein granted. (Emphasis added.)

In addition to this broad grant of authority, and to enhance a housing authority's ability to satisfy the mandate that rentals for low-income dwelling accommodations be fixed at the lowest possible rates, the Legislature enacted two additional provisions that free housing authorities from many of the often costly requirements applicable to other municipal entities. *First*, the Legislature enacted the "specific reference" requirement, RCW 35.82.070(10). This provides:

> No provision of law with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to an authority unless the Legislature shall **specifically so state**. (Emphasis added.)

Second, the Legislature enacted the "trump" provision, RCW 35.82.910. This mandates:

> Insofar as the provisions of this chapter are inconsistent with the provisions of **any** other law, the provisions of this chapter shall be controlling. (Emphasis added.)

Chapter 35.82 RCW provides only one exception to this preemption of other Washington laws – namely, that housing authorities "are subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated." RCW 35.82.120. The impetus for this exemption appears to be the desire that PHAs comply with building codes and other quality standards in the projects they construct. PHAs also comply with prevailing wage requirements under state or federal regulations, requiring the payment of either Washington State prevailing wages or Davis-Bacon wage rates depending on the funding source and jurisdiction for a particular project. The "specific reference" and "trump" provisions of RCW 35.82 ensure that requirements typically applicable to other public entities do not divert financial resources away from a PHA's ability to provide decent housing for the state's low-income families "at the lowest possible rates."

Individually, these provisions of the Public Housing Act provide substantial flexibility to PHAs. Combined, they emphasize the diminished constraint placed on PHAs by the State in comparison to other governmental entities. In ways described in the following sections, this diminished constraint acknowledges that PHAs differ from other governmental entities in ways that make the regular public procurement rules legally inapplicable to them and unsuitable.

III. ATTORNEY GENERAL ANALYSIS

Appellate courts in Washington have not had occasion to apply these provisions in the public works context, but at least two Memoranda from the Attorney General's Office have done so[2]. In a July 31, 1990 Memorandum to the State Auditor's Office, Stacia Reynolds (now Stacia Hollar), then Assistant Attorney General and formerly in-house counsel to the State Auditor, concluded that housing authorities do not have to comply with competitive bid requirements:

> Housing authorities have statutory authority to purchase and maintain property. RCW 35.82.070. This statute further provides that: "No provisions of law with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state." RCW 35.82.070(9). Based on this language, attorneys with this division previously have opined that other statutes, which would include the competitive bid laws, are not applicable to the housing authorities. (See April 26, 1974 Memorandum from Donald Foss, Jr., Assistant Attorney General, to Daryl K. Russell, Chief Examiner, attached to Mr. Anglin's memorandum.) (Emphasis in memorandum.)

Ms. Reynolds (Hollar) found that RCW 35.82.075(4)[3], which permits housing authorities to use a small works roster, did not constitute a specific statement by the Legislature that competitive bid laws are applicable to a housing authority.

> I do not believe that this passing reference is sufficient to constitute a specific legislative statement designed to impose an entire set of requirements upon housing authorities which the Legislature previously specifically provided did not apply. Accordingly, I conclude that housing authorities still do not have to comply with competitive bid requirements. (Emphasis in original.)

Assistant Attorney General Mary Jo Diaz reached the same conclusion in a March 6, 2000, Memorandum:

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[2] Copies of the AG Memoranda are submitted herewith at Tabs 1 and 2.

[3] Enacted in 1989.

> A public body does not have to construct public works or make purchases by competitively awarded contracts unless doing so is required by a constitutional, statutory, or charter provision. *Dalton v. Clarke,* 18 Wn.2d 322, 329-30, 139 P.2d 291 (1943). Chapter 39.04 RCW governs the construction of public works for all municipalities. The term "public work" shall include all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or any municipality, or which is by law a lien or charge on any property therein. RCW 39.04.010. Chapter 39.04 RCW is not a bid law in the same sense as are other statutes which expressly require competitive bidding and then set forth all of the details normally involved in that process. AGO 1984 No. 17. The procedures set forth in ch. 39.04 RCW relate to the preparation and formal publication of plans and specifications, the execution of the particular project in accordance with those plans and specifications, and the maintenance of records of account for the costs of the particular project. *Id.*
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> The housing authority statutes do not expressly require competitive bidding. Indeed, RCW 35.82.070 directs that:
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>> No provisions of law with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.
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> As there are no specific requirements concerning competitive bidding for a housing authority's public works, it would appear that the legislature intended to exempt the housing authorities from such requirements.

