Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Southwest Virginia Community Health Systems, Inc.
Docket No. A-14-7
Decision No. 2605
December 2, 2014

DECISION

Southwest Virginia Community Health Systems, Inc. (SVCHS) appealed the determination of the Health Resources and Services Administration (HRSA) disallowing a total of $1,188,064.80 SVCHS charged to federal funds under five grants awarded by HRSA. HRSA found that this amount was not supported by the documentation provided by SVCHS's contractor, the Community Care Network of Virginia (CCNV), during HRSA's Limited Incurred Costs Review. SVCHS alleged in its notice of appeal that CCNV was the real party in interest in the case, and the Board granted SVCHS's request that CCNV be permitted to present the case on appeal for SVCHS pursuant to the Board's procedures at 45 C.F.R. § 16.16.

CCNV provided additional documentation with its initial brief on appeal, based on which HRSA reduced the disallowance to $1,015,844.31. HRSA Br. at 18. CCNV maintained in its reply brief that "the vast majority" of this amount was expended for allowable costs, and provided further documentation. CCNV Reply Br. at 2, 25.

As explained in detail below, of the remaining amount disallowed by HRSA, we uphold the disallowance of $1,011,018.50 and reverse the disallowance of $4,825.81.

Background

HRSA's final determination disallowed amounts charged to five grants, as follows:[1]

• $44,886.00 charged to the "Operational Grant," Grant Number H22CS0229, funded from September 1, 2003 through August 31, 2007 for a project titled Integrated Services Development Initiative/Share Integrated Management Information Systems;

• $42,348.92 charged to the "Planning Grant," Grant Number H22CS04058, funded from September 1, 2004 through August 31, 2007 for a project with the same title as the Operational Grant;

[1] HRSA took no disallowance under a sixth grant awarded to SVCHS. HRSA ltr. dated 9/9/13, at 2.

• $623,025.58 charged to the "High Impact Grant," Grant Number H2KIT08690, funded from September 1, 2007 through August 31, 2009 for a project titled Electronic Health Record Implementation Initiative; and

• $477,804.30 charged to the "Kiosk Grants," Grant Number H2HIT08612, funded from September 1, 2007 through August 31, 2010 for a project titled Health Information Technology Innovation Initiative, and Grant Number H2LIT16606, funded from September 1, 2009 through August 31, 2010 for a project titled ARRA-Health Information Technology Implementation. (HRSA did not separately identify the amounts disallowed for each of these two grants.)

HRSA awarded four of the grants at issue pursuant to either section 330(e)(1)(C) or section 330(h) of the Public Health Service Act, 42 U.S.C. § 254b (as amended), the authorizing legislation of the Health Center Program. Section 330(e)(1)(C) authorizes the Secretary to make grants for the costs associated with the operation of a managed care network or plan or a practice management network to: (1) public and private nonprofit health centers already receiving grants for the costs of providing health services to medically underserved populations, or, (2) at the request of such health centers, directly to managed care networks and plans and certain practice management networks that are at least majority controlled by such health centers. Section 330(h) authorizes the Secretary to make grants for the planning and delivery of services to a special medically underserved population comprised of homeless individuals. HRSA awarded the fifth grant, one of the "Kiosk Grants," from funds made available by the American Reinvestment and Recovery Act of 2009 (ARRA). SVCHS passed through all the grant funds it received to CCNV in order "to assist with the formation, planning and implementation of services to be provided by CCNV to its network-affiliated health centers." SVCHS Br. at 4.

The award notices for each of the grants at issue state that the award "is subject to the terms and conditions incorporated either directly or by reference in . . . 45 CFR Part 74 or 45 CFR Part 92 as applicable." *See, e.g.*, HRSA Ex. 1, at 1. Part 74 contains uniform administrative requirements governing HHS grants to nonprofit organizations like SVCHS as well as subgrants and other subawards awarded by recipients of such grants. 45 C.F.R. §§ 74.1(a), 74.5(a). Part 74 requires generally that a recipient of federal funds have a financial management system that provides for "[r]ecords that identify adequately the source and application" of funds for grant activities ...." 45 C.F.R. § 74.21(b)(2). Section 74.27 incorporates by reference the cost principles in OMB (Office of Management and Budget) Circular A-122, codified at 2 C.F.R. Part 230 (2005-2013). The cost principles require, among other things, that costs be: "reasonable for the performance of the award," "allocable" to the award, "accorded consistent treatment," "determined in accordance with generally accepted accounting principles," and

"adequately documented." 2 C.F.R. Part 230, App. A, ¶ A.2.a, d, e, g. Paragraph A.4 of Appendix A to Part 230 states in part that a "cost is allocable to a particular cost objective, such as a grant, contract, project, service, or other activity, in accordance with the relative benefits received."

Based on these requirements, the Board has repeatedly held that a "grantee has the burden of documenting the existence and allowability of its expenditures of federal funds." *Suitland Family & Life Dev. Corp.*, DAB No. 2326, at 2 (2010) (citation omitted). "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).

Analysis

Below, we discuss the costs remaining in dispute with respect to each of the grants, using the same general categories used by the parties.

A. OPERATIONAL GRANT

1. Other Direct Costs

Of the $1,032,407 of federal funds paid under the Operational grant (less than the $1,033,207 awarded), HRSA allowed $987,521 and disallowed the remaining $44,886. HRSA Ex. 1; HRSA ltr. dated 9/9/13, at 2. CCNV disputes the entire disallowance, arguing that it had more than $44,886 of additional allowable costs it described as "Other Direct Costs." For the reasons explained below, we uphold the disallowance of $44,886.

The $151,283 of "Other Direct Costs" CCNV claims is allowable consists of the following types of direct costs in the approved grant budget: Travel, Office Supplies, Consultant, Maintenance, Lease, Telephone, Postage, Insurance, Legal, Overhead, and Printing costs. CCNV Br. at 8; CCNV Ex. I, 1st page (Schedule A). CCNV states that it "calculated the Federal share based on the percentage of Federal funding for each expense category stipulated in the grant budget." CCNV Reply Br. at 5; *see also* CCNV Br. at 8.

In response to the appeal, HRSA takes the position that it "is unable to verify the accuracy and allowability" of these costs or "to determine whether the cost allocation to the Operational grant has been properly calculated" because CCNV provided no supporting documentation for the costs. HRSA Br. at 8. In its reply, CCNV asserts that the costs are adequately documented by its audited financial statements for 2004-2006,

which it previously provided to HRSA. CCNV Reply Br. at 2-3, citing CCNV Ex. I.A3-5. CCNV also offers to provide its 2004-2006 general ledgers to further support the allowability of the costs. *Id*. at 3, n.4.

We conclude that neither the audited financial statements nor the general ledgers (were they to be provided) constitute adequate documentation. As noted above, to satisfy the requirement in the cost principles to provide "adequate documentation" to support costs claimed under a grant, a grantee or a subrecipient such as CCNV must provide "records supported by source documentation[.]" *Northstar Youth Servs.* at 5. It is clear from the applicable regulations that accounting records are not source documentation. *See* 45 C.F.R. § 74.21(b)(7) (requiring that recipients' financial management systems provide for "[a]ccounting records, including cost accounting records, that are supported by source documentation"). A general ledger is an accounting record that purports to reflect the information in source documents such as cancelled checks, paid bills, payrolls, and time and attendance records, and a financial statement is based on accounting records such as a general ledger.[2] Unlike source documentation, neither entries in a general ledger nor a financial statement on their face verify that expenditures were made and that they were made for allowable purposes. Thus, CCNV could not meet its burden to show that the costs at issue are allowable by producing only its general ledgers and audited financial statements.

