



How Does a CAA Minimize Liability Arising from Completed WAP Units?

By: Allison Ma'luf, Esq., CAPLAW

Has your community action agency (CAA) ever faced or expressed concern about a scenario like the following?:

A CAA's in-house weatherization crew installs a new, high-efficiency water heater in Jane Doe's home. The CAA conducts a final inspection of the home and reported to the Department of Energy (DOE) a completed unit, i.e., Jane Doe's home. Six months later Jane Doe calls the CAA to complain that the water heater is leaking and the water never gets hot but is consistently lukewarm. The CAA regularly promises to perform high-quality work and wants to re-inspect and make any necessary repairs but is not sure whether it can use federal Weatherization Assistance Program (WAP) Act funds to do so.

The CAA's hesitation is an appropriate response – WAP funds may not be used on a weatherized home after a final inspection has occurred except in a few, limited circumstances. The DOE WAP regulations specifically prohibit the use of WAP funds to install or provide weatherization materials to a unit previously weatherized with WAP funds except:

- To conduct low-cost/no-cost weatherization which entails (i) using inexpensive weatherization materials such as s water flow controllers, furnace or cooling filters, or items which are primarily directed toward reducing infiltration, including weather stripping, caulking, glass patching, and insulation for plugging and (ii) not paying labor to install the weatherization materials (\$50 in material costs per unit is all that is allowed unless prior approval from DOE to spend more is obtained);
- To repair damage to weatherization materials not covered by insurance if a unit is damaged by fire, flood or an act of God; and

- To weatherize further units that were partially weatherized during the period of September 30, 1975 through September 30, 1993.¹

At the end of 2010, DOE emphasized further that WAP funds may not be used for repairs on completed units in [DOE Weatherization Program Notice \(WPN\) 11-3](#). DOE explained that money spent for “call-backs,” “re-works”, “add-ons”, “missed opportunities,” etc. for previously reported completed homes is not a permissible use of DOE WAP funds. Rather, the required, final inspection is intended to ensure that that all applicable work performed was done in a workmanlike manner, including all work that may have been contracted out such as furnace work, etc. WAP funds may not be used to conduct routine maintenance, repairs or warranty-type work beyond those costs already invoiced for a completed unit.

“WAP funds may not be used for repairs on completed units...”

So, how can a CAA minimize potential liability arising from a similar scenario? A CAA could ask clients to sign a waiver or release of liability. Waivers or releases are subject to a state’s laws and every state’s laws regarding waivers and releases are typically different. Thus, if a CAA decides to explore using waivers or releases it should work with an attorney in its state who is familiar with how enforceable such releases and waivers are and how they may be drafted to provide the CAA with protection under its state’s laws.

“A CAA could also contract with a third-party to perform all of the CAA’s WAP work rather than use in-house crews.”

A CAA could also contract with a third-party to perform all of the CAA’s WAP work rather than use in-house crews. [WPN 11-3](#) explains that subgrantees primarily using contractors are less likely to face the liability scenario because the contractor bid process must include “adequate guarantees of workmanship, implied or otherwise.” Moreover, the DOE WAP Procurement Toolkit available via [WPN 10-03](#)

references the inclusion of “work quality standards” as part of a bid package. When a CAA enters into an agreement with the selected contractor, it should consider including language requiring the contractor to cover all costs associated with defective materials and/or work for up to a year or more. Here is an example of such language:

Contractor shall guarantee any defect in materials, manufacture, design or installation of any material provided and/or installed pursuant to this Agreement for a period of one year from the date said materials are provided or are installed, whichever is later. Contractor shall remedy such defects promptly upon notice by the client or CAA, without charge. In the event of Contractor's failure to remedy such defects promptly, CAA may withhold payment to Contractor for any other weatherization work performed by Contractor pursuant to this Agreement. CAA shall be entitled to return to Contractor without payment therefor all materials of quality inferior to that agreed to by CAA and Contractor

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Custom Business Email Addresses (continued from page 11)

was originally designed for nonprofits and will probably be the most suitable as it indicates a trustworthy organization dedicated to serving the public interest. Also registering a domain name with the suffixes “.com” and “.net” may be a good idea to prevent misdirection during web searches. The cost for each domain name is fairly low. In addition, it will reduce risk if someone at your organization ensures that the domain is registered in the name of the organization (not in a staff member’s name) and that fees for retaining the registration are paid promptly so that you will not lose that domain name to another organization. Note that legal issues can arise if an organization did not establish the domain in its own name. For example, the service provider may not agree to renew the domain name if it has been registered in the name of a staff person who has left the organization.

With a domain name established, your organization can proceed to set up email accounts linked to your domain name (see discussion above). If each person’s email address includes his or her full name or at least the first initial and last name, the recipient can easily identify the sender.

Using custom business email for all emails sent on behalf of your organization will help protect the information the organization holds as well as prevent loss and legal liability. It enables your organization to present a consistent, professional message through its email communications.

(See endnotes on page 20)



Minimize Liability from Completed WAP Units (continued from page 3)

If a CAA decides to contract out all or most of its WAP work, it should again consult with an attorney licensed in its state when drafting a contractor agreement as such an agreement will be enforced under its state’s laws. An attorney should also be able to identify what, if any, implicit or explicit warranties are available under the applicable state laws.

Additionally, a CAA may obtain insurance that will cover costs relating to construction errors caused by a CAA’s in-house WAP crew and/or contractors. The DOE WAP Procurement Toolkit requires CAAs to obtain as part of the contractor bidding process documentation showing that the contractor maintains insurance that meets the minimum professional and equipment liability insurance requirements in a state. CAAs will also typically include in the contractor agreement language requiring a contractor to provide proof of such insurance.

Generally, under the Office of Management and Budget (OMB) Cost Principles² and the Omni Circular³ (which will replace the Cost Principles in 2015) the cost of insurance required or approved and maintained pursuant to a federal grant award is allowable where as the cost of other insurance maintained by the organization in connection with the general conduct of its operations is allowable subject to certain limitations.⁴ Also, it is important to note that actual losses which could have been covered by permissible insurance are unallowable unless the losses are (1) expressly provided for in an award, (2) not covered under a nominal deductible and are in keeping with sound business practice or (3) minor ones not covered by insurance (spoilage, breakage, and disappearance of supplies) which occur in the ordinary course of operations.⁵ Under the WAP regulations, the cost of liability insurance for personal injury

NEW CSBG Q&A



Q&A on...

Child Support Referral

If your CAA has questions or concerns about the Community Service Block Grant Act (CSBG) child support referral requirements, check out CAPLAW’s recent analysis. With this analysis, CAPLAW proposes practical ways to approach and implement these sections of the Act. It is important to note that the analysis does not represent the opinions of the federal Office of Community Services (OCS).

[Learn more and download the Q&A!](#)

and property damage resulting from weatherization projects is an allowable expense.⁶ However, this type of insurance may not cover all of the scenarios leading to additional work that may need to be done on a completed unit. Ultimately, a CAA should work with an insurance specialist as well as an attorney in its state that specializes in construction matters to determine what, if any, insurance may be available.

What should a CAA do if it is currently facing the scenario? A CAA should initially determine if it is liable for the repair. If the CAA used in-house crews and determines that it is wholly or partially liable, its insurance may cover the cost of repairs on a completed unit and/or the CAA may use unrestricted funds to pay for such repairs. If the CAA used a contractor, the agreement it entered into with the contractor may require the contractor to take responsibility for the repair and, if not, the CAA should consider working with an attorney in its state that specializes in construction matters to determine what, if any, implied warranties may apply. Additionally, the contractor's insurance may cover the cost of such repairs.

(See endnotes on pages 20-21)



Head Start Disallowances

(continued from page 4)

eight months after the budget period had ended. In support of its request, it provided statements by its former chief financial officer (CFO) and its current executive director that it had made its "best efforts" to meet the non-federal share requirement. The CAA explained that in addition to the drought, there was a shortage of community resources because of the location and demographics of the community.

ACF rejected the CAA's waiver request, and the DAB agreed. Without deciding if an untimely request could be approved retroactively, the DAB found that the CAA failed to provide sufficient evidence showing it had made the reasonable effort required by the Performance Standards to meet the non-federal share requirement. The DAB explained that

declarations by the CAA's management that "best efforts" had been made did not shed light on what the efforts had actually been, and, as a result, the DAB could not assess the reasonableness of the CAA's attempts to find sources of non-federal funds. The DAB explained that sufficient documentation would describe the steps that the CAA had taken to generate non-federal share donations despite the challenges that it faced.

