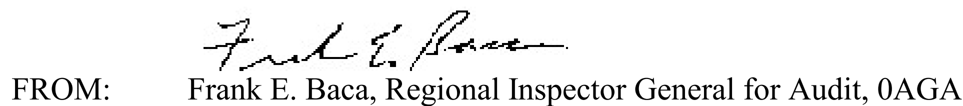
Issue Date
October 22, 2003
Audit Case Number
2004-SE-1001

TO: Robin Prichard, Acting Director, Office of Public Housing, 0PH



FROM: Frank E. Baca, Regional Inspector General for Audit, 0AGA

SUBJECT: Complaint regarding the Seattle Housing Authority's procurement for Section 8 project-based vouchers, and conduct issues regarding conflict of interest and lobbying
Seattle, Washington

INTRODUCTION

We performed an audit to assess the validity of a citizen's complaint alleging that the Authority:

- Did not properly contract for Section 8 project-based funding under Request for Proposals (solicitation) number 2882 issued in May 2001. The complaint alleged that some of the proposal evaluators were coerced into changing scores so that the Authority could commit to project-based Section 8 vouchers through the Young Women's Christian Association (YWCA).

- PorchLight[1] Housing Director had a conflict of interest due to her dual role. Specifically, the complaint alleged that the PorchLight Housing Director, while being employed by both Lutheran Alliance to Create Housing (LATCH) and the Authority, processed revenues and expenditures for Roxbury Village, a LATCH project funded by the Authority.

- PorchLight Housing Director violated federal lobbying rules when she solicited, using Authority time, membership from a co-employee in a Political Action Committee (PAC) in which she was the Treasurer. In addition, she sent a letter to

[1] The Porchlight Housing Center is a division of the Seattle Housing Authority. Located in Seattle's Ballard neighborhood, Porchlight is a place where people seeking assistance can learn about and apply for housing programs.

another employee with her name and title printed on the PAC's letterhead soliciting that employee to become a member of the PAC.

We wanted to determine if the Authority:

- Followed applicable federal procurement requirements and its own procurement policy when it awarded Section 8 project-based vouchers to the YWCA.
- Request for Proposals evaluators were coerced into changing scores so that the Authority could commit to project-based Section 8 vouchers through YWCA.
- PorchLight Housing Director was in compliance with federal conflict of interest rules and lobbying restrictions.

To achieve our objectives, we performed audit procedures that included:

Obtaining and reviewing:

- The Consolidated Annual Contributions Contract and Moving-to-Work Agreement between HUD and the Authority to determine the terms and conditions the Authority must follow when contracting under the Section 8 Project-Based Voucher program.
- HUD files and records to obtain information relevant to the Authority's Section 8 Project-Based Voucher program.
- The Authority's Housing Choice Voucher Administrative Plan to understand the Authority's policies and procedures for contracting under the Section 8 Project-Based Voucher program.
- The Authority's Board-approved Procurement Policies and Procedures to understand policies and procedures for soliciting and awarding a Section 8 project-based contract, and to understand the Authority's policies on conflict of interest.
- The Authority's May 11, 2001 Request for Proposals number 2882 for Section 8 project-based funding to determine if the Authority prepared the Request for Proposals in accordance with the applicable program requirements and its own procurement policy.
- The Authority's contracting files and other related documents to determine if the Authority maintained records supporting its procurement and decision-making processes, and properly awarded Section 8 project-based vouchers.
- The proposals that eight agencies submitted to the Authority to determine if these met the Request for Proposals requirements.

- Federal regulations and the Housing Assistance Payments Contract to understand federal conflict of interest rules, and determine their applicability to local employees.

- The Authority's Employee Handbook and its Manual of Operations on Employee Participation in Political and Community Affairs to determine the Authority's political lobbying policy.

Interviewing:

- HUD program staff to confirm our understanding of the federal procurement, conflict of interest, and lobbying requirements the Authority must follow, and Associate Field Counsel to obtain legal opinions on federal conflict of interest and lobbying issues.

- The Authority's current and former staff members involved in the contracting process to understand their roles and responsibilities in the contracting and decision-making processes.

- Evaluation Committee members to understand how they evaluated the proposals, documented the evaluation process, and obtain their perspectives on the allegation that some of them were coerced into changing their proposal evaluations scores.

- The PorchLight Housing Director to discuss the allegations and obtain her perspectives.

Our audit generally covered the period from January 1997 through December 2002, although we extended this period as appropriate. We performed our audit work from October 2002 through May 2003 at the offices of the Authority and some of its contractors.

We conducted the audit in accordance with generally accepted government auditing standards.

In accordance with HUD Handbook 2000.06 REV-3, within 60 days please provide us, for each recommendation without a management decision, a status report on: (1) the corrective action taken; (2) the proposed corrective action and the date to be completed; or (3) why action is considered unnecessary. Additional status reports are required at 90 days and 120 days after report issuance for any recommendations without a management decision. Also, please furnish us copies of any correspondence or directives issued because of the audit.

SUMMARY

In response to a citizen's complaint, we conducted an audit of the Seattle Housing Authority's procurement process to determine if the Authority (1) followed applicable federal program procurement requirements and its own procurement policy when it awarded a Section 8 project-

based contract to YWCA, (2) Request for Proposals evaluators were coerced into changing scores so that the Authority could commit to project-based Section 8 vouchers through YWCA, and (3) PorchLight Housing Director complied with federal and local conflict of interest rules and lobbying restrictions.

Our audit results indicated that the complaint was not valid. The evidence did not indicate proposal evaluators were coerced into changing scores, nor did the Authority PorchLight Housing Director violate federal conflict of interest rules or lobbying restrictions. However, during the review we found that the Authority improperly waived part of its published contracting requirements when it awarded Section 8 project-based vouchers to the YWCA. Because the Authority did not provide other potential applicants with the opportunity to submit proposals based on the waived requirements, the procurement process was neither open nor fair to all possible proposers. This occurred because the Authority did not have clear and specific controls to ensure that the requirements of the Request for Proposals were followed when determining eligibility of proposals. We are recommending that HUD determine if the Authority has implemented policies and procedures to ensure that procurements are performed fairly, in an open and equitable manner, and require the Authority to implement controls, if appropriate.

