Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Beloved Community Family Wellness Center
Docket No. A-16-141
Decision No. 2961
August 1, 2019

DECISION

Beloved Community Family Wellness Center (Beloved) appealed the August 18, 2016 decision by the Health Resources and Services Administration (HRSA) disallowing $1,096,337.62 in costs charged to two grants for the period September 1, 2008 through September 30, 2013. HRSA disallowed $692,267.95 charged to Capital Development Grant No. C8ACS21347, and $404,069.67 charged to Health Care and Other Facilities Grant No. C76HF13331. The Departmental Appeals Board (Board) stayed the proceedings for an extended period at the parties' requests in order for Beloved to prepare and submit additional documentation for HRSA's review. On review of the supplemental submission, HRSA reduced the disallowance. HRSA further revised the disallowance based on additional information provided in Beloved's brief and appeal file. The final disallowance amount identified in HRSA's response brief and exhibits is $602,123.29, consisting of $3,052.67 charged to Grant No. C76HF13331, and $599,070.62 charged to Grant No. C8ACS21347.

For the reasons discussed below, we reverse the disallowance in the amount of $123,910.75 and sustain the disallowance in the amount of $478,212.54.

Applicable Authority

During the period for which the disallowance was taken, grants awarded by the United States Department of Health and Human Services (HHS) to nonprofit organizations were subject to the regulations at 45 C.F.R. Part 74, which incorporated the cost principles in Office of Management and Budget (OMB) Circular No. A-122 (codified at 2 C.F.R. Part

230, *Cost Principles for Non-Profit Organizations* (2005-2013)).[1] *See* 45 C.F.R. §§ 74.1(a)(1), 74.27. Under the cost principles, a cost is allowable under a federal award if, among other things, it is "reasonable for the performance of the award and . . . allocable thereto[.]" 2 C.F.R. Part 230, App. A ¶ A.2.a. Costs also must be "adequately documented." *Id.* ¶ A.2.g. "In determining the reasonableness of a given cost, consideration shall be given to," among other things, "[w]hether the cost is of a type generally recognized as ordinary and necessary for . . . the performance of the award." *Id.* ¶ A.3.a.

A grantee is "responsible for managing and monitoring each project, program, subaward, function or activity supported by the award." 45 C.F.R. § 74.51(a). The grantee must have a financial management system that provides for "[r]ecords that identify adequately the source and application of funds for HHS-sponsored activities"; "[e]ffective control over and accountability for all funds"; and "[a]ccounting records, including cost accounting records, that are supported by source documentation." *Id.* §§ 74.21(b)(2), (b)(3), (b)(7). The grantee must maintain documentation "to account for the receipt, obligation and expenditure of [grant] funds." *Id.* § 74.22(i)(1).

The "grantee bears the burden of documenting the existence and allowability of its expenditures of federal funds" under the applicable regulations and cost principles. *E.g., Touch of Love Ministries, Inc.*, DAB No. 2393, at 3 (2011). "Once a cost is questioned as lacking documentation, the grantee bears the burden to document, with records supported by source documentation, that the costs were actually incurred and represent allowable costs, allocable to the grant." *Northstar Youth Servs., Inc.*, DAB No. 1884, at 5 (2003) (citations omitted).

The Board is "bound by all applicable laws and regulations" when reviewing a disallowance. 45 C.F.R. § 16.14. Where a disallowance is authorized by law and the grantee has not disproved its factual basis, the Board must affirm the disallowance. *Touch of Love Ministries* at 3.

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[1] On review of a disallowance determination, the Board applies the regulations in effect during the period for which the disallowance was taken, in this case, the period September 1, 2008 through September 30, 2013. *See, e.g., Michigan Dep't of Soc. Servs.,* DAB No. 342, at 2 (1982); *Nebraska Health & Human Servs. Sys.,* DAB No. 1660 (1998). In December 2013, OMB consolidated the content of OMB Circular A-122 and other OMB circulars into a streamlined set of uniform administrative requirements, cost principles, and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. 78 Fed. Reg. 78,590 (Dec. 26, 2013). Effective December 26, 2014, HHS codified the text of 2 C.F.R. Part 200, with HHS-specific amendments, in 45 C.F.R. Part 75, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards." 79 Fed. Reg. 75,871, 75,875-876 (Dec. 19, 2014).

Case Background

1. The Grants

HRSA is an agency of the United States Department of Health and Human Services. HRSA awards and administers grants to health centers serving medically underserved populations pursuant to section 330 of the Public Health Service Act, 42 U.S.C. § 254b, and the regulations in 42 C.F.R. Part 51c.

Beloved is a nonprofit, Federally Qualified Health Center operating in the Englewood area of Chicago, Illinois, with a satellite location in Robbins, Illinois.

In July 2009, HRSA awarded $1,476,239 to Beloved for construction alterations and renovations to its Englewood health center under Health Care and Other Facilities Grant No. C76HF13331, authorized under the Consolidated Appropriations Act of 2008, P.L. 110-161, and P.L. 111-8. HRSA Ex. 1.[2] The Notice of Award (NoA) provided for a project and budget period from June 1, 2009 through September 30, 2009. *Id.*

In October 2010, HRSA awarded $2,229,815 to Beloved to construct an expansion to its Englewood health center and an adjoining parking lot under Affordable Care Act - Capital Development Grant No. C8ACS21347.[3] HRSA Ex. 2; Beloved Exs. 11, 115, 119; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10503, 124 Stat. 119, 1004 (2010). The NoA provided for a two-year project and budget period, from October 1, 2010 through September 30, 2012. HRSA Ex. 2, at 1. The NoA did not break out the approved budget costs by categories, but stated that the award was based on the application submitted to, and as approved by, HRSA. *Id.*; *see also* Beloved Exs. 11 (Budget Justification), 115 (Application). HRSA subsequently granted multiple, no-cost extensions for Beloved to complete the project. HRSA Response at 3.

The NoAs for both awards specified that each was subject to the authorizing grant program legislation, the terms and conditions of the award, HHS regulations governing grants to nonprofit organizations at 45 C.F.R. Part 74, and the HHS Grants Policy Statement (GPS). HRSA Exs. 1, at 1, 3; 2, at 1, 3.

