

DEPARTMENTAL GRANT APPEALS BOARD

The Department of Health, Education, and Welfare

SUBJECT: The Regents of the University of California
(Campus Computing Network at the University of California, Los Angeles)
Audit Control No. 40004-09
Docket No. 75-3
Decision No. 25

DATE: June 30, 1976

DECISION

This is an appeal from a determination of the Regional Director, Region IX, dated January 10, 1975, concerning proposed recharge rates for the Computer Center at University of California at Los Angeles. These rates provide the basis for allocating to individual federally supported research agreements the costs of a central computer system. Cf. University of California at San Diego, Docket No. 23, Decision No. 13.

The case turns on an interpretation of the documents and the applicable grant rules which are essentially those of OMB Circular No. A-21, FMC Circular 73-8 and the HEW Guide for Colleges and Universities and 45 CFR Part 74, primarily §C.5 and J.37 of A-21 and corresponding provisions of the other documents cited.

On June 5, 1956, the University and the International Business Machines Corporation (IBM) established under joint sponsorship the Western Data Processing Center (WDPC). IBM paid half the cost of the building housing WDPC or \$400,000, whichever was less, over a ten year period. The agreement ran for 10 years from completion of the building in July 1958 or until July 1968. IBM installed certain computer equipment at no charge and made it available for four hours a day for the exclusive use of the University and four hours a day for exclusive use of other participating colleges and universities, retaining eight hours a day for IBM's exclusive use. IBM also agreed to reimburse the University for about half of the operating costs. This was a cooperative arrangement in which the partners shared the costs and both received benefits.

In April 1967 by mutual agreement the WDPC agreement due to expire in 1968 was cancelled. The computing facility in the School of Engineering and WDPC merged to form the present Campus Computing Network (CCN). As part of the 1967 agreement, IBM ceased active participation in the operation and management of computing services at the University and ceased paying the share of costs of operation.

On June 23, 1967, IBM proposed to provide to the University an equipment use grant of equipment superior to that supplied to WDPC in the form (Plan A) of supplying free use of a System 360/Model 75 at no charge continuing until a Model 91 is installed and ready for use or until March 31, 1972, whichever occurs first. After installation of the Model 91, IBM proposed to provide the University with the opportunity to share equally with IBM the use of the Model 91 until March 31, 1972.

Alternatively (Plan B), IBM proposed to provide the University with a credit to the Monthly Availability Charge in the amount of \$74,624. on the Model 75 System "or any other IBM leased equipment which the University chooses to install," effective April 1, 1967 and continuing until March 31, 1972. On June 30, 1967 the University elected Plan B. The monthly credit was equal to the then-current monthly availability charge of the Model 75 configuration initially contemplated, net of the usual educational discount.

The present dispute involves the character of this monthly credit. For the entire period involved, the credit comes to \$3,358,153. Based on the average annual Federal use, estimated by the Regional Office at 42 percent and by the University at 31 percent, the effect of this disputed amount on the recharge rate comes to over a million dollars a year.

IBM offered the University a choice between (1) a straight donation of the use of the Model 75 at no charge and (2) a credit of the full then-current Monthly Availability charge for the Model 75 net of educational discount. The University chose to purchase the equipment, receiving a credit against the cost. Although there are some differences between the two transactions, in essence they are substantially the same and no clear argument has been offered to justify different treatment.

The essential question at issue is whether we have, on the one hand, two separate transactions, namely, an acquisition of equipment (rental of the Model 75 followed by purchase of the Model 91) and a separate donation of approximately \$75,000 a month, or on the other hand, two inter-related transactions namely, acquisition of the equipment and a credit of approximately \$75,000 a month, which must be set off against each other in determining the true allowable cost of the equipment.

The Regional Office treated the transaction as governed, at least by extension, by the rules applicable to costs supported in part by a federal government grant. We do not accept that view, but do accept the Regional Office's more general analysis of the transaction as involving an applicable credit.

The Regional Office view that the transactions are interrelated and reflect an applicable credit is confirmed by the words in which the entire proposal was expressed, namely, "IBM will provide to University at its Los Angeles Computing Center an equipment use grant" and again by the words in which Plan B was expressed, namely, "IBM will provide University with a credit to the Monthly Availability Charge in the amount of \$74,624 on the Model 75 system or any other IBM leased equipment which the University chooses to install." The donation is clearly tied to the acquisition of the equipment and clearly characterized as a credit. Although the terms of the agreement confirm that the transaction is properly treated as an applicable credit, the result would not be avoided had the agreement been phrased differently since it is the substance of the relationship that counts.

This is further confirmed by the University's initial bookkeeping entries which it now repudiates as incorrect. These recognized the equipment use credit as a reduction of computer center costs. The University submits in support an affidavit which, however, has no factual content, but merely expresses an opinion on the ultimate issue in dispute. We are not bound to accept and do not accept the affidavit's characterizations of the bookkeeping showing a credit as "erroneous."

It is further confirmed by the terms of a proposal to the National Science Foundation for a grant which described the transaction as involving "a rental credit of \$74,624 per month from IBM towards support of IBM computing equipment on campus." The University's brief seeks to neutralize this expression as referring merely to an accounting procedure. The same proposal states that the "rental-credit support... results in a reduction of computer costs."

The acquisition of the Model 91 was contemplated from the beginning since IBM's proposal expressly stated (Plan A) that the Model 75 was to be provided at no charge "until such time as IBM System 360/Model 91 is installed and ready for use or until March 31, 1972, whichever event first occurs... when an IBM 360/Model 91 is installed...IBM will, at its own expense, remove the Model 75..." The University chose Plan B which was not explicitly tied to the purchase of the Model 91, but it proceeded to purchase it and IBM continued to provide the monthly credit.

The University's effort to translate the transaction into one involving cash payments by IBM to the University for unrestricted use and wholly independent of the acquisition of computer equipment out of which it arose and to which it was expressly tied is ingenious but not convincing. The University points out that the term "applicable credit" does not have a rigorously precise definition. That is so, but a rigorously precise definition is neither practical nor necessary. The term is reasonably clear and reasonably includes the present transaction. The University has not sustained the burden of persuading us that the transaction can realistically be split into two independent parts as it seeks to do.

The appeal is well prepared, fully documented and elaborately argued. The Regional Director's response is persuasive. No material facts appear to be in dispute.

CONCLUSION

The appeal is rejected on the ground that the transaction involved an applicable credit against the rental of the Model 75 and against the purchase price of the Model 91.

It remains necessary for further negotiations to take place concerning certain costs and certain possible duplications which the University asserts and the Regional Office concedes must be considered (Regional Office Response to Appeal pages 19-20 and Response to Order to Show Cause). No stay of this decision is required pending such negotiations.

/s/ Francis D. DeGeorge

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman