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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Department of Labor—Replacement Grants

File: B-322628

Date: August 3, 2012

DIGEST

The Department of Labor's Employment and Training Administration may use amounts obligated for two grants in an appropriation during its period of availability from April 1, 2009 through June 30, 2010, to fund two replacement grants awarded in fiscal year 2011. When an agency vacates a grant award based on the grant officer's discovery of a defect in the competitive selection process, the appropriation originally obligated for the grant remains available to fund a replacement grant awarded after the expiration of the appropriation, where the need for the object of the grant continues to exist, the nature and purpose of the replacement grant are the same as the original grant, and the replacement grant is executed without undue delay. Grant officers are entrusted with the responsibility to ensure that grant awards are made in accordance with all applicable laws and regulations. Replacement grants awarded to maintain the integrity of a competitive selection process represent a continuation of the obligation for the original grant award rather than a new obligation.

DECISION

The Assistant Secretary for Employment and Training of the Department of Labor (DOL) has requested an advance decision pursuant to 31 U.S.C. § 3529 on whether an appropriation enacted in fiscal year 2009 and obligated for two grants during its period of availability from April 1, 2009, through June 30, 2010, remains available to DOL's Employment and Training Administration (ETA) to fund replacement grants awarded in fiscal year 2011. Letter from Assistant Secretary, ETA, to Comptroller General, Oct. 13, 2011 (Request Letter). The decision to award replacement grants results from the agency's initiative to vacate the original grants and reevaluate the grant applications because of concerns about defects in the competitive selection process. As we explain below, ETA may use amounts obligated in DOL's fiscal year 2009 appropriation for the two original grants to fund the replacement grants.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. The record in this case consists of the Request Letter which contains DOL's legal views and the Grant Officer's Motion for Remand filed November 2, 2011 (Motion for Remand).

BACKGROUND

The Omnibus Appropriations Act, 2009,¹ appropriated funds to DOL for the necessary expenses of the Workforce Investment Act of 1998 (WIA).² Of the amounts appropriated, \$88.5 million was made available for obligation from April 1, 2009 through June 30, 2010, "for youthful offender activities."³ In April 2010, ETA published a Notice of Solicitation for Grant Applications (SGA) announcing the availability of approximately \$20 million for two grants to be awarded through a competitive process under section 171 of the WIA. Request Letter, at 2; see also 75 Fed. Reg. 17957 (Apr. 8, 2010). The purpose of the grants is to prepare young adult offenders and high school dropouts in high-poverty, high-crime communities for employment. Request Letter, at 2.

At the conclusion of the grantee selection process, ETA awarded two grants of \$10 million each to the two highest-rated applicants per evaluation criteria set out in the SGA. An applicant that was not selected appealed the award decision to DOL's Office of Administrative Law Judges (OALJ). *Id.* at 3. Whenever a grant applicant is not selected for a grant award made under the WIA, the applicant may request a hearing before the OALJ. See 29 U.S.C. § 2936.

In preparation for the pending hearing, ETA found that the grant management specialist assigned to assist the grant officer had improper contact with the selection panelists. Request Letter, at 3. In addition, ETA questioned how thoroughly the selection panelists had been briefed and supervised. *Id.* Although ETA asserts that its selection process was "legally defensible," ETA concluded that the selection process may not have fully implemented the provisions of the SGA. *Id.* ETA decided that the prudent course was to seek a remand vacating the initial awards so that ETA could re-evaluate the grant applications and ensure that the selection process conformed to the SGA. *Id.*; Motion for Remand. Accordingly, ETA filed a

¹ Pub. L. No. 111-8, div. F, title I, 123 Stat. 524, 750–52 (Mar. 11, 2009).

² Workforce Investment Act, Pub. L. No. 105-220, 112 Stat. 936 (Aug. 7, 1998), codified at 29 U.S.C. §§ 2801–2945.

³ Pub. L. No. 111-8, 123 Stat. at 752.

Motion for Remand with the OALJ on November 2, 2010, which was granted on November 4, 2010. *Id.*

Upon remand, ETA deobligated the awards to the original grantees and a new review panel re-evaluated the grant applications. Request Letter, at 3. On January 28, 2011, the new review panel announced the results of its re-evaluation. Request Letter, at 3–4. The two highest-rated applicants based on the re-evaluation differed from the original grantees. *Id.* Because the fiscal year 2009 appropriation available for the original grants expired on June 30, 2010, ETA asks whether the fiscal year 2009 appropriation remains available to fund replacement grants.