B. PLANNING GRANT

Of the $257,059 of federal funds awarded and paid under the Planning Grant, HRSA allowed $230,432 and disallowed the remaining $26,627. HRSA Ex. 2; HRSA ltr. dated 9/9/13, at 2; HRSA Br. at 18 (showing revised disallowance amount). CCNV disputes the entire disallowance, arguing that it had more than $26,627 of additional allowable costs. For the reasons explained below, we uphold the disallowance of $25,095.49 and reverse the disallowance of $1,531.51.

1. Travel Costs

Undocumented travel costs HRSA found that $973 recorded in CCNV's general ledger as a charge to CCNV's Bank of America credit card for "EMR Planning," which CCNV claimed as travel costs, was unallowable because no documentation was provided. HRSA ltr. dated 9/9/13, at 38; CCNV Ex. II.A, 1st page; HRSA Ex. 6, at 2 (2nd item from bottom). CCNV acknowledges that it has no documentation but argues that the costs should be allowed because after November 30, 2010, CCNV was not required to retain

[2] Section 92.20(a)(6) of 45 C.F.R. Part 92, which applies to grants to state, local and tribal governments, defines the term "source documentation" to include such documents. The term is not specifically defined in Part 74, but we see no reason why the definition should be different for grants to nonprofit organizations.

records documenting the costs. CCNV Reply Br. at 6, citing HHS 2007 Grants Policy Statement (GPS) at II-86 ("Record Retention and Access"). CCNV asserts that it discarded records from 2004, when these costs were incurred, in accordance with its records retention policy. CCNV Reply Br. at 6; CCNV Ex. I.A, 1st page (1st item) The version of the GPS to which CCNV cites was issued after all of the Planning Grant awards were made, and the grant terms and conditions do not incorporate by reference any earlier version of the GPS. However, the record retention requirements in the GPS also appear in 45 C.F.R. § 74.53 (to which the GPS refers). Section 74.53 provides in pertinent part:

> (b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report. The only exceptions are the following:
>
> (1) If any litigation, claim, financial management review, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.
>
> * * * * *

45 C.F.R. § 74.53.[3]

Paragraph (b) of section 74.53 establishes a general three-year record retention period. Subparagraph (b)(1) makes an exception for situations where a financial management review is started before the expiration of the three-year period, in which case records must be retained until all findings involving the records have been resolved and final action has been taken. It is unclear from the record when the Limited Incurred Cost Review began. HRSA's final determination refers to its "Limited Incurred Cost Review (LICR) of SVCHS dated May 15, 2012" (HRSA ltr. dated 9/9/13, at 1), but that appears to be the date of the report on the review rather than the date the review began. However, even if the review began after November 30, 2010, the date CCNV says the three-year record retention period expired, CCNV has not shown that it is excused from producing supporting documentation. "It is well established in Board precedent that grantees have a fundamental obligation to document costs which is not defeated per se by the passage of the records retention period." *Kentucky Cabinet for Human Resources*, DAB No. 957, at 6 (1988) (citations omitted). Thus, if supporting documentation for the costs at issue here was still available when HRSA's Limited Incurred Cost Review

[3] Subsection 74.53(b)(2)-(4) contains additional exceptions not relevant here.

questioned the costs, CCNV cannot reasonably claim that it was not required to produce the documentation merely because the three-year record retention period had passed. CCNV has not provided any evidence that records from 2004 were discarded pursuant to its record retention policy before HRSA questioned the costs at issue in the Limited Incurred Cost Review. Moreover, it appears that CCNV was able to provide documentation for other 2004 costs disallowed by HRSA, as indicated in the discussion of the Charges for EMR Workshop below. [4] This situation is analogous to that in *Kimon J. Angelides*, DAB No. 1677, at 11-12 n.8 (1999), where the Board rejected the appellant's argument that he could not be held responsible for the absence of supporting data because applicable federal regulations required only that records be retained for three years, stating that although "the records could have been legally discarded" pursuant to section 74.53(b) after the three-year record retention period expired and before charges were filed against the appellant, the appellant "offered no testimony … to suggest that he, in fact, disposed of such records" during that time frame and "offered no plausible explanation as to why he would have retained [other data from the same time frame] but discarded the data the existence of which was at issue here."

CCNV also argues that its general ledger "supports the allocability of the travel costs to the … Planning Grant." CCNV Reply Br., citing CCNV Ex. B2 (excerpt from general ledger showing credit card charge of $972.80 under "meetings"). [5] As already discussed with respect to costs claimed as Other Direct Costs of the Operational Grant, however, mere entries in a general ledger do not constitute source documentation adequate to support the allowability of costs claimed under an award.

Accordingly, we conclude that the $973 at issue is not allowable.

Charges for EMR Workshop HRSA initially found that $1,170 identified by CCNV as travel costs for C.B. for "Meetings – EMR through 11/4/04" was not allowable on the ground that "[t]here was no document supplied that explained this charge." HRSA ltr. dated 9/9/13, at 38. On appeal, CCNV explained that C.B. traveled to an EMR Workgroup meeting on October 22, 2004 and an EHealth Steering Committee meeting on November 4, 2004. CCNV Ex. II.A, 1st page (2nd item). CCNV also provided a Travel and Expense Report signed by C.B. that shows $1,170 of miscellaneous charges for October 22 and November 4 in addition to separate charges for mileage, meals and

[4] In addition, CCNV presumably provided documentation for other travel costs from 2004 that were questioned during the Limited Incurred Cost Review but allowed by HRSA. *See* HRSA ltr. dated 9/9/13, at 38 ($208.76 allowed for "EMR Travel").

[5] The amount disallowed was rounded up from the $972.80 shown on CCNV's general ledger (incorrectly identified in CCNV's brief as $972.88). CCNV Ex. B2; CCNV Reply Br. at 6.

lodging. CCNV Ex. II.A1. Based on its review of this documentation, HRSA stated that the charges of $1,170 appear to be "for pre- and post-meeting preparation" and maintained that they are not allowable because they "appear to be based on time and effort and would have been paid to [C.B.] as salary." HRSA Ex. 6, at 1, referencing Tab A1.

CCNV does not dispute that the charges were for pre- and post-meeting preparation rather than costs of travel to and from the meetings. However, CCNV argues that the costs are allowable because C.B. was a consultant, not a salaried employee, during the time at issue. According to CCNV, C.B.'s "labor certification shows that she did not become an employee until January 2005." CCNV Reply Br. at 8, citing CCNV Ex. B4. The "Certification of Labor Effort" signed by C.B. identifies her as the project director and the dates worked as January 1, 2005 – December 31, 2007, and states that "I was a part-time employee for CCNV." CCNV Ex. B4, at 1-2. It seems reasonable to infer from the certification that C.B. was not a CCNV employee in October and November 2004, when the meetings took place. Thus, this documentation adequately addresses HRSA's remaining basis for disallowing this cost.

Accordingly, we conclude that $1,170 at issue is allowable.

Illegible receipts for travel costs HRSA found that receipts provided with CCNV's appeal to support travel costs totaling $328.92, including a car rental receipt, are "not legible." HRSA Ex. 6, at 2, referencing Tab No. 25. In response, CCNV provided legible copies of a car rental receipt for $312.51, a receipt for $8.00 in meal costs, a receipt for a $1.00 toll cost, and a receipt for $40.00 for airport parking. CCNV Reply Br. at 7; CCNV Ex. B3, 7th page.

Accordingly, we conclude that $361.51, the total amount supported by the copies of travel receipts provided with CCNV's reply brief, is allowable. [6]

2. Indirect Costs

HRSA found that $62,519 identified by CCNV during the Limited Incurred Cost Review as indirect costs associated with the Planning Grant was not allowable because the "approved budget" for the grant "did not include line item funding for Indirect Costs, which would have been based on an approved indirect cost rate for SVCHS," and SVCHS "does not have an approved indirect cost rate." HRSA Br. at 9.