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[2] The grantee name on the Notice of Award (NoA) was "Hektoen Institute, LLC/Beloved Community Family Wellness Center." HRSA Ex. 1, at 1. Hektoen Institute acted as Beloved's fiscal agent. HRSA Ex. 3, at 9.

[3] HRSA notes that the name on the NoA is "Capital Development Grants" and the name of the program on the funding opportunity announcement is "Facility Investment Program." HRSA Response at 2 n.2. "The latter program," HRSA says, "is a part of the Capital Development grants" program, and the "names may be used interchangeably." *Id.*

2. *The Incurred Costs Review*

After HRSA awarded the grants, HRSA project officers and grants management specialists raised concerns about whether Beloved was excessively drawing down grant funds, using improper procurement procedures, changing the scope of the projects without authorization from HRSA, claiming the same expenditures under multiple grants, and possibly non-compliant with statutory and regulatory requirements. HRSA Ex. 3, at 3. Consequently, HRSA conducted an incurred costs review of the grants (and two other awards) for the period September 1, 2008 through September 30, 2013, to determine: (1) if the claimed expenditures were allowable, allocable and reasonable; and (2) if the projects approved under the grants were completed within the applicable project periods and/or in accordance with the timeframes specified by the NoAs and program guidelines. *Id.* at 4-5.

The Incurred Costs Review Report, dated July 14, 2014, and finalized after Beloved reviewed and responded to a draft report, stated that Beloved "drew a total of $3,188,236 from" the Payment Management System (the online grants payment, cash management and reporting platform) "for the four grants under review." HRSA Ex. 3, at 8. According to the report, Beloved submitted documentation only for $2,548,828.10 in costs charged to the grants; there "was no supporting documentation submitted for the remaining $639,407.90[.]" *Id.* Of the $2,548,828.10 in costs for which Beloved did submit documentation, HRSA further found, $113,390 was unallowable because the costs were incurred outside the approved project period dates; $345,191.98 was unallowable because the costs were incurred outside of the approved project scope of activities; and $333,840.08 was unallowable because the costs were not necessary to achieve the purposes of the respective grants. *Id.* The report also concluded that Beloved did not have an adequate fund accounting system and failed to adequately monitor the work and performance of the general contractor hired for the parking lot construction, OCA Construction, Inc. (OCA). *Id.* at 10-12.

The report concluded that $692,691.73 of the costs charged to Grant No. C8ACS21347 were unallowable and $517,459.67 of the costs charged to Grant No. C76HF13331 were unallowable. HRSA Ex. 3, at 8-9.

3. *The Disallowance Determination*

By letter dated August 18, 2016, HRSA notified Beloved that on review of the Incurred Costs Review Report findings and recommendations, Beloved's responses to the report, and additional documentation provided by Beloved, HRSA determined that Beloved "did not provide supporting documentation to substantiate . . . $1,096,337.62 in questioned costs," consisting of $692,267.95 for Grant No. C8ACS21347 and $404,069.67 for Grant No. C76HF13331. HRSA Ex. 4, at 1-2; *see also* Beloved Exs. 118, 119 (HRSA June

2016 Audit Resolution Summary Spreadsheet). HRSA further determined that Beloved: (1) did not provide "evidence to show that it implemented processes that would ensure federal grant expenditures [were] adequately documented and readily available for audit"; (2) did "not have an adequate fund accounting system"; and (3) "failed to adequately monitor the work and performance of its contractor" (though corrective actions in response to the finding were "sufficient to effectively monitor projects and prevent future occurrences of noncompliance"). HRSA Ex. 4, at 2, 3. HRSA therefore directed Beloved to refund $1,096,337.62 to HHS. *Id.* at 3. The disallowance letter also advised Beloved of its right to appeal the determination to the Board pursuant to 45 C.F.R. Part 16. *Id.* at 4.

4. Board Proceedings

Beloved timely appealed HRSA's decision to the Board. The Board subsequently stayed the proceedings for Beloved to gather and submit additional documentation for HRSA's review. Based on the additional documentation, HRSA determined that $240,438 of the previously disallowed costs were allowable, revising the disallowance to $855,899.62. *See* Revised Allowable/Unallowable Costs Summary, Sept. 15, 2017 (Excel Format); Revised Unallowable Costs Summary dated October 5, 2017 (PDF Format). Following the stay, HRSA requested that the Board consolidate this case with Board Docket No. A-16-104, Beloved's appeal of HRSA's decision to terminate Grant No. C8ACS21347. The Presiding Board Member denied the request for consolidation on consideration of the parties' arguments. After establishing a revised briefing schedule, the Board granted multiple requests by the parties to extend the deadlines for their submissions.

Beloved's brief and appeal file included additional information and documentation relating to some of the disallowed costs.[4] Based on HRSA's review of the submission, HRSA further revised the total disallowance amount to $602,123.29, consisting of $3,052.67 in costs charged to Grant No. C76HF13331, and $599,070.62 in costs charged to Grant No. C8ACS21347. HRSA Response at 7; HRSA Ex. 7. HRSA Exhibit 7 is a chart that lists the remaining disallowed costs by line item. It "includes HRSA's explanation for each remaining disallowance, grouped into the major categories of disallowances . . . ." HRSA Response at 7.

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[4] In its opening brief, Beloved requested a Board conference pursuant to 45 C.F.R. § 16.10 and a hearing pursuant to 45 C.F.R. § 16.11. The Board directed Beloved to notify the Board no later than the time for filing its reply brief if it was requesting a conference, an evidentiary hearing, or a combined proceeding, and to identify, among other things, why such proceedings were necessary. *See* Board Orders dated June 28, 2018, and September 7, 2018. In its reply brief, Beloved stated it no longer requested an in-person proceeding, and the Board has determined that a conference or hearing is not needed to reach a decision.

Analysis

Beloved makes general arguments for reversing the entire disallowance, and sets out a "point-by-point response" relating to specific disallowed cost categories and items. Beloved Br. at 2 ¶ 9. We first address the general arguments (section 1), and then the arguments concerning the specific disallowed cost categories and items (section 2). As we explain in section 2, some of the disallowed amounts are allowable and, accordingly, we reverse the disallowance determination in part and uphold it in part. In sum, we determine that a total of $123,910.75 is allowable and that a total of $478,212.54 is unallowable.

1. We reject Beloved's arguments that the disallowance should be reversed because its fiscal agents previously approved all of its payments and because its annual audits did not find any questionable costs.

Beloved asserts generally that the disallowance should be reversed because its fiscal agents, "Hektoen Institute and/or Title Services[,] approved all payments, which included invoice support and waivers of lien where appropriate." Beloved Br. at 2 ¶ 7. Beloved also asserts that "the annual audits for the period disclosed no findings of questioned costs," Beloved Br. at 2 ¶ 8, referring to the independent annual audits of Beloved's financial statements conducted pursuant to the Single Audit Act Amendments of 1996, 31 U.S.C. §§ 7501-7506 (Single Audit Act). The Single Audit Act provides, with certain exceptions not applicable here, that a non-federal entity whose annual expenditures of federal grant funds exceed a specified threshold must undergo an annual financial and compliance audit of its programs to determine, among other things, whether the entity has complied with the applicable laws, regulations and award terms. 31 U.S.C. § 7502(a)(1)(A), (e).

Beloved's general arguments are not persuasive. "It is a fundamental principle of grants management that a grantee is required to document its costs" and bears the "burden of demonstrating the allowability of costs for which funding was received." *Nw. Tenn. Econ. Dev. Council,* DAB No. 2200, at 9 (2008) (citing *Tex. Migrant Council* and other decisions); 45 C.F.R. §§ 74.50-74.53; 2 C.F.R. Part 230, App. A ¶ A.2(g). Thus, notwithstanding a fiscal agent's opinion, Beloved bears ultimate responsibility for complying with the applicable award requirements and returning any federal funds used for unallowable expenditures. Moreover, a grantee's reliance on the opinion of a fiscal agent does not render unallowable charges allowable, nor is it a basis to estop the federal government from recovering overpayments for unallowable costs. *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 64-66 (1984) (participant in Medicare had duty to familiarize itself with legal requirements for payment and acquaint itself with the nature of and limitations on the role of fiscal agent).

Furthermore, Beloved's prior annual audits for the period at issue do not bar HRSA from later conducting an incurred costs review and disallowing unauthorized costs. The Board previously has explained that the "failure of a prior auditor to identify" problems discovered subsequently "may be regrettable, but cannot serve to invalidate [a] disallowance." *Ne. La. Delta Cmty. Dev. Corp.*, DAB No. 2165, at 8 (2008). Moreover, the Single Audit Act expressly provides for a federal agency to conduct or arrange for additional audits and evaluations of federal awards and does not "limit the authority of any . . . other Federal official." 31 U.S.C. § 7503(c). Thus, even if an independent auditor previously audited Beloved's awards and did not question the costs at issue, HRSA was authorized to conduct the incurred costs review and issue a disallowance for unallowable expenditures. *Cf. Galveston Cnty. Cmty. Action Council, Inc.,* DAB No. 2514, at 11 (2013) (Inspector General audit on which disallowance was based did not violate Single Audit Act).

Accordingly, Beloved's general arguments do not establish a basis for reversing the disallowance.

2. Based on our review of the record, we reverse the disallowance in part and uphold it in part.

Below, we address Beloved's point-by-point arguments relating to specific categories and items of disallowed costs, explaining how we resolve each of the expenditures identified in HRSA's revised disallowance of $602,123.29. HRSA Br. at 4, 7; HRSA Ex. 7. We group the costs using the categories in the parties' submissions. Each category of costs consists of one or more line items (some including multiple costs) in HRSA Exhibit 7, which we identify individually where appropriate.

A. Parking Lot Contractor and Permit Costs - Grant No. C8ACS21347

VENDOR/PAYEE	DESCRIPTION	AMOUNT
Beverly Asphalt Paving Company	Asphalt Repairs	$8,250
Kingdom Community Construction, LLC	General Contractor	$34,449
Kingdom Community Construction, LLC	Project Manager	$7,292.50
City of Chicago – Permits	Permits	$497
Midwest Fence Corp.	Fencing	$11,005
	Total	$61,493.50

HRSA Ex. 7, at 3, 6, 7 (Line Items 17, 21, 44-46); HRSA Response at 7-8; *see also* HRSA Ex. 3, at 11-12.

On June 20, 2011, Beloved entered into a contract with OCA to construct the parking lot for the capital development project. Beloved Ex. 1. The contract price of $248,462.74 included payment for fencing, concrete, and asphalt, as well as payment and performance bonds. *Id.* at 8, 10, last page. The contract listed "City permit and all related fees" among "Other items that will be needed – fees not included." *Id.* at last page. In 2012, the parties executed a change order to the contract, which provided for, among other things, construction of a carport for Beloved's van, iron gates, and grading and crushed stone for a temporary parking lot. Beloved Ex. 5; Beloved Reply at 2-3. The revised contract price was $325,701.75. *Id.* Disputes subsequently arose between Beloved and OCA, leading to a lawsuit in 2012. The parties ultimately entered into a settlement to resolve the dispute. Beloved paid OCA $277,510, and Beloved retained Kingdom Community Construction, LLC to repair and complete the work started by OCA. Beloved Ex. 17; Beloved Ex. 100, at 3; Beloved Reply at 3 (citing Beloved Exs. 109, 110, 113).

HRSA disallowed the claims for the additional contractor and permit payments as "duplicative costs" charged to the grant due to Beloved's "lack of oversight over" the administration of the contract with OCA. HRSA Response at 7; HRSA Ex. 7, at 3, 6, 7. To support the disallowance, HRSA relies on 45 C.F.R. § 74.47 (Contract administration), which provides:

> A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

HRSA also relies on 45 C.F.R. § 74.41, which provides in part that the grantee is the "responsible authority" with regard to "the settlement and satisfaction" of contractual issues arising out of procurements entered into in support of an award. HRSA Response at 8. HRSA asserts that Beloved paid OCA for work and permits even though Beloved found defects with OCA's workmanship and performance. "Since OCA was paid for their work with grant funds . . . which were claimed and allowed under the grant because the work was completed for approved activities under the grant program," HRSA says, the payments to the other contractors "to replace the defective work are not only duplicative, but reflect (1) a lack of monitoring of the original contractor to ensure conformance with the contract and (2) an assumption of costs by the Federal government for dissatisfaction with contractor performance." *Id.* (citing 45 C.F.R. §§ 74.41, 74.47).

Beloved asserts that under the settlement with OCA, Beloved ultimately paid OCA less than the full contract price. According to Beloved, most of the parking lot construction costs that HRSA disallowed were for work contemplated under the grant, and it paid for most of the work "out of savings that Beloved realized when it terminated OCA." Beloved Reply Br. at 2-3. According to Beloved, it "obtained a substantially reduced price [from OCA] because of the shoddy work." *Id.* at 2. Beloved asserts that "all but $13,301.75 that HRSA seeks to disallow was paid for out of savings that Beloved realized when it terminated OCA and hired other contractors to complete the work in a satisfactory manner." *Id.* at 3.

We conclude that Beloved did not maintain a system for contract administration that ensured OCA complied with the parking lot contract terms, conditions and specifications, but we reject HRSA's characterizations of the payments to the other contractors, and we conclude that $48,191.75 of the disallowed parking lot contractor and permit costs are allowable. In its grant application, Beloved said that the administrative structure for overseeing the capital development project would consist of participants operating "as a team, with the Board of Director[]s holding ultimate responsibility," while Beloved's Executive Director would have "daily oversight of the project and report[] to the Board." Beloved Ex. 115, at 11. In addition, Beloved stated that it would hire a project manager (a trained architect) to be on the job site approximately 3 days per week. *Id.* Addressing how Beloved would deal with any unexpected difficulties, the application stated that the project manager would address day-to-day issues and would "bring more significant issues to the weekly progress meetings with the Contractor and staff." *Id.* at 13-14.

By Beloved's own account, the project manager it hired to oversee the parking lot construction "failed to attend mandatory scheduled meetings and was dismissed." Beloved Ex. 100, at 3. We hold Beloved accountable for the project manager's failure to monitor OCA's work, however, because it is a grantee's responsibility to ensure that it hires competent, reliable employees. *E.g. Rural Day Care Ass'n of Ne. N.C.*, DAB No. 1489, at 2, 115 (1994), *aff'd, Rural Day Care Ass'n of Ne. N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 20, 1995). Furthermore, while Beloved says that it hired a replacement project manager who timely addressed OCA's poor performance, Beloved provided no notes, communications or reports showing that any project manager monitored the parking lot construction. HRSA Ex. 100, at 3. Rather, Beloved produced copies of e-mails between its Executive Director and OCA showing that it was a City of Chicago Department of Transportation Inspector who brought to Beloved's attention that OCA had not properly installed the driveway entrance. Beloved Ex. 9. These e-mails, as well as City of Chicago ordinance violation tickets, show that OCA did not have the requisite permits for the driveway construction. Beloved Exs. 8, 9. Had a project manager sufficiently monitored OCA, one would reasonably expect the requisite permits to be timely secured and defective work corrected prior to city inspection.

While we agree with HRSA's conclusion that Beloved failed to adequately monitor OCA, we reject HRSA's description of OCA's work as "completed for approved activities under the grant program" and HRSA's characterization of the disallowed contractor and permit costs as "duplicative" of payments made to OCA. HRSA Response at 8. The record shows that OCA's work was defective and incomplete because the parking lot would not pass city inspection without repairs. Beloved Exs. 100, at 3 ("OCA's defective work had to be remediated"); 6 (photos of parking lot entrance not meeting city codes and redevelopment to meet codes); 8 (notices of City of Chicago ordinance violations). The disallowed contractor and permit costs therefore were not duplicative – that is, payments for the very same work for which OCA was paid – but payment for additional work that was necessary to remediate OCA's defective workmanship and to complete the parking lot. In other words, the additional work was necessary to fulfill the objective of the grant at the time the work was provided.

As stated above, the applicable cost principles provide that a cost is allowable under a federal award if, among other things, it is "reasonable for the performance of the award and . . . allocable thereto[.]" 2 C.F.R. Part 230, App. A ¶ A.2.a. Under the circumstances presented here, we conclude that the negotiated price of $325,701.75 under the final OCA contract for the construction of the parking lot represents a reasonable, fair market price for the services and items identified in the final contract. Because Beloved ultimately paid OCA a total of $277,510,[5] which was $48,191.75 less than the final contract price, $48,191.75 of the payments made to other contractors to remediate OCA's defective work and complete the parking lot represent allowable costs, properly documented and charged to the award. *See* Beloved Exs. 7 (payment to Beverly Asphalt), 10 (payment to Midwest Fence Corp.), 11 (budget justification, including line items for site work, construction, and contingencies), 17 (Kingdom Construction contract), 21 (Payment to Kingdom Construction, 31 (payment to City of Chicago for driveway permit).

Accordingly, we conclude that $48,191.75 of the questioned parking lot contractor and permit costs is allowable and we revise the disallowance amount to $13,301.75.

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[5] HRSA initially disallowed $21,370 in payments by Beloved to OCA on the ground that the amount represented "Legal Settlement with the existing contractor." BCFWC Revised Unallowable Costs Summary dated September 15, 2017, Item 115; *see also* HRSA Ex. 3, at 12. Beloved subsequently asserted that the "payment was for actual work performed" Beloved Appeal File Spreadsheet, Item 217, and provided source documents to support its claim; HRSA thereafter allowed the payments. HRSA Ex. 7, Item 51.

B. Electronic Medical Records (EMR) System Costs - Grant No. C8ACS21347

VENDOR/PAYEE	DESCRIPTION	AMOUNT
Illinois Primary Healthcare Association	EMR System Licenses	$16,575
Debra Wilkinson-Bailey	EMR Implementation Specialist	$43,458.40
Sandra Han	EMR Implementation Specialist	$41,544.18
Net-Telligence Group, Inc.	Installation of EMR system	$2,112
Professional Dynamic Network	Installation, set up and Implementation of EMR system	$19,945
	Total	$123,634.58

HRSA Ex. 7, at 4, 6, 7, 8, 9 (Line Items 23, 43, 48, 53-60, 65).