We provided the Authority Board and management officials with a discussion draft report on August 7, 2003, and discussed the finding with them at an August 18, 2003 exit conference. On August 22, 2003 we issued a formal draft report to the Authority, and they provided a written response on September 10, 2003. In their verbal and written comments, Authority officials expressed disagreement with the audit results. They indicated that the Authority actions regarding the processing of the voucher applications were appropriate and in the best interest of the Authority and its clients. The finding section of this report summarizes and evaluates the Authority's comments. A copy of the Authority's full response is included in Appendix A.

BACKGROUND

The Seattle Housing Authority administers its public housing programs through HUD under the provisions of the United States Housing Act of 1937, as amended. The Authority currently manages over 11,000 HUD-assisted public housing units. The primary purpose of the Authority is to provide decent, safe and sanitary, and affordable housing to low-income and elderly families in Seattle, Washington, and to operate its housing programs in accordance with Federal and State laws and regulations. Although not a component unit of the City of Seattle, the Authority's seven-member Board of Commissioners was appointed by the Mayor of the City of Seattle. Mr. Harry Thomas, Executive Director, is in charge of the Authority's day-to-day operations.

In December 1998, the Authority entered into a Moving to Work (MTW) Agreement with HUD. The MTW Agreement authorized the Authority to " . . . establish a reasonable competitive process for project-basing Section 8 Certificates and Vouchers at otherwise non-subsidized units that meet HQS standards and that are owned by non-profit housing entities in Seattle." Under the Section 8 program, the Authority provides rental assistance to low-income families.
The Authority enacted its Housing Choice Voucher (Section 8) Project-Based Policy in September 2000.

Under the project-based voucher program, a public housing authority (PHA) enters into an assistance contract with the property owner for specified units and for a specified term. The PHA refers families from its waiting list to the owner to fill vacancies. Because the assistance is tied to the unit, a family who moves from the project-based unit does not have any right to have continuous housing assistance. However, they may be eligible for a tenant-based voucher when one becomes available.

FINDING 1

THE AUTHORITY DID NOT PROVIDE OPEN AND FAIR COMPETITION IN ITS SECTION 8 PROJECT-BASED VOUCHER PROGRAM CONTRACTING PROCESS

Evidence did not support complaint allegations that Request for Proposals evaluators were coerced into changing scores, or that the Authority PorchLight Housing Director violated federal conflict of interest rules or lobbying restrictions. However, we found that the Authority inappropriately waived part of its published contracting requirements when it committed a contract award to Young Women's Christian Association (YWCA) under its Section 8 project-based program. The Authority did not provide other potential applicants with the opportunity to submit proposals based on the waived contract requirements. Consequently, the Authority's procurement process was neither open nor fair to all prospective proposers. This occurred because the Authority did not have clear and specific controls to ensure that procurement (Request for Proposals) requirements were followed when determining eligibility of proposals.

HUD and Authority Requirements

HUD's Moving to Work Demonstration Agreement with the Authority authorizes the Authority to develop and adopt a reasonable policy and process for project-basing Section 8 certificates and/or vouchers (Section VII. E., Statement of Authorizations).

The Authority's Procurement Policies and Procedures require the Authority to provide fair and equitable treatment of all persons or firms during purchases, and include in its Request for Proposals (RFP) the time frame for provision of the services or completion of the project.

The Authority issued Request for Proposals number 2882 for its Section 8 Project-Based Voucher program

On May 11, 2001, the Authority issued Request for Proposals number 2882 under its Section 8 Project-Based Voucher program. This solicitation allowed for a maximum award of 150 vouchers, although a later Addendum stated it was possible that more than 150 vouchers would be awarded. The Request for Proposals required that all units receiving Section 8 project-based funding subsidies under a Housing Assistance Payment contract must be available for occupancy no later than March 31, 2003. The Authority issued the Request for Proposals to 30 potential applicants.

In response to its Request for Proposals, the Authority received nine proposals from eight agencies. One agency, Downtown Emergency Services Center, submitted two proposals.

Plymouth Housing Group
Archdiocesan Housing Authority
Community Psychiatric Clinic
Compass Cascade Ltd. Partnership
Downtown Emergency Services Center
Young Women's Christian Association
Parkview Services
Low Income Housing Institute

An Evaluation Committee reviewed the proposals

To evaluate the proposals for the project-based Section 8 vouchers, the Authority established an Evaluation Committee consisting of individuals having knowledge and experience related to Section 8 or project-based housing programs. The Evaluation Committee was comprised of four Authority staff and one staff from the City of Seattle's Office of Housing. The four Authority staff in the Committee included the PorchLight Housing Director, Occupancy Manager, Project Manager and Program Manager (the Occupancy Manager and Project Manager are no longer with the Authority).

The Authority's normal process is to initially screen proposals for eligibility prior to their being evaluated by the Evaluation Committee. In this case, the Contract Administrator initially screened all the proposals, and determined that all nine proposals were submitted on time, and contained the required administrative documents.

Throughout the procurement process, the Authority Contract Administrator acted as the coordinator and moderator. On June 8, 2001, she held a pre-evaluation meeting with the Evaluation Committee members where she determined (by asking each member) that no Evaluation Committee member had a financial interest in any of the nonprofits that submitted proposals. She also briefed the members on Authority procurement evaluation policies and procedures, and provided them with a packet for evaluating the nine proposals. She further instructed them to rate each proposal individually using the packets she provided them, and to meet again to discuss the scores and recommend which agencies were eligible for a voucher contract award under the Authority's Section 8 Project-Based Voucher program.

On June 19, 2001, the Evaluation Committee met and provided their evaluation scores for each of the nine proposals based on the following Request for Proposals evaluation criteria:

Qualifications and Experience
Household Composition and Bedroom Count
Priority for Homeless Households
Special Needs Populations
Service-Enriched Housing Opportunities

Financial Assistance Required for Project
Deconcentration of Poverty
Long-Term Commitment to Extremely Low-Income Households

The Contract Administrator tallied and averaged the initial scores and as a result, all except one agency's proposal met the threshold score of 65 points or more to receive a commitment for an award under the Request for Proposals.

The evidence did not support the complaint allegations

The complaint alleged that the Authority:

- Coerced some of the Request for Proposals evaluators into changing scores so that the Authority could commit to project-based Section 8 vouchers through the YWCA.
- PorchLight Housing Director, while being employed by both Lutheran Alliance to Create Housing (LATCH) and the Authority, processed revenues and expenditures for Roxbury Village, a LATCH project funded by the Authority.
- PorchLight Housing Director violated federal lobbying rules when she solicited, using Authority time, membership from a co-employee in a Political Action Committee in which she was the Treasurer, and sent a solicitation letter to another employee with her name and title printed on the PAC's letterhead.

The evidence did not support the complaint allegations that the Request for Proposals evaluators were coerced into changing scores, or that the Authority violated federal conflict of interest rules or lobbying restrictions.

No convincing evidence that proposal evaluators were coerced into changing scores. The Evaluation Committee members discussed the proposals and the evaluation scores each had given and as a result, some scores were changed. Only one of the five committee members said they felt coerced into changing scores (although one other committee member agreed that this one member was coerced). None of the other committee members felt coerced, and there was no other evidence to indicate the members were coerced. Additionally, there was no impact on the awards as a result of any changes in scores. The entities that initially met the threshold score of 65 points were the same entities that met the threshold score after any changes made during the scoring process.

No evidence that the Authority PorchLight Housing Director violated federal conflict of interest rules or lobbying restrictions. The PorchLight Housing Director was employed at LATCH only prior to October 27, 2000. From October 27, 2000 through November 30, 2000 she was employed both at LATCH and the Authority, and subsequent to November 30, 2000 she was employed at the Authority. According to the HUD Associate Field Counsel, under Federal regulations at 24 CFR 982.161 there would only be a conflict of interest if the PorchLight Housing Director had benefited personally from her dual employment at the nonprofit and the Authority. However, the complainant could not provide nor was there any

indication of evidence that the PorchLight Housing Director personally benefited from her dual employment. Further, the Associate Field Counsel indicated that federal lobbying restrictions do not apply to local employees.

Inappropriate waiver of published contracting requirements

Although we did not find that the complaint allegations were supported, during the review we found that the Authority improperly waived part of its published contracting requirements when it awarded Section 8 project-based vouchers to the YWCA.

In its proposal, the YWCA did not state that any of its housing units would actually be available by the occupancy deadline date of March 31, 2003 as required by Request for Proposals number 2882. Instead the YWCA's proposal only stated it would like to have some of its Opportunity Place project units available by March 2003 (the Authority’s project manager stated that YWCA does not plan to complete the project until December 31, 2003).

In a June 19, 2001 meeting, Evaluation Committee members discussed whether YWCA was eligible for funding under Request for Proposals number 2882 because YWCA’s proposal did not state that all units would be available for occupancy by March 31, 2003. During the discussion, at least two of the Evaluation Committee members questioned whether YWCA should be disqualified because it did not meet the Request for Proposals occupancy date requirement.

The majority of the Evaluation Committee members recommended waiving the occupancy date requirement for YWCA based on "informality," (i.e., that the issue was a matter of form rather than substance) and recommended to the Executive Director that the Authority commit to enter into Housing Assistance Payment (HAP) contracts with the seven agencies that met the threshold rating score. The Executive Director concurred with the Evaluation Committee’s recommendation, and the Authority subsequently awarded 339 vouchers with an estimated annual subsidy of over $1.5 million to the seven agencies. YWCA’s Opportunity Place project received 145 of the 339 vouchers.

The Authority’s procurement process was neither open nor fair to all possible proposers because a mandatory Request for Proposals requirement was ignored when evaluating the proposals. In our opinion, the Authority’s action to waive the occupancy deadline requirement for YWCA was not an informality, but instead constituted a significant change in procurement requirements. The occupancy deadline requirement was cited three times in the Request for Proposals, and could have been a factor in limiting the number of potential applicants.

Authority officials disagreed with our determination. They contended that their definition of informality did not apply to “potential” but rather to “other” proposers. However, the Acting Director of the Seattle HUD Office of Public Housing agreed with our determination that informalities apply to potential proposers, and that a date of delivery much later than the date required by the Request for Proposals is a matter of substance rather than form.

No clear and specific controls to ensure that the proposals met all the requirements of the RFP

We concluded that the Authority did not have clear and specific controls to ensure that the proposals met all the requirements of the Request for Proposals. It was not clear in the procurement process whose responsibility it was to determine if a proposal met all the RFP requirements. The Contract Administrator said that it was not her responsibility to determine if a proposal met all the RFP requirements, including the occupancy deadline date requirement. She told us that during her initial screening of the proposals for eligibility, she only determined that the submissions were received by the due date and time, and that they contained the required administrative documents.

We believe that the Authority should have first determined whether the proposals met the Request for Proposals requirements prior to having the Evaluation Committee rate or evaluate the proposals based on the evaluation criteria elements. The occupancy date was an RFP requirement and not one of the evaluation elements that the Evaluation Committee used when it rated each proposal. One of the Evaluation Committee members said the panel felt the Contract Administrator had approved the occupancy date by allowing the Committee members to evaluate the YWCA's proposal, and the Committee did not want to override the Contract Administrator.

Thus, there was no clear indication whose responsibility it was to determine if a proposal met eligibility requirements not included as part of the evaluation criteria elements the committee members used.

AUDITEE COMMENTS

[See Appendix A for the full text of the Authority's response to the formal draft report.]

The Authority took exception to the finding that it inappropriately waived a provision of the Request for Proposal, and indicated that:

> * The finding did not identify federal or Authority procurement requirements that were not adhered to.
>
> * The Authority was clearly within its right to waive the occupancy date as an informality. The Authority's decision is not wrong simply because the OIG disagrees.
>
> * The informality was not significant as evidenced by an Addendum that indicated the Authority would review instances that the deadline was not met on a case-by-case basis, and because the RFP did not indicate whether full or partial occupancy was required.
>
> * It was not the Contract Administrator's duty to screen all proposals to ensure the proposals met the occupancy date requirement of the RFP. The occupancy deadline should have been included as part of the evaluation criteria.

* The draft finding does not meet the materiality test for Government Auditing Standards that requires audit findings to be material and reflect a systematic violation of statutes and regulations.

The Authority also included in its response suggested alternative language for the audit finding.

Regarding the occupancy deadline, the Authority further stated that it "…acknowledges that it should have been included as part of the evaluation criteria, and the evaluation panel would then have rated the YWCA's proposal with a partial March 2003 occupancy date accordingly…We believe the internal controls in place now, along with the significantly revised SHA Procurement Policies, have addressed concerns raised by the draft audit report at this point."

OIG EVALUATION OF AUDITEE COMMENTS

The OIG referenced in its finding HUD and Authority requirements and policies regarding the issues of reasonableness and fairness in procurement. We maintain that the waiver should not have been an informality; that it was material and could have significantly impacted the award results. In addition, the occupancy deadline as stated in the Request for Proposal was a basic application requirement and should have been part of the application screening process. The Addendum clearly refers to possible post-award situations, not to pre-award requirements, and the RFP stated that all units must be available for occupancy by the deadline. Further, the draft finding complied with Government Auditing Standards; since the Authority disagreed with the issues raised, it was appropriate for us to issue the finding so the matter can be resolved.

Because the Authority responded that it has already implemented controls that address the issues raised by the audit report, we revised the recommendations to state that HUD should determine if these controls are in place.

RECOMMENDATIONS

We recommend that you:

1A. Determine if the Authority has adequate policies and procedures to ensure that procurements are performed fairly, in an open and equitable manner.

1B. Require the Authority to implement appropriate controls, if you determine that its policies and procedures do not ensure that procurements are performed in an open and equitable manner.

MANAGEMENT CONTROLS

In planning and performing our audit, we obtained an understanding of the management controls that were relevant to our audit. Management is responsible for establishing effective management controls. Management controls, in the broadest sense, include plan of organization, methods, and procedures adopted by management to ensure that its goals are met. Management controls include the processes for planning, organizing, directing, and controlling program operations. They include the systems for measuring, reporting, and monitoring program performance.

Relevant Controls

We determined the following management controls were relevant to our audit objectives:

- Program Operations – Policies and procedures that management has implemented to reasonably ensure that procurements provide for a fair and open competition.

- Compliance with Laws and Regulations – Policies and procedures that management has implemented to reasonably ensure that resources used are consistent with laws and regulations.

Scope of Work

We assessed all of the relevant controls identified above.

Significant Weaknesses

It is a significant weakness if management controls do not provide reasonable assurance that the process for planning, organizing, directing, and controlling program operations, will meet an organization's objectives.

We identified a significant weakness in the Authority's management controls when it did not provide for fair and open competition during its procurement under its Section 8 Project-Based Voucher program (Finding 1).

AUDITEE COMMENTS

September 10, 2003

Frank E. Baca, Regional Inspector General for Audit
U.S. Department of Housing and Urban Development
909 First Avenue, Suite 126
Seattle, WA 98104-1000

Dear Mr. Baca:

Re: Response of Seattle Housing Authority to Draft Audit Report on Section 8 Project-Based Vouchers

The Seattle Housing Authority (SHA) has reviewed your August 22, 2003, letter and draft audit report on SHA's process related to Section 8 project-based vouchers. We appreciate the opportunity to comment and respond to the report. Clearly, both SHA and the OIG, as stewards of the public's trust, value fair and equitable procurement processes.

While we are pleased that the Office of the Inspector General (OIG) investigation has concluded that the issues raised in the citizen's complaint received by your office are not valid, we do take exception to the finding in the report that SHA "inappropriately waived" a provision of the Request for Proposals (RFP).

We respectfully request that your office review the additional information and alternative recommendations provided in this letter and make correspondingly appropriate modifications to the final audit report. While SHA understands and respects the OIG's opinion, we believe that the draft audit report's understanding of the nature of informalities and screening proposals in public contracting can be further sharpened and focused. We also request that the OIG consider and factor into the conclusions of the final report the significant changes that SHA has made to its procurement processes since the Section 8 Project-Based Voucher RFP was issued in the spring of 2001, improvements that have addressed the concerns raised in the draft audit report.

SHA notes that one of the objectives of the OIG investigation was to determine if SHA "followed applicable federal procurement requirements and its own procurement policy when it awarded Section 8 project-based vouchers to the YWCA" (page 2). In reviewing the draft audit report, we were unable to identify any references that would support the draft audit finding that particular provisions of federal procurement requirements or SHA procurement policies were not followed. Instead, as we articulate in this letter, public procurement regulations across the board, and court cases related to the issues raised in the draft audit

report, support the decision made by SHA to waive the occupancy date for units proposed by the YWCA.

Nature of Informalities: The draft audit report states that:

> "The Authority's procurement process was neither open nor fair to all possible proposers because a mandatory Request for Proposals requirement was ignored when evaluating the proposals. In our opinion, the Authority's action to waive the occupancy deadline requirement for YWCA was not an informality, but instead constituted a significant change in procurement requirements. The occupancy deadline requirement was cited three times in the Request for Proposals, and could very well have been a factor in potential applicants not submitting a proposal, as indicated by the YWCA proposal."

In evaluating the nature of an informality in public procurement, it is important to survey and understand the applicable regulations and generally accepted procurement practices for other government agencies, along with legal precedence as established in court decisions.

SHA's Procurement Policies and Procedures,[2] one of the OIG's stated benchmarks for determining SHA's compliance,[3] defines informalities as follows:

> "The proposal will also state that SHA may waive any informalities or irregularities in the proposal depending on which action is in the best interest of the SHA.[4] Informalities are matters of form rather than substance, evident from the proposal, or insignificant mistakes that can be waived or corrected without prejudice to the other proposers; that is, the effect of price, quality, delivery, quantity, or contractual conditions is negligible. The RFP will also state that SHA reserves the right to reject any or all proposals."

The HUD Procurement Handbook 7460.8, Rev 1, while only advisory to SHA, provides a federal perspective on informalities. Bid informalities are defined as follows:

> "The Contracting Officer may waive minor informalities or allow the bidder to correct them depending on which action is in the best interest of the HA. Minor informalities are matters of form rather than substance, evident from the bid

[2] November 1997, SHA Procurement Policies and Procedures, "Procedures for Competitive Proposals (Request for Proposals/RFP) (over $100,000 Formal Advertising)," Section A 2 a.

[3] "We wanted to determine if the Authority followed…its own procurement policy when it awarded Section 8 project-based vouchers to the YWCA" (p. 2 of OIG draft audit report).

