

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Council for the Spanish Speaking, Inc.

Docket No. A-16-33

Decision No. 2718

June 30, 2016

DECISION

Council for the Spanish Speaking, Inc. (Council), a nonprofit corporation that operates Head Start and Early Head Start programs in Milwaukee, Wisconsin, appeals the November 23, 2015 determination by the Administration for Children and Families (ACF) to disallow \$554,013 in federal funding relating to four ACF awards (05CH8290/01, 05CH8290/02, 05CH8320/01, and 05SA8290/01). ACF disallowed the funds on review of the Council's financial reports and Department of Health and Human Services (HHS) Payment Management System (PMS) accounts, which showed that the Council drew down award funds exceeding the federal share of its reported, allowable expenditures for each of the four awards. On appeal, the Council does not deny that ACF correctly identified \$554,013 in unallowable costs for the four awards. Rather, the Council seeks to reduce the disallowance amount by offsetting \$163,311.48 allocated to a fifth award, 05SA8290/02, which the Council alleges it was owed but that it did not draw down from the PMS.

For the reasons discussed below, we affirm the \$554,013 disallowance and we deny the Council's request to reduce the remittance amount. ACF's November 23, 2015 determination related to unallowable expenditures of funds drawn down for awards 05CH8290/01, 05CH8290/02, 05CH8320/01, and 05SA8290/01. By seeking to reduce the disallowance amount with funds allegedly owed in connection with the fifth award, 05SA8290/02, the Council in effect seeks to charge costs allocable to the fifth award to the four other awards, which had different funding periods or different funding sources and objectives. As explained below, the governing regulations and cost principles do not permit an award recipient to shift costs allocable to one award to other awards with different funding periods or different funding sources and objectives.

Legal Background

The Head Start program is authorized under the Head Start Act, 42 U.S.C. § 9831 *et seq.* During the period at issue here, ACF approved a recipient's Head Start program for a multi-year or indefinite "project period" but funded the program with discrete awards

corresponding to specific “funding periods” (sometimes called “budget periods”). *See, e.g.,* ACF Ex. 1; 45 C.F.R. § 74.25(a); *Action for a Better Cmty., Inc.*, DAB No. 2014, at 2 (2007). The term “funding period” is defined as “the period of time when Federal funding is available for obligation by the recipient.” 45 C.F.R. § 74.2. The term “obligations” refers to “the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the [grantee] during the same or a future period.” *Id.* The standard award notice specifies the applicable funding period and the approved budget for that period, with a schedule of cost items and corresponding amounts to which the federal funds may be applied.

A Head Start grantee must (with some exceptions not relevant here) comply with the grant administration requirements in 45 C.F.R. Part 74.¹ 45 C.F.R. § 1301.10. In turn, the Part 74 regulations require a nonprofit recipient of a federal “award” (a term that includes a grant) to comply with Office of Management and Budget (OMB) Circular A-122, titled “Cost Principles for Non-Profit Organizations.”² *Id.* §§ 74.2, 74.27(a). Head Start grants are also subject to the terms and conditions in the HHS Grants Policy Statement (GPS) (available at <http://www.acf.hhs.gov/discretionary-post-award-requirements>, last visited June 22, 2016).³

The Part 74 regulations require grantees to comply with standards of financial management. 45 C.F.R. §§ 74.20, 74.21. Among other requirements, grantees must have financial management systems that provide “[a]ccurate, current and complete disclosure of the financial results of each HHS-sponsored project” and “[e]ffective control over and accountability for all funds,” ensuring that funds “are used solely for authorized purposes.” *Id.* § 74.21(b)(1), (b)(3). Grant closeout procedures require

¹ Effective December 26, 2014, Part 74 of Title 45 of the Code of Federal Regulations was superseded by the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards” published in 45 C.F.R. Part 75. *See* 79 Fed. Reg. 75,872, 75,875-76 (Dec. 19, 2014). We cite to the Part 74 regulations because they were in effect during the award periods at issue here.

² Until 2014, OMB Circular A-122 was codified in Appendices to 2 C.F.R. Part 230. *See* 70 Fed. Reg. 51,910 (Aug. 31, 2005); 2 C.F.R. Part 230 (Jan. 1, 2013). This decision cites to, and quotes from, that codification. In December 2013, the OMB consolidated the content of OMB Circular A-122 and eight other OMB circulars into one streamlined set of uniform administrative requirements, costs principles, and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. *See* 78 Fed. Reg. 78,590 (Dec. 26, 2013).

³ Excerpts from the GPS (pages II-43-44, II-83-84, II-91) are of record. ACF Ex. 12.

recipients to submit, within 90 calendar days after the date of award completion, all financial, performance, and other reports required by the terms of the award.⁴ *Id.* § 74.71.

Payments of funds awarded to a grantee may be made to the grantee in advance or by way of reimbursement. Generally, the payments are made by electronic transfer, pursuant to a request from the grantee to “draw down” federal funds (that is, transfer funds from the U.S. Treasury to the grantee’s account). In general, a grantee is required to minimize the amount of time between drawdown of federal funds from the U.S. Treasury and actual disbursement of funds to cover allowable costs. 45 C.F.R. § 74.22. Grantees receiving HHS funds electronically use the PMS to draw down funds.

If a Head Start grantee “materially fails to comply with the terms and conditions” of its award – including the requirements specified in, or incorporated by, 45 C.F.R. Part 74 – ACF may impose one or more enforcement remedies, including “[d]isallow[ing] (that is, deny[ing] both use of funds and any applicable matching credit for) all or part of the activity or action not in compliance.” 45 C.F.R. § 74.62(a)(2); *Bright Beginnings for Kittitas County*, DAB No. 2623, at 2 (2015) (citing 45 C.F.R. § 1301.10(a) and stating that compliance with Part 74 requirements is a term and condition of a Head Start grant).

Case Background

The Council has received multiple ACF awards to support its Head Start and Early Head Start Programs. ACF issued the disallowance here based on the four awards identified in the chart below. ACF issued awards 05CH8290/01, 05CH8290/02, and 05CH8320/01 pursuant to the Head Start Act to fund the Council’s Head Start and Early Head Start Programs. ACF Exs. 1, at 1; 2, at 1; 4, at 1. ACF issued award 05SA8290/01 pursuant to Public Law 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA), to fund expansion of the Council’s Early Head Start Program.⁵ ACF Ex. 3, at 1, 8. As

⁴ Prior to February 2011, HHS award recipients used form SF-269, Financial Status Report to report expenditures. For reports due on or after February 1, 2011, award recipients were required to use form SF-425, Federal Financial Report. *See* 73 Fed. Reg. 47,246 (Aug. 13, 2008); <http://www.acf.hhs.gov/grants/implementation-of-the-federal-financial-reporting-form-sf-425-0>.

⁵ Funding Opportunity Announcement HHS-2009-ACF-OHS-SA-0087 stated that the ARRA Early Head Start Expansion grant funding was made available to “support the enrollment of *additional* children and families as well as create *new teaching and other positions* in Early Head Start programs.” Specifically, ACF announced, “approximately \$619 million [was] to be competitively awarded for the purpose of *expanding enrollment* by approximately 55,000 low-income children and their families.” “This expansion” ACF stated, “*is only to increase the number of pregnant women, infants and toddlers served in Early Head Start.*” Funding Opportunity HHS-2009-ACF-OHS-SA-0087 (emphasis added), available at <http://www.grants.gov/web/grants/search-grants.html>. The terms and conditions of award 05SA8290/02 stated that the award was subject to the requirements of 45 C.F.R. Part 74 and the GPS. ACF Ex. 3, at 7.

reflected in the chart, the federal shares of the Council's reported, authorized expenditures (column 4) were less than the amounts ACF originally awarded to the Council (column 3). Notice of Disallowance at 1; ACF Exs. 5, at 1; 7, at 1, 14; 8, at 1; 9, at 1.⁶ The Council therefore reported unobligated balances for the awards.⁷ *Id.* The PMS records show, however, that the Council drew down federal funds exceeding the federal share of reported and authorized expenditures (column 6). ACF Exs. 5, at 2; 6; 8, at 2; 9, at 2; *see also* Council Ex. 5. Based on the "drawdowns by [the Council] exceeding the authorized funding levels," ACF identified a total of \$554,013 subject to disallowance. Notice of Disallowance at 1.

