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MEMORANDUM

March 26, 2018

To: Tribal Housing Clients

From: Hobbs, Straus, Dean & Walker, LLP

Subject: ***Rules for Managing Federal Funds at 2 CFR Part 200 – Reminder that New Procurement Policies Must Now Be Implemented; Notice of HUD Consultation Period on Revising Section 184 Program Regulations***

This memo reports on two recent developments related to Indian housing programs: (1) a HUD training on updates to the federal procurement regulations (2 CFR part 200), and (2) the initiation of consultation on proposed regulatory changes to the Section 184 loan guaranty program.

1. HUD Training on Updates to Federal Procurement Regulations

On March 13 and 14, the Northwest Office of Native American Programs (NW ONAP) held a refresher training on the recent changes to federal procurement and audit regulations. The training was held to answer interpretation questions, and to remind tribes and Tribally Designated Housing Entities (TDHEs) that the deadline to implement the new regulations has passed. We attended the training and provide you with some relevant information regarding the changes and the deadline.

A. Deadline to Revise Procurement Policies Has Passed

In December of 2014, the Office of Management and Budget (OMB), together with various Federal award-making agencies, including HUD, published a joint interim final rule implementing the final guidance for 2 CFR Part 200 at 79 Federal Register 75871, “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.” The purpose of the revised regulations was to streamline the Federal government’s guidance, administrative requirements, and procurement regulations by consolidating the requirements from eight OMB Circulars and other regulations into a single regulation at 2 CFR part 200. The new standards are government-wide, affecting procurement, contracting, and auditing for many Federal agencies, including HUD. The revised regulations affect Tribal governments and Tribal entities such as TDHEs that receive Federal awards.

The new regulations became applicable to tribes and TDHEs effective December 26, 2014, with one relevant exception: 2 CFR 200.110(a) was revised

(several times) to provide a final three-year grace period for implementation of the new procurement standards contained in the rule. The grace period has now ended, and tribes and TDHEs should have implemented revised procurement policies to reference and incorporate the new procurement requirements.

However, a number of tribes and TDHEs have not yet updated their procurement policies as required. Several of these entities have received findings from HUD for failing to update their policies, or for non-compliance with the revised regulations. It is important for tribes and TDHEs to review and properly revise their procurement policies and procedures as soon as possible to comply with the new regulations.

B. Discussion of Changes to Federal Procurement Requirements

The training covered the wide variety of changes made as part of the consolidation to 2 CFR 200. Those amendments involved many minor changes to nearly every procurement topic area. The following list is not all-inclusive of those changes, but merely highlights several of the key changes that affect tribes and TDHEs:

- A new provision requires disclosure of violations of Federal criminal law to HUD: “The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award ...”. Failure to disclose may result in remedies as determined by HUD under 25 USC 4161, which include termination of payments, reduction of payments, limiting the availability of payments to those programs not affected by noncompliance, or replacing the recipient with a different recipient. 2 CFR 200.113; 24 CFR 1000.26(a)(1); 25 USC 4161. These disclosures should be made during the application process. The prior regulations did not require disclosure to HUD. Participants engaged in discussion over this issue. In response to a participant question, the NW ONAP staff noted that all such violations must be reported - there is no time limit for when a violation occurred. The staff further noted that a disclosure will not make an applicant automatically ineligible. For example, if there was a recent violation, perhaps someone who was not involved in the violation could be substituted in any role managing the award funds.
- The provisions regarding internal controls have been modified to require a recipient to “take reasonable measures to safeguard protected personally identifiable information and other information [the entity] designates as sensitive...” 2 CFR 200.302(b)(e). The NW ONAP staff present noted the example that many tribes and TDHEs are still printing out documents containing social security numbers, which would violate this provision.

NW ONAP recommends installing masking software which will only print the last four social security numbers. Other participants recommended using locked drawers for all housing files.

- If the tribe or TDHE has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, then the tribe or TDHE must also maintain written standards of conduct covering organizational conflicts of interest. An organizational conflict of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the tribe or TDHE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization. 2 CFR 200.318.
- Section 2 CFR 200.319 covers competition in procurement transactions, and requires that all procurement transactions must be conducted with full and open competition consistent with the standards the section. The new language states: “[i]n order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements.” 2 CFR 200.319.
- A cost and price analysis is no longer required at or below the simplified acquisition threshold (currently \$150,000), although the price must still be “reasonable” and an estimate might be necessary to determine whether the procurement will fall into this category. 2 CFR 200.325.
- Updated Required Contract Provision: the Equal Employment Opportunity clause must now be included in all contracts that meet the definition of “federally assisted construction contract”. 2 CFR 200 App. II(C).
- Updated Required Contract Provision: the Contract Work Hours and Safety Standards Act applicable threshold was raised to \$100,000, where it was previously \$2,000 (construction contracts) or \$2,500 (other contracts which involve the employment of mechanics or laborers). 2 CFR 200 App. II(E).
- Financial Management: Each award recipient must now have written procedures for determining allowability of costs. 2 CFR 200.302(b). Factors that affect the allowability of costs are found at 2 CFR 200.403.
- Prior to consolidation at 2 CFR 200, the awarding agency’s rights to intangible property (property having no physical existence, such as trademarks, copyrights, patents and patent applications and property, such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership) did not apply to recipients of the IHBG program. The awarding agency rights to certain intangible property now apply to both IHBG and ICDBG recipients. The rights are fairly extensive and may be found at 2 CFR 200.315. However, NW ONAP staff noted that this change will likely have little to no impact to IHBG/ICDBG

programs. The new requirement is likely more relevant for tribal recipients of research grants.

The above changes are not inclusive of all of the new requirements that affect tribes and TDHEs. If we may be of assistance drafting revised procurement policies, or reviewing revised policies for compliance with 2 CFR Part 200, please let us know.

C. NAHASDA Exceptions

Several of the procurement requirements at 2 CFR 200 do not apply to tribes or TDHEs, as the NAHASDA statute and its regulations provide exceptions that supersede the federal regulations. *See* 24 CFR 1000.26 and 1000.28:

- For any procurement of goods and services with a value of less than \$5,000, tribes and TDHEs don't need to comply with the procurement requirements of 2 CFR 200.
- Tribes and TDHEs don't need to comply with the following sections of 2 CFR 200:
 - Section 200.302(a), "Financial management."
 - Section 200.305, "Payment," applies, except that HUD shall not require a recipient to expend retained program income before drawing down or expending IHBG funds.
 - Section 200.306, "Cost sharing or matching."
 - Section 200.307, "Program income."
 - Section 200.308, "Revision of budget and program plans."
 - Section 200.311, "Real property," except as provided in 24 CFR 5.109.
 - Section 200.313, "Equipment," applies, except that in all cases in which the equipment is sold, the proceeds shall be program income.
 - Section 200.314, "Supplies," applies, except in all cases in which the supplies are sold, the proceeds shall be program income.
 - Section 200.317, "Procurement by states." Section 200.328(b) through (d) and (f), "Monitoring and reporting program performance."
 - Section 200.333, "Retention requirements for records."
 - Section 200.338, "Remedies for noncompliance."
 - Section 200.343, "Closeout."

In addition, as you know, recipients may also access federal supply sources from the General Services Administration, which is a procurement not governed by 2 CFR 200. ***There are no NAHASDA exceptions for compliance with the 2 CFR 200 Subpart F audit requirements.***

2. Notice of Consultation: Regulations for Section 184 Indian Housing Loan Guarantee Program

Section 184 Indian Housing Loan Guarantee (“Section 184”) is a loan guarantee program through which HUD will guarantee a home loan up to 100% for home ownership by American Indian and Alaska Native families. The Section 184 program is specifically designed for American Indian and Alaska Native families, Alaska villages, as well as for tribes and TDHEs. Congress established this program in 1992 to facilitate homeownership and to increase access to capital in Native communities. The Section 184 guarantee loan program can be used for new construction, rehabilitation, purchase of an existing home, or refinance. There have been several concerns identified with the Section 184 program over the past few years, including the relatively low numbers of Section 184-guaranteed loans on reservation and trust lands (as opposed to fee lands), the continued reluctance of certain lenders to make loans in Indian Country, and the recent statements by HUD that it has been advised by the Department of Justice that such loans and their related mortgages cannot be enforced in tribal courts.

As a result of these issues and other considerations, HUD is proposing to revise the regulations for the Section 184 Indian Housing Loan Guarantee (Section 184) program and is seeking to consult with tribes and Tribal leaders at the beginning of the regulation revision process in accordance with the HUD Government-to-Government Consultation Policy.

HUD has held consultation sessions on revisions to the regulations at the NCAI 2018 Executive Council Winter Session, the NAIHC 2018 Legislative Conference, and at the Nevada/California Indian Housing Association Annual Business Meeting at Thunder Valley Casino and Resort in Lincoln, California.

HUD plans to hold the following upcoming consultation sessions:

- The Midwest Alliance of Sovereign Tribes (MAST) Impact Week at Holiday Inn Capitol in Washington, DC, March 26, 2018
- The United Native American Housing Association (UNAHA) Annual Meeting at Holiday Inn Lakewood in Lakewood, CO, April 9, 2018
- An Association of Alaska Housing Authorities’ (AAHA) meeting and webinar at AAHA offices in Anchorage, AK, April 9, 2018
- The Northwest Indian Housing Association (NWIHA) Quarterly Meeting at Coeur d’Alene Resort Casino in Worley, ID, April 17, 2018

- The Southern Plains Indian Housing Association (SPIHA) Spring Meeting at the Hard Rock Hotel in Catoosa, OK, April 19, 2018
- The Tribal Self-Governance Annual Consultation Conference at the Albuquerque Convention Center in Albuquerque, NM, April 22-26, 2018

We will be attending the consultation at the Coeur d'Alene Resort Casino in Worley, Idaho on April 17, 2018, and can assist with preparation and submission of comments for that consultation, or with any comments submitted by email to 184consultation@hud.gov. Comments may be submitted by email until the publication of the proposed rule in the Federal Register (date to be determined). Following publication of the proposed rule, tribes may submit comments under the public comment period provided in the Federal Register notice.

3. Conclusion

Please let us know if you have any questions about this memorandum. We are available to assist with preparation and review of revised procurement policies and with submission of comments on the revised Section 184 regulations. Please do not hesitate to contact me at egoodman@hobbsstrauss.com or by phone at (503) 242-1745.