

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - #07-008

TO: Barbara Gomez, Director, Community Development
FROM: Jorge L. Fernandez, City Attorney
DATE: May 8, 2007
RE: Legal Opinion - Allapattah Business Development Authority - Ralph Plaza II - Conflict of Interest

You have requested a legal opinion on the following question:

WHETHER THERE IS A CONFLICT OF INTEREST AS DESCRIBED IN A MEMO DATED MARCH 22, 2007 FROM LEWIS R. BLAKE, SENIOR STAFF AUDITOR, OFFICE OF THE INDEPENDENT AUDITOR GENERAL¹?

ANSWER

For the reasons set forth below, your question is answered in the affirmative, relative to CDBG funds and in the negative relative to HOME funds.

ANALYSIS

The memo referenced above states that the City of Miami ("City") and Allapattah Business Development Authority, Inc. ("ABDA") entered into an agreement for the development of the Ralph Plaza Townhomes Phase II project (the "Phase II Project"). The memo further states that the City Housing and Commercial Loan Committee awarded the Phase II Project HOME and CDBG funds for its development. Moreover, the subject memo alleges that ABDA requested permission to award the construction contract for the combined project Ralph Plaza I and Ralph Plaza II projects (together the "RP Project") to Allapattah Construction, Inc. Allapattah Construction, Inc., is a for profit company and is a **wholly owned subsidiary** of ABDA.

Based upon the above facts and pursuant to federal regulation, it appears that a conflict of interest does exist as it relates to the awarding of the CDBG funds to ABDA and then ABDA's participation in the selection of its own for-profit corporation (via its request for permission) to construct the RP project. The March 22, 2007 memo is correct in the proposition that 24 C.F.R.

¹ To the extent that the auditor's memo referred to herein represent any audit observations (findings/conclusions), this City Attorney's legal opinion is not responsive to the same.

§ 85.36(b) (3) (2006) (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments) ascribes a conflict of interest where it states in pertinent part:

No employee, officer or agent of the grantee or sub grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when: (iv) An organization that employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for the award.

In this case, ABDA is the sub grantee referred to in the immediately preceding paragraph and it participated in the selection of Allapattah Construction, Inc., a company in which it has a financial interest.

Similarly, 24 C.F.R. § 570.611 (2006) (Community Development Block Grants) links its conflict of interest provision to 24 C.F.R. § 85.36 where it states that in the procurement of supplies, equipment, construction and services by recipients and by sub recipients, the conflict of interest provisions in the 24 C.F.R § 85.36 shall apply. Additionally, in all cases not governed by the aforementioned, 24 C.F.R. § 570.611 shall apply. This provision states in part:

No persons described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this part or who are in a position to participate in a decision making process or gain inside information with regard to such activities, may have a financial interest in any contract, subcontract or agreement with respect to a CDBG assisted activity or with respect to the proceeds of the CDBG assisted activity, either for themselves or those with whom they have business ties . . . 24 C.F.R. § 570.611(b) (2006).

Under paragraph (c) of this provision, persons covered includes employee, agent, consultant, officer or elected official or appointed official of the recipient or of any designated public agencies or of sub recipients that are receiving funds under this part. ABDA is a sub recipient pursuant to 24 C.F.R. § 570.611(b). It should be noted that 24 C.F.R. § 570.611 provides for exceptions to this conflict of interest and HUD will consider an exception after the recipient has provided certain documentation.

However, as it relates to HOME funds, it appears that there is no conflict of interest. In 24 C.F.R. § 92.356 (2006), Conflict of Interest (Home Investment Partnerships Program), this provision states in pertinent part:

(b) No persons described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to activities assisted with HOME funds or who are in a position to participate in a decision making process or gain inside information with regard to these activities, may obtain a financial interest or benefit from a HOME-assisted activity, or have an interest in any

contract, subcontract or agreement with respect thereto, or the proceeds thereunder, either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter.

