

Application of "Common Rule"

February 19, 1997

Mr. Edwin I. Gardner
Acting Director
Alabama Department of Economic
and Community Affairs
401 Adams Avenue
Suite 580
Montgomery, AL 36103-5690

Dear Mr. Gardner:

This will respond to your letter of December 20, 1996, to former General Counsel Nelson A. Díaz regarding application of the "common rule" (24 CFR 85) to a private entity that is receiving section 108 loan guarantee funds in the form of a loan from a nonentitlement public entity. You indicate that the section 108 loan guarantee funds may be used for such activities as the purchase of land, buildings and equipment; site improvements; construction or renovation of buildings; operating capital; and professional and management services.

Section 108 of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5308) authorizes loan guarantees by HUD on behalf of units of general local government for the purpose of financing some of the eligible activities under the Community Development Block Grant (CDBG) Program, such as those mentioned above. We understand your agency administers the State of Alabama's formula share of CDBG funds for use in nonentitlement areas of Alabama, and assists nonentitlement units of general local government in applying for and administering section 108 loan guarantees as provided in 24 CFR 570, Subpart M. You ask for confirmation of advice from "HUD staff" that the common rule's procurement requirements (i.e., 24 CFR 85.36) do not apply to a for-profit business.

In general, the advice you refer to is correct. HUD takes the position that when a CDBG grantee or section 108 loan recipient provides CDBG funds to a private for-profit entity for the purpose of carrying out an eligible activity (e.g., to the property owner for rehabilitation of privately owned housing under 24 CFR 570.202, or to a business carrying out an eligible economic development project under 24 CFR 570.203) the purchase of goods and services by such for-profit business is not a procurement subject to 24 CFR 85. As described in 24 CFR 570.502(a), HUD views 24 CFR 85 as applicable only to "governmental entities." This is not to say, however, that a State, as part of its own requirements in administering a State CDBG program, or as a condition of the pledge of State CDBG grant funds required for a section 108 loan guarantee, would be prohibited from requiring that nonentitlement units of local government in the State impose the State's own procurement requirements on private businesses engaged in activities assisted with CDBG funds. Pursuant to 24 CFR 570.489(g) or 570.707(b), States may impose such additional requirements on the use of CDBG funds provided that the requirements do not violate some specific Federal mandate, such as applicable nondiscrimination statutes.

We hope this response will be helpful in assisting nonentitlement public entities in administering State CDBG grant and section 108 funds in Alabama.

Sincerely,

George L. Weidenfeller
Acting General Counsel