[4] Page 8 of the RFP stated: "SHA reserves the right to waive any irregularities or informalities in the submittal package and to reject any or all proposals." Since the publication of the RFP in the spring of 2001, SHA has revised this language in order to clarify that the agency does not "waive…informalities," but rather waives irregularities as informalities. The revised language follows: "SHA reserves the right to waive as an informality any irregularities in submittals and/or to reject any or all Proposals."

> document, or insignificant mistakes that can be waived or corrected without prejudice to the other bidders."[5]

The Washington Administrative Code (WAC 236-48-003)[6] defines an informality as follows:

> "An immaterial variation from the exact requirements of the competitive solicitation having no effect or merely a minor or negligible effect on quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to bidders."

The Federal Acquisition Regulation (14.405)[7] states that a minor informality or irregularity:

> "pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders."

Court Decisions. Court decisions clearly support the rights of a government agency to act in its own best interest and to waive irregularities as an informality. In one of the foundational cases in this state[8], the Washington Supreme Court ruled as follows:

> "We appreciate fully that requiring public bidding on municipal contracts is 'to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable.'[9] We are aware, too, that the requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of bidders; and such requirements should be construed with the primary purpose of best advancing the public interest."

The same case further goes on to discuss informalities and to define when they are permissible in public contracting:

> "If there are material irregularities in the bidding process, the municipality should not accept the offensive bid. It may, however, waive the irregularity as an informality in the bidding if the irregularity is not material. 'The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders.'"[10]

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[5] Chapter 4-15 C.
[6] While SHA is not required to comply with this WAC, it is nevertheless instructive on the nature of informalities as generally understood in public procurement.
[7] While SHA is not required to comply with this FAR, it is nevertheless instructive on the nature of informalities as generally understood in public procurement.
[8] Gostovich v. City of West Richland (75 Wash. 2d 583, 452 P.2d 737 (1969)
[9] Quoting from Edwards v. City of Renton, 67 Wash. 2d 598, 602, 409 P.2d 153, 157 (1965).
[10] Gostovich case quoting from Duffy v. Village of Princeton, 240 Minn. 9, 60 N.W.2d 27, 29 (1953).

Furthermore, the courts have ruled that a plaintiff must demonstrate and prove that an action to waive an irregularity as an informality did, in fact, provide another party with a substantial advantage or benefit not enjoyed by others. In a case dealing with the late submittal of a bid, the court ruled as follows:

> "Although Quinn and several of the contractors present at the bid opening filed declarations stating that the five to ten second delay gave Korsmo an unfair advantage, no one articulated any specific advantage gained by the delay."[11]

Citing speculative unfair advantages was not enough to convince the court that another bidder had been harmed.

It is a significant point that informalities are generally defined above with respect to bids, not proposals. This is in recognition of the fact that proposals, by their very nature, permit re-definition, clarification, and alternative approaches to the requirements based on the creative input of proposers in the proposals submitted. The RFP process is much less structured and rigid than the bid process. Bids represent a clear and tightly drawn scope of work for which interested parties are required to submit a price, with no alteration or deviation permitted regarding the work to be performed or the schedule specified. But even the rigid requirements of a bidding environment permit waiver of informalities as cited above. Taking the strictness of bidding requirements too far and imposing them on an RFP process negates the value of seeking proposals (and alternative approaches) in the first place.

There are three critical issues that are embedded in the above-noted regulations and court decisions related to informalities and that are directly relevant to the question of whether SHA had the discretion to waive the occupancy deadline for units in the YWCA's proposal:

1. Benefit to the owner: The decision to waive any requirement as an informality must be based on which action is in the best interest of the agency, or as cited in the Gostovich case, "of best advancing the public interest." Clearly, with the shortage of available housing, awarding the vouchers to the YWCA was not only in SHA's best

   interest to help further promote its statutory mission of providing low-income housing, but was in the best interests of the general public by providing additional housing opportunities. To reject the YWCA's proposal would not have been in SHA's best interests or in the best interest of the public it is charged to serve.

2. Significance of the irregularity: The second issue relates to the significance of the irregularity that is being waived. In this instance, the YWCA indicated the following in their proposal:

   > "All government applications relating to and providing funding for this new construction currently show a completion date of December 2002. However, due to DCLU processing delays, the construction schedule has been extended. We would

[11] Quinn Const. Co., L.L.C. v. King County Fire Protection Distr. No. 26, 110 Wash.App. 1057, 2002 WL 418036, Wash.App. Div. 1, Mar 11, 2002.

> like to have partial occupancy by March 2003. Full occupancy is not expected until summer 2003."

Two factors demonstrate that the March 31, 2003 occupancy date in the RFP was never intended to be viewed as a rigid requirement. First, Addendum 1 to the RFP, in responding to a question from a proposer about the impact if they didn't meet the March 31, 2003 deadline for occupancy, stated the following:

> "If the intention is for the project to meet this deadline but it is not ready by the deadline then, at that point, we'll take this into consideration on a case-by-case basis."

SHA's answer to the question clearly indicates that the occupancy deadline was not an inflexible requirement, but that variations to the schedule would be entertained by SHA on a case-by-case basis. Clearly, the YWCA intended to meet a completion date of December 2002, but was delayed by the City of Seattle's permitting process. Furthermore, the RFP was not explicit in distinguishing between partial or full occupancy by March 31, 2003, thus further granting SHA the option to exercise discretion when the YWCA indicated partial occupancy by March 2003 and full occupancy by the summer of 2003. SHA went on record in Addendum 1 in stating that the occupancy date was not a matter of substance with respect to the RFP, but would be evaluated on a case-by-case basis.

Second, while it is clear that the March 31, 2003 occupancy date was noted in the RFP, the evaluation criteria in the RFP did not indicate that proposers would be evaluated based on the occupancy date they proposed. This further supports that the deadline could not have been imposed as a mandatory requirement, but that, consistent with the nature of RFPs, in which SHA requests "a proposed scope of work, schedule, and pricing,"[12] proposers could submit alternative occupancy dates, but at their own risk.

Whether the evaluation criteria should have included rating the occupancy deadline is a separate issue that is discussed later in this letter. However, to not waive the occupancy deadline for the YWCA would have potentially subjected SHA to a challenge from the YWCA based on the fact that they received sufficient scores based on the evaluation criteria, and that to reject their proposal based on something not included in the evaluation criteria would not represent a fair and equitable process.

