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JUL 30 2003

CASE:GLS-142243-03
PCTL:BSTurgess

MEMORANDUM FOR SUSAN E. GILBERT
TAXPAYER ADVOCATE SERVICE

FROM: Lori R. Larson
Chief, Public Contracts & Technology Law

SUBJECT: *PO* New Orleans Legal Assistance Merger

The purpose of this memorandum is to provide our legal opinion on the merger of a Low Income Tax Clinic (LITC) grantee New Orleans Legal Assistance (NOLA) with a non-LITC grantee Southeast Louisiana Legal Services Corporation (SLLSC).

Issue

Is it legal for the IRS to deobligate fiscal year 2003 funds previously "earmarked" for NOLA as an LITC grantee and reobligate them to SLLSC this same fiscal year?

Conclusion

Based on the facts we have, NOLA has transferred all its assets to SLLSC and SLLSC is serving the same community of LITC clients previously serviced by NOLA. If your office determines that SLLSC is qualified under the statutes and regulations to be a LITC grantee and it is in the interest of the IRS, the IRS may deobligate the fiscal year 2003 funds previously earmarked for NOLA and reobligate them to SLLSC this same fiscal year.

Facts

NOLA, a legal aid program, applied for and received a LITC grant in 2003 for \$13,000 in fiscal year 2003 funds. The grant was for the period January 1, 2003 to December 31, 2003. As of this date, your office has informed us that NOLA has not "drawn down" any of these funds. SLLSC did not apply or receive a LITC grant in 2003.

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In January 2003, NOLA merged with SLLSC. According to Mark Moreau, the Director of NOLA, all NOLA's assets and personnel were transferred to SLLSC at that time. All NOLA personnel were moved onto the SLLSC payroll. The new organization is called SLLSC. With regard to NOLA's LITC clinic, SLLSC took over all functions in January 2003. The former NOLA LITC staff are serving the same clients and same community under the SLLSC name.

It appears that NOLA is now simply a corporate shell. It is still a corporation, has a Board of Directors, and its own employer identification number (EIN). However, no substantive work is being performed under this corporate name.

Discussion

There are several considerations that must be made prior to making a determination as to whether or not funds awarded to NOLA may be reobligated to SLLSC. First, we must consider general appropriation rules and then, the requirements of the 2003 LITC application itself.

A. General Appropriation Law for the Substitution of Grantees

1. Fiscal Year Funds

As a general rule, when a recipient of an original grant is unable to implement his grant as originally contemplated, and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, the award to the alternate grantee must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. See B-164031(5), June 25, 1976.

In the situation presented here, the period of availability for obligation of the grant funds previously given to NOLA have not expired. NOLA was awarded fiscal year 2003 funds and the availability of 2003 funds for obligation will not expire until September 30, 2003. Therefore, as long as the funds are properly deobligated prior to the expiration of the period of availability and reobligated during that same time period, this requirement will not be an impediment.

Although it is clear that we need not concern ourselves with fiscal year funding issues, we still need to consider whether there is a problem with creating a new obligation payable to SLLSC in fiscal year 2003 since SLLSC did not apply for a 2003 LITC grant. We explain below how we can avoid facing this potential problem as long as SLLSC qualifies as a replacement grantee rather than a new grantee.

2. Replacement Grantees

Grant awards are

made to individuals based upon their personal qualifications. Whether an award is considered an agreement or a grant, it is a personal undertaking and where an alternate grantee is substituted for the original recipient, there is created an entirely new and separate undertaking. The alternate grantee is entitled to the award in his own right under the new agreement or grant and not on behalf of, on account of, or as an agent of, the original grantee. It seems clear that the award to an alternate grantee is not a continuation of the agreement with, or grant to, the original grantee executed under a prior fiscal year appropriation, but is a new obligation.

See Cancer Research Institute, B-189712, 57 Comp. Gen. 205. It would seem, therefore, that there may be a requirement that in order for alternate grantees to receive a grant, it may be important that the alternate grantee apply for the original grant. However, whether this is a requirement or not is irrelevant for our purposes because replacement grants are not new and separate undertakings. B-157179, 1970 U.S. Comp. Gen. LEXIS 2027 (September 30, 1970). Where a grant is identical in scope and purpose to the original grant, it is a replacement grant. Id. In B-157179, a grant originally awarded to the University of Wisconsin was permitted to be used by Northwestern University to fund an unfinished project by a project director transferred from one university to the other. In addition to the fact that the director was the only one capable of performing the project, the Comptroller General also considered that the original grant to the University of Wisconsin was made in response to a bona fide need then existing and that the need for completing the project continued to exist. There was no evidence presented whether or not Northwestern University had applied for a similar grant during the same or a subsequent fiscal year.