These opinions reflect the Attorney General's long-standing view that PHAs have been granted substantial contracting flexibility by the Legislature, and that the Legislature's intent is to free PHAs from administrative burdens that would impact the efficiency and cost-effectiveness of their construction procurements.

The legislative exemption PHAs have been granted from public bidding laws supports the position that housing authorities should similarly be exempt from the new alternative contracting procedures. Given that SSHB 1506 was designed to increase access to GC/CM and Design-

Build construction contracting for municipalities to which such methods were previously unavailable, it is inconsistent with this clear statutory intent to place new burdens (e.g. CPARB review) on PHAs that were already utilizing these methods. This is particularly so since, as discussed above, PHAs have been previously exempted from the strictures of other public contracting statutes.

The applicability requirement of RCW 35.82.070(10) for PHAs is clearly not met within SSHB 1506. The definition of "Public Body" in Section 101 of the new statute includes "any general or special purpose government, including but not limited to state agencies, institutions of higher education, counties, cities, towns, ports, school districts, and special purpose districts." Housing authorities are not explicitly mentioned, which RCW 35.82.070(10) requires in order for the statute to apply to PHAs. Since housing authorities are not specifically enumerated in the list of agencies to which SSHB 1506 applies, the legislature's unambiguous statement in RCW 35.82.070(10) precludes the applicability of the new alternative procurement statutes to housing authorities.

The PHAs' exemption from SSHB 1506 also appears to conform with how that bill was drafted. The drafting process was admirably inclusive, with participation by a full range of public stakeholders. These participants appear on CPARB's list of stakeholders (available on its web site). It includes state agencies, cities, counties, ports, community colleges, school districts,

colleges and universities, and hospitals.[4] The House Bill Report, summarizing the testimony in the bill's favor from these stakeholders, included comments that "no one was left out of the process," "the bill is a compromise from all the parties," "[t]he process has been one of collaboration and negotiation," and "[t]he final product represents a delicate balance between the stakeholders (sic)." House Bill Report (HB 1506). It is revealing therefore that PHAs were neither alerted to the effort, nor included in the drafting or negotiations, nor consulted about concerns they may have. This omission does not concern PHAs because it is consistent with the understanding that the public procurement process, and its amendment under HB 1506, do not pertain to PHAs. The concern would arise from an application of either that process or of HB 1506 contrary to that understanding.

IV. PHAs SUBJECT TO OTHER CONTRACTING CONTROLS

Beyond the issues of statutory construction and applicability, there are sound practical reasons for exempting PHAs from the requirements of CPARB approval for alternative procurement construction projects. Perhaps more than any other municipal agency in the state, PHAs are subject to extensive outside scrutiny of their contracting activities. As with any municipal agency in Washington, PHAs are of course under standard third-party oversight by entities such as the state Auditor. However, due to the nature of funding utilized by PHAs for

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[4] CPARB added the Tacoma Housing Authority (THA) to the list of stakeholders only in November 2007 after CPARB's representatives engaged THA in discussions.

capital construction projects, they are also subject to the regulations of and oversight by numerous other bodies, most notably the federal government.

