

Hartford Susan L

From: Hartford Susan L
Sent: Wednesday, April 20, 2005 2:28 PM
To: Swartz William R; Mallon Bridget
Subject: Chief Counsel opinion on EITC Focus Groups

Attachments: RE: questions about the EITC focus groups; 05117766.pdf

Attached below is the legal opinion we received from CC:GLS addressing whether the IRS may pay taxpayers as an incentive to participate in earned income tax credit (EITC) focus groups and whether low income taxpayer clinic (LITC) facilities may be used as the locations for holding focus group meetings. As discussed in the opinion, there are generally no legal impediments to this approach. [REDACTED]

DP



RE: questions
about the EITC f...

Please let me know if you have any questions. I provided the memo to Tom Beers and Jeff Wilson, the two individuals who originally contacted our office to investigate whether this approach was feasible.

Susan L. Hartford

Office of Chief Counsel
Technical Advisor to the Special Counsel, NTA
CC:NTA Room 3045
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Office of Chief Counsel
Internal Revenue Service

memorandum

CC:GLS:EGG:GLS-117766-05

GLS-HQ-751-05

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date: **APR 18 2005**

to: Susan L. Hartford
Technical Advisor to the Special Counsel, NTA

from: Mark S. Kaizen 
Associate Chief Counsel (GLS)

subject: **EITC Focus Groups**

This responds to your request for advice as to whether the IRS may use appropriated funds to pay taxpayers as an incentive to participate in Earned Income Tax Credit ("EITC") focus groups and whether the agency may use Low Income Taxpayer Clinic ("LITC") space to hold these focus group meetings. You have indicated that the purpose of the EITC focus groups is to explore taxpayers' views of EITC customer service, in order to assist in the design of an effective survey instrument that will be used to obtain qualitative data to improve EITC customer service. In the past, the agency has hired outside vendors to conduct EITC focus groups, and the vendors paid the focus group participants out of IRS funds. Currently, due to a lack of funding, the agency is not able to hire an outside vendor, and therefore would like to directly pay each EITC focus group participant approximately \$100 and use LITC space, at local academic institutions and non-profit organizations, to hold focus group meetings. You have also asked us to address any liability issues that may exist with regard to the IRS using the LITC space.

As discussed further below, the IRS may use appropriated funds to directly pay taxpayers to participate in EITC focus groups and may use LITC space to hold these focus group meetings. Also, there is not a significant risk of liability to the agency arising out of using LITC space to hold the focus group meetings.

Paying Focus Group Participants

A basic rule of appropriations law is that an agency may only use its appropriations for authorized purposes. 31 U.S.C. § 1301(a); see 71 Comp. Gen. 469, 471 (1992). Under the necessary expense doctrine, an agency may incur expenses not specifically provided for in an appropriation if they are reasonably necessary to carry out an authorized function or purpose of the appropriation and are not otherwise prohibited by law. 66 Comp. Gen. 356, 359 (1987). The spending agency has reasonable discretion

in determining whether the necessary expense doctrine is applicable in a given instance. GAO, *Principles of Federal Appropriations Law*, p. 4-20 (3d ed. 2004) ("*Principles*").

In the Consolidated Appropriations Act, 2005, Congress appropriated funds for "Processing, Assistance, and Management" which may be used "[f]or necessary expenses of the Internal Revenue Service for pre-filing taxpayer assistance and education" Pub. L. 108-447, 118 Stat. 2809, 3239 (Dec. 8, 2004). We believe that paying the focus group participants may be considered a necessary expense of the Processing, Assistance, and Management appropriation. By getting feedback from taxpayers with regard to EITC customer service, the IRS can use this information to improve its assistance and education to taxpayers who are eligible for the EITC prior to their filing their tax returns.¹

