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February 1, 2000

No. 00-AT-106-0801(Revised)

MEMORANDUM FOR: Harold Lucas, Assistant Secretary for Public and Indian
Housing, P

FROM: Nancy H Cooper
District Inspector General for Audit-Southeast/Caribbean, 4AGA

SUBJECT: HUD's Approval of Noncompetitive Procurement
Public Housing Division
San Juan, Puerto Rico

Our recent review of the Puerto Rico Public Housing Administration (PRPHA) procurement procedures disclosed that HUD's approval of noncompetitive procurement for two multi-million dollar contracts was improper. On December 23, 1997, HUD's Public Housing Division authorized the PRPHA to execute a contract with Cardona, Irizarry & Co. for \$9.6 million due to an emergency, and a contract with CVR Puerto Rico, Inc. for \$4.4 million as sole source. Our review disclosed that the PRPHA's request to procure these contracts using noncompetitive method was not justified and did not include a cost analysis, which is mandatory, especially in these cases. Therefore, neither the PRPHA nor HUD had a basis to determine the reasonability of the contract costs. We questioned the reasonability of the charges under both contracts in the audit report on the review of the PRPHA procurement procedures.

We are issuing this revised memorandum to include HUD's comments. Excerpts from HUD's comments are included in the finding. Appendix A contains the complete text of the comments. The original memorandum was issued on November 15, 1999, under the same number.

CRITERIA

Title 24 of the Code of Federal Regulations (CFR), Part 85.36 (d) (4) (i) states that procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Also, procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies: (A) the item is

available only from a single source; (B) the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (C) the awarding agency authorizes noncompetitive proposals; or (D) after solicitation of a number of sources, competition is determined inadequate.

Public Housing Authority procurement regulations define an emergency as a situation which causes unexpected and unforeseen public needs and which requires immediate action because of the danger to life, health, or public safety. Similar criteria is provided by HUD Handbook 7460.8 Rev. 1 Appendix 1, Part E.1.b. It also states that an emergency is a situation that “would otherwise cause injury to the Public Housing Authority, as may arise by reason of a flood, earthquake, epidemic, riot, equipment failure or similar event.”

Contract with Cardona, Irizarry & Co.

The 3-year contract with Cardona, Irizarry & Co. for \$9.6 million was to obtain management consulting services for the establishment of internal financial controls, train the personnel, and operate the Finance and Administration Area. The contract also authorized Cardona, Irizarry & Co. to procure, on behalf of the PRPHA, computers and software with a cost not to exceed \$2.8 million, which was included in the \$9.6 million.

The PRPHA requested HUD’s approval to use the noncompetitive procurement method for this contract based on emergency conditions. Among the documentation submitted to HUD to support the request was Administrative Order No. 43, dated October 30, 1997, signed by Ana Carmen Alemañy, Secretary of the Puerto Rico Housing Department. According to the Order, the Secretary was declaring that emergency conditions existed at the PRPHA. The conditions were sufficient to permit the contracting of a management consulting firm to provide for the establishment of internal financial controls, train the personnel, and operate the Finance and Administration Area through an expedited procurement process. The Order described the following three conditions to justify the emergency:

1. To avoid the PRPHA from being placed back on the list of troubled public housing agencies. It came off the list in December 1996.
2. The PRPHA, which manages an annual budget of about \$200 million, was in danger of losing over \$70 million from the previous fiscal year due to lack of efficient financial and contract management procedures. The PRPHA may be in danger of losing about \$150 million during the next 2 years.
3. The possibility that a matter under investigation would disclose the embezzlement of funds by private contractors. If embezzlement occurred the PRPHA would be required to develop financial internal controls, which the PRPHA cannot accomplish without external help from a financial management firm.

