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Financial Assistance And The Bona Fide Need Rule: Severability No Longer An Issue

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In a decision that could have significant impact on grants administration, the General Accounting Office (GAO) was presented with the issue of whether the Department of Education could use appropriations available for only one fiscal year to fully fund grant awards of multiple years in the case of two Education programs. See U.S. Department of Education's Use of Fiscal Year Appropriations to Award Multiple Year Grants (B-289801, December 30, 2002). The GAO held that Education could fully fund such grant awards, relieving agencies funding grants with annual appropriations or other time-limited funds from going through an often convoluted bona fide need analysis to determine whether the activities under a grant are severable or nonseverable. (Note: The bona fide need rule does not apply to no-year funds. 43 Comp. Gen. 657 (1964).) This relief is provided regardless of whether the grant at issue is to be a multi-year award or multiple year award. Unlike multiple year awards, which are fully funded for a period of more than one year, multi-year awards, by

definition, are financial assistance awards for a period of more than one year, which are partially funded when the award is made, and then are subsequently funded in increments. See Department of Commerce Grants and Cooperative Agreements Interim Manual, Chapter 3, A.29. Thus, while the distinction between a multiple year award and a multi-year award may remain for grants administration and definitional purposes, there is no difference between the two types of awards based on the fiscal law principles of the bona fide need rule and severability. Under either, a severability determination is now irrelevant to a bona fide need analysis.

Bona Fide Need Rule

The bona fide need rule establishes that an appropriation is available for obligation only to fulfill a genuine or bona fide need of the period of availability for which it was made. The GAO held that the rule applies to all federal government activities carried out with appropriated funds, including

contract, grant, and cooperative agreement transactions. An agency's compliance with the bona fide need rule is measured at the time the agency incurs an obligation. In the grant context, the obligation occurs at the time of award.

Bona Fide Need Rule and the Principle of Severability

In its discussion in the case, the GAO stated that, in a number of contexts, most notably government contracts for services, it had addressed whether the bona fide need rule is violated when an agency uses current fiscal year funds to pay for contractual services rendered subsequent to the end of that fiscal year. When services are severable, the bona fide need rule serves to limit the amount of a service contract charged to an available fiscal year appropriation. In 64 Comp. Gen. 359 (1985), relying on case law applying the bona fide need rule in the context of service contracts, the GAO held that NIH research project grants could not be funded for three fiscal years with fiscal year 1985 appropriations because the bona fide need rule would be violated. Since it could not be said that there was a need for an end product in any particular year or that the grants envisioned an end product, the GAO concluded that the bona fide need rule was violated when funds were obligated for more than one year for the grants, i.e., the grants were for severable services.

Three years later, however, in B-229873, November 29, 1988, the GAO noted that it significantly undercut the analysis used in the NIH decision. In this later decision, the GAO held that the SBA did not violate the bona fide need rule when it used its fiscal year appropriation on

September 30, the last day of the fiscal year, to award cooperative agreements to operate Small Business Development Centers even though the Centers would use the money in the next fiscal year. In essence, the GAO had concluded that the concept of severability was not relevant to the cooperative agreements at issue. In other words, the award constitutes the obligation, and upon award, the agency's need--to financially assist the awardee--is complete. In this latest Education case, the GAO reiterated that the application of the bona fide need rule found in the SBA case is the correct approach. It expressly recognized the fundamental difference between a contract and a grant or cooperative agreement and the significance this difference has on a bona fide need analysis. Contracts and grants are transactions that fulfill significantly different needs of an agency, the former to acquire goods and services and the latter to provide financial assistance.

Conclusion of Education Case

Thus, the GAO concluded: 1) for grants, the principle of severability is irrelevant to a bona fide need determination, and 2) a bona fide need analysis in the grant context focuses on whether the grants are made during the period of availability of the appropriation charged and further the authorized purposes of program legislation. Consequently, the duration of the grant award itself is irrelevant to a bona fide need determination. In other words, whether the activities under a grant are characterized as severable or nonseverable no longer legally mandate that an award be funded for only one year or funded in its entirety.

With regard to the specific two Education programs at issue, program authorizations for the GEAR UP Program and the Early Childhood Educator Program for FY 2001 did not provide explicit authority to award multiple year grants. In fact, prior to FY 2001, Education had funded the GEAR UP awards one year at a time. Nevertheless, the GAO found that Education's award of 5-year, fully funded grants for the GEAR UP Program and 2-year, fully funded grants for the Early Childhood Educator Program was in accordance with the program legislation and fulfilled a bona fide need of the period for which the funds used were available. Absent from GAO's opinion was any analysis of the severability of the activities to be carried out under the awards.

Caveat

The Education case contains a cautionary "but see" cite to 73 Comp.

Gen. 77 (1994), in which this case was described as follows: "bona fide need determination in the context of a cooperative agreement properly required assessing severability of research activities where agreement under which research was conducted more closely resembled a contract than a grant of financial assistance." In this 1994 case, the GAO held that the Fish and Wildlife Service could not incrementally fund "research work orders" of multiple year duration that were nonseverable. The Fish and Wildlife Service issued research work orders that were project-specific extensions of unit cooperative agreements. Thus, according to the GAO, the underlying character of the transaction must still be analyzed to determine whether it is in the nature of an acquisition of goods or services, or the provision of financial assistance. If it is the former, then an assessment of severability may still be required.