



DAB Accepts E-mail as Evidence of Written Approval for Budget and Program Plan Revisions

Brown Magnolia Community Development Corp., DAB No. 1917 (April 16, 2004)

*September 2004 CAPLAW Update
By Maximillian J. Bodoin, CAPLAW*

The U.S. Department of Health and Human Services (HHS) Department Appeals Board (DAB) recently reversed a decision by the Administration for Children and Families (ACF) to disallow \$196,363.17 in discretionary Community Services Block Grant (CSBG) funds spent by Brown Magnolia Community Development Corporation to acquire a building.

The DAB rejected ACF's argument that Brown Magnolia was not entitled to use the grant funds to buy the building because it failed to obtain prior written approval from the Office of Community Services (OCS) before making budget and program plan revisions and to comply with grant terms requiring Brown Magnolia to submit and have approved a third party agreement before spending more than \$100,000 in grant funds. Brown Magnolia argued, and the DAB agreed, that Brown Magnolia had requested prior approval on a timely basis and that a congratulatory e-mail from the director of OCS constituted written approval of the building purchase. Moreover, the DAB concluded that ACF waived the third party agreement requirement by approving, after Brown Magnolia had made the expenditure in question, the third party agreement Brown Magnolia had submitted.

Background

OCS awarded Brown Magnolia a \$350,000 grant to implement a business expansion project that would employ low-income residents in producing highway safety products. Because Brown Magnolia proposed to rely on a donation of a building and some surrounding land for the project, Brown Magnolia's budget only included expenses for personnel, equipment, and supplies. When the building donation fell through, Brown Magnolia, sent an e-mail and letter on January 31, 2000 to the then director of OCS Donald Sykes, requesting prior approval to purchase another building. On February 16, 2000 Brown Magnolia purchased the alternate building using grant funds. Although the organization did not receive written approval of the budget change prior to the acquisition, on March 10, 2000 OCS director Sykes sent a congratulatory e-mail to Brown Magnolia for "successfully acquiring the building."

In July 2000 HHS Office of Inspector General (OIG) began investigating a complaint stating that Brown Magnolia had misused its grant monies. On September 15, 2000 the director of ACF's Office of Grants Management (which had taken over responsibility for managing Brown Magnolia's grant project) required that Brown Magnolia transfer title to the property to its own name (it had been held in another name during the purchase) and file and record a federal interest in the property; Brown Magnolia

promptly complied with both requirements. In April 2001 OIG concluded that Brown Magnolia's alleged misuse of funds was unverifiable. Nevertheless, 21 months later, on October 13, 2001, OCS denied Brown Magnolia's request for authorization to purchase the building. Finally, on September 26, 2002 ACF advised Brown Magnolia that it was disallowing the \$196,363.17 used to purchase the building because Brown Magnolia had changed the scope of the project without obtaining prior approval and because it failed to comply with grant terms limiting expenditures of grant funds to \$100,000 until a third party agreement was approved.

HHS Rules on Prior Approval

The administrative requirements governing HHS grants are found at 45 CFR Part 74. Grantees are required to request prior approval if there is a change in the scope or the objective of the project or program.¹ Prior approval is defined as "written approval by an authorized HHS official evidencing prior consent."² The head of the HHS operating division that made the initial grant award has the authority to approve a written request—in this case the director of OCS had such authority.³ The awarding agency must notify a grantee of its decision within 30 calendar days of a request, and, if a decision is not made within the 30 day period, the awarding agency must inform the grantee in writing of the date when a decision may be expected.⁴ Moreover, ACF's Grants Administration Manual permits retroactive approval in "exceptional cases," such as when the transaction would have been approved had it been requested in advance.⁵

Brown Magnolia's Request and OCS Director's Response Constituted Prior Approval

The DAB concluded that the congratulatory e-mail sent by the OCS director constituted written approval evidencing prior consent of Brown Magnolia's request to modify its original project. According to the DAB, the OCS director's e-mail indicated that he was both aware and supportive of Brown Magnolia's intent to purchase and subsequent acquisition of the property. The DAB reasoned that had there been any outstanding approval issues to address, the OCS director would have informed Brown Magnolia that the purchase was unauthorized and unapproved, which he did not do.

The DAB was not persuaded by ACF's argument that it provided its answer 21 months, and not 30 days, after the request was submitted because it felt that it was prudent to reserve judgment until the OIG concluded its review of Brown Magnolia. The DAB noted that: first, even if ACF had been justified in waiting until the Inspector General submitted its report, ACF still violated HHS policy by waiting six months after the report was submitted to make a decision; second, ACF failed to identify any legal authority that allowed it to forego its regulatory responsibilities due to a pending investigation; and third, the OIG investigation had nothing to do with the objectives of the grant or the specific issues raised by the prior approval request. Furthermore, the DAB observed that the 30-day regulation was intended to provide grantees with the opportunity to seek alternative sources of funding should their requests be rejected.

The DAB identified several other factors supporting its conclusion. First, ACF could not provide contrary evidence to refute Brown Magnolia's reliance on the OCS director's actions; ACF merely claimed that it was unable to secure this evidence because Mr. Sykes was no longer a government employee. Second, ACF's actions—requiring that Brown Magnolia transfer the property title and file and record the federal interest in the property—clearly indicated that ACF treated the purchase as an approved acquisition. Third, it was consistent with general principles presuming regularity in administrative actions for the DAB to presume that OCS acted in accordance with the HHS regulation on prior approval requests by indicating its approval of the building purchase in the OCS director's congratulatory e-mail. Fourth, Brown Magnolia acted reasonably by immediately locating another building and ACF never argued

that Brown Magnolia should have acted otherwise, that the price of the building was too high or that

¹ 45 CFR 74.25(b) and (c).

² 45 CFR 74.2.

³ See 45 CFR 74.25(k).

⁴ 45 CFR § 74.25(i).

⁵ GAM § 3.10.403 B.