



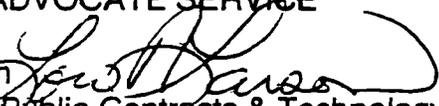
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JUN - 4 2003

CASE:GLS-130943-03  
PCTL:BSturgess

MEMORANDUM FOR SUSAN E. GILBERT  
TAXPAYER ADVOCATE SERVICE

FROM:

Lori R. Larson   
Acting Chief, Public Contracts & Technology Law

SUBJECT:

LITC Program Review Panel: Conflict of Interest

The purpose of this memorandum is to respond to your question regarding the proposed composition of the Low Income Taxpayer Clinic (LITC) review panel. It has been suggested that the 2004 review panel should include staff members from the grants office although these people have been excluded from this panel in the past. You have questioned whether this would be legally permissible.

In order to answer your question, we reviewed applicable laws and regulations as well as the 2004 LITC grant application. We then reviewed other agencies' formal regulations and informal directives and manuals. Finally, we considered the relevant caselaw.

We found that there is no legal requirement regarding the composition of the grant application review panel, that some agency panels include grants office staff while others do not, and that the participation of a grants office staff member on the grant application review panel would not *per se* create an improper conflict of interest although it may create an appearance of impropriety that an agency may wish to avoid if possible. As a result, we conclude that such participation is a policy determination, which must be made on a case by case basis.

#### LITC Application Process

There are no laws or regulations regarding the pertinent part of the IRS' LITC program's application review process. The enabling legislation, IRC § 7526, includes provisions specifying, among other things, "criteria for awards" and the requirement for "matching funds." See IRC § 7526 (c)(4) and (5). This statute does not, however, address the existence of an application process or the details of an application's review.

PMTA: 00616

The only other guidance one has is IRS Publication 3319, 2004 Grant Application Package and Guidelines (May 1, 2003), which similarly does not address the matter. It merely states that the Director of the Taxpayer Advocate Service (TAS) LITC Program Office reports directly to the National Taxpayer Advocate and is responsible for providing oversight, guidance, and assistance to LITC grantees and prospective applicants. Thus, the membership of the LITC review panel is not limited by these documents and we must consult other sources.

### Other Grant Programs

Several other agencies have developed rules and guidelines for the review of grant applications. ~~These rules, however, are not consistent across the agencies.~~

For example, the Department of Health and Human Services has implemented Grant Policy Directive (GPD) 2.04. It provides that applications must be reviewed by a minimum of three qualified independent reviewers. The independent reviewers must not have any financial interest in any of the potential grantees. Further, when government personnel are used as independent reviewers, GPD 2.04 provides that they should "be as far removed as possible organizationally from the OPDIV approval official and his or her program office and grants office staff."

On the other hand, the United States Department of Labor (DOL) also has a directive regarding the administration of grant programs. TED 6.1D provides that grant applications shall be approved by a panel and that the panel may include grants office staff. The DOL panel prepares grant review documents for presentation to the Assistant Secretary, who makes the approval decision.

And, yet another method is employed by the National Science Foundation (NSF). According to NSF's Grant Proposal Guide, the program office first reviews the application. Usually, final programmatic approval is at the division level. If the program office recommends the application for award and final division or other programmatic approval is obtained, then the application goes to the Division of Grants and Agreement for review of business, financial, and policy implications.

Thus, it seems that there is no set requirement for the composition of the grant application review panel. Some agencies feel the panel should be far removed from the approval official and the grants office while other agencies provide that grants office staff may serve on the panel. Before we make a final determination regarding the permissibility of the participation of the grants office staff on the review panel, we will consider the relevant caselaw.

