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MEMORANDUM

April 13, 2023

TO: TRIBAL HOUSING CLIENTS

FROM: ED CLAY GOODMAN

RE: *Tribal Housing Updates*

This memo reports on several matters related to Tribal housing, including presentations by United States Department of Housing and Urban Development (HUD) Office of Native American Programs (ONAP) and HUD Office of Special Needs Assistance Program (SNAPS) regarding the Continuum of Care program, new HUD guidance in several areas, and proposed rulemaking.

NwONAP: Common Challenges and Solutions

Tom Carney, Administrator at Northwest Office of Native American Programs (NwONAP), and David Boyd, Director of the Grants Management Division at NwONAP, presented on a number of topics related to HUD and ONAP.

Mr. Boyd first provided a grants management update. Mr. Boyd shared that the Fiscal Year (FY) 2022 Indian Community Development Block Grant (ICDBG) awards are imminent, and the FY 2022 Indian Housing Block Grant (IHBG) competitive grant applications are currently being rated. All FY 2023 IHBG amounts have been posted and a few recipients still need to return signed grant agreements. The FY 2023 IHBG competitive grant Notice of Funding Opportunity (NOFO) will be published this summer, with a total pot of \$150 million available and \$7.5 million available per applicant. Mr. Boyd also shared additional HUD funding opportunities. Tribes and Tribally Designated Housing Entities (TDHEs) may apply for the Section 184 Skilled Worker Demonstration Program, which provides funding for rental housing for skilled workers. Tribes and TDHEs may also apply for Section 4 Capacity Building Grants, which can be used to help enhance the capacity and ability to provide affordable housing activities.

Mr. Carney presented on common challenges that Tribes and TDHEs face when administering housing programs. In the realm of admissions and occupancy, Mr. Carney shared that Tribes and TDHEs often struggle with inconsistent income calculations, missing applicant documentation, following internal policies, and calculating rent for non-low-income participants. He recommended entities try utilizing additional adjustments to income and provide incentives for tenants to encourage tenants to pay rent on time. In the area of finance, entities struggle with audits, separation of duties, maximizing program income, and collecting payment. Mr. Carney expressed an interest in helping Tribes and TDHEs implement online pay and auto-pay, and Tribal leaders shared the sentiment. For environmental review, Mr. Carney identified challenges with timing, lack of documentation, and the Request for Release of Funds Process. Turning to issues with construction and procurement, Mr. Carney recommended Tribes and TDHEs ensure

their procurement policies are up to date. Specifically, he highlighted new guidance (Notice PIH 2023-01) related to the small purchase options for procurement. The new guidance allows for Tribes/TDHEs to increase the micro-purchase threshold from \$10,000 to a maximum of \$50,000 through a self-certification process (and even higher through a process requiring HUD approval), clarifies the rules for *de minimis* procurements under NAHASDA (less than \$5000), and confirmed the simplified acquisition threshold at \$250,000. This Notice is discussed in more detail below. In closing, Mr. Carney emphasized the importance of ensuring that housing policies match the practices, and he encouraged Tribes and TDHEs to update their policies and continue to pursue a diverse range of funding opportunities.

HUD Continuum of Care

Scott Rich, HUD office of Special Needs Assistance Program (SNAPS), presented on the Continuum of Care (CoC) program. The CoC is a HUD program that provides \$3.3 billion dollars in funding to coalitions of governments, non-profits, public housing agencies, businesses, housing developers, and other community organizations to address homelessness in the United States. These coalitions are responsible for applying for funding and distributing funding in their specific regions to address homelessness issues. In 2021, the CoC program was expanded to allow for the participation of Tribes and TDHEs in the CoC Program.

