



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Environmental Protection Agency--Inspector General--Cooperative Agreement--Procurement

File: B-262110

Date: March 19, 1997

DIGEST

Environmental Protection Agency (EPA) should have used a procurement contract rather than a cooperative agreement to obtain support services from the University of Kansas (KU) for an EPA data management conference. If EPA had chosen to use a contract to procure the services, KU would not have been allowed to pay travel and related expenses for non-federal conference attendees. However, since the EPA Assistant Regional Administrator caused the error by choosing an inappropriate funding vehicle, neither the certifying official nor KU should have to repay EPA; both acted in good faith in fulfilling their obligations and neither had a basis for questioning the Assistant Regional Administrator's decision to use the cooperative agreement.

DECISION

This responds to a request from the Inspector General of the Environmental Protection Agency (EPA) for our opinion on whether EPA should require either its certifying official or the University of Kansas (KU) to repay the cost of travel and related expenses incurred by non-federal attendees of an EPA conference, and paid by KU under a cooperative agreement between EPA and KU for conference support services. The Inspector General has concluded, and EPA agrees, that under the Federal Grant and Cooperative Agreement Act, EPA should have acquired conference support services from KU using a contract instead of a cooperative agreement. 31 U.S.C. § 6303. The Inspector General notes that under a contract, funds would not have been available to KU to pay for the travel and related expenses of non-federal attendees, and asks whether EPA's certifying official or KU should be required to repay those amounts. In our opinion, neither the official who certified the payments nor KU should be required to reimburse EPA for the travel and related expenses since they both acted in good faith and had no basis to question the decision of EPA's Assistant Regional Administrator to use a cooperative agreement.

BACKGROUND

In April 1989, EPA's Region 7 awarded a cooperative agreement to KU in response to a proposal to provide management services for EPA's National Environmental Information Conference. The total amount awarded was \$533,523, which included approximately a 5 percent contribution from KU. Approximately 400 EPA employees, a handful of other federal employees, and almost 300 non-federal representatives, primarily from state agencies, attended the conference. Just as it had outlined in its proposal to EPA, KU used amounts awarded to cover the cost of travel, hotels and meals for 171 of the non-federal attendees. After an audit of the conference and the cooperative agreement, the EPA Inspector General issued a report in June 1994 concluding that EPA should have used a contract to procure the services of KU rather than a cooperative agreement because the support services that KU provided were a direct benefit to EPA. Under the Federal Grant and Cooperative Agreement Act of 1977, when the principal purpose of the funding instrument is to acquire services "for the direct benefit or use of the United States Government," the agency acquiring the services should use a procurement contract to fund the acquisition. 31 U.S.C. § 6303.

The Inspector General's report stated that as a result of using a cooperative agreement instead of a contract, EPA circumvented the statutory prohibition against using appropriated funds to pay for travel and related expenses of non-federal officials. See 31 U.S.C. § 1345. The Inspector General, citing 55 Comp. Gen. 750, 754 (1976), explained that while a contractor's use of contract funds are subject to the restrictions placed on the contracting agency's use of appropriated funds, funds transferred pursuant to a cooperative agreement are not.¹ Because the travel and related expenses of non-federal attendees would not have been allowed if EPA had chosen the proper funding instrument, the report recommended that EPA disallow all of the travel and related expenses and recover those amounts from KU or the EPA certifying official.

ANALYSIS

Even though EPA management does not dispute that it should have obtained the conference support services from KU through the use of a contract instead of a cooperative agreement, it disagrees with the Inspector General's recommendation that either the certifying official or KU should reimburse EPA for the travel and

¹Because the nature of cooperative agreements "is to transfer a thing of value to the . . . recipient," 31 U.S.C. § 6305(1), awards made under cooperative agreements lose their identity as federal funds.

related expenses of the non-federal officials. EPA management asserts that neither of the two parties should be held liable for the expenses since the payments on behalf of the non-federal officials were the result of an error by the Assistant Regional Administrator, Region 7. For the reasons discussed below, we agree.

Prior to making the award to KU, EPA management had determined that the only way for the conference to be successful was to ensure the attendance of certain state and Native American officials. According to EPA, the Assistant Regional Administrator, with this in mind, opted to fund the conference with a cooperative agreement, knowing that the travel and related costs of these officials could not be paid under a contract. It appears from the record submitted to us, however, that the Assistant Regional Administrator made her choice without reference to the requirements of the Federal Grant and Cooperative Agreement Act, and without confirmation by appropriate legal authority that her choice was proper. In a July 30, 1993 memorandum, EPA's Deputy Assistant Administrator for Management and Administration stated, "Had we realized that the choice of instrument was at all questionable, we would have obtained a more formal ruling, and sought advice from contracts, grants, or legal counsel on this matter." He stated, further, that the Assistant Regional Administrator "had every reason to believe that she was correct in using a cooperative agreement. . . . She was simply following [an approach] that I and others had assured her was correct based on our honest opinion and experience." As suggested by both EPA management and the Inspector General, with respect to the Assistant Regional Administrator, any recourse is through such personnel actions, including disciplinary ones, appropriate under the facts and circumstances.