It is our opinion that, if your office is satisfied that SLLSC is providing the same scope and type of services previously provided by NOLA, is serving the same community previously serviced by NOLA, and meets all the requirements of publication 3319 explained below, the fact that SLLSC did not apply for a 2003 LITC grant will not affect the IRS' ability to treat SLLSC as a replacement grantee of NOLA as opposed to an alternate grantee.

B. Requirements in the 2003 LITC Application

1. Advance Notice Requirement

Paragraph III.A.2.r on page 12 of the 2003 LITC Grant Application Package and Guidelines, Publication 3319 (Rev. 4-2002) states

Describe plans, if any, to make name or organizational changes. Requests to approve name or organizational status changes must be submitted in writing to the Grants Administration Office in advance of the effective dates of proposed changes with sufficient time to afford program evaluation and legal review. Supplemental information may be required. Supplemental information may include, but is not limited to, certifications by the clinic's legal counsel that transfers were properly effected under applicable laws and evidence that a successor in interest is eligible to perform the grant and will comply with all the terms of the grant, including the program plan. IRS approval criteria will include, but not be limited to, the statutory requirements of IRC § 7526 and the interests of the Government. The statutory requirements include, but are not limited to, the limitation that the aggregate amount of grants which may be made to a clinic for a year shall not exceed \$100,000.

Clearly, publication 3319 requires that all organizational changes must be submitted in advance of the effective dates of the changes. Here, NOLA did not submit notice of the merger until almost 7 months after the merger was complete. NOLA has not offered an explanation for this oversight. That would seem to be a complete block to NOLA's request for reobligation.

However, as we've said in previous legal opinions, there is a well-developed line of court decisions that permit agencies to "relax or modify procedural rules adopted for the orderly transaction of business when, in a given case, the ends of justice require it." American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970). See also GLS legal opinion 147406-02 (IRS may relax application deadline rules if the ends of justice require it).

Therefore, we must consider whether or not the provision referenced above is reflective of a statutory requirement or is simply a procedural rule for the orderly transaction of business. As we've noted in previous legal opinions, there is nothing in the LITC authorizing statute, grant application guidelines, or the OMB Circulars that outlines exactly what is required of grant recipients should their name, identity, or organizational status change. See GLS legal opinion 108269-02. As a result, this office considered the Federal Acquisition Regulations' (FAR) rules on successors in interest in drafting

applicable language for insertion in the 2003 Grant Application Package and Guidelines, Publication 3319. Id. The FAR does not require organizational changes to be presented in advance to the agencies. It our understanding that the purpose of the advance notice provision was to provide the grantee with knowledge as to whether or not its grant funding would be affected by a proposed merger. In other words, the advance notice provision is principally for the benefit of the grantee and, perhaps, if followed, would serve to ease the administrative burden on the agency and agency legal counsel. Thus, we would conclude that the advance notice provision is simply a procedural rule that may be relaxed in this case if in the interest of the IRS. Any determination to waive such rule should be well documented in the file.

2. Other Requirements of III.A.2.r.

[REDACTED]

[REDACTED]

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program plan.

Finally, the LITC program office must also consider whether all requirements of IRC § 7526 will continue to be complied with after the substitution of SLLSC by NOLA. Namely, you must consider whether SLLSC qualifies as a low income taxpayer clinic as well as the

- (A) the number of taxpayers who will be served by the clinic, including the number of taxpayers in the geographical area for whom English is a second language;
- (B) the existence of other low-income taxpayer clinics serving the same population;
- (C) the quality of the program offered by the low-income taxpayer clinic including the qualifications of its administrators and qualified representatives and its record, if any, in providing service to low-income taxpayers; and
- (D) alternative funding sources available to the clinic, including amounts received from other grants and contributions, and the endowment and resources of the institution sponsoring the clinic.

IRC § 7526(c)(4).

Once you receive and consider this information, a document should be placed in the file that fully supports any determination made as to whether or not to accept SLLSC as NOLA's successor in interest.

Should you need further assistance, please contact Beth Sturgess of this office at (202) 283-7900.