Award Number (1)	Funding Period (2)	Award (3)	Expenditures Per Final Financial Reports (4)	Funds Withdrawn from PMS (5)	Overdraw Amount/ Disallowed Costs (6)
05CH8290/01	9/30/11 - 12/31/12	\$1,182,975	\$1,063,749	\$1,064,225	\$476
05CH8290/02	1/1/13 – 12/31/13	\$900,181	\$759,047	\$900,181	\$141,134
05SA8290/01	12/1/09 – 9/29/10	\$854,847	\$621,535	\$854,847	\$233,311 ⁸
05CH8320/01	7/1/13 – 10/31/13	\$1,359,191	\$1,180,099	\$1,359,191	\$179,092

ACF Exs. 1, at 1; 2, at 1; 3, at 3; 4, at 1; 5; 6; 7, at 1, 14; 8; 9.

⁶ The Council initially reported \$881,860 as the federal share of expenditures relating to award 05CH8290/02. ACF Ex. 7, at 1. The Council submitted a revised report on December 24, 2014, showing that the federal share of expenditures for grant 05CH8290/02 was \$759,047. ACF Ex. 7, at 14. ACF calculated the disallowance for award 05CH8290/02 based on that revised report.

⁷ The GPS specifies that upon receipt of the Federal Financial Report, if the funds available exceed the grantor agency's share of the approved budget for the current budget period, the grantor agency may use the unobligated balance to reduce or offset funding for a subsequent budget period. GPS II-49–51. In this case ACF moved the unobligated balance reported on the Council's original Federal Financial Report for award 05CH8290/01 to program year 2 of the grant, award 05CH8290/02. Consequently, ACF was unable to increase the authorized costs for the first year of the grant when the Council submitted an untimely (i.e., more than 15 months following the end of the budget period) December 24, 2014, revised financial report on which it listed an increased total federal share of expenditures. ACF Ex. 7, at 2; GPS at II-84 (ACF Ex. 12, at 5), II-91 (ACF Ex. 12, at 6). The Council does not dispute ACF's decision not to accept that untimely report.

⁸ The Council's final revised SF-269, dated February 14, 2011, reflects an "Unobligated balance of federal funds" of \$233,312. ACF Ex. 8, at 1. The amount of \$233,311 in the chart is the amount ACF states was overdrawn for award 05SA8290/01. Notice of Disallowance at 1; chart appended to Notice of Disallowance. The Council does not dispute that \$233,311 is the correct overdrawn amount. *See* Council Ex. 5.

Discussion

On appeal, the Council does not dispute that it drew down \$554,013 that “exceeded authorized funding levels” for awards 05CH8290/01, 05CH8290/02, 05CH8320/01, and 05SA8290/01. Council Br. at 1; Council Ex. 5. The Council states that the “sole dispute” “centers on the underpayment” that relates to a different award – 05SA8290/02 (awarded under ARRA for budget period 9/30/2010 – 9/29/2012) – “in the amount of \$163,311.48.”⁹ Council Br. at 1; Council Ex. 5; ACF Ex. 10. Specifically, the Council asserts that it reported \$828,539.03 in authorized expenditures relating to award 05SA8290/02, but drew down only \$665,227.55 for that award, resulting in the “underpayment” of \$163,311.48. Council Br. at 1; Council Ex. 5. The Council asserts, “By offsetting [that] amount, the Council will have a repayment balance in the amount of \$390,702.” Council Br. at 1. The Council included with its submissions a November 20, 2014 email from ACF, which, the Council asserts, “indicat[es] that a final SF 425 needed to be submitted by the Council to obtain the underfunded amount of \$163,311.48.” *Id.*; Council Ex. 1.

In light of the Council’s admission that ACF correctly disallowed \$554,013 in expenditures for awards 05CH8290/01, 05CH8290/02, 05CH8320/01, and 05SA8290/01, the only issue before us is whether the Council may offset the alleged “underpayment” of \$163,311.48 relating to award 05SA8290/02 against the amount it owes for the disallowed costs.

As noted above, the cost principles in OMB Circular A-122 govern whether a nonprofit Head Start grantee’s expenditures under a federal award are “allowable” – that is, may be charged to that federal award. 2 C.F.R. § 230.20, App. A, ¶ A.2 (Jan. 1, 2013). The Circular provides that a grantee’s costs must be “reasonable for the performance of the award,” “allocable to” the award, and “adequately documented.” *Id.*, App. A, ¶¶ A.2.a, A.2.g, and A.4. A cost is allocable if, among other things, it is incurred specifically for the award. *Id.*, App. A, ¶ A.4.a.1. “Any cost allocable to a particular award . . . may not be shifted to other Federal awards to overcome funding deficiencies . . .” *Id.*, App. A, ¶ A.4.b. Similarly, the GPS provides that “[c]ost transfers by recipients between grants, whether as a means to compensate for cost overruns or for other reasons, generally are unallowable . . .” GPS at II-43 (ACF Ex. 12, at 2).

⁹ The Council’s undated brief (uploaded to DAB E-File on March 14, 2016) refers to the fifth award as “05SA2900/02” and “05SA82902/02.” Based on other documentation in the record, we conclude that the Council was referring to award 05SA8290/02.

Section 74.28 of the regulations provides that when an award specifies a funding period, the grantee “may charge to the award only allowable costs resulting from obligations incurred during the funding period” and any authorized pre-award costs. The Board has explained that the prohibition on using federal funds awarded for a specific time period for expenses from a previous period (which should be charged to grant funds awarded for that previous period) reflects the general requirement in OMB Circular A-122 that allowable costs charged to a federal award must be allocable to the award. *Central Piedmont Action Council, Inc.*, DAB No. 1916, at 4 (2004), citing OMB Circ. A-122, Att. A, ¶ A.2.a; *see also William Smith, Sr. Tri-County Child Development Council, Inc.*, DAB No. 2647, at 5 (2015). To be allocable to the federal award, charges must benefit the activities for which that award was made. *River East Economic Revitalization Corp.*, DAB No. 2087, at 6 (2007). The term “benefit,” as used in connection with the principle of allocability, derives from accounting principles that the costs must relate not only to cost objectives, but to funding periods as well. *Id.*; *see also* DAB No. 1916, at 4 (“Grant expenditures incurred outside of the applicable budget periods are not allocable to awards for those budget periods, and this violation of the requirement of allocability is a basis for a disallowance.”).

Applying the foregoing requirements and principles here, we conclude that the Council may not reduce the \$554,013 that it must remit based on the disallowance of expenditures for awards 05CH8290/01, 05CH8290/02, 05CH8320/01, and 05SA8290/01, by the \$163,311.48 to which the Council claimed it is entitled, but did not draw down, for award 05SA8290/02. The Council in effect asks to apply federal funding for costs that were allowable and allocable to award 05SA8290/02 to fund other costs that were not allocable to that award. In other words, the Council seeks to charge costs allocable to grant 05SA8290/02 to other grants with different funding periods or different funding sources and objectives. As noted, any cost allocable to a particular award generally may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award. 2 C.F.R. Part 230, App. A, ¶ A.4.b. Similarly, the GPS explains that cost transfers by a recipient between grants, whether as a means to compensate for cost overruns or for other reasons, generally are not allowed. GPS at II-43 (ACF Ex. 12, at 2).

The Council asserted in its notice of appeal that the parties previously had agreed that the amount of money that the Council owed HHS was \$390,000. The Council also stated that e-mail correspondence between the parties showed that ACF staff “indicat[ed] that a final SF 425 [Federal Financial Report] needed to be submitted by the Council to obtain the underfunded amount of \$163,311.48” from award 05SA8290/02. Council Br. at 1. The referenced November 20, 2014 e-mail, however, indicates that ACF advised the Council that it needed to submit a revised financial report for award 05CH8290/02 if the

Council wanted credit for more expenditures than it had originally reported for **that** award, not to obtain the underfunded amount for award 05SA8290/02. Council Ex. 1. The Council subsequently submitted a revised report for award 05CH8290/02, and ACF calculated the disallowance for award 05CH8290/02 based on that revised report. ACF Ex. 7, at 14.

Furthermore, while ACF acknowledges that “[d]uring [its] initial conversations with [the Council], ACF considered allowing [the Council] to offset the underdrawn amount from grant 05SA8290/02 (\$163,311.48) from the total money owed ACF for the overdrawn grants” and that “[t]his credit is reflected on some of the initial charts exchanged with [the Council],” ACF’s initial consideration of an offset did not preclude ACF from ultimately deciding not to permit an offset. ACF Br. at 5. Furthermore, the Council has not pointed to any legal basis to require an offset. Insofar as the Council is making an equitable argument that ACF should be estopped from issuing the disallowance in full, the Board has consistently held that it has no authority to waive a disallowance based on equitable principles and, in accordance with 45 C.F.R. § 16.14, is bound by all applicable laws and regulations. *See, e.g.*, DAB No. 2623, at 6-7. We thus reject the Council’s suggestion that prior discussions between the parties provide a basis for reducing the disallowance.

Conclusion

For the reasons stated above, we sustain the \$554,013 disallowance and deny the Council’s request to reduce the repayment amount.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member