



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Small Business Administration Questions about
Funding of Small Business Development Centers

File: B-229873

Date: November 29, 1988

DIGEST

Although the "bona fide needs" rule, 31 U.S.C. § 1502(a), applies to grants and cooperative agreements as well as procurement contracts, the Small Business Administration (SBA) did not violate the bona fide needs rule by making 1-year cooperative agreement awards to Small Business Development Centers (Centers) on September 30 of 1 fiscal year even though the cooperative agreement work was to be done in the next fiscal year. The SBA's bona fide need is to provide assistance to the Centers by entering into grants or cooperative agreements within the fiscal year sought to be charged. 64 Comp. Gen. 359 (1985) distinguished.

DECISION

The Small Business Administration (SBA) asks several questions about application of the bona fide needs rule, 31 U.S.C. § 1502(a), to its funding of certain Small Business Development Centers' (Centers) cooperative agreements on September 30 of a fiscal year, notwithstanding the fact that the services provided by the Centers will be performed in the subsequent fiscal year. The answer is that the rule is not violated. The agency's bona fide need is to provide assistance to Centers by entering into grants or cooperative agreements within the fiscal year sought to be charged. In the assistance relationship considered here the dates on which the recipient of support in turn provides services to others is irrelevant for purposes of determining when a bona fide need arose. We will set forth the specific questions, agency positions where appropriate, and answers following the "Background" section. We also distinguish 64 Comp. Gen. 359 (1985).

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BACKGROUND

The Small Business Development Center program began in 1977 as a pilot program pursuant to the SBA's general authority under the Small Business Act, as amended by Pub. L. No. 87-305, 75 Stat. 666, 668-69, to provide management and technical assistance to small businesses. In 1980, the Congress enacted legislation specifically authorizing the SBA to make grants (and contracts and cooperative agreements) to qualifying applicants, both public and private, to assist in establishing Small Business Development Centers for:

"small business oriented employment or natural resources development programs; studies, research, and counseling concerning the managing, financing, and operation of small business enterprises; delivery or distribution of such services and information; and providing access to business analysts who can refer small business concerns to available experts." Pub. L. No. 96-302, 94 Stat. 833, 843-44, codified at 15 U.S.C. § 648.

In implementing this authority, the SBA has established assistance funding relationships using cooperative agreements with colleges and universities and other non-federal entities in each of the 50 states to operate Centers and frequently one or more subcenters. The SBA uses cooperative agreements rather than grants because it believes the program involves substantial federal involvement between the SBA and the Centers. See 31 U.S.C. § 6305. The cooperative agreements are funded from the SBA's lump-sum salary and expense appropriation. Through fiscal year 1988, this appropriation had been a 1-year appropriation; that is, it had been available for obligation only during the fiscal year in which it had been appropriated. E.g., Pub. L. No. 99-180, 99 Stat. 1136, 1165-66, 1168. The fiscal year 1988 appropriation allows the amount appropriated for Centers' cooperative agreements to be obligated during fiscal year 1988 or 1989. Pub. L. No. 100-202, 101 Stat. 1329-34.

Once admitted into the program, the Centers have been awarded renewal cooperative agreements on an annual basis to continue and expand their operations in accordance with their state-wide or regional plans. During both the pilot program, which involved nine Centers, and the first year under the statutory program, the Centers were funded on cycles based on the date of entry of participants into the program. These dates often coincided with the beginning of the calendar year, rather than the fiscal year. Thus, many

Centers' funding cycles covered portions of more than 1 fiscal year.

In addition, in fiscal year 1980, the award to two Centers was made on September 30, to enable them to begin operations at the start of fiscal year 1981. The SBA informs us that this was done because fiscal year 1980 money was available and it was uncertain as to whether or to what extent fiscal year 1981 funds would be provided. Subsequently, this practice was continued for other Centers so that a substantial number of cooperative agreements with the Centers were awarded on September 30, the last day of a fiscal year.

In 1984, the Congress amended the program. Pub. L. No. 98-395, 98 Stat. 1366. Among other things, the amendment added language providing that the "terms of such [Center] grants shall be made on a calendar year basis or to coincide with the federal fiscal year." The House Committee which proposed the amendment found that approximately one-half of the Centers had agreements with the SBA which began and ended on a calendar year basis, rather than on the more usual fiscal year basis. By authorizing two funding cycles, new entrants could be funded closer to the time of approval of their applications. The term of the Center's agreement^{1/} could then be set to coincide with either the calendar or fiscal year for future funding arrangements. H.R. Rep. No. 739, 98th Cong., 2d Sess. 18 (1984).

The SBA states that when the Congress amended the program in 1984, it was required to change its funding cycles for a substantial number of Centers. The SBA says the Congress was aware not only of the funding problem caused by the calendar year agreements but also of the September 30 fundings. As support the SBA relies on a letter of September 18, 1985 to the SBA Administrator from the Chairmen of the Senate and House Small Business Committees. The letter says:

"This goal of insuring a greater degree of uniformity in program administration and delivery of services to the small business community can be accomplished by clustering the contract terms within two or three or four days of the beginning of either the Federal fiscal year or the calendar year. It is not

^{1/} The House Report refers to the Center grants as contracts or grants. H.R. Rep. No. 739, 98th Cong., 2d Sess. 18 (1984). As mentioned previously, they are actually cooperative agreements.

necessary that every contract commence precisely on one of two dates."

The SBA understood this passage to mean it would be consistent with the Congress' intent if cooperative agreements were awarded within a few days before or after the first day of the fiscal year, and that the practice of funding some of the Centers as of September 30 was consistent with the amendment.

Nevertheless the SBA's Inspector General has questioned the propriety of funding agreements on September 30 using current fiscal year money, when all grant activities would be performed during the following fiscal year. He is concerned that this kind of funding violates the bona fide needs rule, 31 U.S.C. § 1502(a). The Administrator indicates that "the involved parties within SBA have been unable to reach agreement on this complex issue." He requests a decision on the question raised by the Inspector General.

Legal Discussion

1. Does the bona fide needs rule require, where a grant is made for services, that the funds obligated be of the same fiscal year as that in which the services will be rendered? Answer: No.

2. Is the application of the bona fide needs rule affected by the continuing relationship characteristic of the Center program? Answer: Not in this instance.

Without express statutory authority, no agency may obligate an appropriation made for the needs of a limited period of time, usually 1 year, for the needs of prior or subsequent years. This is a paraphrase of what we have termed "the bona fide needs rule" which is codified at 31 U.S.C. § 1502(a). This rule applies to all federal government funding activities carried out with appropriated funds, regardless of whether the funding mechanism used is a contract, grant, or cooperative agreement.^{2/} However, in

^{2/} The Grant and Cooperative Agreement Act of 1977, 41 U.S.C. § 501 et. seq., requires the use of a procurement contract if the purpose of the appropriation is to fund the agency's acquisition of property or services for its own needs. If the purpose is to provide assistance to a non-federal entity through the transfer of money or anything else of value to accomplish a public purpose, the proper funding mechanism is a grant. If the above-described

order to determine compliance with the rule, we must first determine the purpose for which the appropriation was made, because the government's "bona fide need" is shaped by the purpose of the appropriation.

If the purpose is to enable an agency to procure specific supplies or other property for its own use, there is rarely a problem in determining compliance with the rule. It is only necessary to show that the articles were needed during the year or years for which the appropriation is available, and the contract or other commitment must actually have been made during that fiscal year or years, even if actual delivery takes place during a subsequent fiscal year.

The task of determining the proper fiscal year to charge for a contract for services is sometimes more difficult. As explained, infra, this is when the concept of severability and non-severability is most pertinent. If by the terms of the contract, services are to be performed at the request of the agency or at fixed intervals during a period that spans 2 or more fiscal years, 31 U.S.C. § 1502(a) would be violated to the extent that a prior year's funds were expended for services which, by their very nature, could not be considered to be a bona fide need of that prior year. See, for example, 60 Comp. Gen. 219 (1981). In a case with many parallels to the case in point, the SBA entered into an agreement late in fiscal year 1979 with a number of private organizations to provide management and consultation services to eligible small businesses at an agreed-upon hourly rate for 1 calendar year. The contract also provided that payment was to be made only for completed tasks, which were to be ordered by the contracting officer from time to time as he thought to be necessary. Since no services were ordered during fiscal year 1979, even though the contract was signed in fiscal year 1979, we refused to allow services actually ordered and provided in fiscal year 1980 to be charged to the fiscal year 1979 appropriation. These were clearly "severable" services. Id.

Contrast the above-described case with the Small Business Development Centers program in question. Both involve management and consultation services to be provided to small businesses. However, the purpose of the Small Business Development Centers appropriation is to fund an assistance program for non-federal entities which, in turn, are

assistance relationship contemplates substantial involvement by the federal agency during the period of performance of the grant, the legal instrument to be used is a cooperative agreement.

expected to use the funds, together with some of their own, to fulfill a public purpose. Although the purpose of the program is to provide assistance to Centers for a 1-year period, it really does not matter when the Center begins or completes its tasks. The statutory purpose was fulfilled once a grant or cooperative agreement was awarded during the period of availability of the appropriation for obligation; in other words, the award constitutes the obligation, and upon award, the funds belong to the awardee. Thus, SBA's September 30 awards were just as permissible as its January 1 awards. The legislation amending the Centers program, which permitted Center awards to be made on a calendar or fiscal year basis, and accompanying legislative history indicate that the Congress was aware of the SBA's varied funding cycles and intended to provide the SBA some flexibility in when it could make its awards.

Our decision in 64 Comp. Gen. 359 (1985), in which we stated that the bona fide needs rule had been violated in a grant program by which the National Institutes of Health provided assistance to universities and other organizations for biomedical research, is distinguishable, since the issue being considered there was different. The statement of the question before us in 1985 is presented below in the words of the Chairman of the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Senate Committee on Appropriations, in his request for a legal opinion on February 4, 1985:

"The FY 1985 NIH budget requests were presented and justified to Congress as supporting research projects for a period of one year (a long-standing funding practice for NIH research projects). Congress acted with the understanding that research projects would continue to be funded on that basis. By its subsequent decision to fund projects on a multiyear basis without seeking prior congressional approval, has the Executive Branch usurped congressional prerogatives and violated the intent of Congress?"

The Chairman was referring to the fact that the Congress had appropriated increased funds to enable NIH to continue its program of awarding new 1-year research grants and to continue the funding of other grants for an additional 1-year period. Instead, NIH chose to use the funds to make a large number of 3-year grants; that is, some grantees received support for 3 years' research efforts at one time, thus obviating the need to request refunding on a competitive basis, as had been customary. The 3-year funding plan also reduced the number of new research grants that could be awarded. Our decision that the bona fide needs rule had

been violated was based on the fact that the NIH did not have multiyear authority to commit the United States for 3 years' worth of funding. Its authority was limited to the grant needs of only 1 year. We were not concerned with the dates of entry into the grant program or the period during which the research would be conducted as long as the funding was consistent with the statutory purpose of awarding 1-year grants.

In this instance, the SBA had 1 fiscal year in which to make its awards to the Centers, and did so for each fiscal year beginning in 1980. The awards made on September 30 were as proper as those made at any other point in the year. Furthermore, unlike the NIH situation where the manner in which NIH made its awards conflicted with the will of the Congress, in this instance, the Congress intended that the SBA be permitted to make its awards at different times during a fiscal year. We therefore find no violation of 31 U.S.C. § 1502(a), regardless of the date an award is made, as long as the award is made during the fiscal year or years for which appropriations are provided.

3. What interpretation is to be given to the amendment to section 21(a)(1) establishing a calendar year and fiscal year funding cycle?

The amendment to section 21(a)(1) of the Small Business Act, Pub. L. No. 98-395, 48 Stat. 1366, allows the Centers' cooperative agreements to be funded on a calendar or fiscal year basis. The legislative history suggests that this was done to accommodate the Centers' projects that had been funded on a calendar year basis. H.R. Rep. No. 739, 98th Cong., 2d Sess. 18 (1984). The letter to the SBA Administrator from the Chairmen of the Senate and House Small Business Committees, which we quoted on page 3, also suggests an intention to allow the SBA some leeway over the time at which the awards are made. The amendment need not be interpreted as the provision of an exception to the bona fide needs rule, as the Administrator suggests. No such exception is necessary, for the reasons explained above. Instead, we think the amendment was aimed at "insuring a greater degree of uniformity in program administration," as the chairmen of the House and Senate committees on Small Business stated in a jointly signed letter to the SBA Administrator on September 18, 1985.

4. How are grants involving a mixture of severable and non-severable activities to be treated for purposes of applying the bona fide need rule?

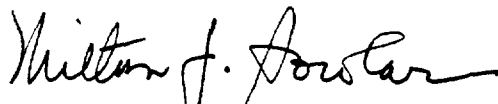
Please see the answer to questions 1 and 2. The concept of severable and non-severable services is not relevant to the program under consideration.

5. What actions should the SBA take to correct the bona fide needs problems raised by the September 30 fundings?

The SBA states that currently there are nine Centers being funded on the September 30 renewal dates. The federal share of these nine grants amounts to approximately \$8 million. Were the SBA to renew these grants on October 1 rather than September 30, the SBA suggests it would lose the \$8 million of appropriated funds and the following year's appropriations requirements would be distorted.

The SBA also states that it has taken steps to alleviate its concerns about the September 30 fundings. All new Centers admitted to the program since 1984 have been funded on either a calendar year or fiscal year cycle. The SBA also has developed plans to complete the transition of the remaining nine Centers by fiscal year 1990 so that they too will be funded either on a calendar or fiscal year basis. The SBA states that its phased approach was adopted to minimize the budgetary impact of the transition.

As indicated in question one, we do not think the September 30 fundings violate the bona fide needs rule. There is, of course, a need to comply with the congressional directive to conform its funding of the Centers' cooperative agreements to a fiscal or a calendar year basis for administrative purposes, and we have no objections to the actions the SBA proposes to take.

for 
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