HRSA disallowed the above-listed costs on the ground that the funding opportunity announcement (FOA) for the capital development award, FOA HRSA-10-029,[6] "did not list the installation, set-up, and implementation of electronic medical record systems as allowable costs, and the only costs allowed for these [electronic health records systems] were for site licenses for 'currently operational systems . . . .'" HRSA Response at 9; *see also* HRSA Ex. 5, at 37 & n.11. Accordingly, HRSA says, "the costs claimed are unallowable because they are not necessary for the performance of the award." HRSA Response at 9.

[6] Beloved's grant application shows that Beloved applied for funds under "Program Announcement Number: HRSA-10-029," "Program Name: [American Recovery and Reinvestment Act] Facility Investment Program," Catalog of Federal Domestic Assistance Title "ARRA – Health Center Integrated Services Development." Beloved Ex. 115, at 1, 3, 5; *see also* HRSA Ex. 5 (FOA HRSA-10-029). Title VIII of ARRA, the American Recovery and Reinvestment Act of 2009, Public Law No. 111-5, made funding available "for grants for construction, renovation and equipment, and for the acquisition of health information technology systems, for health centers…receiving operating grants under section 330 of the [Public Health Service] Act[.]" The NoA for Grant No. C8ACS21347, HRSA Ex. 2, at 1, 3, shows that Beloved applied for funding through FOA HRSA-11-134 and that the authorizing legislation for the award was the Patient Protection and Affordable Care Act of 2010, Title X, Section 10503, P.L. 111-148, however. HRSA states that "Announcement Number 10-029 and Announcement 11-134 (the FOA number listed on the NoA for [Beloved's] FIP grant) are for the same grant opportunity but for a subsequent round of funding." HRSA Response at 8 n.5.

Beloved argues that the prohibition in the FOA relates only to site licenses, not to the development, set-up and implementation of a new EMR system. Beloved Reply at 7 (quoting HRSA Response at 8-9; HRSA Ex. 5, at 37 & n.11). Beloved concedes in its reply brief that the $16,575 payment to Illinois Primary Healthcare Association "was for practice management provider licenses" and is therefore unallowable. Beloved Reply at 8. Beloved asserts that other EMR system costs were necessary for the performance of the award and not of the type excluded under the FOA or in HRSA's guidance. Beloved Reply at 7-8; Beloved Ex. 100, at 13 (quoting Beloved Ex. 27, at 3 (HRSA FAQs stating that costs related to electronic health records **ongoing** operations and maintenance cannot be supported with Health Infrastructure Investment Program funds)). Beloved relies on its grant application narratives to show that the grant was awarded in part to purchase and implement a replacement EMR system, not ongoing operations. Beloved Reply at 7.

With respect to payments to Debra Wilkinson-Bailey and Sandra Han, Beloved asserts that it sought approval from its HRSA project officer to "use construction funds to bring an individual on board to assist with the development and implement[ation]" of the "EMR system." Beloved Ex. 100, at 13 (citing Beloved Ex. 48 (E-mail asking whether use of capital grant funds for training staff on EMR system would "be a problem")). When the project officer did not respond by e-mail, Beloved says, it followed up with a phone call and was given oral approval "to charge all consultant services related to the EMR system implementation to this grant." Beloved Ex. 100, at 13. With respect to the Professional Dynamic Consultants costs and $825 of the Net-Telligence Group costs, Beloved asserts that the payments were for the installation, set-up and implementation of the EMR system and paid from contingency line-item 13 of its budget. Beloved Ex. 100, at 15, 16; Beloved Ex. 11.

The Board has long emphasized that under the cost principles, grantees are "permitted to use federal funds only for the allowable costs of performing the activities for which the grant was awarded." *Ne. La. Delta Cmty. Dev. Corp.*, DAB No. 2165, at 7 (citation omitted). And, to be allocable, costs must be "of benefit to the activities *for which the grant was awarded*." *Id.* at 7-8 (emphasis in original). Costs also must be "adequately documented." 2 C.F.R. Part 230, App. A ¶ A.2.g. The Board has "consistently held that it is a fundamental principle of grants management that a grantee is required to document its costs, and that the burden of demonstrating the allowability . . . of costs for which funding was received rests with the grantee." *Rincon San Luiseno Band of Mission Indians*, DAB No. 1826, at 2 (2002); *see also Benaroya Research Inst.*, DAB No. 2197, at 3 (2008) (citing cases).

The record here establishes that the activities for which Beloved's grant was awarded included the purchase and implementation of a new EMR system. The October 6, 2010 NoA, which established the terms and conditions of the award and the federal funding limits, provided that the grant was "based on" the "application submitted to, and as

approved by HRSA," and it did not indicate that HRSA disapproved any part of the application. HRSA Ex. 2, at 1. Beloved's grant application plainly stated that the purpose of the award was, in part, to "improve[e] efficiency by **implementing a computerized medical practice management/EMR system** . . . ." Beloved Ex. 115, at 5 (Section 1. Purpose) (emphasis added). Beloved said that it needed the system because it had "outgrown it[s] current medical practice management and paper medical records system," which was "very slow and interfere[d] with timely care and patient flow," frustrating "the patients, providers and staff." *Id.* at 12-13 (Section 4. Need). The application also specified that "[Facility Investment Program] funds will allow [Beloved] to upgrade its medical practice management system and implement an electronic medical record system (EMR)." *Id.* at 13 (Section 5. Implementation and Monitoring). Furthermore, in describing how the grant project would benefit its health center and patients, Beloved's application stated that the new "EMR system will improve efficient and effective services," and that an "upgraded patient registry will keep track of our current quality indicators and provide reminders on regular bases for patients whose indicators are not up to date." *Id.* at 27. "Our system," Beloved said, "will allow us to improve patient compliance and outcomes and enhance the quality of care[.]" *Id.* Thus, Beloved's approved grant application made clear that the grant project included purchasing and implementing a new EMR system.

