

DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education, and Welfare

SUBJECT: Southern University
Baton Rouge, Louisiana
Grant No. OEG-6-71-0468
Docket No. 29
Decision No. 24

DATE: June 29, 1976

DECISION

This case involves a grant for the conduct of an Emergency School Assistance program dated March 1, 1971 and expiring February 28, 1972.

Two items of cost have been challenged. First, grantee had claimed indirect costs at the rate of 14.5 percent of total direct costs or \$25,640.34 instead of 40 percent of direct salaries and wages or \$14,350.84. The indirect cost agreement negotiated November 10, 1971 clearly sets forth a final rate for the period July 1, 1968 through June 30, 1971 at 40 percent of direct salaries and wages and a pre-determined rate for the period July 1, 1971 through June 30, 1972 at the same 40 percent rate. This covers the period of the grant. We rule against grantee on this issue.

Second, the grantee entered into a contract with Essential Resources, Incorporated, to perform a series of tasks related to the performance of vaguely described services related to the grant program. The contract did not have prior written approval and was not within the scope of the budget approved in writing by HEW. Grantee appears to have relied in good faith on oral representations made by persons it believed to be authorized spokesmen of HEW but these persons did not in fact have such authority. This conclusion is not challenged by the Regional Commissioner. Specific elements of the fact background are taken here from an affidavit incorporated in grantee's appeal and not challenged by the Regional Commissioner.

Grantee submitted four successive proposals. The second was apparently the only one actually approved by someone authorized by HEW to do so. After that proposal was submitted an unidentified person instructed the University according to the affidavit submitted to meet two "representatives from HEW in Washington, D. C." in New Orleans. One of these was a Mr. Paul Walsh who was reasonably taken under the circumstances of the meeting and later meetings to be an HEW employee but is

nowhere shown to have had any authority to deal with this matter. The University representative met Walsh in New Orleans. Walsh was unaware that a second proposal had been submitted. He instructed the University representative to submit two readjusted budgets. The first readjusted budget was to pad the line items by \$45,000. The second was to be submitted only after the first was approved and was to transfer the padded amount to the External Evaluation and Special Consultants categories to cover a contract with ERI, selected by Walsh over the University's objection. The first budget was orally "approved" by a phone call from an unidentified caller at Prarieview, Texas. The second budget was then submitted and the University reluctantly entered into the contract with ERI, having been threatened that all its grants would be frozen if it failed to do so. Walsh later appeared with HEW personnel at a Regional conference on HEW grants held at Southern University.

Several circumstances should have combined to trigger skepticism on the part of the University as to the authority claimed. The alleged HEW spokesman, in a crucial meeting, was uninformed as to the status of the case on which he purported to give instructions. The contract the alleged spokesman asked to have incorporated in the project was one the University knew was worthless. The University's reliance under the circumstances was therefore questionable. Moreover, the alleged spokesman specifically directed the University to misrepresent its proposal and budget by deliberately padding its budget and then submitting an amended budget after approval was obtained. This direction to misrepresent should have alerted the University to the questionably official character of the direction received.

The contract with Essential Resources, Inc., would appear to be a service contract under Article 19 of the applicable grant conditions and required advance written approval which grantee did not have.

The situation facing grantee is a harsh one since it appears to have acted in good faith and to have been misled by misrepresentations of persons it thought were authorized to speak for the Department. Sympathy for grantee's plight is, however, not sufficient to warrant our setting aside of the disallowance determination of the appropriate Regional Office.

Reliance on oral approvals and understandings creates several risks for grantee and grantor. Grantee may misrepresent what was said orally; grantee may have misunderstood what was said orally; grantee may have been misled by unauthorized representations which can more readily and with less risk be made orally than in writing. The OE grant requirements were for written approval by the grant officer. This requirement is a protection not only to OE but also to grantees who are thereby warned that they require a writing to protect themselves. Grantee's failure to obtain written approval in this case has created a loss for which grantee and not HEW was responsible and, with recognition of the harshness of the result, we rule against the grantee.

CONCLUSION

Accordingly, the appeal is rejected on the issue of the Essential Resources contract for failure of the grantee to have complied with provisions of Article 19 of the applicable grant conditions requiring advance written approval, and, on the issue of indirect cost, because of the controlling effect of the indirect cost agreement negotiated November 10, 1971.

/s/ Francis D. DeGeorge

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman