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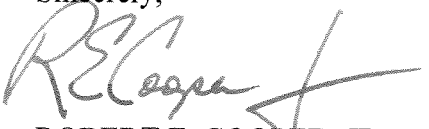
February 29, 2012

Ted R. Fellman, Executive Director
Tennessee Housing Development Agency
404 James Robertson Parkway, Suite 1200
Nashville, TN 37243-0900

Dear Mr. Fellman:

In response to your request, attached is opinion number 12-25 . If you have further questions or comments, please contact this Office.

Sincerely,



ROBERT E. COOPER, JR.
Attorney General and Reporter

Enclosure

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202

February 29, 2012

Opinion No. 12-25

Administration of Project-Based Section 8 Housing Assistance Payments Contracts

QUESTION

Is the Tennessee Housing Development Agency the only agency authorized by Tennessee law to be the administrator of Project-Based Section 8 Housing Assistance Payments contracts for the State of Tennessee?

OPINION

Yes. The General Assembly has created no entity other than the Tennessee Housing Development Agency with the statutory authority to administer a state-wide Project-Based Section 8 contract.

ANALYSIS

The Project-Based Section 8 Housing Assistance Payments program was created by the Housing and Community Development Act of 1974.[1] The Housing Assistance Payments program is a rent subsidy program that assists eligible low income families in obtaining decent, safe, and sanitary housing. Families receive the benefit of a rent subsidy, known as a housing assistance payment, equal to the difference between their share of the rent and the rent charged by the owner. Owners, who may be public or private, receive the housing assistance payments directly from the United States Department of Housing and Urban Development ("HUD") or one of its performance-based contract administrators. *See* 42 U.S.C. § 1437f.

In August of 2000, HUD awarded the Tennessee Housing Development Agency ("THDA") with a Performance-Based Annual Contributions Contract for oversight of properties with Section 8 Housing Assistance Payments contracts. Pursuant to this contract, THDA has continuously served as a performance-based contract administrator for HUD, overseeing Section

[1] "Section 8" refers to Section 8 of the United States Housing Act of 1937, which was added by the Housing and Community Development Act of 1974, Pub.L. No. 93–383, § 201(a), 88 Stat. 633, 662–66 (codified as amended at 42 U.S.C. § 1437(f)). Section 8 housing assistance may be either "project-based" or "tenant-based." 24 C.F.R. § 982.1(b)(1). Project-based assistance is appurtenant to specific housing units, pursuant to which the federal government provides rental assistance payments to unit owners on behalf of low income tenants in those units. *Id.* Tenant-based assistance, on the other hand, is appurtenant to the tenant, pursuant to which the tenant may retain a rental subsidy when he or she moves to another Section 8 housing unit. *See* 42 U.S.C. § 1437f(o), (r); 24 C.F.R. §§ 982.1(b)(1), 982.314, 982.353, 982.355.

8 Housing Assistance Payments contracts appurtenant to approximately 400 properties located throughout Tennessee. *See* http://www.thda.org/s8ca/cacover.html.

Currently, HUD is engaging in a new competitive process to select performance based-contract administrators for its Housing Assistance Payments contracts in each state. On March 23, 2011, HUD issued an Invitation for Submission of Applications wherein it announced that it would select one administrator for each state, other than California. *See* Invitation for Submission of Applications, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=invitationforappsfinal.pdf.

The Invitation states that the successful applicant for each state will enter into a single Performance-Based Annual Contributions Contract ("ACC") with HUD. *Id.* at 3 The principal tasks to be performed under the contract include, but are not limited to, the following:

- Monitoring compliance by project owners with their obligation to provide decent, safe, and sanitary housing to assisted residents;
- Paying property owners accurately and timely;
- Accurately and timely submitting required documents to HUD (or a HUD designated agent); and
- Complying with applicable Federal law and HUD regulations and requirements, as they exist at the time of ACC execution and as amended from time to time.

Id. at 4.

The Invitation further provides that the successful applicant must perform certain "Performance Based Tasks" set forth in the ACC. *See* Performance-Based Annual Contributions Contract, § 1, Exhibit A § 3, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=accfinal.pdf.

Importantly, the Invitation seeks applications from legally qualified "public housing agencies," consistent with 42 U.S.C. § 1437f, which provides in pertinent part:

> 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.

42 U.S.C. § 1437f(b)(1).

The term "public housing agency" is defined in pertinent part as follows:

> Except as provided in subparagraph (B),[2] the term "public housing agency" means any 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[3] of public housing.

42 U.S.C. § 1437a(b)(6)(A)(emphasis added).

Based on the information provided with this opinion request, HUD received protests in several states regarding whether certain applicants were legally authorized "public housing agencies" eligible to be awarded the ACC proposed to be let by the Invitation. In light of these protests, HUD has elected to engage in a new competitive process in those states where more than one application was received. Since Tennessee is one of the states in which HUD will be engaging in a new competitive process, the question posed is whether THDA is the only agency authorized by Tennessee law to be the administrator of Project-Based Section 8 Housing Assistance Payments contracts for the State of Tennessee. For the reasons set forth below, we believe that THDA is the only agency so authorized.

