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DECISION

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

FILE: B-197100 DATE: April 24, 1980

MATTER OF: Environmental Protection Agency Public Participation Program

DIGEST:

1. In deciding whether intervenor in proceedings should receive financial assistance, agency should examine income and expenses and net assets of applicant to determine whether applicant can afford to participate without assistance. If intervenor has insufficient resources to participate in proceeding agency may provide full or partial assistance from appropriated funds. However, fact that intervenor would be forced to choose among various public activities and could not afford to participate in all of them, does not, without more, make participant unable to finance own participation. Agency may not use appropriated funds to assist such participant.

2. Since agency is authorized to provide assistance to needy intervenors, as explained in GAO decisions, under Federal Grant and Cooperative Agreement Act of 1977, agency may properly characterize this assistance as grant. If so characterized, prohibition against advance funding contained in 31 U.S.C. § 529 does not apply provided adequate fiscal controls to protect Government's interests are utilized. 56 Comp. Gen. 111 (1976) and B-139703, September 22, 1976, distinguished.

The General Counsel of the United States Environmental Protection Agency (EPA) has requested our opinion on the agency's proposed pilot public participation program. Specifically, she asks whether the draft of the notice establishing the program conforms with decisions of this Office concerning the use of appropriated funds to assist participants in agency proceedings.

We have examined the EPA draft notice and find, that with two exceptions, it is in conformity with our previous decisions. We also conclude that the enactment of the Federal Grant and Cooperative

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Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3, subsequent to our earlier decisions, requires us to modify the statements we set forth in those decisions that advance payments to intervenors are not permissible.

The question of the legal authority of Federal agencies to provide financial assistance to intervenors in their proceedings has been before this Office several times in the past. See, e.g., Costs of Intervention--Food and Drug Administration, 56 Comp. Gen. 111 (1976); Costs of Intervention--Nuclear Regulatory Commission, B-92288, February 19, 1976. In these decisions we addressed the extent to which payments to intervenors may be considered "necessary expenses" within the discretion of Federal agencies in carrying out their statutory functions. We determined that an agency may use appropriated funds to finance the cost of intervenors in its proceedings when it determines (1) that the participation of a particular party is necessary for the agency to determine the issue before it, or "can reasonably be expected to contribute substantially to a full and fair determination" of that issue; and (2) the party is indigent or otherwise unable to finance its own participation.

NEED FOR ASSISTANCE

On page 16 of EPA's draft notice, the following statement appears;

> "In its January 7, 1977, Advance Notice of Proposed Rulemaking, EPA stated its belief that the 'financial inability' test would be met if an organization had already committed all its available funds to other uses. In Opinion No. B-180224 (April 15, 1977), the Comptroller General disagreed, saying that the correct test was 'more stringent than the EPA interpretation'. However, the exact nature of the correct test was not and never has been specified by the Comptroller General, except that in an earlier opinion, he had held that an applicant does not have to be actually indigent to meet it. Decision B-139703, December 3, 1976, p. 6."

From the earliest of our decisions on the question of using appropriated funds to provide assistance to intervenors, it has been our position that the agency itself, rather than this Office, must determine whether to provide this assistance. Accordingly, we have never set forth a stringent test to be followed, but rather guidelines to assist the agency in making this decision.

For example, in the opinion referred to in the EPA notice, we did not speak of a "correct test". Rather, we found that EPA's own formulated test, which would have allowed assistance to a party which had

sufficient funds to participate on its own but chose to spend them for another purpose, was not satisfactory. Specifically, we stated:

> "Accordingly, EPA's interpretation of our position on the question of eligibility for reimbursement in terms of lack of financial resources is not correct. Our approach is more restrictive than the EPA interpretation."

As noted by EPA, we have repeatedly indicated that an agency could use appropriated funds to assist intervenors if it determines that the party is indigent or otherwise unable to finance its participation. It is this latter phrase which EPA states needs further clarification.

We believe that assistance should be extended only to those individuals and organizations which cannot afford to participate without this assistance. An agency should consider the income and expense statements, as well as the net assets, of applicants for assistance. If the agency concludes that the applicant has insufficient resources to participate in the proceeding, it may use appropriated funds to offset the applicants' costs in whole or in part.

On the other hand, the mere fact that the participant would have to choose among alternative activities and could not, for example, participate both in a rulemaking proceeding of EPA and an adjudication by another agency, or lobbying activities in the Congress, does not mean that that party needs financial assistance in order to participate. In such instances, we would expect the participant to choose which public activities are most significant and to use its own resources to participate in those activities.

ADVANCE PAYMENTS

In one of our earlier decisions, B-139703, September 22, 1976, we stated:

> " * * * 31 U.S.C. § 529 (1970) prohibits the making of advances of public money in any case unless authorized by the appropriation concerned or other law. Since we are not aware of any such authorization on the part of the Commission which would apply here, we must conclude that payments for the participation here involved must be made on a reimbursement basis. Thus the Commission could make disbursements only as participation is actually accomplished. Of course, such participation might be accomplished prior to the close of a Commission proceeding. While the inability to make advance payments might in some cases impede or prevent the Commission from obtaining desired

> participation, 31 U.S.C. § 529 clearly requires statutory authority for advance payments in this context."

Also, see Costs of Intervention--Food and Drug Administration, 56 Comp. Gen. 111, 115 (1976). Although not stated explicitly, our position was based on what we perceived as the contractual nature of the relationship between the agency and the intervenor.

The EPA draft notice recognizes our position in the following statement on page 15:

> " * * * the Comptroller General's opinions preclude payment of compensation before the work in question is completed. Accordingly, in normal cases the money will be committed when the application is approved, but will not be paid out until the comments are received."

But the notice goes on to say:

> "However, in appropriate cases applicants may request, and EPA may grant, progress payments in proportion to expenses already incurred as of that time. Without such a provision the ability of participants to prepare their comments might be unreasonably constrained by cash-flow problems."

This proposed payment to a participant prior to actual participation, or submission of an intervenor report, regardless of its desirability, would not be permissible under our prior decisions. The mere fact that an expense has been incurred, without transfer of a concrete benefit to the Government, does not make the payment any less a violation of the advance payment prohibition, if the relationship between the agency and the intervenor is contractual.

On the other hand, subsequent to our decisions the Congress enacted the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3 (to be codified at 41 U.S.C. §§ 501 et. seq.). One result of this Act was the establishment of standards to distinguish Federal assistance relationships from Federal procurement relationships (and cooperative agreements), regardless of traditional labels for the type of transaction involved.

The Act directs agencies to use procurement contracts whenever the principal purpose of the relationship between the Government and the recipient is the acquisition, by purchase, lease, or barter, of

property or services for the direct benefit of the Federal Government. Agencies are to use a grant instrument whenever the principal purpose of the relationship is assistance; i.e., the transfer of money, property, services, or anything of value to the recipient in order to accomplish a public purpose of support or stimulation, and there is to be no substantial involvement of the Government in the contemplated activity. (Under the same circumstances, if substantial involvement by the Government is contemplated, the proper instrument is a cooperative agreement.) See Bloomsbury West, Inc., B-194229, September 20, 1979; Burgos & Associates, 58 Comp. Gen. 785 (1979).

The Act gives considerable weight to an agency's own characterization of the type of relationship it proposes to enter as a grant, cooperative agreement or contract (assuming, of course, that it has the underlying authority to engage in the activity involved in the first place. In this instance, we have already ruled (B-180224, May 10, 1976) that EPA has implied authority to assist intervenors who qualify under the conditions set forth in the Comptroller General's many decisions on this topic.) While the agency must set forth its rationale for its particular characterization of the relationship, we will not question its determination unless it is clearly contrary to the statutory guidance in the Act.

The EPA draft notice describes the relationship between EPA and the participant receiving funds as a grant. We believe that this is a reasonable determination. It appears that the principal purpose of EPA's transfer of funds is to assist participants not otherwise able to contribute to the agency's rulemaking proceedings. The input of all intervenors may be said to be for the direct benefit of the Government but the financial assistance is for the principal benefit of would-be intervenors who lack sufficient resources to participate without it.

As we stated above, our earlier determination that advance funding of intervenors in agency proceedings was precluded by 31 U.S.C. § 529, was based on the contractual nature of the funding relationship. However, 31 U.S.C. § 529 does not preclude advance funding in grant relationships. In fact, one of the characteristics of a grant is that the grantee may receive funds prior to completing the purposes of the grant.

We note that EPA does not propose to give each applicant a blank check by making all the funds available at the start of the grant period. The draft notice states quite explicitly (see portions quoted above) that in "normal cases", no payments will be made until the agency receives the intervenor's comments. In other cases (where there are cash flow problems), payments will be made only "in proportion to expenses already incurred as of that time." We are satisfied that the proposed method of funding these grants will provide adequate fiscal controls to protect the Government's interests.

Therefore, if an agency which is funding public participants characterizes the relationship as a grant, which it is authorized to do under the Grants and Cooperative Agreement Act of 1977, 31 U.S.C. § 529 does not preclude participants from receiving funds in advance of the completion of participation subject to the provision of adequate fiscal controls, as discussed above. Our earlier decisions, which held to the contrary, are distinguished.

Milton J. Socolar

Acting Comptroller General
of the United States