Furthermore, we reject HRSA's contention that the FOA precluded Beloved from charging the reasonable costs of installing, setting-up, and implementing the EMR system to its award. To support its contention, HRSA relies on Appendix 1 of the FOA, which set out instructions for applicants to complete a budget information form and specifically identified site licenses for currently operational certified electronic health records as an allowable, "miscellaneous" cost. HRSA Ex. 5, at 37 & n.11. Section I of the FOA, which described the overarching purposes of the funding legislation, stated that one of the statute's objectives was the "acquisition of health information technology systems." HRSA Ex. 5, at 5. We therefore conclude that it was reasonable to presume that acquisition of an EMR system was one of the forms of capital development that was eligible for funding under the funding opportunity. Hence we do not view the FOA instruction that prospective grantees could include in their project budgets the costs of site licenses for currently-operational certified electronic health records systems as a general prohibition on the use of award funds to set-up and implement a new EMR system.

While Beloved has established that the costs of developing, installing and implementing the EMR system were necessary for the performance of the award, Beloved provided sufficient documentation for only some of the disallowed charges. Beloved furnished invoices with sufficient detail and cancelled checks supporting the entire $19,945 in claimed payments to Professional Dynamic Network. Beloved Ex. 35. We therefore

reverse the disallowance for the payments to Professional Dynamic Network. Beloved also produced an invoice and cancelled check with sufficient detail to support $825 of the claimed payment to Net-Telligence Group. Beloved Ex. 34. We therefore revise the disallowance for the claimed Net-Telligence Group payment to $1,287, and we reverse the disallowance for $825 of the claimed payment.

Beloved did not produce sufficient documentation to support the charges to the award for the claimed EMR-related services furnished by Ms. Wilkinson-Bailey and Ms. Han. Beloved characterizes Ms. Wilkinson-Bailey and Ms. Han as "consultant[s] paid out of payroll," but did not provide invoices, a contract, or any other documentation to show what services these individuals actually provided. Beloved Reply at 8. The only documentation that Beloved furnished to support the claimed payments to Ms. Wilkinson-Bailey and Ms. Han are redacted 2013 IRS W-2 Forms showing Beloved as employer and Ms. Wilkinson-Bailey and Ms. Han as employees. Beloved Exs. 116, 117. The compensation amounts paid to the individuals are redacted, however. *Id.* Beloved's Appeal File Spreadsheet, which identifies supporting documents associated with each disallowed items includes the notation, "Please advise if you desire payroll records" for the Wilkinson-Bailey and Han disallowances. Appeal File Spreadsheet Line Items 65, 289.

The applicable cost principles provide that costs of professional and consultant services are allowable under certain circumstances when rendered by *persons who are not employees* or officers of the grantee organization and when reasonable in relation to the services rendered. 2 C.F.R. Part 230, App. B ¶ 37. *See also Kan. Advocacy & Protective Servs.*, DAB No. 2079, at 12-13 (2007) (and cases cited therein), *aff'd sub nom. Disability Rights Ctr. of Kan., Inc. v. Leavitt*, No. 07-2333-JTM, 2009 WL 395212 (D. Kan. Feb. 18, 2009). As reflected in the W-2 forms provided by Beloved, Ms. Wilkinson-Bailey and Ms. Han worked as employees of Beloved. The cost principles further provide that charges to an award for employee salaries and wages must be based on documented payrolls meeting multiple criteria. 2 C.F.R. Part 230, App. B ¶ 8(m)(1). Among other things, the grantee must maintain reports showing the distribution of activity of each employee whose compensation is charged, in whole or in part, directly to awards. *Id.* ¶ 8(m)(2). Beloved did not provide any such documentation to support the claimed payments to Ms. Wilkinson-Bailey and Ms. Han. We therefore deny the claimed costs associated with these two persons.

Accordingly, we sustain the disallowances of $16,575 for payments to Illinois Primary Healthcare Association, $43,458.40 for payments to Debra Wilkinson-Bailey, and $41,544.18 for payments to Sandra Han. We reverse the disallowance of $19,945 for the payments for services provided by Professional Dynamic Network. We revise the disallowance for the Net-Telligence Group payment to $1,287, and we reverse the disallowance for $825 of the claimed payment.

C. Mortgage Payoff - Grant No. C8ACS21347

VENDOR/PAYEE	DESCRIPTION	AMOUNT
U.S. Bank	Mortgage	$180,000

HRSA Ex. 7, at 10 (Line Item 73).

During the incurred costs review, Beloved submitted a list of expenditures to HRSA to support costs claimed under Grant No. C8ACS21347. HRSA Ex. 6; HRSA Response at 9. The list included an entry showing: Vendor, U.S. Bank; Description, Mortgage; Amount, $180,000.00; Invoice Date, January 3, 2011; Invoice Number, 1924-06; Check date, January 3, 2011; Check Number 4285. HRSA Ex. 6, at 3. The Incurred Costs Review Report concluded that the expenditure was unallowable because Beloved provided no supporting documentation for it. HRSA Ex. 3, at 9, 18. HRSA subsequently disallowed the mortgage payment in its August 18, 2016 disallowance determination and on further review. Beloved Ex. 119 (Audit Resolution Review Spread Sheet Line 68); HRSA Ex. 7, at 10.

Beloved argues that it produced the U.S. Bank "invoice . . . in error" during the incurred costs review and that it "did not draw down Federal funds to cover this cost." Beloved Ex. 100, at 23. Beloved further contends that "HRSA seeks this disallowance based on pure conjecture" and "provides nothing to show that any grant money was used to make this payment." Beloved Reply at 9. Beloved also produced documents that it calls "the relevant draws . . . covering the relevant time frame." *Id.* (citing Beloved Exs. 107, 108, 109). The documents, titled "Disbursement Ledger[s]" and identified as "Draw #7," "Draw # 8," and "Draw # 9," appear to be JPMorgan Chase bank account disbursement ledgers accompanied by related invoices, lien waivers and cancelled checks. Beloved argues that these records "make it clear that grant funds were not, in fact, used to make this payment" because none of them show a payment was made to U.S. Bank for $180,000. Beloved Reply at 9.

