DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education, and Welfare

SUBJECT: St. Landry Parish School Board
Opelousas, Louisiana
Grant No. OEG-6-72-0556
Audit Control No. 06-40026
Docket No. 75-4
Decision No. 17

DATE: May 28, 1976

DECISION

This appeal involves Emergency School Assistance Program (ESAP-II) grant assistance for special community activities.

On February 27, 1975 the Regional Commissioner, Office of Education, Region VI, disallowed two items of expense which had been questioned in an audit report, namely, Contracted Services, $726, in the absence of a prior approval, and Salaries, $18,544, found to violate the no supplant provisions.

The letter of disallowance advised the grantee that the decision may be appealed to this Board in accordance with the provisions of 45 CFR Part 16. Grantee appealed by letter dated March 25, 1975. Francis D. DeGeorge, then Chairman of the Board, accepted jurisdiction of the matter and the case was referred to the Agency involved for comment which was received. Thereafter, in an effort to complete the file and to narrow the issues, the Executive Secretary wrote to both parties outlining the facts and issues as they appeared from the file and invited both parties to brief any issues in the case and, without limitation, to address nine specific questions that appeared to be raised by the file. The parties' responses addressed the nine specific questions but substantially failed to brief other issues raised by the Executive Secretary's letter.

Both parties agreed without material comment, except as noted below, that the Executive Secretary's summary of the facts and issues is not in any material respect inaccurate or incomplete.

The Regional Commissioner, however, in his response takes the position that the Emergency School Assistance Program is not included in the list of programs in the Appendices to 45 CFR Part 16 and states: "It would appear, therefore, that subject grantee does not have the right of appeal." As noted above, the Regional Commissioner and the then Chairman of the Board both made the preliminary judgment that the grantee did have a right to appeal. The programs with current authority to make grants listed in the Appendices are subject to change from day to day as program authorizations may be added by legislation and old ones may expire or be replaced. The Appendices are a useful checklist but it is not possible nor was it contemplated that they should constitute a definition of the Board's jurisdiction which, instead, is defined in 45 CFR 16.2 and applies so far as is relevant to: "(1) Any program which authorizes the making of direct discretionary project grants..." Since the program in question involves a direct discretionary project grant and the decision appealed from was made after the effective date of the Board's Charter, the grantee does have the right of appeal to this Board.

Contracted Services -- $726

The applicable regulations contain two separate provisions which the parties separately point to as controlling. The grantee entered into an agreement with a consulting firm for consultant services in connection with an Office of Education review during December 1971 and billed for the services of two consultants, a total of 40 hours at $15 an hour, plus travel and overhead, a total of $726. Each consultant worked a maximum of six hours in one day. (We construe the $100 per day rule, in analogy to the rule governing Federal consultants under 5 U.S.C. 3109(b), as applying to maximum compensation in any one day rather than as equivalent to a rate of $12.50 per hour.)

The grantee contends that these services are governed by the General Terms and Conditions of the Emergency School Assistance Program, Article 26, entitled Use of Consultants. This provision requires prior written approval only for the use of and payment to consultants whose rates will exceed $100 a day. There appears to be in other cases no requirement for prior written approval but the requirements are that hiring and payments shall be in accordance with applicable state and local laws and regulations and grantee policies and that grantee must maintain a written report for the files on the results of all consultations charged to the grant. This report must include as a minimum

the consultant's name, date and amounts charged to the grant,

the names of the grantee's staff to whom the services are provided,

and the results of the subject matter of the consultation.

The Agency does not contend that the provisions of Article 26 have not been complied with. It contends instead that the applicable provision is not Article 26, but Article 18, captioned Service Contracts. This provision requires that contracts for the provision of part of the services under the grant by agencies or institutions other than grantee shall be specified in the projec proposal or in an amendment thereto and the proposed contract submitted to the grants officer for his written approval. Assuming the applicability of this paragraph, no substantive reason has been indicated (although we asked) why after the fact approval would not have been meritorious. The Agency's position is that since the regulations do not provide for retroactive approval of subcontracts, it would not be possible to approve such subcontracts at this time. There is no occasion to decide this question of the validity of retroactive approval under the terms of Article 18 and OE regulations generally. The essential issue is whether the consultant contract is a service contract.