Mr. Rich shared that Tribes and TDHEs have two options for participating in the CoC program. First, Tribes and TDHEs may join an existing coalition of entities in a geographic area, known as a continuum of care (CoC). HUD is responsible for approving CoC areas, and there are approximately 390 in the United States now. Tribes and TDHEs can join the existing CoC that includes their tribal lands, in which they would work alongside the other community players to apply for and distribute CoC funding. A map of existing CoCs can be found here: <https://files.hudexchange.info/resources/documents/FY-2022-National-CoC-Boundaries-Poster-Map.pdf>.

Second, Tribes and TDHEs have the option of applying to create their own CoC that covers only their tribal lands. This option would allow the tribe or TDHE to apply for CoC funding and distribute that funding without engaging in collaboration with other players located outside of their tribal lands. Mr. Rich emphasized that the addition of Tribes and TDHEs to the CoC program is still new and it is unclear how receptive HUD will be to the idea of including tribal lands as separate CoC areas.

Mr. Rich emphasized that the CoC program focuses on providing funds to CoCs, but does not necessarily control how those funds are spent by the entities making up a CoC. Tribal leaders expressed concerns that if they participate in existing CoCs, tribal needs will still be ignored by the other members of the coalition. Additional information for tribal communities interested in participating in the CoC can be found here: <https://www.hudexchange.info/programs/coc/tribal-communities/>.

Recent Changes to the Federal Micro-Purchase and Simplified Acquisition Thresholds

On January 19, 2023, HUD issued Notice PIH 2023-01, entitled “Recent Changes to the Federal Micro-Purchase and Simplified Acquisition Thresholds.” You can find the notice here: <https://www.hud.gov/sites/dfiles/PIH/documents/2023PIH01.pdf> The stated purpose of Notice

PIH 2023-01 is to inform Tribes and Tribally Designated Housing Entities (TDHEs) about increases to the micro-purchase threshold for programs involving Federal funds. The micro-purchase threshold sets the level below which procurements are not required to obtain competitive price quotations, and the recipient needs to determine that the price is “reasonable” based on research, experience, purchase history or other information.

By way of background, the Notice explains that the National Defense Authorization Act for FY 2018, (Public Law 115-91), signed into law on December 17, 2017, raised the Federal micro-purchase threshold from \$3,500 to \$10,000. It also raised the simplified acquisition threshold to \$250,000. While the changes were implemented in 2018, the Uniform Guidance and the Federal Acquisition Regulation were not updated to match the Act at the time. On August 13, 2020, the Office of Management and Budget (OMB) issued Final Guidance revising sections of OMB’s Guidance for Grants and Agreements, 85 Fed. Reg. 49506 (August 13, 2020). The Final Guidance revised 2 C.F.R. Part 200 and formally adopted the \$10,000 micro-purchase threshold and the \$250,000 simplified acquisition threshold.

Among the revisions in the Final Guidance that became effective November 12, 2020, was a revision to 2 C.F.R. § 200.320(a)(1) to allow non-Federal Entities (including Tribes and TDHEs) to establish a micro-purchase threshold up to \$50,000 based on certain conditions, including maintaining necessary records and self-certification of compliance. The micro-purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or Tribal laws or regulations. In addition, the regulatory update allows Tribes and TDHEs to seek Office of Native American Programs (ONAP) approval for micro-purchase thresholds **greater than** \$50,000. Tribes and TDHEs must demonstrate organizational and financial capacity through an institutional risk assessment.

Under the revised 2 C.F.R. § 200.320(a)(1), Tribes and TDHEs may self-certify a micro-purchase threshold amount of up to \$50,000, increased from \$10,000. A Tribe or TDHE may establish a threshold higher than the micro-purchase threshold of \$10,000 by self-certifying a threshold amount up to \$50,000 on an annual basis. The Tribe or TDHE must maintain documentation of that annual self-certification in accordance with 2 C.F.R. § 200.334 and 24 C.F.R. § 1000.552 to be made available to ONAP and auditors upon request. Under the revised 2 C.F.R. § 200.320(a)(1)(iv), the self-certification must include the following elements: 1) Clear identification of the threshold amount; 2) Justification for the threshold amount; and 3) Supporting documentation of any of the following: a) A qualification as a low-risk auditee, in accordance with the criteria in 2 C.F.R. § 200.520 for the most recent audit; b) An annual internal institutional risk assessment described below to identify, mitigate, and manage financial risks; or c) For public institutions, a higher threshold consistent with State law.

Micro-purchase thresholds higher than \$50,000 must be requested in letter format and approved in writing by ONAP. Tribes and TDHEs must submit a request that includes the Self Certification Elements to the Area ONAP for approval. The increased threshold is valid until there is a change in status in which the justification was approved.

Notice PIH 2023-01 also reiterated the availability and requirements of the IHBG-program-specific *de minimis* procurement exemption. Under the IHBG Program, for procurements of goods and services valued less than \$5,000, recipients may continue to operate under the existing NAHASDA *de minimis* procurement exemption, which exempts such

procurements from all federal procurement requirements, including competitive quotations, determination of reasonableness, and Indian/Tribal preference. HUD added a note to state the following:

Micro-purchase and *de minimis* exemptions are two different methods for simplifying purchasing. Recipients can develop procurement policies that choose between the two options for purchases under \$5,000. However, Tribal preference requirements will apply to all micro-purchases regardless of the value but will not apply to *de minimis* procurements.

Extension of Public Interest, General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance

On April 7, 2023, in accordance with the Build America, Buy America Act (BABA), HUD published a notice proposing an extension to the previously issued public interest, general applicability waiver for an additional period of one year to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) as applied to Federal Financial Assistance provided to Tribes, TDHE, and other Tribal Entities (collectively “Tribal Recipients”). <https://www.federalregister.gov/documents/2023/04/12/2023-07675/extension-of-public-interest-general-applicability-waiver-of-build-america-buy-america-provisions-as>

BABA was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (“IIJA”) (Pub. L. 117–58). BABA establishes a domestic content procurement preference for Federal infrastructure programs. Section 70914(a) establishes that no later than 180 days after the date of enactment, HUD must ensure that none of the funds made available for infrastructure projects may be obligated by the Department unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, the Act further defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property. Thus, starting May 14, 2022, new awards of HUD funding, and any of those funds newly obligated by HUD then obligated by the grantee for infrastructure projects, are covered under the Buy American provisions of the Act, unless covered by a waiver.

HUD previously published a one-year general applicability, public interest waiver of the BAP in connection with HUD funding provided to Tribal Recipients effective May 14, 2022, in order to provide the agency with sufficient time to complete the Tribal consultation process. While that waiver was pending, HUD participated in governmentwide consultation efforts with respect to the applicability of the provisions of BABA to Tribal Recipients. On September 21, 2022, eight agencies (U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Housing and Urban Development, U.S. Department of Homeland Security, U.S. Department of Energy, U.S. Department of Transportation, U.S. Department of Commerce, and U.S. Small Business Administration) participated in a joint consultation hosted by the White House Council on Native American Affairs to consult with Tribal Nations on discretionary Buy America provisions and potential waivers. Tribes were requested to provide written comments and feedback by October 20, 2022 for Federal agency consideration. The resulting comments were received by the White House Council and distributed to agencies on October 25, 2022.

HUD is moving forward with consultation on specific plans for implementation of the Buy American Preference in HUD's funding provided to Tribal Recipients. However, the HUD notice states that, in order to appropriately engage in consultation as described in HUD's Tribal Government-to-Government Consultation Policy, consistent with President Biden's "Tribal Consultation and Strengthening Nation-to-Nation Relationships" Memorandum regarding the appropriate application of BAP to such entities, HUD needs an additional period of time in which to further consult on the more specific application of the Buy American Preference to HUD's Tribal Recipients. Hence the announcement of a proposed additional one-year waiver.

