U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
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To: Todd C. Thomas, Director, Public Housing Programs, PEH
From: Ray Keyser, Chief Counsel, Cleveland Field Office, 5DC
Re: Stark Metropolitan Housing Authority—Energy Performance Contract
Date: March 23, 2021

This memorandum is to apprise you of certain discussions within the Office of General Counsel ("OGC") and the Cleveland Office of Public Housing and other developments related to an Energy Performance Contract ("EPC") pursued by the Stark Metropolitan Housing Authority ("SMHA").

By way of background, SMHA obtained approval for an EPC in 2018 with Johnson Controls, Inc. serving as the Energy Service Company ("ESCO"). Following approval, SMHA abandoned its original financing plan in favor of a lease-purchase arrangement (the "LPA") offered by the Ohio Governmental Development Leasing Corporation ("OGDLC"). When brought to its attention by field staff, OGC's initial review determined the LPA failed to meet the financing requirements described in 24 C.F.R. § 990.185. Such a deficiency would render SMHA ineligible for the anticipated energy performance incentives. SMHA subsequently provided a legal opinion from its outside legal counsel, as well as supporting documents, seeking reconsideration (the "Updated Submission"). These materials largely resolved OGC's concerns under § 990.185, provided certain other requirements are met as described below. Upon resolution these matters, there should be no legal impediment to SMHA enjoying its energy performance incentives.

General Depository Agreements

As determined following a thorough legal review of the Updated Submission, the LPA is effectively a bond-financing arrangement that will ultimately leave SMHA with legal title to all the acquired fixtures and equipment once completed and paid in full. Rather than bonds, however, the investors will acquire securities characterized as "certificates" to avoid certain complications under Ohio law for public entities in need of debt financing. Huntington National Bank ("Huntington") is serving as the trustee with responsibilities for both disbursing funds to pay EPC costs and collecting (what are effectively) debt service payments from SMHA. As funds will flow through multiple deposit accounts in both these contexts, consideration is warranted as to the extent the LPA warrants SMHA having additional general deposit agreements ("GDA") in place. Having carefully examined the LPA documents, I can offer the following confirmations on this point:

- The LPA documents identify a "Project Fund," "Certificate Fund," "Lease Payment Account," and "Redemption Account" as part of the LPA funding and certificate servicing procedures. Each of these defined terms pertain to either (a) a fund that exists for accounting purposes and/or (b) a deposit bank account owned and controlled by Huntington in its capacity as the trustee. Any funds passing through these funds and deposit accounts are either (a) undisbursed and, accordingly, not yet SMHA's property or (b) funds remitted by SMHA to extinguish a valid contractual obligation and, as a result, no longer SMHA's property. Consequently, there should be no need for a GDA on any of the deposit bank accounts contemplated by these defined terms as used in the LPA documents.

- Sections 7(a) and 7(f) of the Trust Agreement between Huntington and OGDLC contemplate a Monthly Rent Account and HUD Subsidy Account that will in fact hold certain funds while they remain under SMHA's ownership and control, albeit temporarily. SMHA should (a) confirm in writing whether these accounts will be comingled in a single deposit bank account or held separately and (b) provide a GDA for each account identified by the confirmation.

Section 30 Review

OGC initially determined this EPC would not require approval under Section 30 of the United States Housing Act of 1937. OGC has reconsidered this conclusion after reviewing the Updated Submission, and particularly provisions that contemplate SMHA's pledge of certain financial assets. These assets are covered by defined term "Pledged Receipts." OGC does not anticipate any legal impediments to approval but believes this pledge renders a Section 30 review necessary to fully confirm statutory compliance.

ACC Amendment and Section 30 Approvals

Upon the submission and favorable HUD review of the submissions contemplated above, your division should issue approval correspondence for the required ACC amendment and Section 30 review that incorporates the following additional points:

- Notwithstanding any provision to the contrary in the LPA documents, SMHA is not authorized or permitted to self-insure any assets without obtaining HUD's prior approval in accordance with governing law and policy.

- Approval is conditioned on the understanding of all parties that OGDLC will indemnify SMHA for any damages caused by OGDLC to public housing property in the event OGDLC assumes direct responsibility for the energy performance measures in its capacity as either lessor/owner or as an ESCO.

- All parties should be aware that HUD will construe the applicable EPC statutes, regulations, and policies as the governing authorities in the event of any conflict with the documents evidencing SMHA's financing arrangements with OGDLC.

Should you have any further legal questions on this matter, please feel free to contact me directly via e-mail or the TEAMs application.

cc: Vicki Longosz, Office of General Counsel, CAHBB
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