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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of Labor—Grant to New York Workers’ Compensation Board

File: B-303927

Date: June 7, 2005

DIGEST

1. Appropriation to the Department of Labor “for payment to” New York Workers’ Compensation Board for “processing of claims” was not available for the Workers’ Compensation Board to make payments to other New York State entities. The Department should seek recovery of \$44 million improperly transferred unless the Secretary seeks and obtains congressional ratification of the grant expenditures to date.
2. Department of Labor’s grant to New York Workers’ Compensation Board imposed a responsibility on the Department to ensure proper performance of that grant, even though it was outside the Department’s normal sphere of operations.

DECISION

On September 8, 2004, the Government Accountability Office (GAO) testified before the Subcommittee on National Security of the House Committee on Government Reform about the New York Workers’ Compensation Board’s use of federal grant funds to meet expenses related to the September 11, 2001, terrorist attack on the World Trade Center.¹ At that time, we indicated a need for further review of grant expenditures totaling \$44 million that the Board made to reimburse state entities other than the Workers’ Compensation Board, because those expenditures may have

¹ GAO, *September 11: Federal Assistance for New York Workers’ Compensation Costs*, GAO-04-1013T (Washington, D.C.: Sept. 8, 2004).

been in conflict with the appropriation act that made funds available for the grant.² We have since received additional information from the Department of Labor (Department)³ and the New York Workers' Compensation Board (Board),⁴ and, for the reasons explained below, we conclude that the appropriation used was not available for the reimbursements to other entities and that the Department did not meet its responsibilities to ensure the funds were properly applied.⁵

Both the Department and the Board seem to have contributed to the misunderstandings that resulted in the payments to the Crime Victims Board and the State Insurance Fund. Nevertheless, the Department should seek to recover the \$44 million improperly transferred to the Crime Victims Board and the State Insurance Fund. If the Secretary wishes to forego recovery of the improperly expended funds, she should seek and obtain congressional ratification of the grant expenditures to date and permission to authorize use of the remaining grant funds appropriated by Public Law 107-117 for other World Trade Center-related claims and benefits. If such authority is forthcoming, the Department should modify the grant agreement accordingly. Until then, the Board should refrain from further reimbursements to other entities and the Department should monitor grant performance to ensure adherence to the purposes of administration and mitigation consistent with the statute.

BACKGROUND

In the aftermath of the September 11 attacks on the United States, Congress in Public Law 107-38 quickly appropriated \$40 billion to assist in response and recovery.⁶ Among other purposes, Congress made these funds available to provide "... Federal, State, and local preparedness for mitigating and responding to the

² Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, Ch. 115 Stat. 2230, 2312-13 (Jan. 10, 2002).

³ Letter from Carol A. De Deo, Deputy Solicitor for National Operations, U.S. Department of Labor, to Dayna K. Shah, Associate General Counsel, GAO, Sept. 3, 2004 (De Deo Letter).

⁴ Letter from David P. Wehner, Chairman, New York State Workers' Compensation Board, to Dayna K. Shah, Associate General Counsel, GAO, Sept. 30, 2004 (Wehner Letter).

⁵ We have not audited the actual use of the funds by the recipients.

⁶ 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220-221 (Sept. 18, 2001).

attacks”⁷ Of the total amount appropriated, \$20 billion were reserved to be made available in future emergency supplemental appropriation acts. Public Law 107-117, approved on January 23, 2002, was such an enactment. Under the heading, “Workers Compensation Programs,” Congress appropriated \$175 million to the Department of Labor Employment and Training Administration to be obligated from amounts previously made available in Public Law 107-38. As appropriated, the \$175 million was to remain available until expended:

“Provided, That, of such amount, \$125,000,000 shall be for payment to the New York State Workers Compensation Review [sic] Board,⁸ *for the processing of claims related to the terrorist attacks*: Provided further, That, of such amount, \$25,000,000 shall be for payment to the New York State Uninsured Employers Fund, for reimbursement of claims related to the terrorist attacks: Provided further, That, of such amount, \$25,000,000 shall be for payment to the New York State Uninsured Employers Fund, for reimbursement of claims related to the first response emergency services personnel who were injured, were disabled, or died due to the terrorist attacks.”

