

CAPLAW *e-news brief*

Failure to Obtain Prior Written Approval Results in Major Head Start Disallowance

By CAPLAW Staff

October 2014

Child Development Council of Acadiana, Inc., DAB No. 2574 (2014)¹

Knowing when and how to obtain prior written approval when using federal grant funds for specific purposes is often crucial information that, if overlooked or ignored, can result in dire consequences for a federal grantee. The U.S. Department of Health and Human Services (HHS) Department of Appeals Board (DAB) recently emphasized the importance of complying with prior written approval requirements when it disallowed \$1,855,599 in Head Start funds. Much of the disallowance resulted from the affected grantee's failure to obtain the required prior written approval before using federal funds for the construction of a new building for its Head Start program.

Background

In January 2011, the Child Development Council of Acadiana, Inc. (CDCAI), a Head Start grantee, completed construction of a new building used for program administration and parent training. In March 2011, the Office of the Inspector General (OIG) audited CDCAI's financial management practices and systems and concluded in its final audit report that CDCAI failed to meet multiple federal requirements.² The OIG found that CDCAI did not obtain the necessary approval from the Administration for Children and Families (ACF) prior to spending at least \$1,155,646 in Head Start funds to construct the new building. The OIG also found that CDCAI claimed unallowable non-federal share cash and in-kind contributions and spent funds for items that were not recognized as ordinary and necessary for the performance of the award.

While the OIG report was underway, CDCAI submitted to ACF an application for retroactive approval of its use of Head Start funds to construct its new building. After requesting and receiving from CDCAI additional information required by the Head Start Performance

Standards, ACF denied CDCAI's retroactive approval request.

Pursuant to OIG's report, ACF disallowed \$1,855,599 in Head Start funds. ACF agreed with OIG that CDCAI had failed to obtain the required prior written approval and found that OIG had correctly questioned CDCAI's claimed non-federal matching funds and operating costs. The DAB upheld ACF's full disallowance. However, because CDCAI only addressed in its appeal the \$1,155,646 disallowance relating to construction costs and did not dispute the non-federal share and operating costs disallowances, the DAB upheld those disallowances without further analysis. As a result, this e-news brief focuses on the \$1,155,646 disallowance.

Legal Framework

The federal cost principles explain that, generally, capital expenditures for buildings are unallowable as direct charges to a federal grant except where prior approval has been obtained from the federal awarding agency.³ Furthermore, pursuant to HHS's uniform administrative requirements, budget revisions must include costs that require prior approval under the federal cost principles unless such approval has been waived.⁴ The requirements also explain that a federal grantee must request prior written approval from an authorized HHS official for budget and program revisions.⁵ The Head Start Act also specifies that a grantee must receive prior written approval from an HHS official, ACF, before using Head Start funds to construct a facility.⁶ The Head Start Performance Standards set forth the steps a grantee must take to establish "eligibility" to use Head Start funds to construct a facility, which include:

- Establishing that the grantee serves an Indian Tribe or is located in a rural or other low-income community;

Failure to Obtain Prior Written Approval Results in Head Start Disallowance

- Determining if there is a lack of suitable facilities in its area – either its own facility or a leased facility – and explaining the factors considered along with providing support by a licensed real estate professional in the grantee’s service area, when possible;
- Submitting an application to ACF for approval to build the facility, the elements of which address, among other things: a legal description of the site including an explanation of the appropriateness of the location to the grantee’s service area; a written estimate of all costs associated with the project prepared by an architect or engineer; a comparison of costs relating to construction of a facility versus purchase of a facility versus renovation of a leased/purchased facility; and assurances that the project complies with local and federal licensing, construction, access, and environmental safety laws.

The Head Start Performance Standards also set forth additional procedures a grantee must follow before advertising and awarding a construction contract and during the construction process. The Standards reinforce that prior written approval must come from an individual officially authorized to award Head Start funding or the official’s designee.⁷

The DAB has stated in prior decision that in “grant programs generally, retroactive approval may be granted for transactions that would have been approved had the grantee requested approval in advance.” Moreover, where retroactive approval is permitted, the awarding agency “may consider all relevant factors,” including “a grantee’s fiscal management history,” in deciding whether to approve the request. The federal awarding agency must also state the basis for its decision and may not deny retroactive approval based on unsubstantiated conclusions or on bases so insubstantial that the decision is deemed capricious.⁸

Prior Written Approval

CDCAI argued that ACF officials led CDCAI to believe that the use of Head Start funds for facility construction was authorized. CDCAI

contended that the building it previously rented and used for administrative and parent training functions was unsafe and that the new facility was constructed to ensure staff and parent safety. CDCAI claimed that ACF was slow to respond to approximately five applications it submitted to ACF for one-time supplemental funding for the new building and ultimately ACF denied all of the applications without explanation. CDCAI explained that, when it was clear that additional funding was not an option, it obtained and acted on advice from ACF instructing CDCAI to use its available resources to carry out relocation. To support its argument, CDCAI relied on board of directors’ meeting minutes reflecting that the Head Start Program Director informed the board that she had discussed funding with the Regional Office Head Start Program Specialist, who “advised” the Program Director “to proceed on to get a facility and to get the staff out of” the building it had been using for administrative functions. According to CDCAI, a standard reply e-mail from the Program Specialist confirmed these verbal instructions because it stated that the grantee should “[u]se whatever funds are available to do whatever needs to be done. Just make certain that Head Start Program expenditures are allowable: 1. Allocable, 2. Reasonable, and 3. Necessary.”