A. Urgency

The three conditions cited did not justify foregoing competitive solicitation. The first condition did not constitute an emergency. Regarding the second condition of being in danger of losing money within the next 2 years, it was not a condition that could not wait for competitive solicitation. The third condition involves a matter of establishing internal controls, the need of which has been brought to the PRPHA's attention numerous times through Independent Auditors' Reports, HUD monitoring, and Office of Inspector General (OIG) reviews. The sudden urgency caused by the second and third conditions is questionable, when HUD has provided technical assistance on these areas through CVR Associates since October 1995. Additionally, although the emergency was declared on October 30, 1997, the contract was not executed until January 8, 1998, or 69 days later. The emergency execution took longer than the competitive award process of another contract to the same contractor. In the case of the other contract, the request for proposal was published July 5, 1997, and the contractor was notified of its selection on August 26, 1997, or 46 days later. Therefore, we concluded that the procurement of the \$9.6 million contract using the noncompetitive method was not justified.

B. Cost Analysis

The cost analysis submitted by the PRPHA for HUD's review was actually a cost estimate. A cost analysis involves obtaining a cost breakdown from the proposed contractor, analyzing the labor, material, indirect costs and profit proposed. It also involves identifying areas of questioned or unallowable costs, or items which appeared to be inflated or unnecessary. A cost analysis serves to assist the PRPHA in preparing for negotiation with the contractor to obtain a reasonable price.

Paragraph 4-33 D of the HUD Procurement Handbook 7460.8 REV-1, states that if the Housing Agency has justified procurement by noncompetitive proposals, it must request a breakdown of the proposed costs and use cost analysis (i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of cost and profit).

The information submitted by the PRPHA consisted of a chart for each of the 3 years of service, showing the positions, hours, and the compensation rate per category. On the charts submitted for HUD's review, we were concerned with the number of hours per category. For example, the first year chart was as shown below:

<u>Category</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Partners	1,250	\$165	\$ 206,250
Managers	14,560	80	1,164,800
Seniors	31,800	55	1,749,000
Special Staff	12,480	20	249,600
Total			<u>\$3,369,650</u>

Assuming a regular working schedule of 40 hours per week, the above represents having partners working 60 percent (1,250 / 2,080) of the time on the job, which according to the local Association of Certified Public Accountants is not normal practice. However, this is not as disturbing as having the equivalent of 7 managers and 15 seniors full time on the job. Usually there is a manager per job and a senior as a supervisor of each area. The majority of the staff should consist of the special staff positions. It appears that the cost breakdown/estimate submitted by the PRPHA to HUD was not reasonable. Since the PRPHA did not submit a cost analysis as required, there was no assurance that the estimated costs were reasonable.

Contract with CVR Puerto Rico, Inc.

A. Sole Source

The 18-month contract, executed on January 8, 1998, with CVR Puerto Rico, Inc, Housing Management Specialists, for \$4.4 million was to provide for the establishment of internal management controls for the modernization program. Also, the contract was to assist in the area of personnel recruitment, which included the training of the recruits and to ensure that all HUD requirements were incorporated into the established internal financial controls.

The PRPHA requested HUD's approval to use the noncompetitive procurement method for this contract as an emergency and as a sole source. Among the documents submitted with the request was the previously discussed Administrative Order No. 43, declaring the emergency. Also submitted was a Unique Circumstances Statement claiming that due to the lack of available firms in Puerto Rico experienced in managing large Public Housing Authorities, the PRPHA was recommending a sole source procurement process to address the deficiencies in the modernization area. Documents at the PRPHA indicate that the contract was to be awarded to CVR Associates which was still providing similar services under an October 1995 contract with HUD. As a result, a new company, CVR Puerto Rico, Inc., was incorporated on November 13, 1997. This company has the same principals as CVR Associates.

The task orders applicable to PRPHA under the CVR Associates contract required the contractor, among other things, to provide technical assistance on the modernization program. The assistance included creating monitoring controls, developing program close-out procedures, and recruiting staff. It also required the contractor to develop internal control systems including procurement practices and procedures. Although the services under this contract were originally scheduled to end on April 14, 1997, CVR Associates continued providing services until at least March 1998.

We concluded that the PRPHA request to award the contract to CVR Puerto Rico, Inc. due to an emergency and as a sole source was not justified. As discussed in the previous section, the emergency was not reasonable. As to the sole source issue, the PRPHA stated that there were no firms in Puerto Rico experienced in managing large Public Housing Authorities. To the contrary, there were other firms in Puerto Rico capable of providing these consulting services.

For example, in 1996 the PRPHA contracted with three firms to manage its 1994 and 1995 CGP funds. CVR Associates is not a local company and the PRPHA had been paying for lodging, per diem and other travel expenses incurred by the contractor's principals, employees and sub-contractors without official residence in Puerto Rico. On November 21, 1997, HUD's Public Housing Division advised the PRPHA that Notice PIH 96-94 provided a partial source list of consultants that provide services to Public Housing Authorities and HUD. Therefore, other companies outside the Puerto Rico jurisdiction could have been considered.

B. Cost Analysis

The cost analysis submitted by the PRPHA for HUD's review was actually a cost estimate. There was no analysis to determine the reasonability of the contract cost. There were significant differences between the PRPHA's estimate, the cost proposal submitted by the contractor, and the payment schedule included in the contract. The PRPHA estimate included the following cost categories with total costs of \$4,944,000:

Labor	74,100 hours at various rates	\$4,544,000
Other Costs	travel and miscellaneous	400,000

The package sent to HUD did not include the cost proposal from the contractor. It contained only the estimated staff hours of 58,440. However, the PRPHA records contained the contractor's cost proposal (in the name of CVR Associates not CVR Puerto Rico, Inc.) with the following cost categories and total costs of \$5,344,700:

Labor	58,440 hours at various rates	\$4,667,400
Other Costs	travel and miscellaneous	677,300

The payment schedule attached to the contract totaling \$4,418,326 included the following cost categories:

Labor	63,690 hours at various rates	\$3,338,532
Other costs	Travel and miscellaneous	334,000
Overhead and Profit		745,794

These three documents show differences that should have been explained in the PRPHA procurement records.

Based on the matters discussed, we believe HUD's approval of the contracts to Cardona, Irizarry & Co. and CVR Puerto Rico, Inc. was improper.

HUD Comments

Generally, it is HUD's opinion that the finding was erroneous. HUD believes that it used programmatic discretion under the applicable regulations in granting the PRPHA's

request to procure the two contracts using a noncompetitive method. Specifically, 24 CFR § 85 permits public housing agencies to use noncompetitive procurements, such as these if any one of four exceptions applies, including approval by HUD. Here HUD's determination under the applicable regulation, as well as HUD's fact finding, was at the sole discretion of the program discipline and the exercise of that discretion was more than reasonable given the circumstances.

In considering whether to approve the request, HUD considered the totality of the situation. The most relevant and therefore most important factors considered were:

1. The 1992 and 1993 Single Audit Reports containing a Disclaimer of Opinion. These reports were dated October 31, 1995.
2. Failure to submit the 1994-1996 Independent Public Accountant reports.
3. Declaration of Emergency by the Puerto Rico Secretary of the Housing Department.
4. The discovery of alleged fraudulent scheme of over \$1 million.
5. The 1997 Public Housing Management Assessment Program report designating the PRPHA as a modernization troubled authority.
6. The information on or about December 1997 that there was a possibility that a PRPHA finance employee could be the target of a Grand Jury Investigation.

Contrary to the finding, the emergency declaration was not the sole determinant in the approval of the contracts, rather it was merely one of many factors. However, the declaration did support HUD's ultimate decision.

Several of the exceptions are applicable to the facts of this case, including subsection (C), which provides sole discretionary authority to the program discipline to approve a noncompetitive procurement. However, the report does not recognize subsection (C) as the authority for HUD to permit these contracts. The report solely concentrates on the exigency/emergency provision under subsection (B). In so doing, OIG attempted to substitute its opinion for HUD's programmatic decision.

A similar standard involving an unusual and compelling emergency appears in the Federal Acquisition Regulation (FAR) 6.302-2. Subsection (b) (2) specifies that the section applies when delay in award of a contract would result in serious injury, financial or other, to the Government. Therefore, OIG's view of an emergency as requiring some sort of physical event is excessively restrictive under this provision in the FAR.

OIG's interpretation of public exigency or emergency is unsupported and apparently based only on its own apparent policy preference not to allow programmatic discretion as to when HUD should permit noncompetitive awards. Even if the OIG or HUD disagrees with what constitutes public exigency or emergency under 24 CFR § 85.36 (d) (4) (i) (B), subsection (d) (4) (i) (C) permits the awarding agency to authorized noncompetitive proposals without the existence of an emergency. HUD's programmatic decision to approve the contracts was based on a thorough and comprehensive risk assessment.

The authorization of a noncompetitive procurement method was a sound decision to place an adequate administrative control system to immediately stop fraud, waste, and abuse at the PRPHA.

OIG Response

HUD stated that its decision to approve the noncompetitive proposal was based on several factors including the PHA's emergency declaration. HUD also stated that their programmatic decision to approve the contracts was based on a thorough and comprehensive risk analysis. However, in its December 23, 1997, letter of approval for the noncompetitive method, HUD did not make any reference to the risk assessment or to any factors other than the PHA's emergency declaration and the justification for sole source procurement. In addition, the response to this memorandum failed to address what risk assessment was performed in making the decision.

The HUD files for the noncompetitive procurement contained a section titled "Field Office Risk Assessment for Finance and Modernization Areas." The file section contained: the 1992-1993 Single Audit Reports, dated October 31, 1995; part of the 1997 Public Housing Management Assessment Program report; the April 15, 1997, Comprehensive Grant Program monitoring review; and various letters dealing with unresolved findings. However, the file did not contain a written risk assessment or any other analysis to support HUD's approval of the PRPHA's noncompetitive procurements.

It is also HUD's position that 24 CFR § 85.36 (d) (4) (i) (C) permits the awarding agency to authorize noncompetitive procurement without the existence of an emergency. This is true only if the solicitor demonstrates that the award of the contracts was infeasible under small purchase procedures, sealed bids or competitive proposals, or that the services were available only from a single source. The PHA failed to demonstrate that the contract award was infeasible and HUD did not make the required determination that the competitive process was infeasible. In addition, any exceptions to the regulations are required by 24 CFR § 85.36 (d) (4) (ii) to have a cost analysis performed.

HUD's position that it had limitless discretion to approve the noncompetitive contracts without the existence of a valid emergency or sole source situation is contrary to its own Legal Counsel's recent opinion on the subject. In a May 29, 1998, letter addressed to Mr. Blakeman, PRPHA Administrator, HUD's Chief Field Counsel was replying to another request for HUD's approval of a noncompetitive procurement. The Chief Counsel stated the following:

"Mr. Gonzalez Rivera's letter correctly acknowledges that HUD regulations require competitive procedures unless certain conditions are met. Although the regulations permit HUD to grant an exception to an agency following competitive procedures [See 24 CFR § 85.36 (d) (4) (i)], HUD will do so only when it is infeasible and when a circumstance of the type listed in the regulations exists. The type of circumstances listed include emergencies (such as situations endangering life or property) and when an item is only available from one source. Even in emergency situations, the regulations implicitly require competition unless a delay would cause risk of further harm. What the listed circumstances have in common is that they are all of a kind where competition is either unavailable or where competition would create a serious problem. Id. It is in those types of circumstances when HUD would consider authorizing noncompetitive procurements."

The first request for approval of noncompetitive procurement was submitted by the PRPHA on November 11, 1997. The PRPHA was requesting HUD's approval of CVR as a sole source procurement and of Cardona, Irizarry and Co. as an emergency procurement. On November 21, 1997, HUD informed the Acting PRPHA Director at that time of the following: "CVR Associates, Inc. is one of the contractors listed in Notice PIH 96-94 which provides a partial source list of consultants that provide services to [Public Housing Authorities] and HUD. However, this notice does not relieve a [Public Housing Authority] from its responsibility to advertise and follow policy requirements and procurement regulations found at 24 CFR Part 85.36. [Public Housing Authorities] are not to construe this Notice as authorization to enter into noncompetitive, sole source contracts with listed firms. Reasons for contracting CVR as a sole source may be justified on information other than this Notice. "

Notice PIH 96-94 provided an updated list of 106 potential firms, which according to HUD were qualified to provide services in analysis of problem areas, implementation of needed improvements, or the management of one or more public housing developments. According to HUD, the firms appear to be qualified for the management of large-scale real estate rental housing operations entailing administrative responsibility for all service areas. The service areas included the review of: (1) procurement policies, procedures, and inventory control systems; (2) automated data processing and management information systems; (3) budgeting, financial accounting, and reporting procedures; and (4) administrative staffing and organization, etc. The Notice also stated that "[Public Housing Authorities] must seek out and consider a wide range of sources in addition to those on the list. Interested firms not listed must be allowed to compete for contracts in any of the service areas covered by this Notice."

