Public Housing Notice: 2007-04

TO: All Local Housing Authorities
FROM: Carole Collins, Director, Bureau of Housing Management

RE: Commercial Marketing Agreements

DATE: June 25, 2007

In recent months, it has come to our attention that a number of local housing authorities either had or were considering signing agreements with Verizon which encompassed marketing access and sales promotion to public housing residents. The DHCD Office of the Chief Counsel has taken these proposed agreements under consideration and found a number of possible conflicts and implications that have lead to an opinion that it was inappropriate and possibly illegal for an LHA to enter into such an agreement with any commercial venture. The background for this decision is presented below. The primary findings of the analysis are that:

- We believe that it is improper and inappropriate for an LHA to assist a vendor to market products to its low income tenants even if the money and perks received in exchange are used for bona fide LHA purposes.
- If these agreements were entered into in violation of c. 30B and were not approved by DHCD as required, then they are void.

If you need further consultation regarding this matter, please contact our Office of the Chief Counsel at 617-573-1501.

General Background

DHCD has reviewed two different versions of the Marketing Agreements that Verizon would like to enter into with local housing authorities. These Agreements provide that the LHA will support Verizon's marketing of its fiber optical cable (internet, telephone, television) service to its tenants by distributing promotional materials, by posting advertising, by providing Verizon space to meet with tenants and by allowing Verizon to hold promotional events in common areas. The LHA is prohibited by the Agreement from marketing competitor's services. The concept itself, as well as the specific terms of the Agreements, raises troubling legal and policy issues.

Verizon will be getting something of value from the LHA in exchange for the remuneration it will pay to the LHA ($200 per unit fee, a computer and free service.) As a result of the LHA's marketing services, Verizon will get a very strong competitive advantage to sell LHA tenants its products through the access to the tenants provided by the LHA and by the apparent LHA endorsement of its products. It is questionable whether LHAs have the power or authority under c.121B to engage in marketing. The powers of LHAs are set out in c. 121B, ?11 and ?26, and there is nothing in those statutes that could be construed as authority for an LHA to enter into an agreement with a private company to sell or advertise its products.

Even if it could be found that an LHA has the power to enter into such a Marketing Agreement with a private company, both the Anti-Aid Amendment and the Credit Clause of the Mass. Constitution are implicated in providing state funded services and facilities to a private enterprise for less than fair market value unless it is for a public purpose. Selling one competitor's brand of cable TV, telephone and internet service is not a public purpose. It is not possible to tell what the fair market value of such marketing services is without a public procurement procedure. The Marketing Agreements may require a public procurement in accordance with c. 30B anyway, if they meet the dollar amount threshold, because they do not fall into any exception from that law.

If an LHA were to solicit bids or proposals for Marketing Agreements, there would be no rational basis for restricting the bid to telecommunications companies. Many types of private vendors could undoubtedly benefit from LHA marketing of their products. If this seems inappropriate, that is because the basic premise of LHA marketing to its tenants is flawed. Such marketing is designed to give the appearance to tenants that the LHA endorses a particular product or that the vendor's services are the preferred or exclusively available ones at the LHA, and this could constitute an unfair or deceptive trade practice which is a violation of state consumer protection law (c. 93A). Such marketing also raises serious questions under the state Conflict of Interest law (c. 268A, ?23) which would prohibit LHA employees from giving the appearance that the LHA may treat tenants differently depending upon whether they do business with Verizon or not.

Some of the specific terms of the Verizon Marketing Agreement would require the LHA to provide addresses of tenants in violation of the Fair Information Practices Act (c. 66A) and would also attempt to restrict the LHA from disseminating information which is a public record under c. 66. Even if this were not expressly stated in the Agreement, contractual terms requiring the LHA to ?cooperate? with Verizon in marketing its products may necessarily entail unlawfully providing Verizon with personal data of tenants.

Finally, most state-aided elderly/handicapped buildings have ?no solicitors? signs posted in their lobbies, and if the LHA consulted with local tenants organizations as required by the DHCD regulation at 760 CMR 6.09 (3)(g), it is extremely doubtful that the tenants would approve of a private vendor being given direct access inside their buildings by the LHA. It is not hard to envision situations in which low income elderly/handicapped tenants will be taken advantage of by high pressure in-home sales and the LHA justifiably will be held publicly accountable and legally responsible when such situations arise.

For all of these reasons, DHCD should prohibit LHAs from entering into Marketing Agreements with Verizon, or any other private vendor that wants to sell products or services to LHA tenants.