Beloved mischaracterizes the basis for the mortgage cost disallowance and misunderstands the parties' respective burdens. The Board has long held that in "an appeal of a federal agency's disallowance determination, the federal agency has the initial burden to provide sufficient detail about the basis for its determination to enable the grantee to respond." *Me. Dep't of Health & Human Servs*., DAB No. 2292, at 9 (2009), *aff'd, Me. Dep't of Human Servs. v. U.S. Dept. of Health & Human Servs*., 766 F. Supp. 2d 288 (D. Me. 2011). "If the federal agency carries this burden, which is 'minimal,'

then the non-federal party must show that the costs are allowable." *L.A. Cnty. Dep't of Pub. Health*, DAB No. 2842, at 6 (2018) (quoting *Mass. Exec. Office of Health & Human Servs.*, DAB No. 2218, at 11 (2008), *aff'd, Mass. v. Sebelius*, 701 F. Supp. 2d 182 (D. Mass. 2010)).

Furthermore, "[o]nce a cost is questioned as lacking documentation, the grantee bears the burden to document, with records supported by source documentation that the costs were actually incurred and represent allowable costs, allocable to the grant." *Northstar Youth Servs., Inc.*, DAB No. 1884, at 5 (2003) (citations omitted). As explained above, grantees such as Beloved are required by regulation to maintain such records. *See* 45 C.F.R. §§ 74.21(b)(2), (b)(3), (b)(7), 74.22(i)(1) (grantees must maintain documentation to account for receipt, obligation and expenditure of grant funds and must have financial management system that provides for records that identify adequately the source and application of funds and accounting records supported by source documentation). "Being able to account for the expenditure of federal funds," the Board has long held, "is a central responsibility of any grantee." *Recovery Res. Ctr., Inc.*, DAB No. 2063, at 12-13 (2007) (citations omitted).

With respect to the disallowed mortgage payment to U.S. Bank, HRSA carried its burden to provide sufficient detail about the basis for its determination to enable Beloved to respond. HRSA's disallowance of the mortgage payment was not "based on pure conjecture," but on documentation submitted by Beloved during the incurred costs review and the finding that Beloved failed to produce source documentation covering all of the federal funds that it drew down for the grants under review. HRSA Ex. 3, at 8 (stating that Beloved "drew a total of $3,188,236 from the [Payment Management System] for the four grants under review; however, documentation submitted by [Beloved] totaled only $2,548,828.10").

Beloved has not carried its burden to reverse the $180,000 disallowance for the mortgage payment made to U.S. Bank. While Beloved contends that it did not use capital development grant funds or other federal funds to make the mortgage payment, it has failed to explain and document how it spent the $180,000 that it drew down from the payment management system which remains unaccounted for. Furthermore, Beloved has not explained how the funds that it drew down from the Payment Management System may be compared with the time periods and amounts identified on the "Disbursement Ledgers" or "draws" produced in this appeal. Absent such an explanation, we have no basis to conclude that Beloved did not use federal funds to make the mortgage payment. Moreover, since Beloved does not deny that it made a $180,000 mortgage payment to U.S. Bank, it is Beloved's responsibility to identify and document the source of the funds used for that expenditure.

Accordingly, we sustain the disallowance of $180,000.

D. Legal Fees – Grant No. C8ACS21347

VENDOR/PAYEE	DESCRIPTION		AMOUNT
Ice Miller	Legal Fees		$136,893.94
Foley & Lardner	Legal Fees		$63,086.34
		Total	$199,980.28

HRSA Ex. 7, at 5, 6 (Line Items 31-42).

Professional services costs, including the costs of legal services, are generally allowable under the applicable cost principles "when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government." 2 C.F.R. Part 230, App. B ¶ 37.a.[7] The GPS provides that the costs of legal services are generally allowable, but before "a recipient incurs legal costs that are extraordinary or unusual, the recipient should make an advance agreement regarding the appropriateness and reasonableness of such costs with" the grantor agency. GPS at II-35. "Legal costs incurred in defending or prosecuting claims, whether equitable or monetary," however, "are unallowable charges, except as provided in the applicable cost principles." *Id.* "While legal expenses may be allowable charges to a federal grant program," the Board previously stated, "they must, like all charges, be necessary and reasonable for the proper administration of the program." *Ala. Comm'n on Aging,* DAB No. 1411, at 5 (1993).

HRSA disallowed multiple claimed payments to Ice Miller totaling $136,893, and one claimed payment to Foley & Lardner in the amount of $63,086.34, on the ground that allowable costs under FOA HRSA-10-029 "included General, Administrative and Legal fees," but "capped" these fees "at 10% of the total project cost." HRSA Response at 10 (citing HRSA Ex. 5); HRSA Ex. 7, at 5-6 (Line Items 31-42). HRSA stated that "the legal fees, along with other General and Administrative costs charged to the grant exceeded 10% of the total project costs," and "the legal fees exceeded [Beloved's] approved budget of $60,000 for legal fees." *Id.*

[7] Paragraph 37 also provides that legal and related services are limited under the circumstances described in 2 C.F.R. Part 230, App. B ¶ 10, which are not applicable here.

Beloved concedes that three of the claimed payments to Ice Miller "ought not have been billed to the grant and were done so in error." Beloved Ex. 100, at 18 (citing Beloved Ex. 47, Check 4607 ($4,007), Check 4639 ($5,000), Check 4914 ($4,147)); *see also* HRSA Ex. 7, at 5-6 (Line Items 32, 33, 38). Beloved also says that it previously claimed incorrect amounts for some of the other payments made to Ice Miller for construction-related legal fees. Beloved Ex. 100, at 18.