With respect to the certifying official and KU, we conclude that neither may be required to repay the amount improperly spent to pay the travel and related expenses of non-federal attendees. As a general matter, certifying officials are responsible for the legality of a payment under an appropriation, and are held strictly liable for authorizing any payment that is prohibited by law. See 31 U.S.C. § 3528(a). Here, there was such an illegal payment; however, the certifying official may be relieved of his liability upon a determination that "(i) the obligation was incurred in good faith; (ii) no law specifically prohibited the payment; and (iii) the United States Government received value for payment." 31 U.S.C. § 3528(b)(1)(B).

A finding of good faith is premised, in large part, on our finding that the certifying official did not have, nor should reasonably have had, doubt regarding the propriety of the payment. B-257893, June 1, 1995. Whether the certifying official should have been in doubt requires weighing all surrounding facts and circumstances and cannot be resolved by any "hard and fast rule." 70 Comp. Gen. 723, 726 (1994). In many cases, good faith is found simply by the absence of any evidence to the contrary.

B-250884, Mar. 18, 1993. Here, we found no evidence indicating that the certifying official doubted or had reason to doubt his authority to certify the payments to KU.

The request for payment was submitted pursuant to a cooperative agreement and we did not find anything on the face of the materials that the certifying official had before him at the time of the certification that would signify that the Assistant Regional Administrator had erred in her choice of a funding instrument. To suggest, in hindsight, that the certifying official should not have relied on the Assistant Regional Administrator's determination, but should have, instead, second guessed the Administrator's exercise of discretion and refused to make the payment to KU, would create an unreasonably high standard for the proper certification of payments. It is often difficult to draw fine lines between the types of arrangements and fact situations that require the use of a procurement contract and those that do not. B-257430, Sept. 12, 1994; B-227084.6, Dec. 19, 1988. We are not willing to charge the certifying official with the responsibility of ensuring that agency officials are always correct in exercising their discretion in choosing funding instruments. A certifying official's inquiry should be directed at assuring that correct administrative procedures are followed and the agency's payment is within statutory limits. See B-257334, June 30, 1995. It becomes the certifying official's duty to second guess matters usually reserved for the discretion of program officers only when, in conducting his inquiry, the certifying official uncovers information that indicates that the payment may be questionable, and he must question the program officer's discretion in order to verify the propriety of the payment.

In addition, no law specifically prohibited the payments certified pursuant to the cooperative agreement. Without any indication that Region 7's principal purpose was to acquire the services of KU, there would be no reason for the certifying official to question the Assistant Regional Administrator's choice of funding instruments. In this regard, since no law prohibits the use of cooperative agreements to pay the travel expenses of non-federal officials² and since the proposed expenditure fell within amounts available to EPA, it was not unreasonable for the official to certify the payment.

Regarding the third criterion for relief of the certifying official, EPA received value for the payments to KU. The purpose of the conference was to provide information on data management to the attendees. EPA officials stated that it was critical for the state and Native American officials to attend the conference so that they would learn how to manage data effectively so that they could provide timely, accurate

² See 62 Comp. Gen. 531, 533 (1983).

and complete information to EPA. Since all three elements for relief under section 3528(b)(1)(B) are present, we grant relief to the certifying official.

With respect to KU, EPA has no claim. After awarding the cooperative agreement to KU, EPA may not argue that KU should have to repay the funds because it should have known that the EPA Assistant Regional Administrator chose an improper funding instrument. KU apparently performed in accordance with the terms of the cooperative agreement, thereby discharging its obligations under its agreement with EPA. The choice of instruments was EPA's, not KU's. Nor was KU in a position to question the Assistant Regional Administrator's use of a cooperative agreement to acquire the conference support services. See, e.g., B-198976, Feb. 24, 1981 (Matters involving the exercise of discretion afforded by law to an agency are not subject to the review of a grantee).

Accordingly, we agree with EPA management that neither the certifying official nor KU should have to repay EPA for the travel and related expenses of the non-federal officials paid in accordance with the terms of the cooperative agreement.

/s/Robert P. Murphy
for Comptroller General
of the United States