[6] CCNV also provided receipts for meal costs of $35.52 and $29.98. CCNV Ex. B3, 8th page. However, HRSA allowed those costs based on documentation provided earlier. HRSA Ex. 6, at 2, referencing Tab No. 25.

The award notices for the Planning Grant show indirect costs of $0.00. Moreover, CCNV does not allege that SVCHS had an approved indirect cost rate and acknowledges that CCNV did not have such a rate. HRSA Ex. 2, at 1, 7; CCNV Br. at 10; CCNV Reply Br. at 8-9. CCNV argues, however, that $11,100 of the amount it previously claimed as indirect costs corresponds to "management and support costs that were approved as direct costs in the grant budget" for which it has not been reimbursed and which should therefore be allowed as direct costs. CCNV Reply Br. at 8-9. CCNV relies on an indirect cost rate proposal it submitted to HHS's Division of Cost Allocation in August 2010 in an unsuccessful attempt to obtain a provisional indirect cost rate for a grant awarded in February 2010 to the Virginia Health Quality Center for which CCNV was a subcontractor.[7] CCNV Ex. IV.B1. CCNV identified costs in the indirect cost pool that it determined corresponded to certain types of costs (office supply, postage, legal, equipment, and communications costs) HRSA had approved as direct costs of the grant for one or more budget periods. According to CCNV, it then "calculated Planning grant salaries as a percentage of total salaries for each year [2004, 2005, and 2006] and applied that percentage to each 2004, 2005 and 2006 indirect account total to estimate the amounts allocable to the Planning grant." In addition, CCNV "determin[ed] the percentage of Planning grant direct costs to total direct costs for [2007]" and "applied this percentage to each 2007 indirect account total to estimate the amounts allocable to the [2007] Planning grant." CCNV estimated that $7,676 is allocable to the Planning Grant for 2004 – 2006 and $3,424 is allocable to the Planning Grant for 2007. CCNV Reply Br. at 9, citing Exs. B5 and B6 (Excel spreadsheets). (CCNV stated that it separately determined the amount allocable to the Planning Grant for 2004 – 2006 because "[m]ost of CCNV's 2004 to 2006 management support costs were allocable to, and claimed under, the HRSA Operational grant." CCNV Reply Br. at 9; *see also* CCNV Ex. B5, 1st page, Note.) CCNV asserts that the total, $11,100, represents "reasonable, allocable and allowable grant costs, supported by CCNV's audited financial statements[.]" CCNV Reply Br. at 9.

CCNV has not presented any evidence that its proposed allocation method is consistent with the requirements in the cost principles, which reflect generally accepted accounting principles, for directly allocating the types of costs at issue. Direct costs are defined as "those that can be identified specifically with a particular final cost objective, i.e., a particular award, project, service, or other direct activity of an organization." 2 C.F.R. Part 230, App. A, ¶ B.1. Thus, a cost "may be charged as a direct cost of an award 'if it

[7] The Division of Cost Allocation (DCA) advised CCNV on August 5, 2010 the "since your organization is not a direct recipient of Federal awards, we are unable to issue an indirect cost rate to your organization at this time." CCNV Ex. IV.B3 (e-mail to CCNV's Controller from Branch Chief, Mid-Atlantic Field Office, Colleges/Universities, Hospitals & Non-Profits, HHS/Division of Cost Allocation). Even if DCA had approved an indirect cost rate based on CCNV's indirect cost rate proposal, it is not clear that the rate would have applied to the time period at issue here.

can be specifically identified with that award as a final cost objective.'" *N.E. Louisiana Delta Cmty. Dev. Corp.*, DAB No. 2165, at 7 (2008), quoting *Rio Bravo Ass'n*, DAB No. 1161, at 9 (1990). Indirect costs are "those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective." *Id.* ¶ C.1. "A cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to an award as a direct cost." *Id.* Indirect costs must be allocated using an approved indirect cost rate. *Id.* ¶ D.1a, b; ¶ E.2.a.

One of the methods for allocating costs is the "[d]irect allocation method," under which "[j]oint costs, such as depreciation, rental costs, operation and maintenance of facilities, telephone expenses, and the like are prorated individually as direct costs to each category and to each award or other activity using a base most appropriate to the particular cost being prorated," and all remaining costs are distributed to individual awards by applying an indirect cost rate determined in accordance with the "[s]implified allocation method" described in paragraph D.2. *Id.* ¶ D.4.a, c. The base used to allocate direct costs "must accurately measure[] the benefits provided to each award or other activity." *Id.* ¶ D.4.b. Thus, for example, square footage of space used may be used to allocate rent or similar costs, if appropriate. Moreover, a grantee is supposed to have written procedures for determining allocability of costs, as part of its financial management systems. 45 C.F.R. § 74.21(a)(6).

In essence, CCNV is trying to use a direct allocation method to allocate joint costs that it indicates its accounting system did not identify with any specific project, but without following the process for obtaining an indirect cost rate. Thus, we have no assurance that CCNV has treated direct and indirect costs consistently or used an appropriate distribution base to allocate a variety of types of costs among the allegedly benefitting projects.

Moreover, CCNV's indirect cost rate proposal was for a provisional indirect cost rate for a period that began after all the awards for the Planning Grant (and the other grants at issue here) were made. CCNV Ex. IV.B1 (Certificate of Indirect Costs stating that the proposal was "to establish a provisional cost rate for the period January 1, 2010 through December 31, 2010"). It appears that the proposal was based on CCNV's audited financial statements for the years ended December 31, 2008 and December 31, 2009, which are included in the exhibit with CCNV's indirect cost rate proposal. CCNV does not explain why it was reasonable to base its estimates of unclaimed direct costs for the awards at issue here on costs incurred in later years.

Furthermore, it is unclear whether the costs in the indirect cost pool that CCNV now says are direct costs allocable in part to the Planning Grant are allowable types of costs. Contrary to what CCNV asserts, not all of these costs clearly correspond to budget line items approved by HRSA. *See* HRSA Ex. 2, at 1, 7. (CCNV may be referring to the

direct costs identified in its grant applications, which were not necessarily the same as the costs in the approved budget included in the grant award notices. *See* CCNV Ex. A8, 1st page.) In addition, it appears that the independent auditor who prepared CCNV's financial statements, on which CCNV indicates its indirect cost rate proposal was based, did not consider the issue of whether costs were allowable under federal cost principles. *See* CCNV Ex. IV.B1 (1/18/10 ltr. from CPA firm to CCNV). It also appears that CCNV may not in fact have identified the unclaimed direct costs based on audited costs in an indirect cost pool, but instead used an amount equal to total costs as shown in its general ledger or financial statement minus costs that had previously been direct-charged. CCNV Ex. B6, at 5ff. That amount may not have previously been direct-charged precisely because the costs were not considered allowable, allocable costs.

Finally, we note that CCNV does not explain why it needed to resort to what is essentially an indirect method of allocating unclaimed direct costs if its accounting system was able to identify similar costs as direct costs allocable to the Operational Grant.

Thus, CCNV has not shown a sufficient basis for allowing the $11,100 as direct costs.

CCNV also maintained in its initial brief that the remaining costs originally claimed as indirect costs should be allowed as indirect costs based on the indirect cost rate in its indirect cost rate proposal even though that proposal was not approved. CCNV Br. at 10-12. It is unclear from CCNV's reply brief whether CCNV is pursuing this argument. *See* CCNV Reply Br. at 8. In any event, even if the grant award budgets could be revised to include indirect costs, no indirect costs are allowable in the absence of an approved indirect cost rate, on which the applicable cost principles condition payment of indirect costs.[8]

Accordingly, we conclude that CCNV has not shown that any of the $62,519 it originally claimed as indirect costs of the Planning Grant is allowable. Our conclusion does not preclude HRSA (which did not address CCNV's arguments about indirect costs anywhere in its brief) from determining that some amount is allowable based on additional information or clarification provided by CCNV at HRSA's request.

[8] CCNV argued in its brief that it should be permitted to rebudget "between the grant cost categories" any amounts it originally identified as indirect costs that are not allowed as direct costs. CCNV Br. at 12, 22, 28. However, CCNV did not explain specifically what such rebudgeting would involve, and its reply brief does not mention this argument.

C. HIGH IMPACT GRANT

Of the $1,400,000 of federal funds awarded and paid under the High Impact Grant, HRSA allowed $907,222.99 and disallowed the remaining $492,777.01. HRSA Ex. 3, at 1, 5, 7; HRSA ltr. dated 9/9/13, at 2; HRSA Br. at 18 (showing revised disallowance amount). CCNV disputes the disallowance in part, arguing that it had $659,507.63 of additional allowable costs (more than the amount disallowed). For the reasons explained below, we uphold the disallowance of $489,532.71 and reverse the disallowance of $3,244.30.

1. Pre-Award Costs

HRSA found that a total of $306,844 identified by CCNV during the Limited Incurred Cost Review as costs of equipment and software licenses purchased from three different vendors was not allowable because prior approval was not requested for the purchases, which were invoiced more than 90 days before the grant was awarded on September 1, 2007. The invoice dates ranged from December 13, 2006 to May 23, 2007. HRSA ltr. dated 9/9/13, at 23, 28, 31, 32 (listing invoices from Network Advantage (equipment), eClinicalWorks (software licenses), and TechSecurityPro (hardware/software assessment)).

CCNV takes the position that prior approval to incur the costs was not required, quoting the GPS, which was incorporated by reference in the grant terms and conditions. CCNV Br. at 14; HRSA Ex. 3, at 2, 6, 8. CCNV relies specifically on the following language in the GPS:

> . . . . OPDIV[9] prior approval is required for any costs to be incurred more than 90 days before the beginning date of the initial budget period of a new or competing continuation award.
> Recipients may incur pre-award costs before the beginning date of a non-competing continuation award without regard to the time parameters stated above and without prior approval. . . .

GPS at II-37.[10] These provisions implement 45 C.F.R. § 74.28, which provides in part that "a recipient may charge to the award . . . any pre-award costs authorized by the HHS awarding agency pursuant to § 74.25(d)(1)." Section 74.25(d)(1) states that the "HHS

[9] "OPDIV" refers to an operating division of the Department of Health and Human Services, such as HRSA, that awards a grant.

[10] The GPS is available at http://www.hhs.gov/asfr/ogapa/aboutog/hhsgps107.pdf.

awarding agency" may grant waivers "authorizing recipients to … [i]ncur pre-award costs . . . more than 90 calendar days [prior to award] with the prior approval of the HHS awarding agency."

CCNV acknowledges that the High Impact Grant awarded for the budget period beginning September 1, 2007 was nominally a "competitive continuation grant," not a non-competing continuation award as to which the GPS allows pre-award costs to be incurred without prior approval even if incurred more than 90 days before the beginning of the award. CCNV Br. at 14. CCNV argues that this grant award should nevertheless be considered a non-competing continuation award because "the substance of the work under the High Impact grant is a continuation of CCNV's work under the Planning grant." CCNV Reply at 18. CCNV asserts that there was a "perfect overlap in grant purposes" since the Planning Grant was awarded "to support planning for the development, acquisition and implementation of a network electronic health record" and the High Impact Grant was awarded "to support the infrastructure building and implementation of Virginia's community health center electronic health record." *Id*. CCNV notes that the High Impact Grant began the day after the Planning Grant ended. *Id*.

CCNV's argument has no merit. The GPS permits the use without prior approval of grant funds for costs incurred more than 90 days before the beginning of a non-competing continuation award. It is clear on the facts of this case that the High Impact Grant was not a non-competing continuation award. The Board has previously explained that a "'continuation award' is the funding for a particular 'budget period' within the overall 'project period'" and that funds are actually awarded by "budget period," while a "'project period' is the number of years for which funding is tentatively approved." *Sangre de Cristo Community Mental Health Servs. Inc*., DAB No. 570, at 1 n.1 (1984). Following the initial award, a grantee does not need to compete for each new award within the project period, thus "allow[ing] the grantee some certainty regarding how much money will probably be available for the grant while allowing the Department some opportunity to discontinue funding if necessary." *Id*.; *see also* GPS at I-34-35 ("Budget Period and Project Period") and 45 C.F.R. § 74.2 (definition of "Project period"). Here, the project period of the Planning Grant that preceded the High Impact Grant ended August 31, 2007. HRSA Ex. 2, at 7.[11] It follows that the High Impact Grant

[11] The first Planning Grant award was for the budget period September 1, 2004 through August 31, 2005 and the project period September 1, 2004 through August 31, 2006. HRSA Ex. 2, at 1 (Award Notice dated 9/16/2004). The project period was later extended through August 31, 2007. HRSA Ex. 2, at 7 (Award Notice dated 8/23/2005).

was a new grant award, regardless of any similarity of purpose between the Planning Grant and the High Impact Grant. Indeed, both the project period and the budget period of the High Impact Grant began on September 1, 2007. HRSA Ex. 3, at 1 (Notice of Award dated 8/28/2007); HRSA Ex. 3, at 5 (revised Notice of Award dated 11/6/2007).

Thus, pursuant to the grant terms and conditions, prior approval was required in order for costs incurred more than 90 days prior to the beginning of the first budget period of the High Impact Grant to be allowed as costs of that budget period. CCNV does not allege that either it or SVCHS requested HRSA's prior approval. CCNV nevertheless seems to suggest that HRSA's Program Announcement for the High Impact Grant in effect authorized grantees to incur the types of costs in question here prior to grant award. CCNV Br. at 16 (stating that the Program Announcement "specifically stated that grant funds could be used in the project planning phase to purchase software and equipment"). However, the language in the Program Announcement does not support this suggestion. The Program Announcement states in part that "[s]uccessful applicants will have already completed most of the planning," that the grant project includes a "final planning phase" followed by a "testing phase," and that "[g]rant funds may be used during [the testing] phase (and/or during the planning phase as well) to purchase software and licenses . . . ." CCNV Ex. III.G1 (HRSA-07-142, Program Description). Nothing in these statements indicates that the High Impact Grant would provide funding for purchases made during planning that occurred before the grant was awarded.

Finally, CCNV takes the position that the pre-award costs are allowable because HRSA did not question the allowability of the costs on any other ground and "the costs were necessary to overall completion of the grant objectives." CCNV Br. at 17-18; *see also* CCNV Reply Br. at 19. The Board is bound by applicable laws and regulations and thus has no authority to reverse a disallowance on either of these grounds. 45 C.F.R. § 16.14; *see, e.g.*, *Arlington Cmty. Action Program, Inc.*, DAB No. 2141, at 5 (2008). Moreover, it appears here that CCNV spent more funds than awarded for the Planning Grant and then tried to shift the expenditures to the later High Impact Grant, contrary to the applicable cost principles. *See* 2 C.F.R. Part 230, App. A, ¶ A.4.b. ("[a]ny cost allocable to a particular award . . . may not be shifted to other Federal awards to overcome funding deficiencies . . . .").

Accordingly, we conclude that the $306,844 at issue is not allowable. Our conclusion does not preclude HRSA from exercising its discretion to approve the costs if SVHCS were to request retroactive approval.[12] HRSA may also wish to consider whether any of the pre-award costs charged to the High Impact Grant are allocable to the Planning Grant and could be paid for by that grant since, as previously indicated, we uphold the disallowance of $25,095.49 charged to the Planning Grant, thus reducing the charged and allowed expenditures under that award to an amount less that the amount awarded for that period.

2. Travel Costs

Payments totaling $1,166 to eClinical Works for training CCNV disputes HRSA's revised finding that a total of $1,166 paid to CCNV's consultant eClinical Works for travel costs of three of its employees who provided training to CCNV was not allowable because supporting documentation was missing, cut-off or insufficient. CCNV Reply Br. at 11-12; CCNV Ex. III.E (Schedule E-8); HRSA Ex. 8; HRSA Br. at 14..[13] CCNV asserts that it "has now provided the receipts" supporting $219 for travel costs charged for C.D. CCNV Reply Br. at 11, citing CCNV Exs. C1 and C2. CCNV states that it cannot provide supporting documentation for travel costs of $296 for A.T. and $651 for M.T. because the invoices from eClinical Works for these travel costs date back to 2007 and "eClinical Works no longer has the documentation on file." CCNV Reply Br. at 11-12, citing CCNV Ex. C3 (e-mail from eClinical Works Director of Finance).[14] CCNV

[12] The Board has observed that in "grant programs generally, retroactive approval may be granted for transactions that would have been approved had the grantee requested approval in advance." *Child Development Ctr. of Acadiana*, DAB No. 2574, at 10 (2014), quoting *Arizona Affiliated Tribes, Inc.*, DAB No. 1500 (1994). The federal agency "may not deny retroactive approval based on unsubstantiated conclusions or on bases so insubstantial that the decision fairly can be described as capricious." *Id.* However, where a grantee has not requested retroactive approval, we have no basis for directing the federal agency to consider whether retroactive approval should be granted. *See Touch of Love Ministries, Inc.*, DAB No. 2393, at 9 (2011) ("While the Board has, in other cases, reviewed whether an agency's refusal to grant retroactive approval was an abuse of discretion, TLM has not made that argument here….").

[13] As indicated below, CCNV identifies disputed costs of $219, $296, and $651. HRSA's revised finding shows a disallowance of $650.79 of $1,036 originally disallowed but does not list either of the other two costs disputed by CCNV. HRSA Ex. 8. However, these two costs are listed in the original disallowance, and the amount identified in HRSA's brief as remaining disallowed clearly includes all three disputed costs. HRSA ltr. dated 9/9/13, at 33; HRSA Br. at 14.

[14] The Director of Finance stated that the "supporting documentation would have been provided with the original invoices." CCNV Ex. C3, 1st page. CCNV does not allege that it discarded any of the documents pursuant to its records retention policy. In any event, as explained with respect to undocumented travel costs charged to the Planning Grant, such an argument would have been unavailing.

argues that these amounts are nevertheless allowable because "eClinical Works was a consultant and, therefore, its employee's [*sic*] travel receipts are not necessary to support the allowability of the costs." *Id.*

As support for its argument, CCNV points to language in the GPS which describes "Consultant Services" as an allowable cost and states in part:

> Documentation maintained by the receiving organization should include the name of the consulting firm or individual consultant; the nature of the services rendered and their relevance to the grant-supported activities, if not otherwise apparent from the nature of the services; the period of service; the basis for calculating the fee paid (e.g., rate per day or hour[s] worked or rate per unit of service rendered); and the amount paid. This information may be included in the consultant's invoice, in the report, or in another document.

GPS at II-32, quoted in CCNV Reply Br. at 11.[15]

As the GPS recognizes, a consultant's invoice may constitute acceptable source documentation. CCNV provided three eClinicalWorks invoices, one for the travel costs of each of the trainers involved here. CCNV Exs. C1, C2, and C4 (documents in the last exhibit are also at CCNV Ex. III.E2).[16] We conclude based on these invoices that all of the travel costs at issue are allowable.[17] Each invoice lists airfare, lodging, ground transportation, fuel, and meal costs and identifies the trainer and dates of travel. HRSA does not question whether the costs listed on the invoices were incurred or whether CCNV paid the invoices.[18] Nor has HRSA made any finding that the travel was

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[15] The GPS also identifies travel costs charged by a consultant as a type of cost that may be charged to federal funds, stating that "[t]he general circumstances of allowability of these costs, which may include fees and travel and subsistence costs, are addressed in the applicable cost principles under 'professional services costs'," which are at 2 C.F.R. Part 230, Appendix B, Paragraph 37. GPS at II-32.

[16] The $1,036 invoiced for M.T. does not correspond to the $651 disallowed (rounded up by CCNV from the $650.79 shown in its Exhibit C4) due to the fact that HRSA allowed $385.21 of the $1,036 based on some of the receipts (which it did not specifically identify) provided by CCNV to support the travel costs. See HRSA Ex. 8, referencing Tab No. E2; CCNV Ex. C4.

[17] Contrary to what CCNV asserts, there are no "receipts" for C.D.'s travel costs in the exhibits provided with CCNV's reply brief.

[18] Moreover, although HRSA found the receipts for M.T.'s disallowed travel costs either "cut-off or insufficient," the receipts at least confirm that travel costs were incurred. In addition, the invoices for M.T.'s and A.T.'s travel costs include contemporaneous documentation that the invoice was paid (showing the amount, check number, date paid, approver's initials, and account on which drawn). CCNV Ex. E1 and E4, 1st page.

unnecessary for the performance of the award or that any of the itemized travel costs were unreasonable in amount, in violation of the requirement in the cost principles that costs be "reasonable for the performance of the award." *See* 2 C.F.R. Part 230, App. A, ¶ A.2.a.

We note that CCNV did not charge to its High-Impact Grant the full amount invoiced for either C.D. or A.T. because part of the invoiced amount was allocated to other grants or projects. The invoice for C.D.'s travel costs totals $1,315.92; however, an attachment to the invoice shows that only $219.31 of that amount was allocated to CCNV and indicates that the allocation was based on the number of CCNV training participants. CCNV Ex. C2. The invoice for A.T.'s travel costs totals $1,494.35; however, the invoice shows only $295.78 allocated to CCNV, although the basis for the allocation is not clear. CCNV Ex. C1. Since HRSA did not raise a question as to the extent to which any of the disputed travel costs benefitted the CCNV grant awards to which they were charged, we find that no further information is required to show that CCNV complied with the requirement in the cost principles that costs be "allocable" to the award. *See* 2 C.F.R. Part 230, App. A. ¶A.2.a.

Accordingly, we conclude that the $1,166 at issue is allowable.

Lodging costs of $1,111 for A.B. HRSA initially found that $1,111 charged for travel expenses of A.B. for "July/August 2008" was not allowable because A.B.'s "labor" was not in the "approved budget for this grant[.]" HRSA ltr. dated 9/9/13, at 25. A.B.'s name does not appear on HRSA's list of CCNV employees whose salaries were charged to this grant. *Id.* at 21-22. CCNV submitted with its appeal a Certification of Labor Effort signed by A.B. on August 6, 2012 which shows that A.B. was employed by CCNV as a Programmer/Analyst "January 2, 2008-present" and spent 84% of his time on this grant. CCNV Ex. III.B37, 2nd-5th pages. CCNV also submitted a Travel and Expense Report signed by A.B. showing lodging costs of $1,110.79 for training from July 20 – August 2, 2008. *Id.*, 1st page.

HRSA nevertheless maintained that these travel costs are not allowable because "no receipts" were provided and A.B. was "not listed on the grant budget under Salaries to be able to incur travel expenses." HRSA Ex. 7, at 2, referencing Tab No. B37. In reply, CCNV states that the costs are supported by a lodging receipt. CCNV Reply Br. at 13, citing CCNV Ex. C5. The itemized receipt from the hotel supports the amount in dispute. While it shows total charges of $1,202.94, a handwritten note states "No Reimbursement for Room charges for 8/1/01 – Vacation Day," and the amount remaining after subtracting the room charge and taxes for that date ($92.15) is $1,110.79 (which when rounded up equals the $1,111 HRSA disallowed). CCNV Ex. C5, 3rd page.