The CAA also argued that it had not received enough guidance from ACF on the procedure for requesting a waiver, and that it was unclear who had the burden of initiating the application and providing supporting evidence. The DAB rejected this argument by pointing out that the CAA's notice of award indicated that the award was subject to various regulations, including Performance Standards at 45 C.F.R. Part 1301. Among other things, these regulations outline the non-federal share requirement and that additional federal financial assistance may be approved by an HHS official "on the basis of a written application and any supporting evidence he or she may require."⁸ These regulations, therefore, put the CAA on notice that it needed to provide 20% of the program costs and obtain approval from ACF to contribute a lesser amount. The regulations also make clear that the CAA initiates the waiver request, since it is in a position to know if such a request is necessary and would possess evidence supporting the request.

Lessons Learned:

- If your organization anticipates difficulty in meeting the non-federal share requirement, apply for a waiver with your annual refunding application or submit a waiver request to the ACF Regional Office as early as possible in the program year.
- Document all steps taken to obtain non-federal share funds and in-kind donations. The documentation should evidence the reasonable efforts made to obtain funding and donations and can later be used to support a waiver request.

Improper Draw Downs and Lack of Records

A Nebraska CAA incurred a disallowance totaling \$172,399.52 resulting from: (1) drawing down its remaining program funds, \$80,917.32, for program year (PY) 2010 nearly two weeks prior to using the funds and failing to produce records showing how the funds were spent and (2) using \$91,482.20 of PY 2011 funds for payroll expenses incurred in PY 2010.⁹ The HHS uniform administrative grant requirements specify that cash advances to a federal grant recipient must be limited to the minimum amount needed and timed to be in accordance with an organization's actual, immediate cash requirements. The timing and amount of cash advances must be as close as administratively feasible to the actual

"The timing and amount of cash advances must be as close as administratively feasible to the actual disbursements for program costs."

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Article End Notes

Affordable Care Act Employer Mandate Q&A

1. 26 C.F.R. § 54.4980H.
2. 26 C.F.R. § 54.4980H-1(a)(4), -1(a)(21), -1(a)(22) and -2.
3. 26 C.F.R. § 54.4980H-4 and -5.
4. 26 C.F.R. § 54.4980H-6(b) and 79 Fed. Reg. 8543, 8574 (Feb. 12, 2014).
5. 79 Fed. Reg. 8543, 8574.
6. 79 Fed. Reg. 8543, 8573.
7. 79 Fed. Reg. 8543, 8570-8571.
8. 79 Fed. Reg. 8543, 8575.
9. 79 Fed. Reg. 8543, 8576.
10. 79 Fed. Reg. 8543, 8574-8575 and 26 C.F.R. § 54.4980H-1(a)(12).
11. 26 C.F.R. § 54.4980H-1(a)(21).
12. 26 C.F.R. § 54.4980H-1(a)(24).
13. 26 C.F.R. § 54.4980H-1(a)(24)(ii).
14. 26 C.F.R. § 54.4980H-1(a)(7).
15. 79 Fed. Reg. 8543, 8550-8551.
16. 26 C.F.R. § 54.4980H-3(e).
17. 26 C.F.R. § 54.4980H-5(c).
18. 26 C.F.R. § 54.4980H-3(c)(2).
19. 26 C.F.R. § 54.4980H-3(c)(3).
21. 26 C.F.R. § 54.4980H-5(c).
20. 26 C.F.R. § 54.4980H-3(d).
21. 79 Fed. Reg. 8543, 8573.
22. 26 C.F.R. § 54.4980H-3(d).
23. 26 C. F. R. § 54.4980H-3(d)(2)-(3).
24. 26 C.F.R. § 54.4980H-3(d)(2).
25. 26 C.F.R. § 54.4980H-3(d)(3).
26. 26 C.R.R. § 54.9815-2708.
27. 26 C.F.R. § 54.9815-2708(b)-(c)(1).
28. 26 C.F.R. § 54.9815-2708(c).
29. 26 C.F.R. § 54.9815-2708(c)(3)(i).