The essential thought involved in Article 18 is that the grantee is responsible for the services to be provided with Federal funds. To assure that the grantee does not, in delegating its functions, abdicate its responsibility, Article 18 provides with care for specification of the intention to make such delegations in the project proposal or in an amendment and requires approval of the contract in writing by the grants officer. Additionally, it requires explicit incorporation, in the contract delegating such services, of the grant terms and other rules and regulations applicable to the program and provisions, assuring that the grantee will retain supervision and administrative control over the provision of services under the contract. As applied to services provided by the grantee to the public this section serves an appropriate and important purpose. It does not make sense, however, if applied to consultant services rendered not to the beneficiaries but to the grantee itself nor would it make sense as applied to other services rendered in the grantee's own housekeeping function, such as contracted janitorial services.

The reasonable reading of these provisions is that Article 3 governs delegated functions servicing the public, remedial nd other services to meet the special needs of children in chools which are affected by desegregation plans, special ervices for gifted and talented children, guidance, ounseling, and other pertinent services for pupils, and other ervices central to the purpose of the grant. Article 26 indeendently governs consultant services rendered to the grantee. f there were doubt of this result, the existence of separate rovisions tends to confirm this view and the grantee should not e held responsible for a lack of clarity for which the draftsman r the administrator is responsible.

The program officer wrote to the grantee advising it that all subcontracts, whether they be with a university, universities, onsultant firms, contractors, or many other areas, must be pproved in writing by the contracts officer in Dallas before ney are legal and binding under the ESAP-II grant you are operating this year." (June 23, 1972).

Both parties, however, expressly agree that this letter does ot affect the legal requirements and does not add to the requirements of the general terms and conditions.

The grantee asserts that the consultants were used in conection with evaluation, an item specifically written into the roject and the approved budget. Thus, the relevant part f Article 18, if it were considered applicable at all, is not he provision for specification in the project proposal, but the equirement that the contract itself be submitted in advance for pproval.

As we have previously noted in Point Park College, Docket o. 75-12, Decision No. 16, requirements for advance approval hen not mandatory are nevertheless frequently abused in grant dministration. Their unnecessary proliferation should not be ncouraged and in case of doubt advance approval requirements ot plainly warranted by the nature of the case should not be ead into ambiguous provisions. See 45 CFR 74.150. Compare pararaph 1 of Attachment O to OMB Circular A-102 and to proposed ircular "A-102 1/2" 34 CFR Part 258, 40 FR 6304, 6311 (February 10, 975). In this case the advance approval requirement of Article 18 s not applicable by a reasonable construction of the intended scope f Article 18 nor by the underlying purpose which 18 serves. The ommon sense of the situation is plainly served by the application f Article 26 and the contrary reading is not only unfair to a

rantee who appears to have acted in good faith in an altogether easonable reading of the regulations but constitutes the mposition of a burdensome requirement not serving the basic urposes of the program or good grant administration.

alaries -- $18,544 (No Supplant Provision)

Maintenance of effort and no supplant clauses in varying orms have been part of Federal grant program statutes and egulations since the middle 1930's. No supplant clauses very imilar in wording to those now in use have been incorporated n statutes since the 1960's. With varying emphases the basic urpose of those requirements is to preclude use of Federal unding as a device by which the grantee unilaterally divests tself of a continuing responsibility in a field of activity hich the Federal Government by its grant program intends to ssist but not assume full responsibility for.

Several years ago this entire subject was carefully tudied by the Grants Administration Advisory Committee and y the Department.

So far as relevant it may be fair to sum up the results f this extensive inquiry as indicating that the maintenance f effort form of clause has fairly objective testable meaning hich relates to the overall level of grantee expenditures in he field in question as compared with a base period. The o supplant clause, while directed at essentially the same goal, as seen to be less objective, less testable and intended not o much for rigorous enforcement on fiscal audit as for a sub- tantial compliance test and an advance planning basis. That s to say, the no supplant clause is appropriately applied at he outset of a program to require budgeting that shows a con- inued or increased level of effort, to require assurances by he grantee of good intentions in this respect, to require substantial compliance and good faith. But it does not intend nd is not susceptible of meticulous item by item enforcement n fiscal audit.

The OE Title I Audit Hearing Board in the Appeal of the State of Nebraska, Title I, ESEA (Docket No. 8-(10)-74) con- sidered a contention by the State that the term supplanting as ambiguous and its interpretation not free from doubt. The Hearing Board concluded that there was not any reasonable doubt in a case in which projects conducted by local education agencies, entitled to reimbursement from State funds for a portion of certain costs, were instead financed wholly with Title I funds (¶¶ 15-17).

Although no supplant clauses have continued to flourish, hey have not been given sharper meaning either by clarification f the statutory language or by substantially more specific egulations, and we have not had any response from the Regional ommissioner to our inquiry as to whether the no supplant clause s sufficiently clear to be enforceable in the present context.