115 Stat. 2312, 2313 (emphasis added).⁹

The Department determined that it should distribute the funds to the Board by means of a grant.¹⁰ The Department then invited the Board to write a proposal for the grant. The Board submitted its proposal dated September 20, 2002. On November 14, 2002, the Department awarded a 4-year grant to the Board.¹¹ The Department incorporated the Board’s proposal verbatim as the Statement of Work for the grant.

The Statement of Work (Part I of the Grant) applied the \$125 million earmarked in the appropriation for “processing of claims” to the Board’s functions of administration and mitigation. With regard to administration, the Board related that

⁷ *Id.*

⁸ The correct title should have been the New York Workers’ Compensation Board.

⁹ The President has proposed canceling the balance of this appropriation in the fiscal year 2006 budget request to the Congress. Budget of the U.S. Gov’t, Fiscal Year 2006 App. at 724 (“Of funds provided under this heading [Workers Compensation Programs] in the Emergency Supplemental Appropriations Act, 2002 (Public Law 107-117), there is hereby cancelled \$120,000,000.”).

¹⁰ De Deo Letter at 2.

¹¹ Agreement # WC-12748-03-60 (Grant).

it would need about 30 full-time equivalent positions and \$55.7 million to process workers compensation claims that were related to the World Trade Center attack. With regard to mitigation, the Statement of Work indicated the Board would follow well-established principles and fund such items as a call center and an off-site electronic data recovery system in order to lessen the effects of a future disaster, should one occur.¹² The Board estimated that 22 full-time equivalent positions and \$69.3 million would be needed for its mitigation efforts.

In addition, the Statement of Work related that the Board intended to create a “contingency account” within the \$125 million it would receive for administration and mitigation, “to assist other entities” and “respond effectively to any unexpected needs as they arise, both in administrative and in mitigation efforts.” The Statement of Work also mentioned the Board’s need for flexibility in administering the funds provided to it under the grant. In its concluding paragraph, the Statement of Work mentioned the need to meet “changing priorities and circumstances” and to ensure the funds would be used in the most cost-effective way.

GAO reviewed the Board’s performance under the grant and testified before the National Security Subcommittee on the actual use of the grant funds. In our testimony, we reported that of the \$125 million appropriated for “processing of claims” and granted to the Board for “administration” and “mitigation” as described in the Statement of Work, just \$4 million had been used for mitigation to create a remote call center. In contrast, \$44 million of the grant funds had been used under the contingency account mentioned in the Statement of Work to assist other entities.¹³ Pursuant to legislation enacted by the New York State Legislature,¹⁴ the \$44 million were paid over to the New York Crime Victims Board and the New York State Insurance Fund to reimburse those entities for expenses they incurred paying claims to victims of the World Trade Center attack.¹⁵ The New York State Insurance Fund is a state-managed insurance carrier that provides workers’ compensation insurance coverage to state government employees and to other employers in the

¹² The use of funds for mitigation is not in question because the overarching appropriation in Pub. L. No. 107-38 was available for mitigation.

¹³ Of the \$50 million appropriated for reimbursements to the New York State Uninsured Employers Fund of claims related to employees of uninsured employers and emergency first response personnel (volunteers), \$456,000 had been used for claims of volunteers, and none had been used for claims of employees whose employers were uninsured.

¹⁴ 2003 N.Y. Laws, A.B. 7265, S.B. 3377, Mar. 23, 2003.

¹⁵ In the case of the State Insurance Fund, the reimbursement was to cover the cost of workers’ compensation benefits paid to or on behalf of state employees injured or killed in the attack. *See* N.Y. Workers’ Comp. Law § 88-c (McKinney 2004).

state who choose the fund as their insurer. It is distinct from the New York State Uninsured Employers Fund, the entity mentioned in the appropriation act.

ANALYSIS

The questions for decision here are (1) whether the appropriation made for payment to the Board for “processing of claims” was available for the purpose of reimbursing other state entities for the claims they paid because of the September 11 attack and (2) whether the Department met its responsibilities as a grantor of federal funds to clarify the purpose for which the grant was available and to monitor the Board’s use of the grant funds. Our answer to both questions is in the negative.

In this case, Congress appropriated \$125 million to the Department “for payment to” the Board for “processing of claims.” We believe that with respect to the Board, and in the absence of some other specific direction from the Congress, the plain meaning of the words “processing of claims” necessarily refers to the function the Board normally performs under the Board’s statutory authority. That function is the receipt, adjudication, and referral for payment or other disposition of claims for workers’ compensation.¹⁶ The Board agrees that the term “processing of claims” means executing these functions.¹⁷

Because processing of claims is the purpose for which the funds were appropriated, the Department’s grant to the Board was necessarily for that purpose. The Statement of Work articulated the purposes of the grant as “administration” and “mitigation,” both of which are broadly compatible with the Board’s claims processing functions. This was consistent with 31 U.S.C. § 1301, which requires appropriations to be expended only for the purpose for which they were made. Given this constraint, it is not possible to reconcile the Board’s spending patterns. Our review found that the bulk of grant funds expended (\$44 million out of \$48.4 million) have been used for another purpose entirely—reimbursing other state entities for claims they paid to or on behalf of September 11 victims. The entities, the Crime Victims Board and the State Insurance Fund, are not part of the Workers’

¹⁶ See *inter alia* N.Y. Workers’ Comp. Law, §§ 20–24 (McKinney 2004).

¹⁷ “The Board interprets the term ‘processing of claims’ to mean the execution of all functions and services undertaken to resolve, administer and continuously manage issues pertaining to claims. In the case of the volunteer and UEF [Uninsured Employers Fund] claims; that definition extends to the actual payment of claims; as opposed to standard cases that are typically paid by the responsible insurer.” (Punctuation is from the original.) Wehner Letter at 1.

Compensation Board and are separate and independent agencies under New York State law.¹⁸

The Board believes that the grant instrument conveyed the flexibility to make the payments in question.¹⁹ The Board refers to the fact that the Department approved the Statement of Work, in which the Board indicated it required considerable flexibility to ensure the funds would be used efficiently and effectively.²⁰ While the Department did approve the Statement of Work, it lacked the authority to confer the kind of flexibility the Board relies on.

The Statement of Work for the grant cannot change the purpose for which the \$125 million was appropriated—the Board’s “processing of claims.” A grant is an instrument used to effectuate a statutory purpose. 31 U.S.C. § 6304. It is axiomatic that a grant may not exceed, enlarge, or change the statutory authority that underlies it. To illustrate this principle, we concluded in 45 Comp. Gen. 409 (1966) that a sewage treatment plant under construction that was damaged by a tornado could not be considered an “essential public facility” under a statute appropriating funds to make grants for temporary and emergency repairs to essential public facilities damaged in natural disasters. The purpose of the appropriation was to alleviate the immediate effects of natural disasters, not to finance permanent repairs or rehabilitation of facilities. Therefore, a grant to the incomplete facility would have changed the statutory purpose and was not permitted. In the case at hand, the statutory purpose for which the grant funds were available was processing of workers compensation claims by the Board. The transmission of the funds to the

¹⁸ N.Y. Exec. Law, §§ 621–34 (McKinney 2004) (Crime Victims) and N.Y. Workers’ Comp. Law, §§ 76-77 (McKinney 2004) (The New York Department of Labor maintains the State Insurance Fund.)

¹⁹ Wehner Letter at 1-2.

