



Lack of Competition and Credit Card Interest Payments Result in Head Start Disallowances

Beaver County Head Start, No. 2441 (2012)

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Earlier this year,¹ the U.S. Department of Health and Human Services (HHS) Departmental Appeals Board (DAB) upheld a \$20,245 disallowance by the Office of Head Start of the Administration for Children and Families (ACF), for claims by Beaver County Head Start (BCHS) for a building management contract awarded without open competition and for payment of interest on unpaid credit card balances.

Background

ACF disallowed BCHS's expenditure of \$19,000 for a building management contract for a Head Start facility BCHS had recently acquired. ACF determined that BCHS "did not properly obtain at least two oral quotations" for the contract, in violation of an HHS grant administrative regulation requiring open competition in procurement transactions.

BCHS did not deny it failed to conduct any competitive selection process. It justified the lack of competition by asserting that competitive bidding was neither possible nor "practical" because of the existing financial obligation BCHS owed to the real estate development company it used and was thus not required to follow the HHS uniform grants administrative requirements.²

In addition, ACF determined that BCHS paid interest expenses totaling \$1,425 on unpaid credit card balances. ACF disallowed the expenses, noting that, pursuant to the federal cost principles, costs incurred for interest on credit card debt are not permitted to be charged to the Head Start program. BCHS did not address ACF's disallowance of interest charges in its appeal.

DAB Determination

The DAB based its decision to uphold ACF's disallowance on the following:

- The HHS uniform grants administrative requirement that "[a]ll procurement transactions be conducted in a manner to provide to the maximum extent practical open and free competition"³ made applicable to the Head Start program by the Head Start regulations;⁴
- The HHS uniform grants administrative requirement giving ACF the authority to disallow funds if a grantee has materially failed to comply with the terms and conditions of an award⁵; and
- Federal cost principles for nonprofits providing that "costs incurred for interest on borrowed capital, temporary use of endowment funds, or the use of the non-profit organization's own funds, however represented, are unallowable"⁶, made applicable to the Head Start program by the HHS uniform grants administrative requirements.⁷

The DAB concluded that BCHS failed to comply with the HHS uniform grants administrative requirement requiring competition⁸ in awarding the management contract because, as BCHS conceded, it permitted no competition for the contract and did not consider awarding the contract to any other company or individual. The DAB found that the requirement to consider more than one potential contractor in awarding a procurement contract is clear from the language in the HHS uniform grants administrative requirement requiring procurement transactions to be conducted through "open and free competition" with "bids and/or requests for proposals" and awards to be made "to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered."⁹ Significantly, relying on case law, the DAB held that "[w]hile the grantee 'is free to select from a wide range of bidding methods, it may not select a process that does not give a fair and open chance to qualified bidders or a process that provides advantages or information to one bidder without according the same to all bidders.'"¹⁰ Because BCHS admittedly made no effort to consider or solicit other potential contractors, it failed to comply with the HHS uniform grant administrative requirements when it awarded the sole source contract to manage the Head Start facility.¹¹

In addition, the DAB found that BCHS's argument that its debt to the real estate development company precluded soliciting bids or otherwise considering other contractors was unavailing. Nothing in the regulations suggests that a pre-existing, unrelated debt to one bidder justifies awarding a contract to that bidder as a sole source.

Furthermore, the argument that an existing financial obligation to the real estate development company precluded open competition for the management contract

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Head Start Disallowance

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raised additional questions about the allowability of the \$19,000 charged to Head Start funds. BCHS's explanation of the contract suggested that only a portion of the amount was paid to the contractor for management of the building; the balance was repayment of a loan the contractor had made to BCHS. Therefore, the DAB found, the \$19,000 charged to the Head Start grant for the building management contract substantially exceeded the value of the services BCHS received and may have been unallowable under the federal cost principles, which require a cost be reasonable for the performance of the grant.¹² A cost is "reasonable" if "it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs."¹³

The DAB cited as further evidence of BCHS's failure to comply with the open competition requirement in this procurement transaction that the real estate development company in question was owned by BCHS's attorney and board member. By contracting with a company managed by its own attorney without open competition, BCHS failed to also comply with the HHS uniform grants administrative requirement that a grant recipient "shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade."¹⁴

Lastly, the DAB dismissed BCHS's argument that the competition requirement¹⁵ in the HHS uniform grants administrative requirements did not apply because of amount of money at issue was small. The DAB explained that there is no threshold restriction in the HHS uniform administrative requirements and that the requirement applies to all procurement transactions, regardless of amount.