1. The first reason why CPARB oversight is unnecessary arises from the extensive federal oversight governing PHA development. Many significant construction procurements undertaken by PHAs involve at least some degree of funding by the federal Department of Housing and Urban Development (HUD). When HUD funds a project, it takes a proactive role in overseeing how the project is organized, contracted, built, and administered. See 24 C.F.R. Part 85. Of particular note is the fact that for procurements outside the realm of traditional open bidding (e.g. RFPs for alternative procurements), HUD has its own review standards that grant recipients must meet in order to receive approval for the project. A copy of HUD Form 24012, *Justification for Other Than Full and Open Competition*, is attached herewith at Tab 3. This form is the starting point for the detailed application process HUD requires before it will fund such projects, and PHAs are compelled to present a complete and viable project plan that covers all contingencies for both the work and project administration. From there, HUD maintains comprehensive oversight and authority throughout every phase of the project. Examples include the incorporation of HUD's own general and supplemental conditions to the contract for construction (see Tab 4), mandatory reporting of all labor and wage discrepancies (see Tab 5), approval of change orders (see Tab 6), and even the required language for contractor payment bonds (see Tab 7).

The range and depth of oversight provided by HUD for PHA construction projects is both more extensive and of longer duration than that contemplated by Washington's legislature for CPARB. This provides both an assurance of substantive involvement in project quality control by an outside government body for the duration of the project, and also invokes the legal issue of federal preemption. Congressional intent to have federal law and/or regulations preempt state law may be found in three ways. First, Congress may express a clear intent to preempt state law. *E.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Second, the "scheme of federal regulation [may be] sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *California Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613 (1977) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Third, preemption will be found when there is an actual conflict between federal and state law where (1) compliance with both the federal and state law is physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or (2) the state law is an "obstacle" to the "full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *see also Guerra,* at 281.

While there is presently no explicit pronouncement in statutory or case law regarding whether the provisions of SSHB 1506 are preempted by federal law and regulations for HUD-funded projects, potential conflicts between HUD requirements for a project and requirements

issued by CPARB (or its Project Review Committees ("PRC")) 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 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. It is therefore likely that any substantive requirements CPARB or a PRC might issue for a federally-funded PHA project would be preempted by HUD regulations and authority.

2. A second reason also distinguishes PHAs from other governmental entities and further recommends against the need for CPARB oversight. Most governmental developers, such as cities, counties, school districts, port districts and the state, have either taxing or levy authority to raise public financing for developments or they have sources of net income through their business activities. In these cases, tax payers, having provided the money, would have no further direct assurance about the manner of its expenditure. The state's public bidding requirements in general and CPARB's process in particular provide that assurance with oversight

that otherwise would be absent. In contrast, PHAs have no taxing authority and they have no business activity to generate a net income. (Housing low income persons is not an easy way to make money.) The money they spend on development generally comes from sources of financing, both public and private, that exercise their own oversight: e.g, private debt from banks, bond sales, and equity contributions from tax credit investors. The same is true for development financing that PHAs may receive from the State of Washington. This financing usually comes from grants through the Housing Trust Fund. These grants have their own conditions and requirements that protect the public interest in the use of the money. The same is true of financing that PHAs may receive from cities that use either federal funds, such as CDBG or HOME funds, or funds that are raised locally.

In these ways, PHAs much more closely resemble private, usually nonprofit, developers who also rely on these same financing sources, including the public sources such as the Housing Trust Fund or cities. CPARB's oversight does not apply to these private developers in their use of the public money. If this oversight does not apply to private developers using the same money, there is no reason to apply that oversight to PHAs, which in fact have the additional federal safeguards that do not apply to private developers.

V. CONCLUSION

Taken together, the provisions of state law that pertain to contracting by PHAs and the federal requirements of agencies like HUD strongly support the position that PHAs are not

subject to the requirements of SSHB 1506. The new statute does not explicitly incorporate PHAs within its scope as specifically required by RCW 35.82.070; the additional administrative burden and expense (that would be placed upon PHAs by requiring them to submit applications to CPARB) is at odds with the clear intent of RCW 35.82.080; and federal regulations would likely preempt CPARB jurisdiction for any project funded in whole or part by HUD or other federal sources. Given the level of oversight they receive from the various funding sources for their construction projects, PHAs in Washington are already subject to the detailed administrative scrutiny Washington's legislature sought for alternative procurements through its enactment of SSHB 1506, thereby providing at least as much quality assurance as other municipal agencies would receive from the CPARB review process.

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