(c) Persons covered include an employee, agent, consultant, officer or elected official or appointed official of the participating jurisdiction, State recipient or sub recipient, which are receiving HOME funds.

ABDA is not a "person covered" as described in subsection (c) above. In this transaction, ABDA is the owner/developer. Moreover, further review of the HOME regulations relative to administration supports the lack of a conflict of interest in the use of HOME funding in the subject transaction. The requirements and responsibilities of participating jurisdictions relative to written agreements, etc. are outlined in 24 C.F.R. § 92.504 (2006).

More specifically, 24 C.F. R. § 92.504(c)(3)(v) states that the written agreement must require the owner, developer or sponsor to carry out each project in compliance with certain requirements stated in 24 C.F.R. § 92.504(c)(3)(v). These requirements are, among others, (E), the conflict of interest provisions prescribed in 24 C.F.R § 92.356(f) and this provision states: No owner, developer or sponsor of a project assisted with HOME funds (or officer, employee, agent, elected or appointed official or consultant of the owner, developer or sponsor) whether private, for-profit or non-profit (including a community housing development organization [CHDO] when acting as an owner, developer or sponsor) may occupy a HOME-assisted affordable housing unit in a project.

Based on the above analysis, the only conflict or prohibition as an owner/developer under the HOME guidelines occurs if the owner and/or developer decide to occupy a HOME-assisted unit. There were no facts presented in the subject transaction relative to the same. Therefore, there is no conflict of interest by ABDA in the use of HOME funds.

Worthy of note, the Miami-Dade County Conflict of Interest Code and Code of Ethics Ordinance, Chapter 2, Article I, § 2-11(c) contains a provision that prohibits certain business transactions within the county. It states that no person, as defined by specific terms (in this case – autonomous personnel which refers to the members of semi-autonomous authorities, boards and agencies as are entrusted with the day to day policy setting, operation and management of certain defined County functions even though the ultimate responsibility for such functions or areas rests with the Board of County Commissioners) shall enter into any contract or transact any business with person or agency acting for Miami-Dade County.

The City of Miami Code has similar guidelines for transaction of business with the City as well. Article V, § 2-612. However, the City carves out an exception for employees that participate in federal economic development programs, the community development block grant assisted single family rehabilitation loan program or the various affordable housing programs assisted through the home investment partnership program and state housing initiatives partnership program administered by the department of community development provided that

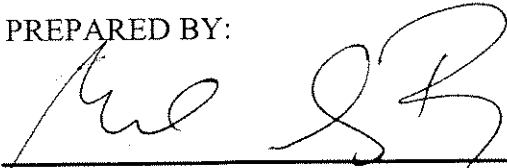
the city Manager approves the participation and that the employee is identified in the applicable documents.

Worthy of note, the State of Florida has a conflict of interest provision relative to public officers, employees, etc. This statute is predicated on essentials of proper conduct and operation of government. However, the subject of this transaction does not fall within the venue of the State of Florida.

CONCLUSION

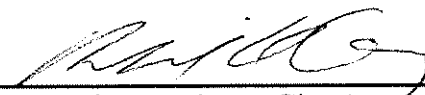
Therefore, since the federal regulations prohibit the type of business transactions between related entities pursuant to the use of CDBG funds, the subject transaction between a non-profit and its for-profit subsidiary would result in a conflict of interest. However, in accordance with the HOME regulations and the use of its funds, the subject transaction is not prohibited and does not create a conflict of interest. Additionally, neither the County code nor the City code can conflict with the aforementioned federal regulations and these codes do not trigger any such conflict. Finally, due to the various positions on the conflict of interest in the subject transaction because of the two different funding sources, it is recommended that HUD should be consulted relative to its opinion of the same.

PREPARED BY:



Gail Ash Dotson, Assistant City Attorney

REVIEWED BY:



Rafael O. Diaz, Assistant City Attorney