After the November 21, 1997 letter, the PRPHA submitted the documentation to justify CVR as a sole source contract and Cardona, Irizarry and Co. as an emergency contract. In the December 23, 1997, approval letter, HUD stated that they viewed the documentation submitted by the PRPHA as supporting evidence of compliance in the procurement of both contracts. The key documents listed by HUD were the emergency declaration and the justification for sole source procurement. Neither the emergency situation nor the sole source procurement was justified based on the reasons stated in the PRPHA's request or in HUD's approval letter. Regarding the sole source contract, it is evident that HUD and the PRPHA were aware that other firms in and outside of Puerto Rico could have provided the same services. Both of the justifications were thoroughly addressed in the main body of the memorandum.

In conclusion, HUD's response does not show a sound basis for its approval of the noncompetitive procurement for the contracts. Overall, the response did not (1) prove that the competitive procurement was infeasible; (2) demonstrate the performance of, or at least document, a risk assessment; (3) verify that the noncompetitive procurement had a cost analysis to support that the costs were reasonable; and (4) factually support HUD's stated reason for giving its approval.

Finally, HUD's current justification that it had broad administrative discretion to approve the contracts was not the reason stated in HUD's approval letter. Further, the after-the-fact rationalization still fails to comply with the regulatory requirements for infeasibility and reasonable cost analysis.

The six factors considered by HUD may have constituted a good justification for contracting consultant services for the PRPHA's modernization and finance areas, but did not constitute justification for authorizing the noncompetitive procurements.

Recommendation

We recommend that your office take the necessary actions to prevent preferential, non competitive selection of contractors. Specifically, we recommend that your office send a reminder to the Caribbean Office Public Housing staff on the requirements that should be met before approving non-competitive procurement methods for public housing authorities. Emphasis should be made on what constitutes a cost analysis and its importance in the procurement process, and especially in noncompetitive procurement methods.



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December 16, 1999

MEMORANDUM FOR: Nancy H. Cooper
District Inspector General for Audit
Southeast/Caribbean, 4AGA

THROUGH: Harold Lucas, Assistant Secretary for Public and Indian Housing, P

FROM: *Hildamar Ortiz* Hildamar Ortiz, Esq., Director, Office of Public Housing, 4NPH

SUBJECT: HUD's Approval of Noncompetitive Procurement
00-AT-106-0801
Public Housing Division, San Juan, PR

The Office of the Inspector General (OIG) reviewed the procurement management practices within the Puerto Rico Public Housing Administration (PRPHA) and issued a report dated November 15, 1999, that included a finding that the HUD Caribbean Public Housing Division (PHD) failed to comply with 24 C.F.R. § 85.36 in the PHD's approval of two contracts non-competitively procured by the PRPHA.

As will be demonstrated, this finding is erroneous in that the PHD properly used its programmatic discretion under the applicable regulations in granting the PRPHA's request to procure the two contracts using a noncompetitive method.¹ HUD regulations at 24 C.F.R. §85 permit public housing agencies to use noncompetitive procurements such as these if any one of four exceptions applies, including approval by HUD. Here, the PHD's determination under the applicable regulation, as well as the PHD's fact finding, was in the sole discretion of the program discipline and the exercise of that discretion was more than reasonable given the circumstances.

FACTS:

On December 23, 1997, the Caribbean PHD approved the PRPHA Administrator's request for authorization of the noncompetitive award to the firms of Cardona, Irizarry & Co. and CVR Puerto Rico, Inc., to administer and fully run the entire operations of the Finance and Modernization Divisions, respectively.

