December 17, 2012

LEGAL MEMORANDUM Ref: AG 12-0850

TO: Acting Executive Director, GHURA
   Chairman, GHURA Board of Commissioners

FROM: Attorney General

SUBJECT: Guam Housing and Urban Renewal Authority Procurement

Earlier this year, former GHURA Executive Director, Ray Topasna, brought to the attention of the Office of the Attorney General that members of the GHURA Board claimed that procurement by their agency is not subject to Guam Procurement Law. Mr. Topasna requested a formal opinion or memorandum from the office regarding the matter.

The Guam Procurement Law applies to Guam Housing and Urban Renewal Authority ("GHURA") except when requirements of federal law with respect to the expenditure of federal funds are inconsistent then federal law shall control. See 12 G.C.A. § 5132. Prior memorandums opined that GHURA was exempt from the centralized Government of Guam Procurement Law because GHURA is 100% federally funded. However, none of the opinions cited a federal law or regulation to support its conclusion that GHURA is exempt.

Title 24 CFR § 85.36, Housing and Urban Development, Office of the Secretary, Department of Housing and Urban Development, Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments, Post-Award Requirements, Changes, Property and Subawards, Procurement, provides that "[w]hen procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. A State includes any territory or possession of the United States. See 24 CFR § 85.3.

GHURA administers several programs that are federally funded. See www.ghura.org.
1. The Public Housing program is a Federal aid administered by Housing and Urban Development ("HUD") to GHURA to manage the housing for low income residents at rents they can afford. The program regulations, 24 CFR Part 960, do not provide for procurement.

2. The Section 8 program is a Federal aid administered by HUD to GHURA to provide rental assistance for very low-income residents to make renting housing in the community affordable. The program regulations, 24 CFR Part 983, do not provide for procurement.

3. The Guma Trankiliidat program is financed through the Farmers Home Administration, Section 515 New Construction. Farmers Home Administration, Section 515 New Construction and Part 884, Section 8 Housing Assistance Payments Program, New Construction Set-Aside for Section 515 Rural Rental Housing Projects and 42 U.S.C. § 1485, Farmers Home Administration under Section 515 of the Housing Act of 1949 do not provide for procurement.

4. The Community Development Block Grants (CDBG) Program is a grant provided by the HUD. CDBG is authorized by the Housing and Community Development Act of 1974, as amended. Program regulations are found in 24 CFR Part 570. The following regulations contained in 24 CFR Part 570 govern procurement:

   Title 24 CFR § 570.200(d)(2), Housing and Urban Development, Office of the Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development, Community Facilities, Community Development Block Grants, Eligible Activities, General Policies, Consultant Activities, Independent Contractor Relationship, provides that consultant services provided under an independent contractor relationship are governed by the procurement requirements in 24 CFR § 85.36.

   Title 24 CFR § 570.200(f) provides, in pertinent part, the means of carrying out eligible activities are subject to local law by the recipient through procurement contracts governed by the requirements of 24 CFR 85.36.

   Title 24 CFR 570.489(g), Program Administrative Requirements, Procurement, provides:

   “When procuring property or services to be paid for in whole or in part with CDBG funds, the state shall follow its procurement policies and procedures. The state shall establish requirements for procurement policies and procedures for units of general local government, based on full and open competition. Methods
of procurement (e.g., small purchase, sealed bids/formal advertising, competitive proposals, and noncompetitive proposals) and their applicability shall be specified by the state. Cost plus a percentage of cost and percentage of construction costs methods of contracting shall not be used. The policies and procedures shall also include standards of conduct governing employees engaged in the award or administration of contracts. (Other conflicts of interest are covered by § 570.489(h).) The state shall ensure that all purchase orders and contracts include any clauses required by Federal statutes, executive orders and implementing regulations.”

Title 24 CFR 570.502, Grant Administration, Applicability of Uniform Administrative Requirements, requires government entity recipients to comply with OMB Circular No. A–87, “Cost Principles for State, Local, and Indian Tribal Governments”; OMB Circular A–128, “Audits of State and Local Governments” (implemented at 24 CFR part 44); and with the sections of 24 CFR part 85 “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments” or the related CDBG provision, including 24 CFR § 85.36. None of the provisions except 24 CFR § 85.36 provide for procurement.

5. The HOME Program is a grant provided by HUD and authorized by Title II of the Cranston-Gonzales National Affordable Housing Act, as amended. 42 USC 12.721 et seq. Program regulation is 24 CFR Part 92 and does not provide for procurement.

6. The Emergency Solutions Grant (ESG) Program is funded by HUD. ESG grants are provided by HUD. ESG is authorized under Subtitle B of Title IV of the Stewart B. McKinney Act (42 USC 11371 et seq.) and renamed in the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act. Program regulations are 24 CFR Part 91 and 576. These provisions do not provide for procurement.

7. The Continuum of Care (Guam Homeless Coalition) program responds to the needs of the homeless. Funds were not identified and regulations were not cited.

8. The Homelessness Prevention and Rapid Re-Housing Program (HRRP) funds may be used to provide homelessness prevention assistance to persons at-risk of homelessness, to provide rapid re-housing assistance to homeless persons, to help cover required data collection and evaluation costs, and to help cover grant administration costs.

9. The Low Income Housing Tax Credit Program was created by the 1986 Tax Reform Act to assist with the development of low-income rental housing by providing qualified owners with Credit to offset their tax obligations.
10. The Weatherization is a program to help reduce energy costs for income eligible applicants by improving the energy efficiency of their homes.

A review of GHURA’s programs and their regulations does not reveal or provide for a different procurement process with federal funds. Rather, it requires GHURA to follow Guam’s procurement process for local funds. See 24 CFR § 85.36. Therefore, the procurement statutes, such as, 5 G.C.A. § 5121(b) and 5 G.C.A. § 5150, that require the Attorney General’s approval on legal services contracts and procurements in excess of $500,000, respectively, apply to GHURA and its procurement. Unless a specific federal statute or regulation provides otherwise, GHURA is not exempt from the Government of Guam Procurement Law.

Respectfully Submitted,

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Assistant Attorney General