### Caselaw

The caselaw with respect to the procedural aspects of the grant application process is limited. We found one case, however, that presents a similar issue to your inquiry. See Pueblo Neighborhood Health Centers, Inc. v. United States Dept of Health and Human

Services, 720 F.2d 622 (10<sup>th</sup> Cir. 1983) (“PNHC”). In PNHC, the unsuccessful HHS applicant asserted that the panel review committee was not composed as per the HHS Grant Application Manual (GAM) and the denial of its application should be reversed. The unsuccessful applicant argued that the HHS GAM provided that committee members must not have been involved with the grantee in an administrative context previously and one particular committee member was so involved. The Court did not find the argument persuasive because it did not find that the GAM had the “force and effect of law,” the purpose of the GAM provision was not violated, and even if the GAM were violated, no prejudice was shown. Thus, according to the 10<sup>th</sup> Circuit, at least, the composition of the grant review panel is within an agency’s discretion as long as no actual prejudice is shown to exist.

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Unlike the 10<sup>th</sup> Circuit, which seemed to have no qualms about reviewing the grant award process, the Comptroller General (GAO) will not review questions regarding an agency decision to deny a grant award unless there is an allegation that the agency used the grant award process to avoid the competitive requirements of a procurement. Sprint Communications Co., L.P., B-256586, B-256586.2, 94-1 CPD P300 (May 9, 1994)(GAO stated CICA limits jurisdiction to reviews of awards or proposed awards of procurement contracts).

Prior to the enactment of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. 253, however, GAO would also review the award of grants and cooperative agreements where it appeared that the process of selecting a grantee might have been influenced by a conflict of interest. Burgos & Associates, Inc., B-195839, 59 Comp. Gen. 273 (February 25, 1980). Although such caselaw sets forth facts over which GAO no longer asserts jurisdiction, it may be helpful to consider. In Burgos, GAO declined to overturn an award of a grant to a grantee whose President was recently selected for a position within the agency because evaluators were deemed to be adequately shielded from undue influence. GAO did, however, note that, as a policy matter, it was incumbent upon an agency to make all attempts to avoid even the appearance of favoritism or preferential treatment by the Government towards a firm competing for a contract or assistance award.

Due to the limited amount of relevant caselaw in the grant context, we also reviewed cases dealing with other comparable contractual relationships. We note, however, that the United States Supreme Court has stated that the grant relationship is unlike normal contractual undertakings and remains governed by statutory provisions expressing the judgment of Congress concerning desirable public policy. Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985). Thus, although many of the rules and principles of contract law will not automatically apply to the grant process, an analysis of the procurement law cases offers us additional guidance.

The Comptroller General has held that the composition of technical evaluation panels, whose function is comparable to the grant application review panel, is within the contracting agency's discretion and, as such, does not give rise to review by the Comptroller General absent a showing of possible bad faith, fraud, conflict of interest or

actual bias on the part of evaluators. ACRAN, Inc., B-225654, 87-1 CPD P509 (May 14, 1987); ALM, Inc., B-225589, et al., 87-1 CPD P486 (May 7, 1987).

Anyone protesting actions by a technical evaluation panel must prove an actual conflict or bias and cannot merely assume it to exist due to the underlying circumstances. See Pinkerton Computer Consultants, B-212499.2, 84-1 CPD P694 (June 29, 1984)(conflict cannot be assumed by supposition or inference even if two employees of awardee are ex-employees of contracting office); see also R&D Dynamics Corp., B-285979.2, 2000 CPD P193 (November 14, 2000)(improper conflict of interest did not exist simply because evaluators worked with research fund awardee on other projects). An actual conflict will not be deemed to exist without further hard facts simply because members of a technical evaluation panel are administering awardee's other on-going contracts. Sterling Services, Inc.; Trim-Flite, Inc., B-229926.5, B-229926.6, 88-2 CPD P306 (October 3, 1988).

Based on the above, one might conclude that a court will not overturn a grant award unless there is a conflict of interest that can be proven to exist. Further, it is our opinion that an actual conflict will not be deemed to exist on the simple basis that one member of the application review panel was involved with the on-going administration of grants awarded to the same grantee in the past. [REDACTED]

DP

### Conclusion

There is no required legal composition of the grant application review panel. Thus, a member of the grants office staff may legally serve on the panel.

Should you have any additional questions or concerns, please contact Beth Sturgess of this office at (202) 283-7900.