



Hon. Pedro Pierluisi Urrutia  
Gobernador

Lcda. Karla G. Mercado Rivera  
Administradora y Principal Oficial de Compras

May 21, 2021

## ADMINISTRATIVE DETERMINATION NO. 2021-01

### RE: APPLICABILITY OF ACT 73-2019 TO THE STATE CDBG, CDBG-DR AND CDBG-MIT PROGRAMS ADMINISTERED BY THE PUERTO RICO DEPARTMENT OF HOUSING

Under our consideration is a request from the Puerto Rico Department of Housing (“PRDoH”) for a determination as to the applicability of Act No. 73 of July 19, 2019, as amended, also known as the *General Services Administration for the Centralization of Government of Puerto Rico Purchasing Act of 2019* (“Act 73-2019”), to purchases under the State CDBG, CDBG-DR and CDBG-MIT Programs administered by PRDoH. Pursuant to Article 11(a) of Act 73-2019, the Administrator of the Puerto Rico General Services Administration (“ASG”, by its Spanish acronym) is empowered to advise public officials as to the public policy established by the Act. After considering the information submitted by PRDoH, and for the reasons discussed herein, we hold that Act 73-2019 does not apply to purchases made under these Programs.

## I. APPLICABLE LAW

### A. General Applicability of Act 73-2019 and Regulation 9230

Act 73-2019 establishes as a public policy of the Government of Puerto Rico (“Government”) the optimization of the level of effectiveness and efficiency of governmental management, the streamlining of procurement processes for goods and services through the use of technological advances, the reduction of public expenditure, and the strategic allocation of resources, among others, through the adoption of a new model for the acquisition of goods, works and services by the Government, framed within the principles of transparency, uniformity and healthy competition. Act 73-2019 was created to standardize the processes of acquisition of goods, works and non-professional services of the Government and establishes the centralization of governmental procurement processes for goods, works and services. Under Act 73-2019, the General Service Administration (“ASG”, by its Spanish acronym) is the agency responsible for implementing this public policy and coordinating and directing the process of procurement and contracting of goods and services for the Government. Article 3 of Act 73-2019, which determines the scope of the law,



stipulates that “[t]he provisions of this Act shall govern the processes of purchases and auctions of goods, works, and non-professional services in all Governmental Entities and Exempt Entities”.

PRDoH is a Governmental Entity under the jurisdiction and scope of Act 73-2019. Moreover, while Act 73-2019 recognizes that there will be circumstances in which federal laws or regulations require a different procurement procedure than the one described in the Act, in such circumstances, Article 24 provides that ASG shall follow such procedures. If applicable, ASG will issue a written statement to the ASG Bid Board and/or the ASG Review Board describing the applicable federal laws or regulations for the corresponding acquisition. Article 3 of Act 73-2019 also specifies that all purchases related to Puerto Rico’s recovery and reconstruction by Exempt Entities must be conducted through ASG.

Furthermore, on December 18, 2020, the *Uniform Regulation for Purchases and Bids of Goods, Works, and Nonprofessional Services of ASG* (“Regulation 9230”) came into effect. Regulation 9230 was drafted with the purpose of establishing the rules and procedures to be followed by ASG in the acquisition of goods, works, and nonprofessional services, as well as to establish the principles and general rules that will guarantee the best utilization of public funds, while promoting healthy competition in order to attain the most competitive prices and the best value. Specifically, Regulation 9230 stated that “[t]he provisions of the Regulation shall regulate the procedures of purchases and bids of goods, works and nonprofessional services, regardless of the source of funds for the purchase (state or federal). In those circumstances in which federal law or regulation (including guides, procedures or agreements executed by or with the federal government or its entities) requires a procedure other than the one established herein, such procedure shall prevail over the one provided herein. If that were the case, the Administration shall issue a written statement to the Bid Board or Review Board, as the case may be, in which it shall detail the federal laws and regulations applicable for the corresponding purchase. Any purchase or bid processed pursuant to a procedure other than that established in this Regulation must include in its record a document detailing the procedure performed and the legal, regulatory, or contractual provision establishing and authorizing processing the acquisition pursuant to said procedure.”

Therefore, ASG’s Act 73-2019 and Regulation 9230 are clear on their jurisdiction over the acquisition processes of the Government of Puerto Rico, regardless of the source of the funds, whether they are state or federal. However, as further discussed below, procurement processes under the State CDBG, CDBG-DR, and CDBG-MIT Programs, and their federal component, take precedence over the mandates of Act 73-2019.

### **B. Doctrine of Preemption and Contracts as Force of Law between Contracting Parties**

The preemption doctrine has been developed to avoid regulatory conflicts and promote uniform policies.<sup>1</sup> Under the preemption doctrine, a federal law or regulation leaves no room for state

<sup>1</sup> See *Gonzales v. Mayagüez Resort & Casino*, 176 D.P.R. 848 (2009); *Semidey v. Consorcio Sur-Central*, 177 D.P.R. 657 (2009).



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regulation and thus, for the specific subject matter regulated in the federal legislation, federal law is the one and only source. This preemption doctrine must be interpreted restrictively, meaning that it will not be presumed that a federal law has preempted a state law unless proven otherwise. There are two (2) ways to prove preemption, (1) explicit preemption, and (2) implicit preemption. Explicit preemption means that the federal legislation or regulation expressly preempts legislation on the subject matter and forbids states from legislating on that specific subject matter.<sup>2</sup> On the other hand, implicit preemption exists under one of two scenarios, (1) when the regulations contained in a federal law are complete to an extent that any further legislation would disarticulate the federal law and its purpose, and (2) when the federal interests are of such an importance over a specific subject matter that any state legislation would be incompatible, regardless of whether federal legislation expressly preempts.<sup>3</sup>

Regardless of Congress' explicit and total preemption of state legislation, preemption occurs when state law is in conflict with federal law to such an extent that the state legislation becomes null.<sup>4</sup> The Doctrine of Preemption avoids conflict between two (2) competing laws that could impose different obligations and/or grant different rights, bringing uniformity and avoiding confusion.

Moreover, obligations are born from (1) law or (2) contracts. While contracts cannot be contrary to law, morality, or public order,<sup>5</sup> the legal principle of *pacta sunt servanda* means that agreements, that are legal under valid legislation, must be kept. In Puerto Rico, contracts are typically referred to as "the law between the parties".<sup>6</sup> A contract made under federal law, whose object is a federal subject matter, much like federal funds, will be valid under federal law, and as such, must be kept in accordance with the *pacta sunt servanda* principle.

## II. CONTRACTUAL OBLIGATIONS OF THE GOVERNMENT OF PUERTO RICO WITH THE FEDERAL GOVERNMENT REGARDING CDBG PROGRAMS

### A. CDBG Action Plans and Grant Agreements

Specifically, on July 29, 2018, the Federal Department of Housing and Urban Development ("HUD") approved the Government's Action Plan for CDBG-DR funds (the "Action Plan") appropriated under the *Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017*, Public Law (P.L.) 115-56, which allocated \$1,507,179,000 for long-term recovery efforts. HUD reviewed the Government's Financial Certifications and Implementation Plan and determined the Government has capacity to manage the funds and the associated risks of the grant. Accordingly, HUD and the Government (the "grantee", who designated PRDoH as the grant

<sup>2</sup> See *Toro Avilés v. PRTC*, 177 D.P.R. 369 (2009).

<sup>3</sup> See *Semidey v. Consorcio Sur-Central*, *supra*. See also *American Ins. Assoc. v. Garamendi*, 123 S. Ct. 2374 (2004).

<sup>4</sup> See *Negrón v. Vera Monroig*, 182 D.P.R. Dec. 218 (2011); *Vega v. Yiyi Motors*, 146 D.P.R. 373 (1998); *Cotto v. Calo Ríos*, 140 D.P.R. 604 (1996).

<sup>5</sup> See *Cooperativa de Ahorro v. Casiano*, 184 D.P.R. 169 (2011).

<sup>6</sup> See Article 1233 of the Puerto Rico Civil Code of 2020, Act No. 55 of January 1, 2020.



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administering agency in charge of the administration of the CDBG-DR Program) executed a Grant Agreement on September 20, 2018 (the “09-20-18 Grant Agreement”). The 09-20-18 Grant Agreement was made pursuant to the authority of Public Law 115-123, *Further Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2018* (“Appropriations Act”).

Thus the Government, as the grantee, and the PRDoH as the grant administering agency, are required to comply with the Action Plan and with the terms and conditions of the Grant Agreement with HUD, which incorporate and mandate full compliance with the *Housing and Community Development Act of 1974*, as amended; the regulations governing the CDBG Program at 24 CFR part 570; the February 9, 2018, Federal Register Notice, *Allocations, Common Application, Waivers, and Alternative Requirements for 2017 Disaster Community Development Block Grant Disaster Recovery Grantees*, 83 FR 5844, and any future Federal Register Notices that HUD publishes that apply to CDBG-DR grants under Public Law 115-56. These Federal Register Notices impose waivers and alternative requirements and implement the requirements on the use of the CDBG-DR funds in Public Laws 115-56, 115-72, 115-123, and 115-141. The 09-20-18 Grant Agreement also included special grant terms and conditions (“Grant Special Conditions, CDBG Disaster Recovery Assistance Commonwealth of Puerto Rico Supplemental Appropriations for Disaster Relief Requirements, 2017 (P.L. 115-56), herein referred to as the “Special Conditions”) which were attached to the Funding Approval/Agreement (form HUD-7082) between HUD and the Grantee (represented by the PRDoH) for grant number B-17-DM-72-0001. These Special Conditions modify the award of CDBG-DR funds under Public Law 115-56 and impose additional requirements on the Government that are not imposed to other States as CDBG-DR grantees.