Beloved asserts, however, that its approved budget for legal fees was $60,000, and that it submitted invoices and checks demonstrating that it incurred more than $60,000 for allowable construction-related legal services. Beloved Reply at 10 (citing Beloved Ex. 11, at 2, Line 1; Beloved Ex. 46); *see also* Beloved Ex. 100, at 18. "At the very least," Beloved says, "the first $60,000 of the fees accounted for in Exhibit 46 should not be disallowed." Beloved Reply at 10. While apparently conceding that the legal fees paid to Foley & Lardner were unallowable, Beloved asserts that the payment to Foley & Lardner was not $63,086.34 (the amount identified by Beloved during the incurred costs review), but $4,767.90, as shown on the cancelled check that it submitted on appeal. Beloved Ex. 100, at 18; HRSA Ex. 6, at 3; Beloved Ex. 47. "The disallowance HRSA seeks for this check, therefore, is $58,318.44 too much," Beloved says. Beloved Reply at 10. According to Beloved, the total disallowance of $199,980.28 for legal fees "should be reduced by the sum of $60,000" that was in the approved budget for legal fees and "$58,318.44 for the excessive disallowance" and that the total disallowance for legal fees "should be $118,318.44 less than the amount claimed by HRSA, or $81,661.84." *Id.*

Based on Beloved's approved application budget and the language of the FOA, we conclude that Beloved was authorized to charge up to $60,000 in construction-related legal fees to the capital development award. Beloved's approved application budget allocated $353,950 for administrative and legal expenses, and its budget justification identified $60,000 of that amount for legal expenses, providing: "Legal services will be on-going throughout the construction project; it is estimated that 300 hrs. service at a rate of $200 per hour at a cost of $60,000." Beloved Ex. 11, at 1, 2. Furthermore, we reject HRSA's contention that the FOA capped allowable administrative and legal fees at 10% of total project costs. HRSA Response at 10. The relevant provision of the FOA did not impose an absolute limit but simply provided guidance, stating: "*Generally*, administrative and legal expenses should be less than 10% of total project costs." HRSA Ex. 5, at 34 (emphasis added).

On review of the invoices and cancelled checks submitted by Beloved in its appeal file, we find sufficient documentation to support only the following allowable construction-related legal services costs:

INVOICE	CHECK	CONSTRUCTION-RELATED FEES
780064	4699	$2,000
794011	4768	$2,709
1200862	4841	$11,784
1195790	4892	$1,519.50
1214229	4922	$15,229.50
1210209	4922	$2,790
1221229	5139	$1,980
1206122	5139	$9,724.50
1236695	5191	$4,587.50
	Total	$52,324

Beloved Exs. 46; 100, at 18. Accordingly, we reduce the disallowance for legal fees by $52,324 based on Beloved's approved project budget allowance for legal services and the documentation of allowable construction-related legal services payments in Beloved's appeal file.

We reject Beloved's claims for additional Ice Miller legal fees in the amounts of $19,447, associated with invoice 1217516, and $6,286 associated with invoice 1226742, because the invoices show that the billed services included unallowable litigation costs and did not separately identify the costs of the litigation and non-litigation services. For example, the list of "Real Estate Construction Project" services in invoice 1217516 includes multiple hours billed for "conferences and follow up relating to complaint against OCA," "Prepared complaint," "Revised complaint," and "Revised letter to OCA regarding suit filed." Beloved Ex. 46, at 28-29.

We also reject Beloved's claim that the disallowance relating to legal fees paid to Foley & Lardner should be reduced from $63,086.34 to $4,767.90 because the check Beloved said was associated with the payment amount was written for the lesser amount. Beloved Reply at 10 (citing Beloved Ex. 47). As HRSA explains, while the check to Foley & Lardner produced by Beloved shows payment in the amount of $4,767.90, Beloved claimed that it paid the larger amount on the spreadsheet that it provided HRSA during the incurred costs review "as substantiation for grant funds drawn" from the Payment Management System. HRSA Response at 10. Beloved has not provided alternative documentation or explanation to substantiate how the $58,318.44 of funds drawn down from the payment management system were otherwise used for allowable costs.

Accordingly, we revise the disallowance for legal fees to $147,656.28.

E. Deposits/Contingencies – Grant Nos. C76HF13331 and C8ACS21347

VENDOR/PAYEE	DESCRIPTION		AMOUNT
Beloved Community Wellness Center	Deposits		$3,052.67
City of Chicago	Deposits		$22,885
		Total	$25,937.67

HRSA Ex. 7, at 3 (Line Items 16, 19).

HRSA disallowed the foregoing costs on the ground that deposits are not allowable expenses "but are assets on the books of the payer until consumed." HRSA Response at 10-11 (citing OMB Circular A-122, codified at 2 C.F.R. Part 230, to be allowable, an expense must be recognized as an expense under Generally Accepted Accounting Principles). HRSA asserts that Beloved provided no documentation indicating that these deposits were consumed and expensed, or returned. HRSA Response at 11.

Beloved concedes that the $22,885 payment to the City of Chicago was an unallowable deposit and that $7.67 of the $3,052.67 identified as "Beloved Community Wellness Center Deposits" was for an unallowable "Owner's contingency." Beloved Reply at 11. Beloved asserts that the remaining payments grouped under the category of "Beloved Community Wellness Center Deposits" were for allowable payments in the amounts of $2,625 to ComEd to establish an account and $420 to People's Gas for "Rate 2 – General Service – Heating." Beloved Reply at 11 (citing Beloved Exs. 44, at 3-5, 8; 100, at 27; 104, at 1, 5, 11).

On review of the documentation submitted by Beloved, we find that the documented payment of $2,625 to ComEd was partial payment on an existing balance of over $7,800 in electric utility charges which ComEd evidently required of Beloved to permit Beloved to pay off the balance in installments. Beloved Ex. 44, at 3-5. We further find that the payment of $420 to People's Gas was a deposit for which Beloved did not provide documentation showing that the cost was consumed or expensed. Beloved Exs. 44, at 8; 104, at 10.

Accordingly, we sustain the disallowances for the $22,885 payment to the City of Chicago, $7.67 for the unallowable "Owner's contingency," and the $420 deposit payment to People's Gas. We reverse the disallowance of $2,625 for the payment to ComEd.

F. Uncontested Costs

Beloved concedes that the following charges are not allowable:

- $1,581.30 City of Chicago - Fines
- $3,200 DuSable Construction Co.
- $6,295.96 No invoice

Total $11,077.26

HRSA Ex. 7, at 3, 4, 7 (Line Items 22, 26, 49).

Beloved Reply at 11. Accordingly we sustain the disallowances for these costs without further discussion.

Conclusion

For the foregoing reasons, we reverse the disallowance in the amount of $123,910.75 and sustain the disallowance in the amount of $478,212.54.

/s/

Christopher S. Randolph

/s/

Leslie A. Sussan

/s/

Susan S. Yim
Presiding Board Member