DISCUSSION

At issue here is whether DOL's fiscal year 2009 appropriation remains available to fund the replacement grants.

Appropriated funds must be obligated during their period of availability. Once an appropriation has expired, the appropriation is no longer available for new obligations. 31 U.S.C. § 1502(a). The \$20 million at issue in this case expired on June 30, 2010.⁴ Accordingly, it is generally not available for new grant awards as they constitute new obligations. However, GAO case law recognizes a few exceptions to this general rule. *See generally* 57 Comp. Gen. 205 (1978); B-157179, Sept. 30, 1970. For example, in B-157179, an agency awarded a grant for a research project to a university that was subsequently unable to complete the project because the principal researcher transferred to another university. Without him, the original grantee could not complete the project. We held that the agency could award the unexpended balance of the grant funds to an alternate grantee, the university to which the principal researcher transferred, to complete the project even though the period of availability of the appropriation originally obligated for the grant had expired. We found that the original grant was made in response to a need and that the need for completing the project continued to exist.

Implicit in this analysis is the premise that the original grant award validly obligated then-current funds, and the termination of the grant award due to the original grantee's inability to carry out the grant does not eliminate the need for the original grant award. The replacement grant in this case represented a continuation of the original obligation rather than a new obligation. Thus, the appropriation available at the time of the original grant award remained available after its expiration to fund the replacement grant.

The facts before us present an issue that we have not addressed in our case law. Here, the award of the original grants was vacated not because the grantees could not carry out the grants, but because the grant officer determined that the

⁴ *Id.*

competitive selection process may not have fully implemented the provisions of the SGA. In similar situations involving contracts, we have held that where a defect exists in the procurement process, the originally obligated funds remain available to fund a replacement contract in a subsequent fiscal year. See 70 Comp. Gen. 230 (1991); 68 Comp. Gen. 158 (1988). In the case of contracts, the replacement contract is considered a continuation of the original obligation, not a new obligation, regardless of whether the defect is determined to exist by a court, or other competent authority such as a board of contract appeals, GAO, or the agency itself. Where the agency itself, rather than a court or other authority, makes the determination that the award was erroneous, the agency must find explicit evidence and document its determinations. See 70 Comp. Gen. 230, at 2.

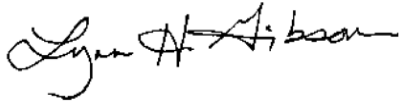
To preserve the integrity of the competitive grant selection process, we think defects in the award of a competitive grant should be treated similarly. In this case, ETA found improper contact between the grant management specialist and the selection panelists. Request Letter, at 3. ETA also had concerns about how thoroughly the selection panelists had been briefed and supervised. *Id.* Where, as here, a grant award is vacated on the initiative of the grant officer, subsequent to his or her discovery of a defect in the competitive selection process, we do not view the replacement grant award as a new obligation. To take such a view would constrain an agency's ability to take remedial action that serves to maintain the integrity of the competitive award selection process. Similar to contracting officers, a grant officer is entrusted with the responsibility for ensuring that grant awards are made in accordance with all applicable laws and regulations. In that regard, although ETA believed its original selections were "legally defensible," it documented its evidence and findings of defects and sought and was granted an order of remand from the OALJ.

ETA advises that the need for the object of the grants continues to exist, the new grants are of the same nature and purpose as the original grants, and the new grants were awarded within three months after vacating the original awards. *Id.* at 8–10. Accordingly, the new grant awards made by ETA constitute replacement grants that may be charged to the same appropriation obligated for the original grant awards.

CONCLUSION

Where ETA vacated the award of two grants because of defects in the competitive selection process, ETA's award of replacement grants constitutes a continuation of the original obligation. Because the need for the object of the grants continues to exist, the nature and purpose of the replacement grants are the same as the original

grants, and the replacement grants were executed without undue delay, ETA may use DOL's fiscal year 2009 appropriation, obligated for the original two grants, to fund the replacement grants.

A handwritten signature in black ink, appearing to read "Lynn H. Gibson". The signature is fluid and cursive, with the first name "Lynn" being more prominent.

Lynn H. Gibson
General Counsel