Against this background we may examine the terms of the o supplant clause involved in the present case.

The no supplant rule applicable to the ESAP is contained n the Office of Education Appropriation Act of 1971, PL 91-380. t contains two elements:

> "...no part of the funds contained herein shall be used...(b) to supplant funding from non-Federal sources which has been reduced as the result of (1) desegregation or (2) the availability of funding under this head;..." (numbering added).

In fact, funding from non-Federal sources steadily increased during the grant period (August 1971 - February 1973) from the level prior to grant award. Total instructional salaries funds from non-Federal sources in the four schools now in question (omitting Grolee Elementary School in which supplanting is conceded) increased as follows:

1970-71	1971-72	1972-73
$861,609	$946,376	$973,753

Total expenditures for the entire system increased:

1969-70	1970-71	1971-72	1972-73
10,384,932	$13,203,092	$15,348,369	$17,921,619

Since funding from non-Federal sources was not reduced but increased, it is obvious that no part of the grant funds was used to supplant funding from non-Federal sources reduced as the result of desegregation or reduced as the result of the availability of the grant funding.

The statutory test is amplified by the regulations issued to effectuate it, 36 Fed. Reg. 16546, 16548 (45 CFR 181.6(a)(4)). These regulations require from the grantee certain assurances.

The first is that the Federal funds made available under the program will be so used as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be available to the applicant from non-Federal sources for purposes which meet the requirementsof the program, and in no case to supplant such funds.

The significant elements of this test are first, that it clearly deals with level of funding, not with individual expenditures, and second, that it deals with a necessarily hypothetical test ("funds that would, in the absence of such Federal funds, be available for purposes which meet the requirements of the program") and thus does not invite or contemplate hard comparisons but only general indications of good faith. This reliance on general indications is consonant with the spirit of the Memorandum of Understanding between OEO and HEW with respect to this program which was conducted, in part, under a delegation from OEO:

> "...measures shall be taken to assure compliance with the provisions of section 225(c) of the [Economic Opportunity Act of 1964] relating to non-Federal share and maintenance of effort. In view of the fact that this is an emergency program designed to aid school districts which have for the most part already firmed up their budgets for the coming school year, it is understood that HEW may desire to waive the formal non-Federal share requirements otherwise imposed by section 225(c) and to rely instead on the school districts' general commitment to the purposes of the program."

The second assurance required is that Federal funds made available under the program will not be used to supplant funds which (a) were available to the applicant from non-Federal sources prior to the implementation by the applicant of an order or plan for desegregation and (b) have been withdrawn or reduced as a result of desegregation. Since in fact there has been no reduction of funds as a result of desegregation, this test is not violated.

We do not believe it was the intention of OE to impose the test which the Regional Contracting Officer seeks to apply. If it was, contrary to our understanding, OE's intent to do so, and assuming without deciding that it legally could have done so under the statute, then it was the responsibility of OE to make the test intended adequately explicit rather than the responsibility of the grantee to divine an intent nowhere communicated in the regulations.

We therefore hold that the applicable statutory and regulatory tests prohibiting the supplanting of funds have not been violated. This is not a determination concerning the no supplant rule in other contexts, where the statutory test may be different, the regulations different, and the character of the program different. The decision is reached on the basis of the explicitly emergency nature of the program, the specific statutory test and the specific regulatory amplification.

Conclusion

It is therefore concluded that the Board has jurisdiction.

With respect to the grantee's use of consultants, the grantee properly relied on Article 26 of the General Terms and Conditions which expressly deals with the use of consultants and which does not require prior approval before employing consultants at less than $100 a day as is here the case. The Regional Contracting Office has misapplied Article 10 of the General Terms and Conditions dealing with services contracts which we construe as applying to contracts to perform a significant part of the services to the public affected contemplated by the grant and not to contracts for services to the grantee, and particularly not to consultant contracts which are separately governed by Article 26. To the extent that there is doubt about this conclusion, the general rule that an ambiguity should be construed against the drafter should be applied.

With respect to the question of supplanting, we find that the Regional Contracting Officer is relying on too narrow a concept of what constitutes supplanting and that there is no charge of supplanting in the sense which we consider appropriate. To the extent that the concept of supplanting contains an ambiguity, it is the responsibility of the Government if it wishes to enforce a concept of

supplanting contains an ambiguity, it is the responsibility of the Government if it wishes to enforce a concept of supplanting as narrow as this, to state it (if indeed this may be done consistently with the statutory intent) much more clearly than it has as yet done.

The appeal is sustained on both items.

/s/ David V. Dukes

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman