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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

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Mr. Gordon L. Harding, Administrator
Department of General Services
Central Data Processing, Blasdel Building
Capitol Complex
Carson City, Nevada 89710

State of Nevada: DLG-00754 Dept. of General Services

Dear Mr. Harding:

This refers to your letter to Dr. Carl Palmer of the Financial and General Management Studies Division of this Office about an accounting problem which exists in the State of Nevada, as a result of the State having undercharged users for depreciation on a State-owned computer. While it is not at all clear from your letter, it appears that the retroactive adjustments you seek are reimbursements made by Federal agencies to State agencies as grantees rather than payments by Federal agencies to State agencies under contracts for services. We also assume that your Department is representing these State agencies in this matter. Although the grant vs. contract distinction is not determinative of whether you are legally entitled to any retroactive adjustment (see discussion below), Government agencies are somewhat more restricted in their ability to make retroactive adjustments under contracts in the absence of any legal right entitling the State to additional payments. This is because no officer of the Government has authority to give away or surrender a vested right or to modify the terms of a contract by a supplemental or substitute agreement, if such action is prejudicial to the interest of the United States. However, there is somewhat more flexibility in the case of grants. Specifically, you asked about the reasonableness of recovering the amount of the undercharge for prior fiscal years from users totally or partially financed by Federal funds.

Since we are unaware of the laws under which the users were funded by the Federal Government and do not have copies of the grants or other documents involved, any comment we can make is necessarily speculative and should not be construed as a decision on the propriety of any possible retroactive payments. The following discussion is merely for informational purposes.

The specific question of whether grant payments may be adjusted retroactively as a result of a change in the method the grantee uses to compute depreciation on equipment used in performing a grant has not

[RETROACTIVE Adjustment ADJUSTMENT of the GRANT PAYMENT] 503307

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previously been addressed by this Office. We have approved retroactive adjustment of certain other payments under grants. See 48 Comp. Gen. 186 (1968); 47 id. 756 (1968); 41 id. 134 (1961); and B-165278, March 24, 1969 (copies enclosed). (Compare 33 Comp. Gen. 93 (1955) (copy enclosed) involving adjustments under cost contracts.) Whether such adjustments may be made depends on, among other things, whether funds are still available in the agency's appropriation, and on the terms of the applicable statutes and regulations, as well as on the grant instrument.

Generally, the principles and standards to be used by Federal agencies in determining the allowable costs of programs administered by State and local governments under grants are set forth in Federal Management Circular (FMC) 74-4, dated July 18, 1974, (copy enclosed). FMC 74-4 Attachment A, part F, discusses indirect costs. FMC 74-4 Attachment B, sets forth the standards for determining allowability selected cost items. FMC 74-4, Attachment B, part B, sec. 11, permits grantors to compensate grantees for the use of equipment either through depreciation or a use allowance. Both the computation for depreciation and the use allowance are to be based on acquisition cost. A combination of the two methods may not be used in connection with a single class of fixed assets. The depreciation cost of data processing services is allowable upon advance approval by the grantor agency, FMC 74-4, Attachment B, part C, sec. 1. Finally, any generally accepted method of computing depreciation may be used, FMC 74-4, Attachment B, part B, sec. 11c.

Thus, in order to be considered for an adjustment, the grantee at a minimum would have to demonstrate that the depreciation method proposed is generally acceptable and is applied to all of a class of assets.

The question of a retroactive adjustment of the grant payment should first be presented to the grantor agency for its consideration. Should the matter not be resolved satisfactorily, the State of Nevada, representing the State agencies who are the grantees, could either file a claim with this Office or sue.

This Office has both allowed and disallowed claims for additional costs under grants. Compare our decision in Monmouth Community Action Program, B-181332, December 28, 1976, with our decision on the claims of the State of Texas on behalf of Willacy and Cameron Counties, B-167790, January 15, 1973. (Copies enclosed.) Generally, our authority to review such claims is predicated on the fact that acceptance of a grant which is not unconditional creates a binding contract between the United States and the grantee, and the principles of our consideration are the same as apply to claims under contracts. (For regulations governing the submission of claims to this Office, see parts 31, 32, and 33 of title 4 of the Code of Federal Regulations (1978).) Of course, we have insufficient information to even speculate on whether any contract theory of relief is applicable to this situation.

I hope that this information and the enclosed materials will be of some use to you.

Sincerely yours,

(Mrs.) Rollee H. Efros
Assistant General Counsel

Enclosures