In order to use the funds in the Processing, Assistance, and Management appropriation, the appropriate vehicle must be used. You have told us that the Procurement office plans to use Form 1321 to charge the payment to the EITC focus group participants as a miscellaneous expense. Form 1321, Authorization for Official Travel, is used to authorize travel expenses for IRS employees or "invitational travelers." The "invitational traveler" statute, 5 U.S.C. § 5703, permits the payment of travel expenses for individuals who are serving the Government as experts or consultants or who are serving without pay. A critical prerequisite to qualifying for travel under 5 U.S.C. § 5703 is that the individual must be performing a direct service to the Government, such as making a presentation at a conference or advising on official business. See 60 Comp. Gen. 303 (1981); 55 Comp. Gen. 750 (1976); 37 Comp. Gen. 349 (1957). The taxpayers who participate in the EITC focus groups would be providing a service to the IRS by providing feedback on its EITC program, and thus they qualify as invitational travelers. As such, the taxpayers may be reimbursed for any local travel expenses that they incur for attending the focus group meeting. As invitational travelers, the taxpayers may not, however, be paid to participate in the EITC focus groups. Pursuant to the travel regulations, the only types of "miscellaneous expenses" that are allowed are in conjunction with lodging, and include such items as baggage expenses, use of computers, official telephone calls, etc. See 41 C.F.R. § 301-12.1. Paying the taxpayers to participate in the EITC focus groups would clearly not qualify as a "miscellaneous expense" and therefore Form 1321 should not be used as the vehicle to pay the taxpayers for their participation in EITC focus groups.

There are generally three types of funding mechanisms: grants, cooperative agreements, and procurement contracts. See *The Federal Grant and Cooperative*

¹ We note that because the EITC focus groups will be created and used primarily as a source of information rather than advice, the groups are not "advisory committees" within the meaning of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix 2. Thus, the procedural requirements of FACA are not triggered, which include providing notice of advisory committee meetings and providing the public access to the meetings.

Agreement Act of 1977, 31 U.S. C. §§ 6301 – 6308. While agencies have no inherent authority to give away anything of value, and thus must have express statutory authority to award grants or enter into cooperative agreements, they do have inherent authority to enter into contracts. *Principles*, p. 4-20. Procurement contracts are used when an agency's "principal purpose . . . is to acquire . . . property or services for the direct benefit of the United States Government." 31 U.S.C. § 6303. Here, we understand that the Service is interested in acquiring the services of EITC-eligible taxpayers to help design a survey instrument that the Service will use to obtain qualitative data to improve EITC customer service. In the past, the Service entered into a contract with a firm for this assistance that, in turn, solicited the assistance of EITC-eligible taxpayers. Legally, as an alternative, the Service could enter into non-personal service contracts for advisory and assistance services with the individual taxpayers, to obtain their "outside points of view to avoid too limited judgment on critical issues." See FAR Subpart 37.2. While Federal acquisitions are generally required to be competed, micro-purchases in the amount of \$2,500 or less may be awarded, pursuant to FAR § 13.202, without soliciting competitive quotations if the Contracting Officer or the individual delegated procurement authority considers the price to be "reasonable." Thus, the Service, in theory, could pay a firm fixed price of \$100 to focus group participants to acquire their viewpoint and assistance to design the survey instrument, if a Contracting Officer considers the sum reasonable.

Use of LITC Space

Generally, an agency may not augment its appropriations by accepting gifts from outside sources without specific statutory authority. *GAO Principles of Federal Appropriations Law*, p. 6-103 (2d ed. 1992). 31 U.S.C. §§ 3302(b), 1301(a). Ordinarily, if the use of LITC space were to be construed as a gift to the IRS, the agency would have to seek acceptance authority from the Secretary of Treasury pursuant to 31 U.S.C. § 321(d) and Treasury Directive No. 61-09 (1998). However, pursuant to a Comptroller General decision, the LITC space would not constitute a gift. In 63 Comp. Gen. 459 (1984), the FCC received free trade show space from a promoter in order to inform the public about the efficient and effective use of radio technology, and the promoter in turn received the FCC's presence at the trade show, which was expected to attract more attendants and in turn increase admissions revenues. The Comptroller General concluded that the free trade show space did not constitute a "gift" because the arrangement between the promoter and the FCC was mutually beneficial, and thus there was adequate consideration:

Here, if the IRS used the LITC space to conduct the EITC focus group meetings, there would be a mutual benefit to both parties. As discussed above, the IRS would benefit by getting feedback from taxpayers that it could use to improve its EITC customer service. Similarly, the LITCs would get the same benefit because they also provide EITC services. Thus, use of the LITC space would not be considered a gift to the IRS, and therefore the agency may use the space to hold the EITC focus group meetings.

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