30. 26 C.F.R. § 54.4980H-3(c)(4) and -3(d)(6) (in the case of an “educational organization,” the relevant break in service period is 26 weeks rather than 13 weeks. However, CSBG network organizations are generally not likely to qualify as educational organizations.)
31. 26 C.F.R. § 54.4980H-5(e).
32. 26 C.F.R. § 54.4980H-1(28) and 26 U.S.C. § 36B(c)(2)(C)(ii) and 45 C.F.R. § 156.145.
33. 2 C.F.R. Part 230, App. B, ¶16 (O.M.B. Circular A-122, which applies to nonprofit grantees); see similar provision in 2 C.F.R. Part 225, App. B, ¶16 (O.M.B. Circular A-87, which applies to state and local government grantees). See also 2 C.F.R. § 200.441 (O.M.B. “Super Circular” cost principle rules, which when effective, will apply to both nonprofit and state and local government grantees).
34. 2 C.F.R. Part 230, App. B, ¶147.a. (O.M.B. Circular A-122, which applies to nonprofit grantees); see similar provision in 2 C.F.R. Part 225, App. B, ¶140 (O.M.B. Circular A-87, which applies to state and local government grantees). See also 2 C.F.R. § 200.470 (O.M.B. “Super Circular” cost principle rules, which when effective, will apply to both nonprofit and state and local government grantees).
35. 2 C.F.R. Part 230, App. B, ¶18.g. (O.M.B. Circular A-122, which applies to nonprofit grantees); see similar provision in 2 C.F.R. Part 225, App. B, ¶18.d. (O.M.B. Circular A-87, which applies to state and local government grantees). See also 2 C.F.R. § 200.431 (O.M.B. “Super Circular” cost principle rules, which when effective, will apply to both nonprofit and state and local government grantees).

Why It’s Important for Your Organization to Use Custom Business Email Addresses

1. When using this link, note that the pdf will automatically open in the Download folder.

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1. 10 C.F.R. § 440.18(e)(2).
2. OMB Circular A-122; OMB Circular A-87.
3. 2 C.F.R. Part 200.
4. See OMB Circular A-122, Attachment B, ¶ 22.a(1), (2); OMB Circular A-87, Attachment B, ¶ 22.a, b; 2 C.F.R. § 200.447(a), (b).
5. See OMB Circular A-122, Attachment B, ¶ 22.a(3); OMB

Article End Notes

Circular A-87, Attachment B, ¶ 22.c; 2 C.F.R. § 200.447(c).

6. See 10 C.F.R. § 440.18 (d)(10).

Document, Review, Follow & Plan: Lessons Learned from Recent Head Start Disallowances

1. Kings Community Action Organization, DAB No. 2534 (2013).

2. 42 U.S.C. § 9835(b).

3. 45 C.F.R. § 74.23(a)(5) and § 92.24(b)(1).

4. 45 C.F.R. § 74.23.

5. 42 U.S.C. § 9835(b). See also Administration for Children and Families Program Instruction 12-02, Feb. 2012.

6. 45 C.F.R. § 1301.21.

7. Administration for Children and Families Program Instruction 12-02, Feb. 2012.

8. 45 C.F.R. § 1301.20; 45 C.F.R. § 1301.21.

9. Community Action Partnership of Western Nebraska, DAB No. 2537 (2013).

10. 45 C.F.R. § 74.22(b)(2).

11. 45 C.F.R. § 74.28.

12. Community Action Partnership of Western Nebraska, DAB No. 2537 (2013), citing Cent. Piedmont Action Council, Inc., DAB No. 1916 (2004).

13. 2 C.F.R. Part 230, App. A ¶¶ A.2.a, A.2.g.

14. Suitland Family & Life Dev. Corp., DAB No. 2326 (2010).

15. Cent. Piedmont Action Council, Inc., DAB No. 1916, at 3-4 (2004); Seminole Nation of Okla., DAB No. 1385 (1993).

16. Cent. Piedmont Action Council, Inc., DAB No. 1916, at 3-4 (2004); Seminole Nation of Okla., DAB No. 1385 (1993).

17. Galveston County Community Action Council, Inc., DAB No. 2514 (2013).

18. 2 C.F.R. Part 230, App. A ¶¶ A.2.a, A.2.g.

19. 2 C.F.R. Part 203, App. B ¶ 37.b(1), (2), (7), (8).

20. 45 C.F.R. § 74.21(b)(2)-(b)(3).

21. Although OIG is not typically involved in auditing individual grantees, the OIG was likely called in because of serious concerns by ACF.

22. Texas Neighborhood Services, Inc., DAB No. 2571 (2014).

23. 2 C.F.R. Part 230, App. B ¶ 8.j.

24. 45 C.F.R. § 1301.31.

25. 45 C.F.R. § 74.28.

26. Seaford Community Action Agency, DAB No. 1433 (1993).

27. Washington County Opportunities, Inc., DAB No. 1464 (1994).

28. 2 C.F.R. Part 230, App. A ¶¶ A.2.a, A.2.g.

29. 2 C.F.R. Part 230, App. A ¶A.3.

30. 2 C.F.R. Part 230, App. A ¶A.3.a.

31. Washington County Opportunities, Inc., DAB No. 1464 (1994).

32. 45 C.F.R. § 74.28.

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