¹ This memorandum refrains from addressing the other issues in the report concerning cost analysis, reasonableness of the contract cost and the timely execution of the contract. This will avoid premature disclosure until the PRPHA has an opportunity to respond to the findings and conclusion. Also, by refraining from commenting at this time, no bias to either the PRPHA or the OIG will be created.

In considering whether to approve the request, the PHD considered the totality of the situation. The most relevant, and, therefore, most important factors considered were the following:

- 1) The Independent Public Accountant (IPA) Audit Reports for 1992-1993 from Price Waterhouse Coopers LLP could not express an opinion on the PRPHA's operations because of the inadequate internal controls and procedures, and lack of accounting records.
- 2) PRPHA failed to submit the FY '94-'96 IPA reports.
- 3) On or about October 28, 1997, the P.R. Secretary of Housing announced an *Emergency Declaration* as to the state of the PRPHA. This declaration was given some deference and supported the PHD's independent assessment of the lack of capacity of PRPHA to manage funds over 500 million dollars in modernization as well as over a 250 million dollars operating and capital budget.
- 4) Between July-October 1997, HUD's Inspector General and the FBI discovered an "alleged scheme" involving several PHA checks. The fraudulent invoices were traced to PRPHA. The four checks amounted to \$1,034,624. This incident raised serious issues concerning internal controls in the PRPHA's Finance Division, and its disbursement process.
- 5) In early November 1997, the Public Housing Management Assessment Program (PHMAP) (24 C.F.R. §901) review designated PRPHA as a "modernization troubled authority" and rated it with a general score of 67.05. This is a borderline grade with substantial findings in the modernization and financial areas. Some of the findings were as follows:
 - Modernization records were poorly organized, not readily available or substantially incomplete.
 - PRPHA failed to provide copies of revised implementation schedules, current budgets, recent reports, quarterly LOCCS obligation data and sustaining documentation in a timely fashion.
 - Technical or management staff failed to assume the full responsibility for the payment process; HUD LOCCS draws; budget monitoring/revisions; implementation schedule compliance and reporting requirements.
 - PRPHA had no strong public housing management expertise at the executive management level, failing to take significant steps toward implementing an asset management system needed to safeguard the PRPHA's large inventory of units (over 57,000) and its operating budget of over 250 million dollars.
- 6) On or about December 1997, on information and belief, the PHD Director was aware that a real possibility existed that a PRPHA-finance employee was the target of the continuing Grand Jury corruption investigation.

What the record demonstrates is that, in arriving at its decision, the PHD considered many factors. Contrary to the OIG's finding, the *Emergency Declaration* was not the sole determinant in the approval of the contracts, rather, it was merely one of many factors. However, the declaration did support the PHD's ultimate decision.

PUBLIC HOUSING DIVISION ANALYSIS:

The state of the operations of the PRPHA at the time of the procurements warranted targeted intervention in the financial and modernization areas. The purpose of the contracts with the firms proposed by the PRPHA (Cardona, Irizarry & Co. and CVR Puerto Rico Inc.) was to utilize these firms' unique capabilities to assist in stabilizing the PRPHA. Furthermore, an immediate stop to the PRPHA's unauthorized spending and payment of duplicate or fictitious training invoices was needed, and internal controls needed to be put in place to avoid continuing serious injury to the PRPHA.

The firms selected had demonstrated expertise in Public Housing, specifically within two critical areas of operation which are multiple and complicated. The on-going investigation on corruption and possible finding of embezzlement, necessitated the consideration of external firms. The need to develop financial internal security controls could not be accomplished by the PRPHA without external help from a financial and modernization management firm. Historically, the PRPHA's poor use of previous consultants called for a more intensive and direct intervention to accomplish the correction of operational deficiencies. Unlike consultants, these firms were entrusted to fully run the complete operations for the PRPHA.