Moreover, the record does not support HRSA's original ground for disallowing this travel cost. A.B.'s Certification of Labor Effort clearly shows that he was a CCNV employee, and HRSA allowed other travel costs for A.B. charged to this grant. *See* HRSA ltr. dated 9/9/13, at 24 (travel costs of $70.80 and $28), 25 (travel costs of $563 and $399).

Accordingly, we conclude that the $1,111 at issue is allowable.

Mileage costs totaling $219.80 for D.F. HRSA found that $134 charged to the grant as mileage for D.F. was not allowable on the ground that the dates for travel to and from the airport, September 24 and October 12, 2007, shown on the Travel and Expense Report signed by D.F. on October 25, 2014, "do not match dates of trip for rental car …for same trip." HRSA Ex. 7, at 1, referencing Tab B6; CCNV Ex. III.B6. That report shows an expense incurred on October 23, 2007 for "Gas for rental car." CCNV Ex. III.B6., 2nd page. However, CCNV showed that the mileage charges were incurred in connection with an earlier trip. According to CCNV, a "note" on D.F.'s October 25 expense report "indicated that September 24, 2007 mileage costs to the airport and October 12, 2007 mileage costs from the airport were omitted from her prior expense report." CCNV Reply Br. at 13. The notation "Forgot on p" appears on the October 25 expense report in the right-hand margin next to the mileage claim for each of those dates. CCNV Ex. III.B6. The rest of the notation was apparently cut off during copying, but the notation likely referred to "prior report." CCNV also points out that the prior expense report, signed by D.F. on October 15, 2007, does not include any mileage costs. CCNV Reply Br. at 13; CCNV Ex. C7, 2nd and 3rd pages (also at CCNV Ex. III.B5). In addition, both the prior expense report and D.F.'s travel receipts for that report show that D.F. "actually traveled to, and incurred costs in, Massachusetts on September 23, 2007 and purchased food at the Boston airport on October 12, 2007." CCNV Reply Br. at 13; CCNV Ex. III.B5.

HRSA also found initially that $85.86 of $315 charged for D.F.'s travel for the period September 11 – October 13, 2007 was not allowable, stating that the "travel to Holiday Inn Staunton was not a reasonable purpose for travel." HRSA ltr. dated 9/9/13, at 24. To support this charge, CCNV submitted a Travel and Expense Report signed by D.F. on October 15, 2007, which lists $85.80 for mileage for "Travel to Holiday Inn Staunton" on September 18. CCNV Ex. III.B5, 2nd page. HRSA reviewed this expense report but nevertheless found that $85.86 for "Lodging for trip to Blue Ridge Medical Center" (near Staunton) was not allowable because no receipt for lodging was provided. HRSA Ex. 7, at 1, referencing Tab No. B5. As CCNV points out, HRSA incorrectly found that the charge was for lodging. CCNV Reply Br. at 14. D.F.'s expense report shows that the $85.80 was based on 192.8 miles at $0.445 per mile. In addition, CCNV submitted internet search results that show 96.8 miles from CCNV's office in Henrico, Virginia and the Holiday Inn in Staunton, which would yield roundtrip mileage almost identical to that shown on the expense report. CCNV Reply Br. at 15; CCNV Ex. C8 (Bing map mileage calculation).

Accordingly, we conclude that the $219.80 at issue ($134 plus $85.80, the amount shown on the October 15, 2007 expense report) is allowable.

Airfare costs totaling $628 for J.C. and D.S. HRSA found that airfare costs charged to CCNV's BB&T credit card are not allowable. HRSA Ex. 7, at 1, referencing Tab B9. HRSA noted that the amounts of the two airfares on the credit card statement are different even though the airfares were purchased on the same date for airfares to and from the same location. *Id*. The credit card statement shows an airfare of $349 for J.C. and an airfare of $279 for D.S. CCNV Ex. III.B9**.** CCNV asserts that the amounts are different because J.C. and D.S. travelled on different dates, relying on travel receipts it says show J.C.'s travel dates as June 8-9, 2008 and D.S.'s travel dates as June 7-10, 2008. CCNV Reply Br. at 14, citing CCNV Exs. C10-12. The exhibits include a receipt from the Hilton at Boston Logan Airport (the travel destination shown on the credit card statement) showing an arrival date of June 8, 2008 and a departure date of June 9, 2008, and a receipt from the Doubletree Hotel in Lowell, Mass. (near Boston) showing an arrival date of June 7, 2008 and a departure date of June 10, 2008. CCNV Exs. 10, 2nd page; 11, 4th page. Although both receipts have D.S.'s name and address, this was apparently because the charges were made to his credit card account. It appears that J.C. stayed at the Hilton since his Travel and Expense Report includes a lodging expense of $246.26, the same amount on the Hilton receipt, incurred on June 9, 2008. CCNV Ex. 10, 1st page. (There is no Travel and Expense Report for D.S. in the record.) These documents are consistent with CCNV's assertion that J.C. and D.S. travelled on different dates, which could explain why their airfares were different amounts.

Accordingly, we conclude that the $628 at issue is allowable.[19]

Lodging costs of $169.50 for G.P. HRSA found that $169.50 charged by G.P. to CCNV's BB&T credit card for a hotel was not allowable because CCNV provided only a copy of the credit card statement with the charge circled. HRSA Ex. 7, at 2, referencing Tab No. B17; CCNV Ex. III.B17, 2nd page (credit card statement). CCNV asserts that the $169.50 was "a prepaid deposit" and provided an Omni Hotels & Resorts receipt for G.P. showing a November 2, 2008 arrival date and November 4, 2008 departure date and a $169.50 credit for "1 night room and tax" that was "Prepaid" by VISA on September 12. CCNV Reply Br. at 15; CCNV Ex. C13. This receipt supports the charge. Although the receipt shows that payment was made on September 12 and the credit card statement shows September 15 as the transaction date, the hotel could have received the credit card information on September 12 and not processed it until September 15.

[19] Although the total of the two airfares is $628, CCNV incorrectly identified the amount in dispute as only $582, apparently based on HRSA's spreadsheet showing a remaining disallowance of $594.01 that purported to include the two airfares and $11.99 for a movie on a hotel bill ($594.01 minus $11.99 = $582.02). CCNV Reply Br. at 14; HRSA Ex. 7, at 1, referencing Tab No. B9.

Accordingly, we conclude that the $169.50 at issue is allowable.[20]

3. Indirect Costs

HRSA found that $295,521 identified by CCNV during the Limited Incurred Cost Review as indirect costs associated with the High-Impact Grant was not allowable on the same ground as the amount CCNV identified as indirect costs of the Planning Grant. HRSA Br. at 14-15. As with the Planning Grant, the award notices for the High Impact Grant show indirect costs of $0.00, and CCNV does not allege that SVCHS had an approved indirect cost rate and acknowledges that CCNV did not have such a rate. HRSA Ex. 3, at 1, 5, 7; CCNV Br. at 20. CCNV similarly argues here that part of the amount it previously claimed as indirect costs corresponds to "management and support costs that were approved in the grant budget" for which it has not been reimbursed and which should therefore be allowed as direct costs. CCNV Reply Br. at 15-17. Based on its indirect cost rate proposal, CCNV estimated that $139,608 in the indirect cost pool corresponding to certain types of costs (office supply, audit, accounting, communication, insurance, legal and office space costs) HRSA approved as direct costs of the grant is allocable to the High Impact Grant awards as direct costs. *Id*. at 16, citing CCNV Ex. C14 (Excel spreadsheets). CCNV allocated these costs based on the percentage of direct costs for the High Impact Grant to total direct costs for the grant project period. *Id*. We conclude that CCNV has not shown a sufficient basis for allowing the $139,608 as direct costs of the High Impact Grant for reasons almost identical to the reasons we discussed with respect to the Planning Grant. (Here, none of the costs in the indirect cost pool that CCNV identifies as types of direct costs approved by HRSA clearly correspond to budget line items in the High Impact Grant Notices of Award, whereas some of the costs in the indirect cost pool appear to correspond to Planning Grant budget line items.)