Furthermore, on February 28, 2019, HUD approved the Government’s First Amended Action Plan (Substantial Amendment) for an additional \$8,220,783,000 CDBG-DR award from Public Law 115-123 (under grant number B-18-DP-72-0001). The acceptance of the Action Plan by HUD implies that it was prepared in accordance with all the CDBG-DR requirements. As described in the Action Plan, the Government must use CDBG-DR funds solely for necessary expenses related to disaster relief, long-term recovery, restoration of housing, infrastructure, and economic revitalization as identified in Federal Emergency Management Agency (“FEMA”) disaster declaration numbers DR-4336 and DR-4339 under Public Law 115-123 and through Federal Register 83 FR 40314. Amended Action Plans (Non-Substantial Amendments) were approved by HUD on August 23, 2019 (Second Amended Action Plan) and on February 24, 2020 (Third Amended Action Plan).

Finally, HUD and the Government as grantee (with the PRDoH as the grant administering agency) signed a second Grant Agreement on February 21, 2020 (the “02-21-20 Grant Agreement”). With regards to procurement, the 02-21-20 Grant Agreement states that “[t]he grantee shall establish requirements for procurement policies and procedures for local governments and subrecipients based on full and open competition consistent with the requirements of 24 CFR 570.489(g), and shall require an evaluation of the cost or price of the product or service. The procurement



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requirements the grantee imposes on its subrecipients must include evaluation of the cost or price of the product or service or the grantee must impose 2 CFR 200.318 through 200.326 on its subgrantees and subrecipients”.<sup>7</sup> Pertaining to these procedures, the Government, in each iteration of its CDBG-DR Action Plan that has been approved by HUD, has consistently stated that “[p]rocurement procedures pertaining to the acquisition of materials and services will be reviewed for compliance with 2 CFR 200 Cost Principles including: necessary costs, cost reasonableness standards, allowable costs, and cost allocability.” The Action Plan is alluding to Title 2 (*Grants and Agreements*) of the Code of Federal Regulations (CFR), Subtitle A (*Office of Management and Budget Guidance for Grants and Agreements*), Chapter II (*Office of Management and Budget Guidance*), Part 200 (*Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*), Subpart D (*Post Federal Award Requirements Procurement Standards*), specifically 2 CFR 200 §§317-326.

To summarize, the contracting procedures for PRDoH's CDBG Programs were specifically tailored to meet procurement requirements in the CDBG Program regulations, including the procurement requirements set forth in the Government's Action Plan and its amendments, as required by HUD, and in the Grant Agreements, duly executed between HUD and the Government of Puerto Rico in 2018 and 2020. The Grant Agreements were executed by the HUD Secretary under the provisions of federal statutes P.L. 115-56, 115-72, 115-123 and 115-141, because HUD concluded that Puerto Rico, as a grantee, had in place competent financial controls and procurement processes, and appropriate procedures for proper grant management. Prior to being approved to manage CDBG funds, PRDoH, as a CDBG-DR grant management agency, had to demonstrate to HUD that it has sufficient capacity to manage allocated funds and associated risks. This included an assessment of staff capacity, including staff responsible for contract procurement/management. Until the closeout of the CDBG-DR grant, Puerto Rico is contractually obliged with the Federal Government to adhere to the controls, processes, and procedures described in the documentation of financial controls and procurement processes of the grant submitted to HUD, unless modified with HUD's approval. Failure to comply with the Special Conditions contracted with HUD and specific requirements relating to the competitive acquisition of property, services and real estate using federal funds can result in a significant number of de-obligations under the CDBG-DR Program.

## **B. CDBG-DR Procurement Manual**

On February 26, 2019, the PRDoH in its role as the CDBG-DR grant administering agency, issued the "*Puerto Rico Department of Housing Procurement Manual and Contractual Requirements for CDBG-DR*", Reg. No. 9075 ("Manual"). The Manual states that the PRDoH, in its administration of the CDBG-DR Program, will use its own procurement procedures as set forth under the Manual

<sup>7</sup> See Page 5 of the 02-21-20 Grant Agreement.





which reflect applicable state and local laws and regulations providing for full and open competition.