HUD's regulations at 24 C.F.R. §85 generally require that public housing agencies use competitive procedures to retain contractors, but permit noncompetitive awards if certain exceptions are met. See 24 C.F.R. §85.36 at subsections (d)(4)(i)(A) to (D). Several of the exceptions are applicable to the facts of this case, including subsection (C), which provides sole discretionary authority to the program discipline to approve a noncompetitive procurement. However, the OIG report does not recognize subsection (C) as the authority for the PHD to permit these contracts. The report solely concentrates on the exigency/emergency provision under subsection (B), which serves as an independent basis for a noncompetitive award. In so doing, OIG attempted, based on a cursory, incomplete review of the facts, to substitute its opinion over the PHD's programmatic decision. The record demonstrates that this emphasis on what constitutes an "exigency" or "emergency" is not supported by any applicable definition.

Legal research was conducted to ascertain whether there are cases interpreting the provisions at 24 C.F.R. §85.36(d)(4)(i)(B) or (C). Some government contracting cases under this subsection involving sole source contracts exist, but the standards are different from the provision in question, i.e., the cases do not address "public exigency or emergency" or standards the PHD must use for authorization.

However, an analogous standard involving an "unusual and compelling emergency" appears in the Federal Acquisition Regulation (FAR) at 6.302-2. Subsection (b)(2) of that section specifies that the section applies when "delay in award of a contract would result in serious injury, financial or other, to the Government." (Emphasis added.) Therefore, OIG's view of an emergency as requiring some sort of physical event is excessively restrictive under the analogous provision in the FAR. See, e.g., *Ervin & Assoc.*, B-275693 (March 17, 1997).

Absent case law and regulations delineating the standards for either exception for noncompetitive procurement in § 85.36, OIG's interpretation of "public exigency or emergency" is unsupported and apparently based only on its own apparent policy preference not to allow programmatic discretion as to when HUD should permit noncompetitive awards. Obviously, findings based upon these preferences are neither objective nor valid. Further, even if the OIG or PHDs within HUD disagree about what constitutes "public exigency or emergency" under 24C.F.R. § 85.36(d)(4)(i)(B), subsection § 85.36(d)(4)(i)(C) permits "[t]he awarding agency [to authorize] noncompetitive proposals" without the existence of an emergency. Therefore, the OIG's finding is erroneous and is not supported in law or fact.

The PHD is cognizant of the seriousness of and the intent behind the procurement regulations. As such, no noncompetitive awards were authorized during the past four years in any of the PRPHA's over 600 procurements/ contracts, with the exception of the two criticized by the OIG. PHD's programmatic decisions to approve the contracts were based on a thorough and comprehensive risk assessment analysis. The OIG auditor, by focusing solely on the Puerto Rico Secretary of Housing's declaration, arrived at an incomplete understanding of the overall circumstances which resulted in an erroneous conclusion.

CONCLUSION:

The Caribbean PHD works in cooperation with the public housing agencies and its clients. In this particular case, not to undermine the Puerto Rico Secretary of Housing's leadership quality, credit was given to her commitment and interest in resolving the issues. The Secretary of Housing for the Commonwealth (a cabinet position) ensured that her agency would remain focused on the delineated corrective plan.

The authorization of a noncompetitive procurement method was a sound decision to place adequate administrative control systems to immediately stop fraud, waste and abuse at the PRPHA. The December 23, 1997, PHD authorization letter advised the PRPHA that it should comply with all other applicable HUD regulations concerning the awards. PHD used due diligence in making this decision and should not be second-guessed two years later through a cursory, incomplete review of the facts.

AUDIT-RELATED MEMORANDUM PROCESS:

The OIG did not provide the PHD with a copy of the draft findings, or a period of time to respond. Instead, a final "audit related memorandum" was prematurely disclosed outside the Department. We strongly believe that the integrity of the process is equally as important as the audit finding itself. Furthermore, the notion of fair play and due process in the procedure not only strengthens HUD's credibility but also its ability to seek correction of the findings on behalf of our client agencies. We request that this report be withdrawn and reissued with the comments contained in this letter.

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United States Senate, Washington DC 20510-6250
The Honorable Joseph Lieberman, Ranking Member, Committee on Governmental Affairs,
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The Honorable Dan Burton, Chairman, Committee on Government Reform,
United States House of Representatives, Washington DC 20515-6143
The Honorable Henry A. Waxman, Ranking Member, Committee on Government Reform,
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