CCNV maintained in its initial brief that all of the $295,521 originally claimed as indirect costs should be allowed as indirect costs based on the indirect cost rate in its indirect cost rate proposal. CCNV Br. at 20-22. It is unclear from CCNV's reply brief whether CCNV is pursuing this argument with respect to any of the $295,521. *See* CCNV Reply at 15. In any event, as explained above, the Board could not find indirect costs allowable where no indirect cost rate was approved.

Accordingly, we conclude that CCNV has not shown that any of the $295,521 it originally claimed as indirect costs of the High Impact Grant is allowable. Our conclusion does not preclude HRSA from determining that some amount is allowable based on additional information or clarification provided by CCNV at HRSA's request.

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[20] CCNV states that the remainder of the $336 charge on the credit card statement, which CCNV does not dispute, was refunded to it. CCNV Reply Br. at 15, n.9.

4. Costs Incurred Outside the Grant Project Period

HRSA found that $53,848 of $88,648.33identified in the Limited Incurred Costs Review as payments to Peak 10 for Equipment/Bandwidth is not allowable because the costs were incurred either before or after the "budget period." HRSA ltr. dated 9/9/13, at 29-30. Both the budget period and the project period of the High Impact Grant ran from September 1, 2007 through August 31, 2009. HRSA Ex. 3, at 7. CCNV acknowledges that the costs were incurred outside that period, stating that $4,548 was invoiced from May 30, 2007 to August 31, 2007, and $49,300 was invoiced from September 1, 2009 to June 1, 2012. CCNV Br. at 22.[21] CCNV argues that the costs are nevertheless allowable "[f]or the same reasons" it gave for allowing charges of $306,844 for equipment and software licenses incurred more than 90 days before the start of the grant budget and project periods (discussed above in the section "Pre-Award Costs"). CCNV Reply Br. at 19.

Of the $4,548 that was invoiced before September 1, 2007, $1,648.33 was invoiced more than 90 days before that date. HRSA ltr. dated 9/9/13, at 29 (showing $498.33 invoiced on 5/30/2007 and $1,150 invoiced on 6/1/2007). We concluded in the section on Pre-Award Costs above that costs incurred more than 90 days before September 1, 2007 are not allowable under the High Impact Grant because that grant was a new grant, not a non-competing continuation award, and SVCHS did not obtain HRSA's prior approval to incur the costs, as required by the GPS. The same rationale applies to the $1,648.33 at issue here.

The remaining $2,900 incurred before September 1, 2007 was invoiced less than 90 days prior to that date. HRSA ltr. dated 9/9/13, at 29 (showing $1,150 invoiced on 7/1/2007, $1,150 invoiced on 8/1/2007, and $600 invoiced on 8/31/2007). The GPS provides in relevant part:

> Where authorized by the OPDIV as an expanded authority . . ., a recipient may, . . .without OPDIV prior approval, incur obligations and expenditures to cover costs up to (and including) 90 days before the beginning date of the initial budget period of a new or competing continuation award . . . .

GPS at II-38.[22] However, nothing in the grant terms and conditions in any of the award notices for the High Impact Grant indicates that HRSA exercised its authority to allow

[21] CCNV rounded $4,548.33 down to $4,548.

[22] The omitted language states that even if prior approval is not required, a recipient incurs such costs "at its own risk" since the costs "must meet the same tests of allowability as if incurred after award[.]"

such pre-award costs without prior approval.[23] Accordingly, prior approval was required to charge to this grant costs incurred up to 90 days before September 1, 2007.

CCNV did not point to any basis for allowing the $49,300 that was incurred after the grant period ended on September 30, 2009, nor do we find any. The applicable regulations provide in part that "a recipient may charge to the award only the allowable costs resulting from obligations incurred during the funding period[.]"[24] 45 C.F.R. § 74.28. The Board has previously stated that this provision "specifically preclude[s] reimbursement of expenses incurred after the expiration of a grant." *Delta Found., Inc.*, DAB No. 1710, at 41-42 (1999) (sustaining the disallowance of expenditures made by the grantee after the specified grant period). The Board also noted in that decision that the cost principles provide that "[g]rant funds may be used only for costs which are allocable, i.e., of benefit, to the activities for which the grant was awarded" and that the term 'benefit,' as used in connection with the concept of allocability,derives from accounting principles that the costs must relate not only to cost objectives, but to funding periods as well," so that the fact that the expenditures were incurred after the grant ended "necessarily means that these expenditures were not allocable to the grant[]." *Id*. at 41. Indeed, CCNV does not argue that the equipment and bandwidth that were purchased after the High Impact Grant ended benefitted that grant.

Accordingly, we conclude that the $53,848.33 at issue is not allowable. Our conclusion does not preclude HRSA from granting retroactive approval of any of the $4,548 incurred before September 1, 2007 or allowing these costs under the Planning Grant to the extent the costs are allocable to the Planning Grant and funds are available.

D. KIOSK GRANTS

Of the total of $741,795 of federal funds paid for the two Kiosk Grants, HRSA allowed $290,240.70 and disallowed the remaining $451,554.30.[25] HRSA Exs. 4, 5; HRSA ltr.

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[23] The GPS states that "OPDIVs may waive certain direct cost-related and other prior approval requirements and provide authority for the recipient to undertake these activities and expenditures without the need for OPDIV prior approval. These operating authorities are termed 'expanded authorities.'. . . . The NoA [Notice of Award] will indicate the applicability of expanded authorities . . . .Therefore, recipients must review the NoA to determine whether and to what extent they are permitted to use expanded authorities." GPS at II-57 ("Expanded Authorities").

[24] The regulations define "Funding period" to mean "the period of time when Federal funding is available for obligation by the recipient," and "Obligations" to mean "the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period." 45 C.F.R. § 74.2.

[25] It is not apparent from the record if the total paid is equal to the total awarded for the two grants since the Notice of Award for the last budget period of the first Kiosk Grant, Grant No. H2HIT08612, is not in the record.

dated 9/9/13, at 2; HRSA Br. at 18 (showing revised disallowance amount). CCNV disputes part of the disallowance, arguing that it had $224,403 of additional allowable costs. For the reasons explained below, we uphold the disallowance of $451,554.30.

1. Indirect Costs

HRSA found that $97,364 identified by CCNV during the Limited Incurred Cost Review as indirect costs of the Kiosk Grants was not allowable on the same ground as the amount CCNV identified as indirect costs of the Planning Grant. HRSA Br. at 16. As with the Planning Grant, the award notices for the Kiosk Grants show indirect costs of $0.00, and CCNV does not allege that SVCHS had an approved indirect cost rate and acknowledges that CCNV did not have such a rate. HRSA Exs. 4, at 8; 5, at 7; CCNV Br. at 25-26. CCNV similarly argues here that part of the amount it previously identified as indirect costs corresponds to "management and support costs that were approved in the grant budget" for which it has not been reimbursed and which should therefore be allowed as direct costs. CCNV Reply Br. at 20. Based on its indirect cost rate proposal, CCNV estimated that $12,326 in the indirect cost pool corresponding to certain types of costs (office supply, audit, accounting, and communication costs) HRSA approved as direct costs of the grant is allocable to the Kiosk Grants as direct costs. *Id*. at 21, citing CCNV Ex. D1 (Excel spreadsheets). CCNV allocated these costs based on the percentage of direct costs for the Kiosk Grants to total direct costs for the grant project periods.[26] *Id*.