Given the language of Addendum 1 that established SHA's intention that the occupancy date could be evaluated on a case-by-case basis, and the less than clear language of the RFP that did not include the occupancy deadline as an evaluation criterion, SHA was faced with the decision of whether to reject the YWCA's proposal (and face a challenge from the YWCA), or to waive the occupancy date as an informality that did not impact other proposers. Given the circumstances, SHA's decision was rational and deliberate, not in violation of any federal procurement regulations or SHA's own procurement regulations, and cannot be characterized as arbitrary and capricious. The courts have ruled that an

[12] November 1997, SHA Procurement Policies and Procedures, "Procedures for Competitive Proposals (Request for Proposals/RFP) (over $100,000 Formal Advertising),"

administrative decision is not arbitrary and capricious simply because there is room for two opinions.[13] The decision must be wholly unsupportable,[14] and with no rational basis.[15] While SHA understands that others may have, under similar circumstances, come to a different conclusion, we believe that it should be acknowledged that SHA was acting in good faith in managing this particular procurement and that any variance of opinion on the issue should not be elevated to the level of an audit finding.

3. Impact of the waiver: The third issue revolves around whether any waiver of an informality is done without prejudice to "other proposers" only, or extends also to "potential proposers." All of the above-noted regulatory and legal citations limit the "without prejudice" element to "other proposers or bidders" and do not extend protection to "potential proposers." The Gostovitch case establishes the legal standard for materiality: "The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders." (Emphasis added). In this instance, none of the other proposers were harmed by SHA's decision to waive the construction completion date as an informality, as they were all awarded Section 8 project-based vouchers, with the exception of LIHI, but for unrelated reasons.
   There is no public procurement regulatory or legal support for the position that the "without prejudice" component of waiving a matter as an informality extends to "potential proposers."[16]

At the core of the finding in the draft audit report is the question of what constitutes an informality. We were unable to identify any references in the draft audit report that support the rationale for determining that SHA's waiver of the occupancy date was not in compliance with federal and SHA procurement regulations. The only support for the draft finding appears to be the "opinion" of the OIG and the Seattle HUD Office of Public Housing, but that opinion was not backed up by citing applicable regulations that SHA is alleged to have violated.

As demonstrated above, based on a regulatory and legal review of the issue, SHA was clearly within its right to waive the occupancy date as an informality. While SHA respects the fact that the OIG has drawn a different conclusion on the matter, that conclusion has no regulatory support. Furthermore, SHA's decision is not erroneous simply because the OIG views this matter differently than SHA.

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[13] Rios v. Washington Department of Labor and Industries, 145 Wn.2d 483, 39 P. 3d 483 (2002).

[14] In Re Dyer, 143 Wn2d 384, 20 P.3d 907 (2001).

[15] Friends of the Earth v. Hall, 693 F.Supp. 904 (W.D.Wash 1988).

[16] In a meeting on August 18, 2003 between SHA and OIG representatives, OIG indicated that the HUD Procurement Handbook provided additional support for the position that an informality must not prejudice "potential proposers." In a subsequent telephone conversation between Tracy Vargas of your office and Mike Purdy, SHA's Purchasing Manager, Ms. Vargas cited the following definition of "proposal" from the HUD Procurement Handbook as support for such a position: "In the competitive proposals or noncompetitive proposals method of procurement, the offer submitted by a potential contractor." SHA respectfully suggests that there is no support from the definition of "proposal" cited above for extending the reach of the term "without prejudice" to include "potential proposers." The definition of "proposal" is intended only to indicate that proposals are submitted by "potential contractors," that is those with whom the agency will contract if they are the firm that submits the successful proposal. There is a fundamental difference between a "proposer" (one who proposes) and a "contractor" (one who contracts).

Screening for Eligibility: The draft audit report states that "it was not clear in the procurement process whose responsibility it would be to determine if a proposal met all the RFP requirements" (page 9) and goes on to suggest that the Contract Administrator should have reviewed the proposals prior to providing them to the evaluation panel to ensure that all proposals met the occupancy date requirement of the RFP.

The RFP stated that "all responses to this RFP that are received on or before the stated deadline will be initially screened for eligibility." The clear intent of this statement has always been that the Contract Administrator should review the proposals only for responsiveness. Responsiveness is a legal term that describes whether a proposer responded to the submission-related requirements of the RFP. This includes items such as whether the proposal was received on time, whether the appropriate number of copies of the proposal were submitted, whether any administrative forms required were submitted, etc.

To suggest that the requirement for proposals to be "screened for eligibility" implies a more substantive review of the content of the proposals is not consistent with the role of a Contract Administrator. For the most part, Contract Administrators do not even read the proposals for a number of very good reasons. First, they do not generally have the technical subject matter expertise to do so as their expertise is in procurement requirements. Second, to read the proposals may compromise the Contract Administrator's objectivity in facilitating the discussion of the evaluation panel. Finally, Contract Administrators simply do not have the time required to read the proposals in detail.

However, in recognition of the confusion that arose regarding the meaning of the phrase "screened for eligibility" in the RFP, SHA has since changed its standard RFP language from that which was included in the subject RFP to the following:

> "All responses to this RFP that are received on or before the stated deadline will be initially screened for responsiveness. An evaluation panel will rate responsive proposals, according to the criteria listed above, and may conduct reference checks as part of the process."

Reviewing proposals for responsiveness has a clear and unambiguous legal meaning, and is almost always the responsibility of procurement personnel. By changing the language as noted above, it clarifies that Contract Administrators will review only for responsiveness issues. It is the responsibility of the evaluation panel, those selected for their particular subject matter expertise, to determine whether the proposals meet the substantive requirements of the RFP, and to rate the proposals accordingly.

Furthermore, as noted earlier in this letter and in the draft audit report, the issue of the occupancy deadline was not part of the evaluation criteria. SHA acknowledges that it should have been included as part of the evaluation criteria, and the evaluation panel would then have rated the YWCA's proposal with a partial March 2003 occupancy date accordingly.

As SHA has worked to improve its procurement practices over the last few years, our Purchasing Manager has worked diligently to ensure that all RFPs issued by the agency have the necessary

correlation between the scope of work, what is required to be submitted by proposers, and the evaluation criteria. We believe the internal controls in place now, along with the significantly revised SHA Procurement Policies, have addressed the concerns raised by the draft audit report on this point.

