



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 12-2

To: The Honorable Dean Mortimer
Idaho State Senate
7403 S. 1st E.
Idaho Falls, ID 83404

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion regarding whether an out-of-state entity may operate as an Idaho project based contract administrator.¹ You also ask what Idaho entities, other than the Idaho Housing and Finance Association, may operate as a project based contract administrator throughout the entire State of Idaho. This opinion addresses those questions.

QUESTIONS PRESENTED

1. Under Idaho law, may an out-of-state entity operate as a project based contract administrator in Idaho?
2. What Idaho entities, other than the Idaho Housing and Finance Association, may operate as a project based contract administrator throughout the State of Idaho?

CONCLUSIONS

1. To serve as a project based contract administrator, an entity must meet the definition of a "public housing agency" under the United States Housing Act of 1937, as amended. In Idaho, the only type of entity that qualifies as a public housing agency is a "housing authority," which is a creature of Idaho statute. Because an out-of-state entity cannot qualify as a housing authority in Idaho, it does not meet the definition of a "public housing agency", and, therefore, may not operate as a project based contract administrator in Idaho.

¹ "Project based contract administrator" is a term defined by the United States Housing Act of 1937, as amended, and refers, in part, to entities that administer federal housing subsidies under Section 8 of the Housing Act.

2. Housing authorities created by Idaho cities or counties are empowered to operate only within their limited boundaries. A city housing authority generally may operate within its city limits plus five miles, and a county housing authority may operate within the county, excluding any city located inside the county. The Idaho Housing and Finance Association, on the other hand, has statutory authority to serve the entire population of Idaho.

BACKGROUND

For over 30 years, the Idaho Housing and Finance Association (“IHFA”) has served as the U.S. Department of Housing and Urban Development’s (“HUD”) only project based contract administrator (“PBCA”) in Idaho. On February 29, 2012, HUD announced a Notice of Funding Availability (“NOFA”) for the Project Based Contract Administrator Program for the Administration of Project Based Section 8 Housing Assistance Payments Contracts.² To receive funding under the NOFA, the applicant must fall within the definition of a “public housing agency.”

The question has arisen whether a housing agency of another state may serve as a PBCA in Idaho. HUD has stated in its NOFA that it will consider out-of-state applicants only if it fails to receive an application from a legally qualified in-state applicant. If HUD receives an application from a legally qualified in-state applicant, HUD will reject the out-of-state application. Assuming IHFA applies, HUD will consider it and will not consider any out-of-state applicants.

LEGAL STANDARDS

1. United States Housing Act of 1937

In section 1441 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974 (“Housing Act”), Congress explains that the United States has a shortage of safe, decent and affordable housing for low-income families. See 42 U.S.C. § 1441. To help address this problem, HUD is empowered to enter into annual contributions contracts with public housing agencies to administer the Housing Act’s Section 8 housing program. Section 8 is a housing subsidy program created to help low-income families obtain decent, safe and sanitary dwellings, while also promoting economically mixed housing. See 42 U.S.C. § 1437f and 24 C.F.R. § 882.101.

The Housing Act defines a “public housing agency” as “any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low income housing.” 42 U.S.C. § 1437a(b)(6). Similarly, HUD regulations define a “public housing agency” as “[a]ny State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to

² The NOFA is published on HUD’s website at www.hud.gov.

engage in or assist in the development or operation of housing for low-income Families.” 24 C.F.R. § 882.102.

2. Idaho Housing Authorities and Cooperation Law

Finding that Idaho lacks safe and sanitary housing for low-income³ families and declaring that “insanitary and unsafe dwelling accommodations” encourage the spread of disease and crimes and constitute a menace to the health, safety, morals and welfare of Idahoans, in 1967, the Idaho Legislature enacted the Housing Authorities and Cooperation Law, title 50, chapter 19, Idaho Code. Section 50-1905 of the Housing Authorities and Cooperation Law provides:

In any city of the state of Idaho, there may be created an independent public body corporate and politic to be known as a housing authority, which shall not be an agency of the city; provided, however, that such authority shall not transact any business or exercise its powers hereunder until or unless the governing body of the city, by proper resolution, shall declare . . . that there is need for an authority to function in such city.

A city housing authority’s area of operation is limited to the city and the area within five miles of its territorial boundaries, but may not operate within the jurisdiction of another city’s housing authority or another county’s housing authority. See Idaho Code § 50-1903(g). Within its area of operation, a city housing authority may, among other things:

1. Contract with other housing authorities for services;
2. Prepare, carry out, acquire, lease and operate housing projects;⁴
3. Contract for the furnishing by any person of services, privileges, works or facilities for a housing project;
4. Lease or rent any dwellings, houses, buildings or facilities embraced in any housing project;
5. Investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions;
6. Conduct examinations and investigations at public or private hearings;
7. Make, purchase, invest in or acquire loans to persons of low income to enable them to acquire, construct, improve, lease or refinance their dwellings; and
8. Make, purchase, invest in or acquire loans for the acquisition, construction, improvements, leasing or refinancing of land, buildings or developments for housing for persons of low income.

See Idaho Code § 50-1904.

³ “Person of low income” is defined in Idaho Code § 50-1903(i).

⁴ “Housing project” is defined in Idaho Code § 50-1903(b).

To help it carry out housing projects within its area of operations, a city housing authority is authorized to “accept contributions, grants or other financial assistance from the federal government.” Idaho Code § 50-1923. In addition, the authority may lease or manage any housing project or undertaking constructed or owned by the federal government. See *id.*

3. Idaho County Housing Authorities and Cooperation Law

Codified in 1970, the County Housing Authorities and Cooperation Law, title 31, chapter 42, Idaho Code, is similar to the Housing Authorities and Cooperation Law, title 50, chapter 19, Idaho Code, in that the Idaho Legislature enacted the County Housing Authorities and Cooperation Law to combat the pervasive problems of insanitary and unsafe housing conditions and to provide habitable accommodations for Idaho’s low-income families. See Idaho Code § 31-4202. A county housing authority, which may operate throughout the county except within the limits of a city, is an independent public body corporate and politic and not a county agency. The governing body of the county creates a county housing authority after determining that the need for one exists.

A county housing authority’s powers mirror those of a city housing authority. See generally Idaho Code §§ 31-4204; 31-4207; 31-4209; 31-4213; 31-4214; 31-4216; and 31-4218. Significantly, a county housing authority is empowered to:

[B]orrow money or accept contributions, grants or other financial assistance from the federal government for or in aid of any housing project within its area of operation, to take over or lease or manage any housing project or undertaking constructed or owned by the federal government, and to these ends to comply with such conditions and to make such trust indentures, leases or agreements as may be necessary, convenient or desirable. It is the purpose and intent of this act to authorize every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance or operation of any housing project by such authority.

Idaho Code § 31-4223.

4. Idaho Housing and Finance Association

In 1972, the Idaho Legislature created IHFA to help address a myriad of social and economic troubles, including, but not limited to, a shortage of decent housing for Idaho’s low-income⁵ population. See Idaho Code §§ 67-6201 and 67-6202. IHFA is an independent public body corporate and politic with extensive authority to operate

⁵ “Person of low income” is defined in Idaho Code § 67-6205(j).

throughout the state of Idaho. See Idaho Code § 67-6205(h). Some of IHFA's more significant public and essential government functions include:

1. Cooperating with housing authorities⁶ throughout Idaho in the development of housing projects;⁷
2. Executing agreements with any housing sponsor,⁸ mortgage lender,⁹ governmental agency or other entity;
3. Leasing, selling, constructing, financing, restoring, operating or renting any housing projects, nonprofit facilities, houses, lands or buildings embraced in any housing project;
4. Owning, holding and improving real or personal property;
5. Acquiring any real property to sell, lease, exchange or dispose of;
6. Investigating the housing conditions of its area of operations;
7. Providing research and technical assistance to eligible agencies to develop low-cost housing;
8. Making and undertaking commitments to make mortgage loans to persons of low income and to housing sponsors;
9. Acting as the designated housing resource clearinghouse in the state for matters relating to affordable housing;
10. Coordinating the development and maintenance of a housing policy for the state; and
11. Entering into agreements with and accepting grants, reimbursements or other payments from the United States, the State of Idaho or any municipality for furtherance of Idaho's housing policies.

See Idaho Code § 67-6207. IHFA also has authority to publish rules regarding its mortgage lending standards and the power to supervise housing sponsors and examine the income of any Section 8 renter. See Idaho Code §§ 67-6207A to 6207D. Within its area of operation, IHFA is authorized under title 67, chapter 62, Idaho Code, "to do any and all things necessary or desirable to secure the financial aid or cooperation of the state or federal government in the undertaking, construction, maintenance or operation of any housing project, nonprofit facility, economic development project or agricultural facility by IHFA."