Lessons Learned

- CAAs should be careful when determining that competition is not necessary for a procurement, even for what they may consider to be a relatively small sum of money. To the "maximum extent practical" is not the same as when it is convenient or financially advantageous.
- CAAs must constantly be alert to staff or organizational conflicts of interests in their procurement processes and they must not elevate their own organization's financial interest above the federal requirement for open competition.
- CAAs should understand that all costs, including seemingly minor ones like interest on an unpaid credit card account, must be regularly reviewed to determine if they may be paid for using federal grant funds.

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Health Care Reform

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Wellness Programs

Starting in 2014, employers will be able to offer discounts of up to 30 percent of the cost of individual or family health care premiums for employees who participate in a wellness program or meet certain health targets. The discount could increase to 50 percent if the U.S. Departments of Health and Human Services, Labor and Treasury deem it appropriate. Existing regulations permit employers to give a discount of up to 20 percent.

More Information

For more information and updates on regulatory guidance, visit www.healthcare.gov, which contains information for individuals and employers, including an interactive timeline, the full text of the legislation, and an insurance finder tool, which provides a variety of insurance options depending on a person's state of residence, age and circumstances. The site also includes a useful web page with [resources for employers](#). Other useful federal government sites with resources on compliance with the ACA include: the site of the [Center for Consumer Information and Insurance Oversight](#), which oversees the implementation of ACA provisions related to private health insurance; the [Department of Labor's Affordable Care Act](#) page; and the [IRS page on Affordable Care Act Tax Provisions](#). Find [additional health care resources](#) on CAPLAW's website.

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Article End Notes

After Health Care Reform Upheld, What's Next for CAAs?

1. Patient Protection and Affordable Care Act (ACA), P.L. 111-148, Section 9002 (amending 26 U.S.C. § 6051(a)(14)).
2. ACA, Section 2715(d)(4) (amending 42 U.S.C. § 300gg-15).
3. ACA, Section 2718 (amending 42 U.S.C. § 300gg-18).
4. Group health plans subject to ERISA are those sponsored by entities other than state or local governments or churches.
5. ACA, Section 937 (amending 42 U.S.C. § 299b-37).
6. ACA, Section 9005 (amending 26 U.S.C. § 125).
7. ACA, Section 1511 (amending Fair Labor Standards Act (FLSA), 29 U.S.C. § 218a).
8. See U.S. Department of Labor *FAQs About Affordable Care ACA Implementation Part V and Mental Health Parity Implementation*.
9. See 2 CFR Part 230, App. B, ¶ 8.g.(2) (OMB Circular A-122, which applies to nonprofits) and 2 CFR Part 225, App. B, ¶ 8.d.(5) (OMB Circular A-87, which applies to state, local and tribal governments).
10. See *National Federation of Independent Business v. Sibelius*, 567 U.S. ___, 132 S. Ct. 2566, 2595 – 98 (2012).
11. See 2 C.F.R. Part 230, ¶47a; see also 2 C.F.R. Part 225, App. B, ¶40.
12. See 2 C.F.R. Part 230, App. B, ¶16. See similar provision in 2 C.F.R. Part 225, App. B, ¶16.
13. ACA Section 2716 (stating group health plans shall satisfy the requirements of section 105(h)(2) of the Internal Revenue Code). The Obama Administration estimates that the majority of group health plans will be non-grandfathered by 2014.
14. ACA, Section 2708 (amending 42 U.S.C. § 300gg-7).

Safely Using Criminal Background Information

1. Enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., No. 915.002, 4/25/12.

2. 42 U.S.C. § 9843a(g)(3)
3. 45 C.F.R. § 1301.31(b)(2) –(3)
4. Id.

NLRB Focuses on Workplace Practices

1. 353 NLRB 93 (July 30, 2012).
2. 358 NLRB 106 (September 7, 2012).

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1. *Beaver County Head Start, Decision No. 2441*, February 14, 2012
2. 45 C.F.R. § 74.43.
3. 45 C.F.R. § 74.43.
4. 45 C.F.R. § 1301.10(a).
5. 45 C.F.R. § 74.62(a)(2).
6. 2 C.F.R. Part 230, App. B, ¶ 23. (OMB Circular A-122).
7. 45 C.F.R. § 74.27.
8. 45 C.F.R. § 74.43.
9. 45 C.F.R. § 74.43.
10. *Value Behavioral Health, Inc. v. Ohio Dept. of Mental Health*, 966 F. Supp. 557, at 569 (S.D. Ohio 1997).
11. 45 C.F.R. § 74.43.
12. 2 C.F.R. Part 230, App. A ¶ A.2.
13. 2 C.F.R. Part 230, App. A ¶ A.3.
14. 45 C.F.R. § 74.43.
15. 45 C.F.R. § 74.43.