

Legal Opinion: GCH-0002

Index: 2.395
Subject: Procurement of Legal Services by IHAs

October 17, 1991

Mr. James F. Wagenlander
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Dear Mr. Wagenlander:

This is in further response to your February 7, 1991, letter requesting a review of two practices of the Department of Housing and Urban Development's (HUD) Region VIII Regional Counsel's Office concerning the approval of legal services contracts and litigation contracts for Indian Housing Authorities (IHAs). Specifically, you are concerned with the Regional Counsel's policy of (1) disapproving IHA legal services contracts that do not include a per diem reimbursement method for travel expenses and (2) delaying emergency legal assistance to authorities until formal procurement practices can be completed.

In response your first inquiry, an IHA must obtain HUD's approval prior to entering into a contract for legal services if it has been determined to be "high risk" in accordance with 24 CFR Part 85 and 24 CFR 905.135. An IHA must obtain HUD's prior written approval to enter into a legal services contract whether or not it has been determined to be "high risk" if the term of the agreement is in excess of two years; the agreement is in excess of an amount specified by HUD; or the agreement or contract is for legal or other services in connection with litigation. See 24 CFR 905.160.

It is our understanding that the Regional Office only reviews legal services contracts when authorized to do so under the regulations set out at 24 CFR § 905.160. In practice, this means that the Regional Office reviews every contract for general legal services entered into by an IHA and every contract for special litigation entered into by an IHA because both types of contracts are contracts for services in connection with litigation. See § 905.160(a)(3)(iii). Under an IHA's general legal services contract, the attorney is authorized to provide routine litigation services and litigation services in connection with contested actions of unlawful detainer. Under an IHA's litigation contracts, the attorney is retained to perform litigation services in connection with one non-routine case.

With regard to the Regional Counsel's review and disapproval of IHA legal services contracts that do not include a per diem

reimbursement method for travel expenses, there are no specific regulations or issuances which address this matter. The Litigation Handbook (1530.1 Rev-4 (May 8, 1981)) provides some guidance with regard to litigation contracts. The Handbook provides that with regard to litigation service contracts, where the fee is expected to exceed \$10,000, PHAs (including IHAs) must obtain the concurrence of Regional Counsel. "Upon receiving a request for concurrence, . . . he/she shall concur . . . if he/she is . . . satisfied that . . . the amount of the fee is reasonable. A fee will be considered reasonable if it does not exceed the rates prevailing in the same or similar localities for the same or similar services or the PHA can demonstrate special circumstances that require payment of a higher fee." (Chapter 3, § 3-3(b)(3), p. 3-5).

In accordance with the Handbook it is our opinion that, with respect to litigation service contracts, where the fee is expected to exceed \$10,000, the Regional Counsel may determine the reasonability of a fee based on the relationship to costs in the locality or localities similar to the locality in which the attorney may reasonably be expected to perform legal services.

It is our understanding that the Regional Office has attempted to assist you in determining costs in localities where you may reasonably be expected to perform legal services by providing you with a copy of the Federal per diem rates for localities in Region VIII. In addition, the Regional Office has also suggested that you may add \$20.00 to each of those rates to off-set special lodging rates that may be built into the Federal per diem rate. This approach may be used to establish a per diem rate in legal services contracts or to set a maximum level of reimbursement for travel and related expenses in legal services contracts.

You also express concern that the Regional Counsel's Office insists that no legal assistance can be committed to by an IHA until formal competitive procurement has occurred. In accordance with 24 CFR 905.175(e) an IHA may award a contract to an attorney without satisfying HUD's regulatory requirement for competition only if an award under those requirements is infeasible and one of the following four conditions applies: (1) the exigencies require immediate performance of the service, (2) only one source is available as certified by the purchasing or contracting officer of the IHA, (3) after solicitation of a number of sources competition is determined inadequate, or (4) HUD has specifically authorized procurement by non-competitive proposals. Consequently, subject to the requirements of § 905.175(e), an IHA may enter into a contract for legal assistance, without prior HUD approval, where such assistance is immediately required.

I hope the information provide is helpful.

Very sincerely yours,

Michael H. Reardon
Assistant General Counsel
Assistant Housing Division