The DAB found that CDCAI failed to provide any evidence supporting the contention that it was led to believe that a responsible HHS official had provided prior written approval. According to the DAB, CDCAI could not have reasonably thought that an oral or after-the-fact approval would be sufficient to allow CDCAI to use “available” funds to construct the facility. Under the federal cost principles, the uniform administrative requirements, and the Head Start Act and Performance Standards, the requirement for prior written approval applies not only when a grantee seeks supplemental funds but also when a grantee seeks to re-budget “available funds” previously awarded for other purposes to cover capital expenditures.

Furthermore, the DAB found that the board meeting minutes failed to show that the CDCAI Program Director clearly communicated to ACF its intent to use previously awarded funds for capital expenditures to construct

Failure to Obtain Prior Written Approval Results in Head Start Disallowance

a new building. Rather, the minutes merely stated that CDCAI's Program Director had informed the Regional Office that "an office is being built and funds may be used along with local dollars to acquire this facility." The DAB noted that CDCAI did not offer any affidavits or testimony to support the conversation and that the Head Start Program Specialist's instruction to "get a facility" may simply have been directing CDCAI to find an alternative location to lease. Moreover, the DAB explained that the subsequent e-mail confirming the Program Specialist's alleged oral advice to CDCAI clearly states that CDCAI had to "make certain" that any expenditure was "allowable." To be allowable, expenditures for construction must be approved in writing by an authorized HHS official's prior to construction. The DAB states further that, even if the evidence showed that the Program Specialist explicitly told CDCAI's Program Director that CDCAI could use any available funds to construct the new building, such oral advice would not satisfy the prior approval requirement because it was not written and CDCAI had not argued or presented evidence that the Program Specialist was a "responsible HHS official" authorized to award financial assistance.

Retroactive Approval

CDCAI asked the DAB to vacate ACF's disallowance of the construction costs and associated non-federal share expenditures and send the matter back to ACF for it to consider CDCAI's retroactive approval request "on the merits." CDCAI argued that an HHS Grants Policy Directive required ACF to examine the request "on its merits" and not deny the request "solely because of timing."

The DAB denied CDCAI's request. The DAB explained that the HHS Grants Policy Directive cited by CDCAI instructed staff and officials that a merit examination includes determining if the requested action is permissible under the governing statute, regulations and policies. The DAB upheld ACF's assertion that the denial of CDCAI's request for retroactive approval was based on the specific requirements of the federal statute and regulations that require the grantee to obtain prior written approval from the appropriate authorizing official before spending grant funds for construction. The

DAB explained further that CDCAI's request did not fall within the purview of prior DAB decisions permitting retroactive approval for transactions that "would have been approved had the grantee requested approval in advance." Rather, the record reflected a January 2009 letter from the ACF Regional Program Manager to CDCAI stating that ACF had received CDCAI's application for funding for the central administration building and advising that it would not fund the construction.

Additionally, the DAB found that, even if CDCAI's prior requests had not been denied, ACF's consideration of retroactive approval was not warranted because CDCAI's application for such approval failed to include all of the information, documentation and assurances that a grantee must submit to ACF to establish eligibility, to complete the application and to advertise and award contracts for construction. For example, the application did not establish that constructing a new facility was the more cost-effective option. In support of its application, CDCAI simply provided statements such as: it had been searching for another facility to lease or rent since 1995, no available facilities were suitable, the leased facility was beyond renovation/repair and the entire facility needed to be rid of pests and mold. The only data CDCAI provided showed that replacing the "air conditioner-heating units . . . would have cost \$2,000 and at least ten would have been needed." No other data was provided showing that the other necessary renovations and repairs to its leased facility would have exceeded the cost of constructing a new building. Moreover, the cost-comparison table provided by CDCAI did not compare the costs of renovating the facility it previously leased with the costs of constructing a new facility. Rather, the table compared the cost of paying for its new building over different time periods such as fifteen years versus five years. Furthermore, the statements by a licensed real estate appraiser that CDCAI submitted to support the construction and the appraiser evaluations were all dated after the construction was completed. CDCAI not only failed to provide the construction plans, drawings, specifications, and a breakdown of the costs for the facility that it had already built but also made no mention of using an architect or engineer to prepare such information.

Failure to Obtain Prior Written Approval Results in Head Start Disallowance

Lessons Learned

- Read and comply with funding source requirements – typically they will be referenced in the grant agreement with the funding source.
- Know when prior written approval for use of federal funds is required.
- Follow a funding source’s specific process, if one exists, for obtaining prior written approval. For example, as discussed in this article, Section 1309 of the Head Start Performance Standards sets forth a specific process that must be followed and information that must be provided before Head Start funds may be used to purchase, construct or renovate a facility.
- Don’t rely on informal discussions with, or general statements regarding, prior written approval – obtain clear, direct approval in writing.
- Ensure that any prior written approval received is from someone who is authorized by the funding source to provide such approval.
- Anticipate potential budget revisions and ensure that any requirements for obtaining revisions, such as prior approval, are met.

Footnotes

- ¹ The complete decision can be found [online](#).
- ² *Office of the Inspector General Audit Report A-06-11-00031*.
- ³ OMB Circular A-122, Att.B, ¶15.
- ⁴ 45 C.F.R. §74.25(c)(5).
- ⁵ 45 C.F.R. § 74.25(b).
- ⁶ 42 U.S.C. § 9839(g)(1)(A).
- ⁷ 45 C.F.R. § 1309.
- ⁸ *Arizona Affiliated Tribes, Inc.*, DAB No. 1500 (1994).

This article is part of the Community Services Block Grant (CSBG) Legal Training and Technical Assistance (T/TA) Center. It was created by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services Cooperative Agreement – Grant Award Number 90ETO441-01. Any opinion, findings, and conclusions, or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Health and Human Services, Administration for Children and Families.