

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: University of California - Letter of Credit
Docket No. 80-83
Decision No. 139

DATE: December 24, 1980

DECISION

This case involves an appeal by the University of California (grantee) from a decision by the Deputy Assistant Secretary, Finance, Department of Health and Human Services (HHS), that the grantee owed to HHS the interest income attributable to premature drawdowns from its HHS Letter of Credit (LOC). The Deputy Assistant Secretary accepted the grantee's calculation of \$767,662 of interest income for the period July 1, 1976 through June 30, 1978, and also accepted the grantee's decision to defer consideration of an analysis of interest income for the period July 1, 1978 through June 30, 1979 pending a binding determination that the grantee must, in fact, turn over the interest to HHS.

There are no material issues of fact in dispute. We have, therefore, determined to proceed to decision based on the written record: the application for review, the relevant Audit Report (Audit Control No. 01025-09), pertinent correspondence between the parties, and the grantee's response to an Order to Show Cause issued by the Board Chair. The Agency was not required to respond to the Order and did not do so. For the reasons stated in the Order and below, we conclude that the decision of the Deputy Assistant Secretary should be upheld.

Applicable Law

Section 74.47(b) of Title 45 CFR, in accordance with the Intergovernmental Cooperation Act of 1968, provides that a state 1/ as defined in the Act is not accountable to the Federal Government for interest earned where the income is attributable to grants-in-aid. However, grants-in-aid as defined in the Act specifically exclude:

... (4) loans or repayable advances;... (6) payments under research and development contracts or grants which are awarded directly and on similar terms to all qualifying organizations, whether public or private; or (7) payments to States... as full reimbursement for the costs incurred in paying benefits or furnishing services to persons entitled thereto under Federal laws. 42 U.S.C. §4201(6).

1/"State" is defined in the Act to include any agency or instrumentality of a state, and the definition does not exclude an institution of higher education which is such an agency or instrumentality.
42 U.S.C. §4201(2).

Absent the exemption under the Intergovernmental Cooperation Act of 1968 for grants-in-aid to states, "grantees shall remit to the Federal Government any interest or other investment income earned on advances of HHS grant funds." 45 CFR 74.47(a).

Discussion

The Agency decision was based on audit findings that the grantee's withdrawal pattern from its LOC resulted in the grantee maintaining cash in excess of its daily needs. The auditors determined that the investment of the excess cash resulted in interest income, which was not credited to HHS. The Agency found that in such a situation the provisions in Section 74.47 of Title 45 of the Code of Federal Regulations require that the interest earned be remitted to the Federal Government. The grantee did not dispute the fact that it prematurely drew down from its LOC based on its daily needs for those programs covered by the LOC.

The grantee also did not dispute the applicability of the Intergovernmental Cooperation Act of 1968 or HHS's implementing regulations. In addition, the grantee did not dispute the Board's preliminary finding that the grantee is a "state" as defined in the Intergovernmental Cooperation Act of 1968, nor did it dispute the Board's preliminary finding that the interest income was attributable to specifically excluded items under the definition of grants-in-aid as defined in the Act. Based on the foregoing, the Board concludes that 45 CFR 74.47 requires the grantee to remit to the Federal Government the interest income earned on the premature drawdowns from its HHS LOC.

The grantee has argued that it would be inequitable to require payment of the interest income to HHS when in its total cash relationship with the U.S. Treasury, the grantee was in a creditor position. The grantee was essentially arguing that since the Federal Government owed it money, there could be no Federal cash available in the grantee's possession upon which interest could be earned. The grantee's characterization of the appeal is that "it concerns a major government contractor's/grantee's internal allocation of funds pending final determination of whether the Government and the Appellant are in a 'net debtor' or 'net creditor' position vis-a-vis one another." In support of its position the grantee cites three Comptroller General opinions for the proposition that, by virtue of 31 U.S.C. §71, the Federal Government has a duty to set off claims between a party and the Government so that only the balance is certified for payment or collection.

The grantee's characterization of the central issue in this appeal is incorrect. This appeal does not involve the grantee's internal allocation of funds. It involves the grantee's use of Federal grant funds, available through its LOC, in a manner contrary to the applicable Federal requirements. The factors cited by the grantee have no bearing on

its obligation to remit interest earned on advances of HHS grant funds under 45 CFR 74.47(a).

The Instructions to Recipient Organizations for Use of Letter of Credit (Instructions)^{2/} dated August 19, 1974 and reissued on September 3, 1976, to reflect procedural changes resulting from the implementation of the Departmental Federal Assistance Financing System, established the requirements for the proper use of the letter of credit. The Audit Report relied on provisions in these Instructions as a basis for their final recommendations. Since the grantee has not disputed this reliance nor that these Instructions were routinely distributed to grantees financed through a letter of credit including this grantee, we conclude the grantee had notice of the provisions contained in the Instructions.

The grantee regarded Federal funds it received from various sources as fungible. This is evidenced by the grantee's statement in the notice of appeal that "[t]o minimize the impact on University cash, the University considered any Federal cash on hand as being available to assist in these expenditure requirements." Such action is contrary to express provisions in the Instructions dealing with the relationship of the LOC to programs and projects.

Section XI(F)(1) of the Instructions provides that the LOC is a fiscal device to be used only in accordance with the grant authorization. Section XI (F)(2) provides that "[a]t no time should cash be drawn to cover unliquidated encumbrances, ... until actual program disbursements are made." Finally, § XI(F)(3) states that "[i]t is important that recipients use the cash draws for any given letter of credit only for the Federal share of disbursements against programs or projects covered by the letter of credit. To do otherwise results in improper charges to Federal appropriations." The grantee's use of grant funds from its HHS Letter of Credit to temporarily finance the cost of other Federal projects was improper under existing regulations and policy statements. The Board therefore rejects the grantee's argument as without merit.

Conclusion

For the reasons stated above, the decision of the Assistant Secretary, Finance, is upheld. As was stated in our letter of May 20, 1980, Board review is limited to the issue of whether the grantee failed

^{2/}These instructions implement Treasury Circular No. 1075 (Revised) as published in the Federal Register, February 27, 1973.

to discharge its obligation to account for direct, discretionary project grant funds. The Board at this time, however, does not have the necessary information to ascertain how much of the amount in dispute relates to direct, discretionary project grant funds. Therefore, the Board directs the parties to make a determination as to the amount involved. If the parties are unable to reach an agreement, the Board will entertain an appeal on the amount involved at that time.

/s/ Cecilia S. Ford

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle, Panel Chair