We conclude that CCNV has not shown a sufficient basis for allowing the $12,326 as direct costs of the Kiosk Grants for the same reasons we discussed with respect to the Planning Grant.

CCNV maintained in its initial brief that the remaining costs originally claimed as indirect costs should be allowed as indirect costs based on the indirect cost rate in its indirect cost rate proposal. CCNV Br. at 27. It is unclear from CCNV's reply brief whether CCNV is pursuing this argument. *See* CCNV Reply Br. at 20. In any event, as explained above, the Board could not find indirect costs allowable where no indirect cost rate was approved.

Accordingly, we conclude that none of the $97,364 CCNV originally claimed as indirect costs of the Kiosk Grants is allowable. Our conclusion does not preclude HRSA from determining that some amount is allowable based on additional information or clarification provided by CCNV at HRSA's request.

[26] CCNV says it "performed a similar calculation for those costs that HRSA identified as outside the grant period" (discussed in the next section). CCNV Reply Br. at 21.

2. Costs Incurred After Grant Period End Date

HRSA found that $42,291 in salaries, $4,021 in fringe benefits and a total of $80,737 paid to the vendor Encounterpoint for an "Annual License Fee," "Free standing Kiosk," and "Admin. Upgrades," a grand total of $127,049, was not allowable because the costs were incurred after the "grant end date." HRSA ltr. dated 9/9/13, at 15, 17.

CCNV acknowledges that these costs were incurred "after the August 31, 2010 grant expiration date," i.e., the date the project periods for both Kiosk Grants ended. CCNV Br. at 28. Specifically, CCNV states that the salaries and fringe benefits were incurred from September 1, 2010 to June 30, 2012, and that the "equipment costs" (i.e., the cost of the items purchased from Encounterpoint) were incurred August 2011 through December 2011. *Id*. According to CCNV, "through no fault of its own, CCNV experienced significant delays on this project...when the vendors it had been working with in developing an interface for the Kiosk software stopped working on the project." *Id*. 28-29. CCNV asserts that the costs "were reasonable and allocable costs of the program funded by the grant" and that HRSA's "sole basis" for disallowing the costs is that they were incurred after the project period ended. *Id*. at 29; CCNV Reply Br. at 22. CCNV takes the position that a retroactive no-cost extension of the grant project period is appropriate under these circumstances and alleges that HRSA granted such an extension for Grant No. H2LCS18138 (the "Reporting Grant"), another grant to SVCHS for which CCNV was the subrecipient. CCNV Br. at 30 and CCNV Reply Br. at 24, both citing CCNV Ex. V.G.

HRSA does not dispute CCNV's assertion that the sole basis for the disallowance is that the costs were incurred after the end of the project period. HRSA maintains, however, that pursuant to the GPS, SVCHS needed to request a no-cost extension of the grant before the end of the award period if more time was needed to complete the project, and that SVCHS made no such request. HRSA Br. at 17, citing GPS at II-55 ("Need for Additional Time to Complete Project- or Program-Related Activities ('No-Cost Extension')"). The GPS was made applicable by the terms and conditions of both Kiosk Grants. HRSA Exs. 4, at 2, 9; 5, at 3, 8. The provision cited by HRSA states in pertinent part, "Unless provided as an expanded authority, OPDIV prior approval is required for any extension of up to 12 months." Nothing in the grant terms and conditions in any of the award notices for the Kiosk Grants indicates that HRSA exercised this expanded authority for these grants. Thus, SVCHS was on notice that prior approval was required for a no-cost extension of the grants.

CCNV argues further that a disallowance would be "tantamount to entrapment" and "fundamentally unfair." CCNV Reply Br. at 23-24. According to CCNV, "HRSA was well aware of the ongoing work on this grant and that the grant objectives could not be completed within the original period of performance" but "never informed CCNV that it should not continue to perform work under the grant beyond expiration of the grant

period end date." CCNV Br. at 30; CCNV Reply Br. at 23-24. In addition, CCNV asserts that "HRSA has never closed out the Kiosk grant," indicating that "HRSA is aware the work under this grant is ongoing," and that HRSA in fact "agreed to leave open the grant to allow CCNV to continue its work toward the grant goals[.]" CCNV Reply Br. at 23, citing CCNV Ex. D2. Thus, according to CCNV, HRSA should not be permitted "to avoid payment for indisputably proper work in furtherance of the grant objectives" when it "knowingly allow[ed] CCNV to continue to incur costs beyond the grant award period[.]" *Id*. at 23-24. CCNV further asserts that "it is improper to disallow costs based, in part, on HRSA's failure to comply with its monitoring and oversight responsibilities." CCNV Reply Br. at 22-23, citing GPS at I-37-38 (stating "OPDIVs monitor their awards to identify potential problems….").

CCNV in effect asks the Board to estop HRSA from disallowing the costs at issue based on equitable considerations. It is well-established that "the government cannot be estopped absent, at a minimum, a showing that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government's employees or agents engaged in 'affirmative misconduct.'" *Oaks of Mid City Nursing & Rehab. Ctr.,* DAB No. 2375, at 31 (2011), citing *Office of Personnel Management v. Richmond,* 496 U.S. 414, 421 (1990), and *Pacific Islander Council of Leaders,* DAB No. 2091 (2007), at 12 ("Equitable estoppel does not lie against the federal government, if indeed it is available at all, absent at least a showing of affirmative misconduct.").

The traditional elements of estoppel were not met here, however. It is immaterial whether HRSA knew that CCNV was continuing to incur the types of costs that would have been allowable under the grant since CCNV has not established that HRSA agreed that grant funds could be used for costs incurred after the project period ended. As evidence of such an agreement, CCNV points to a January 6, 2011 e-mail from SVCHS's Executive Director to CCNV's Chief Executive Director regarding an "ARRA Section 1512 Report Due January 14, 2011" that stated in part:

> We still have to submit quarterly reports until it is closed. Since we have only one or two deployed kiosk[s], I think we told Chris we would leave it open until we were compliant on the goals.

CCNV Ex. D2, 1st page (emphasis added), cited at CCNV Reply Br. at 23. CCNV states that the reference to "Chris" in the e-mail is a reference to "a HRSA official at the time." CCNV Br. at 23. It appears that the quoted statement refers to the Kiosk Grant funded by ARRA with a project period end date of August 31, 2010; however, the statement contains no indication that this HRSA official agreed to leave the grant open, much less that the purpose of leaving "it" open was to permit CCNV to continue to incur costs that could be charged to the grant, rather than simply giving SVCHS more time to close out

the project and submit a report. Grant closeout "includes ensuring timely submission of all required reports and adjustments for amounts due the recipient or the OPDIV." GPS at II-90; *see also* 45 C.F.R. §§ 74.71-74.73. The fact that a grant has not been closed out thus has no bearing on the period during which grant funds may be obligated. CCNV has therefore failed to show that HRSA made a factual misrepresentation or engaged in affirmative misconduct.

Accordingly, we conclude that the $127,039 at issue is not allowable. Our conclusion does not preclude HRSA from exercising its discretion to approve a no-cost extension if SVCHS were to request retroactive approval. If HRSA approved a no-cost extension of Grant No. H2LCS18138 under similar circumstances, as CCNV asserts, it is unclear why HRSA would not approve a no-cost extension here.[27]

Conclusion

For the foregoing reasons, we uphold the disallowance of $1,011,018.50 and reverse the disallowance of $4,825.81.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member

[27] The terms and conditions of the Notice of Award for the no-cost extension of Grant No. H2LCS18138 do not indicate that HRSA was exercising its authority to allow a no-cost extension without prior approval. It is possible that SVCHS requested prior approval for that no-cost extension even though the Notice of Award for the no-cost extension was issued well after the beginning of the period for which the no-cost extension was approved.