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A. S. Summers.
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191420

DATE: AUG 24 1978

MATTER OF: Armed Forces Institute of Pathology Claim Against
Universities Associated for Research and Education
in Pathology

DIGEST:

1. The grant agreement between the grantor, National Cancer Institute, and the grantee, Universities Associated for Research and Education in Pathology, specifically provides that any income construed to be grant-related income shall be retained by the grantee and disposed of as directed by the grantor. The grantor and grantee have construed the proceeds from the sale of the Atlas of Tumor Pathology to be grant-related income. Therefore, since funds in the hands of grantees lose their Federal character and are not subject to requirement that income generated by Federal funds must be deposited in the Treasury, 31 U.S.C. § 484 (1970), the proceeds may be retained by the grantee in accordance with the grant agreement and disposed of as directed by the grantor.
2. The Armed Forces Institute of Pathology (AFIP) position that the Atlas proceeds belong to the Government because the concept for the Atlas originated within the Federal sector, the Atlas preparation was federally funded, and the Atlas was printed on Government Printing Office presses, is without merit. The grantor and the grant agreement, rather the above factors, determine the disposition of grant-related income.

The Armed Forces Institute of Pathology (AFIP) has forwarded a claim against the Universities Associated for Research and Education in Pathology (UAREP) to our Office for collection. The claim involves proceeds from the sale of the Atlas of Tumor Pathology (Atlas). The Atlas has been prepared by UAREP for a number of years under a grant from the National Cancer Institute (NCI). The grantee feels it is not legally obligated to turn these funds over to AFIP. The claim raises the question of whether proceeds from the sale of the Atlas are grant-related program income retainable by the grantee (UAREP) or whether the funds are Federal funds which should be transferred to the Government. We have concluded that the proceeds from the sale of the Atlas

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are grant-related program income and are retainable by the grantee for the furtherance of grant purposes as directed by the NCI.

From documents included in the submission, and from information provided at a meeting with representatives of AFIP, UAREP, and NCI, we have gathered the following background information.

When the American Registry of Pathology (ARP) was made a department of the AFIP in 1946, some \$40,000 in private funds or income-producing investments was turned over by a predecessor unit to be applied to the continued operation and maintenance of the Registry. During the years between 1948 and 1965, additional private donations were accepted, pursuant to the Department of the Army's conditional gift authority, and by 1965, the ARP had a balance of a \$100,438.18. By the end of 1974, there was a balance of \$313,858.71.

In 1965, ARP hired the UAREP to act as its fiscal agent in administering these funds. For ease of administration, the funds were divided into two accounts, known as the 201 and the 202 accounts. No further conditional gifts were accepted after 1955, and gradually all gift and investment money was transferred to the 201 account, which is not in question. The 202 account, for the period in question, was composed entirely of moneys received from the sale of the Atlas. It is these funds only which are in issue. In 1976, UAREP's duties as fiscal agent were terminated and moneys in the 201 account were turned over to the AFIP. However, UAREP refuses to turn over the 202 moneys.

It appears that the Atlas was first conceived by ARP staff. However, Federal institutions are precluded from receiving Federal research grant funds, in the absence of specific legislative authority, (see 42 U.S.C. § 225a) and so the UAREP was encouraged to apply for grant support to prepare and publish the Atlas fascicles itself.

Although the relationship between the parties has apparently changed over the years, for the period now in question, grants provided by the NCI, the American Cancer Society and other organizations were the sole source of funding used by UAREP for the manuscript preparation of the Atlas. AFIP did not provide any financial assistance for this purpose. In determining the amount to be awarded annually to UAREP, NCI reviewed the grantee's approved budget and subtracted therefrom any unobligated balances from prior periods, including in some years some of the grant-related income from the sale of the Atlas. UAREP would then fund, from all sources available to it, the manuscript preparation of new fascicles of the Atlas through a subgrant to a principal researcher.

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UAREP took the manuscript to the AFIP for use of its photographic and printing services. AFIP advises us that pursuant to an agreement with the Government Printing Office (GPO), GPO presses are maintained at AFIP and run by AFIP personnel specifically for the purpose of printing the Atlas.

Concurrent with the printing of each fascicle, AFIP and GPO agreed upon a sale price from each publication, including a volume purchaser discount. UAREP would then purchase copies of the publication at the volume built rate and sell them at a "profit" at a bookstore located in space provided by AFIP. (This relationship has also been terminated due partly to questions raised about its legality and AFIP now sells the Atlas at a bookstore run by its own personnel.) UAREP used the proceeds of the sale to further the research objectives of its NCI grants and to purchase more volumes from GPO for resale. It is the money remaining in this account which AFIP has requested that we collect from UAREP and which UAREP contends is grant-related income from its NCI grant.

AFIP's position is that funds in the 202 account belong to the Government because the concept for the Atlas originated within the Federal sector, the preparation of the Atlas manuscript was financed by Federal funds (the NCI grant) and the Atlas was printed on GPO presses maintained by AFIP specifically for the printing of the Atlases.

UAREP, on the other hand, maintains that the income received from the sale of the Atlases is grant-related program income retainable by it as grantee for the furtherance of the purposes of the grant as authorized by the terms of the grant. NCI, the grantor, agrees with UAREP's position.