Alternative Audit Recommendation Language: Given the nature of the issues as discussed above, SHA does not believe that an audit finding is warranted or justified. Consistent with your letter of August 22, 2003, we are proposing the following alternative recommendations for your consideration in your final report. Language suggested for deletion has been stricken through, and language suggested for the final report is underlined.

Page 5 of Draft Audit Report:

~~FINDING 1~~

~~THE AUTHORITY DID NOT PROVIDE OPEN AND FAIR COMPETITION IN ITS SECTION 8 PROJECT-BASED VOUCHER PROGRAM CONTRACTING PROCESS~~

~~Evidence did not support complaint allegations that Request for Proposals evaluators were coerced into changing scores, or that the Authority PorchLight Housing Director violated federal conflict of interest rules or lobbying restrictions. However, we found that the Authority inappropriately waived part of its published contracting requirements when it committed a contract award to Young Women's Christian Association (YWCA) under its Section 8 project-based program. The Authority did not provide other potential applicants with the opportunity to submit proposals based on the waived contract requirements. Consequently, the Authority's procurement process was neither open nor fair to all prospective proposers. This occurred because the Authority did not have clear and specific controls to ensure that procurement (Request for Proposals) requirements were followed when determining eligibility of proposals.~~

THE EVIDENCE DOES NOT SUPPORT THE CITIZEN COMPLAINT REGARDING THE PROCUREMENT PROCESS.

Evidence did not support complaint allegations that Request for Proposals evaluators were coerced into changing scores, or that the Authority PorchLight Housing Director violated federal conflict of interest rules or lobbying restrictions. However, we noted that a requirement of the Request for Proposals was not included as part of the evaluation criteria, something that the Authority waived as an informality. While we disagree with the Authority's waiver of the occupancy deadline date in the Young Women's Christian Association (YWCA) proposal, we acknowledge, given the language of the RFP, that the Authority's action was not arbitrary and capricious and was consistent with applicable federal procurement regulations and the Authority's own procurement policies. Furthermore, the Authority has taken appropriate actions to improve its procurement practices including the following:

- **<u>Clarifying its standard language for RFPs to reflect that procurement personnel review proposals for responsiveness, and that all substantive matters are reviewed by the evaluation panel.</u>**

- **<u>Instituting internal management review by the Purchasing Manager of all RFPs to ensure that material requested in proposals is included as part of the evaluation criteria.</u>**

- **<u>Significantly revising its procurement policies as of September 16, 2002 to ensure an open and fair process.</u>**

<u>Pages 8 and 9 of Draft Audit Report:</u>

~~Inappropriate waiver of published contracting requirements~~

~~Although we did not find that the complaint allegations were supported, during the review we found that the Authority improperly waived part of its published contracting requirements when it awarded Section 8 project-based vouchers to the YWCA.~~

~~In its proposal, the YWCA did not state that any of its housing units would actually be available by the occupancy deadline date of March 31, 2003 as required by Request for Proposals number 2882. Instead the YWCA's proposal only stated it would like to have some of its Opportunity Place project units available by March 2003 (the Authority's project manager stated that YWCA does not plan to complete the project until December 31, 2003).~~

~~In a June 19, 2001 meeting, Evaluation Committee members discussed whether YWCA was eligible for funding under Request for Proposals number 2882 because YWCA's proposal did not state that all units would be available for occupancy by March 31, 2003. During the discussion, at least two of the Evaluation Committee members questioned whether YWCA should be disqualified because it did not meet the Request for Proposals occupancy date requirement.~~

~~The majority of the Evaluation Committee members recommended waiving the occupancy date requirement for YWCA based on "informality," (i.e., that the issue was a matter of form rather than substance) and recommended to the Executive Director that the Authority commit to enter into Housing Assistance Payment (HAP) contracts with the seven agencies that met the threshold rating score. The Executive Director concurred with the Evaluation Committee's recommendation, and the Authority subsequently awarded 339 vouchers with an estimated annual subsidy of over $1.5 million to the seven agencies. YWCA's Opportunity Place project received 145 of the 339 vouchers.~~

~~The Authority's procurement process was neither open nor fair to all possible proposers because a mandatory Request for Proposals requirement was ignored when evaluating the proposals. In our opinion, the Authority's action to waive the occupancy deadline requirement for YWCA was not an informality, but instead constituted a significant change in procurement requirements. The occupancy deadline requirement was cited three times in the Request for Proposals, and~~

~~could very well have been a factor in potential applicants not submitting a proposal, as indicated by the YWCA proposal.~~

~~Authority officials disagreed with our determination. They contended that their definition of informality did not apply to "potential" but rather to "other" proposers. However, the Acting Director of the Seattle HUD Office of Public Housing agreed with our determination that informalities apply to potential proposers, and that a date of delivery much later than the date required by the Request for Proposals is a matter of substance rather than form.~~

~~No clear and specific controls to ensure that the proposals met all the requirements of the RFP~~

~~We concluded that the Authority did not have clear and specific controls to ensure that the proposals met all the requirements of the Request for Proposals. It was not clear in the procurement process whose responsibility it would be to determine if a proposal met all the RFP requirements. The Contract Administrator said that it was not her responsibility to determine if a proposal met all the RFP requirements, including the occupancy deadline date requirement. She told us that during her initial screening of the proposals for eligibility, she only determined that the submissions were received by the due date and time, and that they contained the required administrative documents.~~

~~We believe that the Authority should have first determined whether the proposals met the Request for Proposals requirements prior to having the Evaluation Committee rate or evaluate the proposals based on the evaluation criteria elements. The occupancy date was an RFP requirement and not one of the evaluation elements that the Evaluation Committee used when it rated each proposal. One of the Evaluation Committee members said the panel felt the Contract Administrator had approved the occupancy date by allowing the Committee members to evaluate the YWCA's proposal, and the Committee did not want to override the Contract Administrator.~~

~~Thus, there was no clear indication whose responsibility it was to determine if a proposal met eligibility requirements not included as part of the evaluation criteria elements the committee members used.~~

Waiver of RFP requirement as an informality

Although we did not find that the complaint allegations were supported, during the review we found that the Authority waived as an informality part of its published RFP requirements when it awarded Section 8 project-based vouchers to the YWCA.

In its proposal, the YWCA stated their intention to have some of its housing units available by the occupancy deadline date of March 31, 2003 as required by Request for Proposals number 2882, and the rest available for occupancy by the summer of 2003.

In a June 19, 2001 meeting, Evaluation Committee members discussed whether YWCA was eligible for funding under Request for Proposals number 2882 because YWCA's proposal did not state that all units would be available for occupancy by March 31, 2003. During the

discussion, at least two of the Evaluation Committee members questioned whether YWCA should be disqualified because it did not meet the Request for Proposals occupancy date requirement.

The majority of the Evaluation Committee members recommended waiving the occupancy date requirement for YWCA as an informality, and recommended to the Executive Director that the Authority commit to enter into Housing Assistance Payment (HAP) contracts with the seven agencies that met the threshold rating score. The Executive Director concurred with the Evaluation Committee's recommendation, and the Authority subsequently awarded 339 vouchers with an estimated annual subsidy of over $1.5 million to the seven agencies. YWCA's Opportunity Place project received 145 of the 339 vouchers.

While we question whether the Authority's waiver of the occupancy deadline date was appropriate, the Authority did provide additional information demonstrating that the date was never intended as a rigid requirement of the RFP or a matter of substance, that the YWCA could have challenged the process had the Authority not waived the requirement since the date was not part of the stated evaluation criteria, and that no other proposers were prejudiced by the waiver (as supported in the Authority's procurement policies, other public procurement practices, and court decisions). We still disagree with the Authority's decision to waive this as an informality, particularly because we believe that potential proposers may have been prejudiced by the waiver, but we acknowledge that the Authority acted consistently with applicable regulations, that the waiver does not reflect a systemic concern with the Authority's procurement practices, and that the Authority has taken the necessary steps to improve its procurement processes to ensure fair and open competition in future procurements, including making changes to its standard RFP document to make it clear that proposals are reviewed initially only for responsiveness, and that all issues of substance are analyzed by the Evaluation Committee as part of their rating of the proposals.

Draft Audit Report Recommendations: The draft audit report provides two recommendations, both of which SHA has already long since implemented. In September 2002, the SHA Board of Commissioners adopted revised Procurement Policies that are in full compliance with HUD and state regulations and that provide the basis for ensuring that procurement processes are fair, open, and equitable. As part of the development of the new Procurement Policies, and as follow-up after their adoption, SHA's procurement staff and project management staff have been trained extensively on the requirements. SHA's Purchasing Manager continues to provide leadership direction and training on an ongoing basis to SHA personnel.

In light of the evidence and information presented in this letter demonstrating that the waiver of the occupancy deadline date as an informality does not constitute an audit finding, and SHA's subsequent improvements in its procurement practices described above, we suggest that the recommendations on page 9 of the draft audit report be deleted.

Summary: As you review and evaluate this letter, we encourage you to consider the significance of the issues in light of the clear practice of the courts and generally accepted auditing standards.

When the courts are faced with disputes about competitive fairness issues, such as the one raised in the draft audit report, they have consistently held that they will not substitute their judgment for the judgment of a public agency, and will only overturn a public agency's decision if it is determined that the agency acted in an arbitrary and capricious manner. While it is clear that the draft audit report disagrees with SHA's judgment on waiving the date as an informality, SHA's decision was not arbitrary and capricious, and the decision is supported not only by applicable policies and procedures, but by generally accepted public procurement regulations in effect for other government agencies and legal precedence as established in court decisions.

Furthermore, HUD's procurement regulations (24 CFR 85.36 (b)(11) establish the principle that federal agencies "will not substitute their judgment" for that of a local agency unless the matter "is primarily a Federal concern."

> "Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. <u>Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern.</u> Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction." (Emphasis added)

In the draft audit report, there has been no demonstration that any federal regulation was breached, and thus, consistent with 24 CFR 85.36, the judgment of the OIG should not be substituted for SHA's.

In addition, even taking at face value the disagreement between the OIG and SHA, the draft audit finding simply does not meet the generally accepted test of materiality for an audit finding. Audit findings should be material and reflect a systemic violation of statutes and regulations, and not merely an isolated difference of opinion. The June 2003 edition of "Government Auditing Standards," published by the Comptroller General of the United States, addresses this issue:

> "In most cases, a single example of a deficiency is not sufficient to support a broad conclusion or a related recommendation. All that it supports is that a deviation, an error, or a weakness existed."[17]

Again, we thank you for the opportunity to review and comment on the draft audit report. SHA requests that the finding be deleted from the final audit report as the occupancy date was clearly an informality that was within SHA's discretion to waive. We believe that we have taken significant steps to continue to improve our procurement process and are committed to continuing to strive for excellence in this critical area.

If you have any questions, please contact Harry Thomas at (206) 615-3500 or Mike Purdy at (206) 615-3470.

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[17] Section 8.42

Sincerely,

//Signed//

Jennifer Potter, Chair
SHA Board of Commissioners

JP:MEP:elc

cc: John Meyers, HUD Regional Director
Robin Prichard, HUD Acting Director of Seattle Office of Public Housing
Tracy Vargas, HUD Office of the Inspector General
Harry Thomas, SHA Executive Director
Al Levine, SHA Deputy Executive Director
James Fearn, SHA General Counsel
Kathy Roseth, SHA PorchLight Housing Director
Dick Woo, SHA Acting Director of Finance & Administration
Ann-Marie Lindboe, SHA Housing Finance Manager
Mike Purdy, SHA Purchasing Manager
Pam Montgomery, SHA Senior Contract Administrator

DISTRIBUTION OUTSIDE OF HUD

Harry Thomas, Executive Director, Seattle Housing Authority
120 Sixth Avenue North, Seattle, Washington 98109-5002
Jennifer Potter, Chair, Board of Commissioners, Seattle Housing Authority
120 Sixth Avenue North, Seattle, Washington 98109-5002
The Honorable Susan M. Collins, Chairman, Committee on Government Affairs, 340 Dirksen Senate Office Building, United States Senate, Washington, DC 20510
The Honorable Thomas M. Davis III, Chairman, Committee on Government Reform, 2815 Rayburn Building, House of Representatives, Washington, DC 20515
The Honorable Henry A. Waxman, Ranking Member, Committee on Government Reform, 2204 Rayburn Building, House of Representatives, Washington, DC 20515