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DECISION

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

FILE: B-118638.101 DATE: October 29, 1979

MATTER OF: District of Columbia Eligibility for Local Public Works Grant Funds

DIGEST: Interpretation by Economic Development Administration of force account prohibition contained in 42 U.S.C. § 6705(e)(1) to disallow the cost of architectural and engineering project inspection directly performed by employees of District of Columbia or other grantees is not unreasonable or inconsistent with the statute, and is not clearly erroneous or inconsistent with agency regulations implementing the statute. Accordingly, with no legal basis to object to legality of this interpretation, these costs need not be allowed under Local Public Works program grants. However, if, as the District contends, EDA approved some grant applications in which the District indicated it would use, and expect to be reimbursed for, its own employees performing this work, the grant approval would bind EDA to paying this cost.

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The Mayor of the District of Columbia (District) requested a decision from this Office as to whether in administering the Federal grant program authorized by Title I of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, July 22, 1976, 90 Stat. 999, 42 U.S.C. §§ 6701-6710 (1976), as amended by Pub. L. No. 95-28, May 13, 1977, 91 Stat. 116, (Act), the Economic Development Administration (EDA) may disallow the costs of architectural and engineering (A/E) project inspection performed by the District's own employees as opposed to private contractors.

In 1976, at a time when the United States was suffering a serious economic recession, Congress passed Title I of the Act to stimulate the economy and to relieve unemployment in the construction industry. Title I authorized to be appropriated $2 billion in Federal grants to State and local governments, defined to include the District, for the construction of local public works (LPW) projects. The Federal Government pays 100 percent of project costs.

In 1977, after conducting hearings to ascertain ways to improve the LPW program, Congress enacted "Round II" of LPW

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grants in Pub. L. No. 95-28 supra. One change incorporated into Round II is the prohibition against construction being performed by the inhouse work force of any State or local government. This "force account" prohibition is contained in 42 U.S.C. § 6705(e)(1), which provides in pertinent part:

> "No part of the construction (including demolition and other site preparation activities), renovation, repair, or other improvement of any public works project for which a grant is made under this Act after the date of enactment of this subsection shall be performed directly by any department, agency, or instrumentality of any State or local government. * * *"

The Act gives EDA the authority, not later than 30 days after the date of enactment of the Act, to prescribe regulations necessary to carry out the provisions of the Act. 42 U.S.C. § 6706. Pursuant to that authority, EDA published regulations on May 27, 1977, which provide:

> "Construction by State or local Governments or Indian tribes. No part of any grant made under this part may be used for the payment of construction activities directly performed by any department, agency or instrumentality of any State or local government or any Indian tribe."

42 Fed. Reg. 27,432 (codified in 13 C.F.R. § 317.18(e)).

In response to inquiries as to the scope of the force account prohibition EDA published notice on October 13, 1977, that "construction activities" as used in 13 C.F.R. § 317.18(e) includes A/E services such as project inspection. 42 Fed. Reg. 55,118. On October 26, 1977, EDA amended section 317.18 adding subsection (e)(1) which provides in pertinent part:

> "'construction activities' includes A/E services performed during and after construction of the project, such as project inspection * * *."

Misprinted in 42 Fed. Reg. 56,488 corrected in id. 57,685.

When the District entered into its grant agreement with EDA, the regulations then in effect described the force account prohibition as applying simply to "construction activities," left undefined. 13 C.F.R. § 317.18(e). In addition to physical construction costs the regulations specifically allowed as "eligible project costs * * * A/E costs such as inspection * * *." 13 C.F.R. § 317.17. Also listed as eligible project costs were the costs of activities which are commonly performed by account, i.e., administrative costs including legal and audit costs.

The District, along with some other grantees, interpreted "construction activities" as used in 13 C.F.R. § 317.18(e) to connote only the costs of actual, physical construction exclusive of the other costs listed in 13 C.F.R. § 317.17 including the costs of A/E inspection and certain legal and audit services. The District contends the EDA's notice and amendment do not clarify the force account prohibition, rather that they redefine it to disallow costs that were allowable when the District entered into its grant agreement with EDA. The District further contends that EDA's interpretation of the statutory force account prohibition is inconsistent with the Act.