The General Assembly created THDA when it enacted the Tennessee Housing Development Agency Act, codified at Tenn. Code Ann. §§ 13-23-101 to -133. THDA is a body, politic and corporate, and it is a political subdivision and instrumentality of the State. Tenn. Code Ann. § 13-23-104. The General Assembly has proclaimed:

> The Agency . . . shall be deemed to be acting in all respects for the benefit of the people of the state in the performance of essential public functions and shall be deemed to be serving a public purpose and improving and otherwise promoting the health, welfare, and prosperity of the people of the state, and that the Tennessee housing development agency shall be empowered to act on behalf of the state of Tennessee and its people in serving this public purpose for the benefit of the general public.

Tenn. Code Ann. § 13-23-104.

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[2] Subsection (B) of 42 U.S.C. § 1437a(b)(6) addresses the meaning of "public housing agency" for purposes of the Section 8 program for tenant-based assistance.

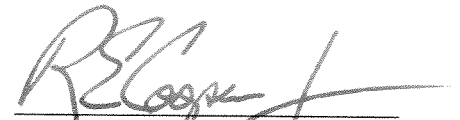
[3] The term "development" means "any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-income housing project. . . ." 42 U.S.C. § 1437a(c)(1). The term "operation" includes "any or all undertakings appropriate for management, operation, services, maintenance, security (including the cost of security personnel), or financing in connection with a low-income housing project. . . ." 42 U.S.C. § 1437a(c)(2). The term "low-income housing project" contained within each of these definitions means "(A) housing developed, acquired, or assisted by a public housing agency under this chapter, and (B) the improvement of any such housing." 42 U.S.C. § 1437a(b)(1).

THDA's purposes include promoting the production of affordable housing units and the preservation and rehabilitation of existing housing units for very low, low and moderate income individuals and families. Tenn. Code Ann. § 13-23-102. To effectuate its purposes, THDA is authorized to perform the following functions, among others: to contract for and accept funds from the United States or any agency or instrumentality thereof and to comply with the terms and conditions associated with such funds, Tenn. Code Ann. § 13-23-115(14); to provide construction and permanent financing for land development and construction of housing for lower and moderate income persons, Tenn. Code Ann. § 13-23-102(1),(2) & Tenn. Code Ann. § 13-23-115(1),(2); to make and administer grants to political subdivisions and private nonprofit corporations for housing and related services, Tenn. Code Ann. § 13-23-102(6) & Tenn. Code Ann. § 13-23-115(31); to enter into all contracts and agreements necessary, convenient or desirable to carry out its purposes or to perform its duties in connection therewith, Tenn. Code Ann. § 13-23-115(13); to employ employees and others as determined in the judgment of THDA, Tenn. Code Ann. § 13-23-115(21); to provide technical and advisory services to those involved in all aspects of affordable residential housing, Tenn. Code Ann. § 13-23-115(22); to promote research and development in proper land use planning, Tenn. Code Ann. § 13-23-115 (23); and to "[d]o any and all things necessary or convenient to carry out its purposes and exercise the powers given and granted. . . ." Tenn. Code Ann. § 13-23-115(28).

In sum, the General Assembly has determined that providing affordable housing for low and moderate income persons is of critical importance, and it has established a pervasive regulatory scheme in which THDA is bestowed with sweeping powers to provide such housing on a state-wide basis – powers which include those necessary to administer Project-Based Section 8 Housing Assistance Payments contracts throughout the State of Tennessee. Moreover, the General Assembly has given THDA explicit authority to contract for and accept funds from the United States or any agency or instrumentality thereof and to comply with the terms and conditions associated with such funds.

Therefore, we conclude THDA is a "public housing agency" under 42 U.S.C. § 1437a(b)(6)(A) since it is an instrumentality of the State of Tennessee that "is authorized to engage in or assist in the development or operation of public housing" in this State. Further, we conclude that THDA is the only "public housing agency" authorized to administer Project-Based Section 8 Housing Assistance Payments contracts for the State of Tennessee, given that the General Assembly has created no other entity with the authority to administer a state-wide Project-Based Section 8 contract. In so concluding, we believe the authorization provision of 42 U.S.C. § 1437a(b)(6)(A) implicitly requires that such authorization be granted by the legislative body of the State in which the public housing agency operates. While Congress could permit a public housing agency created by the laws of one state to operate as a public housing agency in another state, the contrasting definition of a public housing agency for a tenant-based assistance program indicates that Congress has not conferred such permission. In 42 U.S.C. § 1437a(b)(6)(B)(iii)(II), Congress expands the definition of public housing agency "[f]or purposes of the program for tenant-based assistance" to include, "notwithstanding any provision of State or local law, a public housing agency for another area that contracts with [HUD] to administer a program for housing assistance under section 1437f of this title, without regard to any otherwise applicable limitations on its area of operation" when "no public housing agency has been organized or where [HUD] determines that a public housing agency is unwilling or unable to

implement a program for tenant-based assistance. . . ." Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *INS v. Cardoza–Fonseca*, 480 U.S. 421, 432, (1987) (citations omitted).



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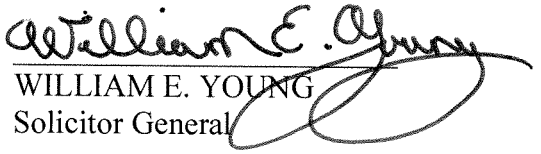

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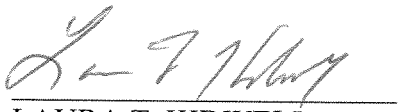
Solicitor General



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