We agree with UAREP's position. The concept for the Atlas may have originated with the Federal Government, but that is not relevant to a determination of the nature of the proceeds. Ideas which result in the granting of funds may come from within the Government or from without, but the determination of the ownership of funds generated by a grantee is dependent upon the grant agreement and the particular facts and circumstances involved.

Also, the fact that the printing of the Atlas was done on GPO presses (by AFIP personnel) is not dispositive of the issue. As a general rule, no work of a private or commercial nature may be accomplished at any Government plant even though the Government is reimbursed therefor. 44 U.S.C. §§ 1102, 1118 (1970); Paragraph 37,

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Government Printing and Binding Regulations (April 1977). However, grantees may be authorized to use GPO presses for the publication of their findings within the terms of their grants provided this publication is not primarily for the purpose of having the findings printed for the use of a department or agency. Paragraph 25-2(b), id.

We have been advised that UAREP is authorized to use the GPO presses located at AFIP which are specifically maintained for the publication of the Atlas. Reimbursement for the costs of printing and distribution was made to the GPO from the funds in the 202 account. In our view, the authorized use of GPO presses, instead of those of the private company, does not convert a non-Federal publication into a Federal publication.

As we understand it, UAREP sometimes consulted with AFIP staff but otherwise, AFIP's financial contribution to the project was limited to providing photographic and printing services (for which latter costs the GPO was paid) and providing space for UAREP to sell the finished product. This assistance, in our view, does not convert the Atlas into an AFIP publication. The grant agreement which controls is the one between UAREP and NCI.

As a general rule, income generated from Federal funds is subject to section 3617 of the Revised Statutes, 31 U.S.C. § 484 (1970), which requires that the gross amount of all moneys received for the use of the United States from whatever source shall be covered into the Treasury. Nevertheless, with regard to grant funds, we have held that the "benefits resulting from the use of the grant technique extend to making the funds, while under the control of the grantee, free from the statutory restrictions generally applicable to the expenditures of appropriated moneys by the departments and establishments of the Government." 44 Comp. Gen. 87,88 (1964). A grant creates obligations between the United States and the grantee under which moneys paid over to the grantee are required to be used for the purposes and subject to the conditions of the grant. The United States has a clear reversionary interest in the unencumbered balances of grants, including any funds improperly applied. 42 Comp. Gen. 289, 294 (1962). Additionally, we have consistently held that interest earned by a grantee on funds granted by the United States (with the exception of States) belongs to the United States rather than the grantee and are to be accounted for and deposited in the Treasury. Id. at 295; B-149441 (July 13, 1976). However, with regard to income from the sale of publications financed by Federal grants, we have authorized the retention of such moneys in a revolving fund to be used for grant purposes in the absence of a provision to the contrary in the grant agreement. 44 Comp. Gen. 87, supra.

In this case, the moneys provided by NCI were grant funds which are not subject to the statutory restrictions generally applicable to appropriated moneys. The terms of the grant clearly provide for the retention of proceeds by the grantee. In the "Notice of Grant Awarded" for the most recent funding of the preparation of the Atlas which was issued on December 22, 1976, is the following provision dealing with grant-related program income:

"Any funds or income generated by the activities of this grant and [construed] to be grant-related income shall be retained by the grantee and disposed of as directed by the National Cancer Institute."

With regard to what is to be construed as grant-related program income, HEW's regulations provide as follows:

"'Program income' represents earnings by the grantee realized from the grant-supported activities as a result of the grant. Such earnings exclude interest income and may include, but will not be limited to, income from service fees, sale of commodities, usage or rental fees, sale of assets purchased with the grant funds, and royalties on patents and copyrights."
45 C.F.R. § 74.71 (1977).

The applicable provision of Office of Management and Budget (OMB) Circular No. A-110 states that:

"... program income earned during the project period shall be retained by the recipient and, in accordance with the grant or other agreement, shall be:

- "a. Added to funds committed to the project by the Federal sponsoring agency and recipient organization and be used to further eligible program objectives;
- "b. Used to finance the non-Federal share of the project when approved by the Federal sponsoring agency or
- "c. Deducted from the total project costs in determining the net costs on which the Federal share of costs will be based."
(Attachment D - OMB Circular No. A-110, 41 Fed. Reg. 32016 (1976) (emphasis added))

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Additionally, under OMB Circular A-110, the NCI must apply standards set forth by the OMB in requiring UAREP, the recipient organization, to account for program income related to projects financed in whole or in part by Federal funds.

The NCI and UAREP consider the proceeds received from the sale of the Atlas to be grant-related program income. Under the terms of the grant agreement, UAREP is authorized to retain and dispose of such funds only as directed by NCI. It is understood that UAREP submits a financial statement showing program income to NCI with each request for annual funding. NCI then decides whether the amount requested should be reduced by applying program income to fund part of the estimated costs. At the end of the 12-year project period, it is understood that UAREP will be required to account for all income received during the 12-year period.

In view of the above, we conclude that the subject funds may properly be retained by UAREP and disposed of as directed by the NCI. We can find no basis for the Army's claim that the funds be transferred to AFIP.

R. F. KELLER

Deputy | Comptroller General
of the United States