The PRDoH states that the purpose of the Manual is to ensure that all CDBG-DR procurements are conducted in a manner providing full and open competition or fair treatment of all persons or entities involved in each and every PRDoH procurement process funded totally or partially with federal funds; and to assure that such procurement processes are in full compliance with federal laws, rules and regulations, including but not limited to, 2 CFR 200, in particular, 2 CFR 200.318-326, the Appropriations Act, the Federal Register Notice and applicable federal, state and local laws, rules and regulations. The procurement policies and procedures contained in the Manual are applicable to every procurement action under PRDoH CDBG-DR Programs and activities whether funded in whole or in part CDBG-DR funds.

HUD analyzed risks associated with the CDBG-DR grant to Puerto Rico and included additional grant terms for the Grantee. These additional terms imposed on Puerto Rico included an obligation of the grantee to develop and maintain policies and procedures outlining, amongst other things, procurement requirements to be submitted to HUD for approval. The procurement regulations and requirements established by the PRDoH in the Manual for the administration of CDBG-DR funds, which incorporate the mandates of 2 CFR 200.318-200.326, define, and outline the policies and procedures for all procurement requirements under the grant. The PRDoH, as the grant administering agency in charge of the administration of the CDBG-DR Program, has elected to adopt and impose these procurement policies and procedures for itself and all subgrantees and/or subrecipients when procuring property and services under the of the CDBG-DR grant.

There is significant importance for the distinction between state recipients and all other recipients in that states, including their agencies and instrumentalities, can follow state procurement law while disregarding federal requirements, while any and all other recipients must be fully compliant with the federal regulations.<sup>8</sup> Despite Puerto Rico being considered state under 2 CFR § 200.90, it was not allowed by HUD to simply follow Puerto Rico's procurement law. The additional terms imposed by HUD mandated Puerto Rico to adhere to stricter policies and procedures than it would customarily utilize for ordinary procurements, under state law.

### **III. ANALYSIS OF APPLICABLE LEGAL PROVISIONS TO PROCUREMENT PROCESSES UNDER THE CDBG PROGRAMS ADMINISTERED BY PRDOH**

Based on Act 73-2019, Regulation 9230 and 2 CFR 200, ASG has ordinary jurisdiction over PRDoH's procurement processes. However, exercising such jurisdiction with regards to the CDBG Programs would operate to the detriment of the purpose behind the CDBG fund

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<sup>8</sup> 2 CFR § 200.317.



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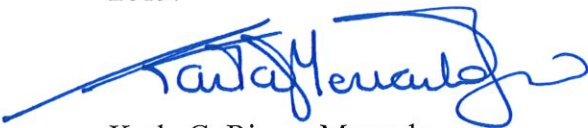


assignment. The Grant Agreement between HUD and the Government contains sufficient safeguards to guarantee compliance with Act 73-2019's public policy by imposing upon the grantee special obligations of compliance with 2 CFR 200. More importantly, the Grant Agreement between HUD and the Government specifically rejects Act 73-2019 in favor of federal laws and their safeguards. By virtue of this Grant Agreement, federal law *de facto* preempts state law and solely governs the CDBG Programs in Puerto Rico. Considering that the obligations undertaken by the Government in the Grant Agreements entered into with the Federal Government for CDBG Programs take precedence over the provisions of state laws, ASG notes the exclusion of the CDBG Programs administered by PRDoH from the processes established in Act 73-2019. Therefore, the State CDBG, CDBG-DR and CDBG-MIT Programs administered by PRDoH are excluded from the application of Act 73-2019.

In addition, PRDoH has several employees working exclusively on CDBG-DR Program issues that have been specifically trained to understand the particularities of the CDBG-DR Program, including full compliance with procurement processes that are specific to the CDBG-DR grant, which in turn includes all federal acquisition, procurement, and audit requirements. All work done by the PRDoH in the CDBG-DR administration Program (including, but not limited to, Action Plans, rules, regulations, procedures, personnel, training, procurement, procurement, auditing, etc.) has been implemented and performed in full collaboration with HUD, who has evaluated, commented on and approved all tasks performed by the PRDoH. Therefore, it is certainly reasonable to conclude that the stability of the CDBG-DR Program is better safeguarded by continuing the current Program under the supervision of the PRDoH, as envisaged, presented and approved by HUD.

#### IV. DETERMINATION

Since the obligations undertaken by the Government of Puerto Rico in the Grant Agreements entered with the Federal Government for CDBG Programs prevail over the provisions of state laws under the doctrine of the preemption and contracts as a source of law between contracting parties, ASG notes the exclusion of the CDBG Programs administered by PRDoH from the processes established in Act 73-2019. Any change to the CDBG Programs, as it they are being administered and currently executed by PRDoH, would have to be first submitted to HUD and approved by HUD prior to implementation. Therefore, the State CDBG, CDBG-DR and CDBG-MIT Programs administered by the PRDoH are excluded from the application of Act 73-2019.



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