Neither the statute nor the May 1977 regulation explicitly sets forth the scope of the force account prohibition. EDA's position is that the word "construction" should be broadly construed to include all activities incident to physical construction in order to allow grant proceeds to be used to fund all aspects of the project. However, in his report to us, EDA's Acting Chief Counsel states: "Just as EDA interpreted 'construction' broadly in section 103(a) in order to allow grant funds to be used to reimburse grantees for all expenses incurred in completing the project, so EDA must interpret 'construction' broadly in determining the extent of the prohibition of force accounts of section 106(e)(1)." He advises that when it published its regulations on May 27, 1977, EDA intended the restrictions of its regulation to apply broadly to all construction activities and not merely to physical construction. He states that through mid-September 1977, EDA did not know that some grantees misunderstood the scope of the term "construction activities." However, he states, grantees seeking advice from EDA during that period were told that the regulatory prohibition was intended to apply broadly to all activities incident to completion of the project.

Upon learning of the interpretation being given to the regulations by some grantees, EDA reexamined its position. EDA felt that it lacked the statutory authority to relax the prohibition against force accounts any further. It points, for example, to the statement of Congressman Roe, Chairman of the Subcommittee on Economic Development of the House Public Works and Transportation Committee where the force account prohibition originated:

> "Another provision that deserves our attention is the conferees' agreement to a new amendment which prohibits any project from being constructed by a State or local government through the use of its own employees. This provision is insured by requiring that construction must be performed by private contractors

through competitive bidding unless the Secretary finds some other method, such as negotiated procurement in the case of architect-engineer services, would be more in the public interest. Grantees are directed to set forth all conditions of contract award in advertised announcements and to comply with appropriate State and Federal laws or practices relating to the various types of contract awards." 123 Cong. Rec. H 3934 (daily ed. May 3, 1977).

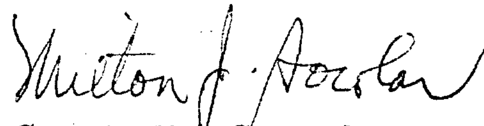
In his report to us, the Acting Chief Counsel further notes that in corresponding with that agency, "Mr. Roe reiterated that Congress intended the force account prohibition to extend to project inspection, but stated that Congress did not intend it to extend to accounting, legal services, procurement and contracting, auditing, and other financial management activities." In February 1978, EDA announced that these five activities were not subject to the force account prohibition. EDA maintains that since the enactment of the force account prohibition, it has consistently held that project inspection and certain A/E services may not be performed directly by the grantees. EDA states that it is now providing those grantees who misunderstood the force account prohibition with the maximum relief possible under the Act.

As a general rule, an interpretation given a statute by the agency charged with its administration is entitled to great weight and will be upheld unless the interpretation is unreasonable or inconsistent with the statute. See 2A Sutherland, Statutory Construction, section 49.04, 49.05 (4th ed. 1973); See also 39 L. Ed. 2d 942 (annotation). Similarly, an administrative interpretation of an agency's own regulation generally is controlling unless it is plainly erroneous or inconsistent with the regulation. See 53 Comp. Gen. 143, 145 (1973); 1A Sutherland section 31.06.

In our view, the District has not demonstrated that EDA's interpretation of the statutory force account prohibition is unreasonable or inconsistent with the Act. The only legislative history on this subject is contained in the statement of Congressman Roe, quoted above which describes the prohibition as extending to A/E services. We also feel that the District has failed to show that EDA's notice and amendment interpreting 13 C.F.R. § 317.18(e) were clearly erroneous or that they unfairly prejudiced grantees. While the initial regulations issued by EDA concerning Round II of the Local Public Works program did not define the word "construction" with precision, grantees in doubt could have informally asked EDA concerning the proper interpretation. We cannot say that as a legal matter,

EDA's interpretation of the statute and its own implementing regulations are clearly erroneous or unreasonable. Accordingly, we have no basis on which to raise legal objections to EDA's interpretation.

We note, however, that the District maintains that the applications it submitted for at least some of these grants clearly specified its intention to use (and its expectation to be reimbursed for them) its own employees to perform A/E project inspections instead of private contractors and that these applications were approved by EDA. If so, EDA's acceptance of the District's applications would have led the District to believe that its use of its own employees to perform A/E services was permissible and not excluded by the "construction" prohibition contained in 42 U.S.C. § 6705(e)(1). It is legally entitled to rely on this position. Because of the admitted ambiguity as to what services actually were prohibited by the statute, EDA's approval of those applications would, in our view, form a binding obligation so that these costs should be paid from grant funds. If EDA did not intend to pay these costs, it should have either required an amended grant application or put a condition on its approval. In the absence thereof, since the law was ambiguous, if EDA accepted grant applications so providing, the District was entitled to reply on the EDA approval. We see no legal basis upon which EDA can withdraw its approval. Of course, applications submitted and approved after the clarifying regulations were issued in October, 1977, cannot legally bind EDA to pay these costs.



For the Comptroller General
of the United States