The notice states that HUD has determined that the prior one-year waiver period was insufficient to fully consult and assess the impacts that the Buy American Preference will have on HUD's Tribal Recipients. HUD is particularly interested in seeking more tailored Tribal feedback on the impact of the Buy American Preference on infrastructure projects that are funded under HUD's various Tribal programs. Additionally, since the interagency webinar was held in 2022, HUD has determined to implement the Buy American Preference in a phased manner across its non-Tribal programs. With the benefit of this recent determination, HUD states that it needs additional time to seek Tribal feedback on whether and when HUD should take a similar phased approach with respect to the implementation of the Buy American Preference under its Tribal programs. HUD will also assess the unique and diverse conditions of Tribal communities across Indian Country and determine how the Buy American Preference should be applied after taking those conditions into account.

Comments on the proposed extension are due on **Monday, April 24, 2023**. All submissions must refer to the docket number (Docket No. FR-6331-N-02A) and title. Comments may be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically. Comments may also be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500.

Office of Violence Against Women FY 2023 Tribal Governments Program

The United States Department of Justice – Office of Violence Against Women (DOJ - OVW) announced the application period for the Grants to Indian Tribal Governments Program (Tribal Governments Program).¹ The Tribal Governments Program provides funding to tribal governments, authorized designees of tribal governments, and tribal consortiums to respond to domestic violence, dating violence, sexual assault, sex trafficking, and stalking in tribal communities. While there is no budget cap to the grants, they are generally in the range of \$500,000 to \$1 million. The initial funding period is 36 months. Applications for the FY 2023 Tribal Governments Program Grant must be initiated in grants.gov by **Tuesday, April 25, 2023** and completed by **Thursday, April 27, 2023**.

¹ OVW Fiscal Year 2023 Grants to Indian Tribal Governments Program – Solicitation, The United States Department of Justice – Office of Violence Against, Jan. 31, 2023.
<https://www.justice.gov/ovw/page/file/1566421/download>.

Tribes that have not participated in the Tribal Governments Program will be required to apply for the Improving Tribal Response grant. Applicants for that program are not required to have a specific project in mind when applying, but only need to have a goal of addressing domestic and sexual violence in their community.

The DOJ – OVW prepared a pre-application information session which can be found at the following link: <https://www.youtube.com/watch?v=Npz7y9TSx9c>. The DOJ – OVW is available for questions regarding this opportunity at OVW.TribalGovernment@usdoj.gov.

Notice of Proposed Rulemaking for Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Risk Management Standard.

On March 24, 2023, HUD published a Notice of Proposed Rulemaking (NPRM) titled “Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standard” (Proposed Rule) in the Federal Register.² The Proposed Rule aims to revise HUD’s regulations governing floodplain management and the protection of wetlands to incorporate the Federal Flood Risk Management Standards (FFRMS). The Proposed Rule would also provide a process for determining the FFRMS Floodplain that would establish a preference for a climate-informed approach. It would also streamline and modernize HUD’s floodplain and wetland regulations. Lastly, the Proposed Rule would revise HUD’s minimum property standards for one to four-unit housing under HUD mortgage insurance, to require the lowest floor in new and substantially improved structured located within the 100-year floodplain to be built at least two feet above base flood level.

HUD is hosting live listening sessions about the Proposed Rule for members of the public and stakeholder groups on April 17th, May 2nd, and May 15th. Information for the sessions can be found at the following:

- [FFRMS Listening Session 1 - State and Local Government Representatives \(April 17, 2023\)](#)
- [FFRMS Listening Session 2 - Federally Recognized Tribes, Native Hawaiian Organizations, and Alaskan Native Attendees \(May 2, 2023\)](#)
- [FFRMS Listening Session 3 - Open Public Forum \(May 15, 2023\)](#)

HUD is also seeking comments on the Proposed Rule until May 23, 2023.

Conclusion

If you have any questions about this memorandum, please contact Ed Clay Goodman (egoodman@hobbsstrauss.com or 503-242-1745).

² Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standard, 88 Fed. Reg. 57, 17755 (Mar. 24, 2023).

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