⁶ "Housing authority" is defined as a housing authority established under the Housing Authorities and Cooperation Law, title 50, chapter 19, Idaho Code. Idaho Code § 67-6205(m).

⁷ "Housing project" is defined in Idaho Code § 67-6205(b).

⁸ "Housing sponsor" is defined in Idaho Code § 67-6205(p).

⁹ "Mortgage lender" is defined in Idaho Code § 67-6205(q).

ANALYSIS

I.

AN OUT-OF-STATE ENTITY MAY NOT SERVE AS A PROJECT BASED CONTRACT ADMINISTRATOR IN IDAHO

The IHFA, along with Idaho's city and county housing authorities, are "authorized to engage in or assist in the development or operation of low income housing." 42 U.S.C. § 1437a(b)(6). As such, Idaho's housing authorities are public housing agencies under the federal Housing Act and may serve as PBCAs in Idaho.

The separate question is whether a public housing agency created by a foreign state may serve as a PBCA in Idaho. The answer is no, because only IHFA and Idaho city- and county-established housing authorities are authorized under Idaho law to act as public housing agencies in Idaho. An out-of-state public housing agency's authority under a foreign state's law is irrelevant. A foreign state may not authorize an out-of-state public housing agency to exercise the powers that Idaho has granted to its housing authorities. See Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501, 59 S. Ct. 629, 632, 83 L. Ed. 940 (1939). Furthermore, the State of Idaho is under no obligation to accept the laws of another state, particularly when those laws conflict with Idaho law or state policy. See Nevada v. Hall, 440 U.S. 410, 421, 99 S. Ct. 1182, 1188, 59 L.Ed.2d 416 (1979).

An out-of-state entity cannot meet the requirements necessary to qualify as an Idaho housing authority because the entity is, obviously, not the IHFA, nor the creation of an Idaho city or county. Consequently, without the ability to become a housing authority in Idaho, it cannot meet the definition of a public housing agency in Idaho and cannot serve as a PBCA in Idaho.

II.

ONLY THE IDAHO HOUSING AND FINANCE ASSOCIATION HAS STATUTORY AUTHORITY TO OPERATE AS A PROJECT BASED CONTRACT ADMINISTRATOR THROUGHOUT THE STATE OF IDAHO

An authorized Idaho housing authority may serve as a PBCA within its limited area of operation, which is defined as the city and area within five miles of the city's territorial boundaries, Idaho Code § 50-1904(g), or as the entire county except within the corporate limits of a city within the county, Idaho Code § 31-4204(g). Only IHFA, however, has a defined area of operation that encompasses the entire state. See Idaho Code § 67-6205(h).

No Idaho-created entity other than IHFA is statutorily qualified to implement HUD's Section 8 programs throughout Idaho. Every city- or county-established housing

authority, by definition, will be limited to the territorial limits of its establishing entity. IHFA is the proper entity to continue serving as Idaho's statewide PBCA under the Housing Act.

AUTHORITIES CONSIDERED

1. Federal Code:

42 U.S.C. § 1437a(b)(6).
42 U.S.C. § 1437f.
42 U.S.C. § 1441.

2. Idaho Code:

Title 31, chapter 42.
§ 31-4202.
§ 31-4204(g).
§ 31-4207.
§ 31-4209.
§ 31-4213.
§ 31-4214.
§ 31-4216.
§ 31-4218.
§ 31-4223.
Title 50, chapter 19.
§ 50-1903(b).
§ 50-1903(g).
§ 50-1903(i).
§ 50-1904.
§ 50-1904(g).
§ 50-1905.
§ 50-1923.
Title 67, chapter 62.
§ 67-6201.
§ 67-6202.
§ 67-6205(b).
§ 67-6205(h).
§ 67-6205(j).
§ 67-6205(m).
§ 67-6205(p).
§ 67-6205(q).
§ 67-6207.
§ 67-6207A to 6207D.

3. Federal Regulations:

24 C.F.R. § 882.101.
24 C.F.R. § 882.102.

4. U.S. Supreme Court Cases:

Nevada v. Hall, 440 U.S. 410, 99 S. Ct. 1182, 59 L.Ed.2d 416 (1979).

Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939).

DATED this 31st day of May, 2012.



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