²⁰ As an example of the flexibility the Board believes it was given in the Statement of Work, the Board maintained that the Statement of Work approved transferring funds between the \$125 million for “processing of claims” and the two \$25 million amounts for the claims from the Uninsured Employers Fund. To effectuate the requested transfer of funds, the Board asked for immediate release of the full \$50 million appropriated for reimbursement of claims paid from the Uninsured Employers Fund. The transfers were not permitted to go forward, however. The Department of Health and Human Services Payment Management System, which administers payments under this grant and other federal grants, declined to advance the \$50 million to the Board, noting that the appropriations act limited the payments to the Uninsured Employers Fund to “reimbursement of claims” paid from the Fund. Furthermore, we note that even had a transfer between the Uninsured Employers Fund and the Board been permitted and the advance of funds approved, the authority conveyed thereby would not have included the flexibility to transfer funds to other state entities.

Board by means of a grant instrument did not, and could not, create a larger purpose—payment of claims by other state entities.

The Board points to the “contingency account” mentioned in the approved Statement of Work as the source of authority for payments to the Crime Victims Board and the State Insurance Fund. In this regard, the Statement of Work provided as follows:

“Additionally, the Board is proposing to use a portion of the disaster funds to assist other entities by creating a contingency account within our funding structure that will allow the State to respond effectively to any unexpected needs as they arise, both in administrative and in mitigation efforts. This will allow the State to evaluate and respond to applications for assistance by affected stakeholders within the system, subsequent to [sic] rules, regulations and eligibility criteria that will be established to oversee this process.”

Relying on this provision in the Statement of Work²¹ and on the action of the New York State Legislature,²² the Board made payments of \$28 million to the Crime Victims Board and \$16 million to the State Insurance Fund. However, on its face, the contingency account language does not provide authority for reimbursements to either entity. Whatever authority the contingency language created in the grant was for the Board to support administrative and mitigation activities, i.e., processing of claims. The contingency account could not create new authority to reimburse other state agencies for benefits they paid out to or on behalf of victims of the World Trade Center attacks.²³

Moreover, the Common Grant Management Rules (Common Rules) provide a framework for grant administration.²⁴ Even if the contingency account had been available for reimbursements to other state entities, such a large change in the budget for the grant (35 percent of the funds granted for administration and mitigation expenses of the Board redirected to reimbursement of claims paid by others) would have required written advance approval under the Common Rules. 29 C.F.R. § 97.30 (2004). The Statement of Work appears to have recognized this and anticipated that in certain circumstances the Board would make formal requests for

²¹ According to the Board, it relied upon the Department-approved statement of work, “which clearly states the Board’s intention to use a portion of the funds to assist other entities. The SOW [statement of work] also clearly states the need for flexibility between the grants. . . .”

²² See footnote 14, *supra*.

²³ For purposes of this decision, it is not necessary to determine what contingency expenses would have been supportable under the approved Statement of Work.

²⁴ Labor’s Common Rules are published at 29 C.F.R. Pts. 95-97 (2004).

modification of the grant agreement.²⁵ Any such request would have given the Department an opportunity to review these reimbursements before they took place. This might have prevented the questioned expenditures, but it was not done.

As we have discussed above, the appropriation provided authority to expend funds for “processing of claims” and it was broad enough to support the activities of “administration” and “mitigation” set out in the grant’s Statement of Work. However, this authority was not broad enough to support payments from a contingency account mentioned in the Statement of Work to reimburse entities for claims they paid out to or on behalf of September 11 victims.

For the reasons above, we conclude that the appropriation which provided the funds for the grant to the Board was not available to reimburse other New York State agencies for claims they paid to or on behalf of September 11 victims.

The second question is whether the Department met its responsibilities as a grantor of federal funds. The appropriation that funded the grant was made to the Department of Labor, although the Department did not take an active part in the creation, or monitoring, of the grant. The Department believed that it had neither the authority nor the responsibility to structure the grant or direct its performance.²⁶ The Department points out that the appropriation in Public Law 107-117 was made “for payment to the . . . Board.” Therefore, the Department concluded that it had no role in administering the functions that would be carried out with the grant. Accordingly, the Department argues, it properly refrained from interjecting itself in the Board’s design and performance of the grant.²⁷ That view is not correct. It is the specific earmark of funds in an appropriation act for transfer to a third party that creates the authority to make a grant. 67 Comp. Gen. 401 (1988). This includes a grant that would not otherwise be within the grantor agency’s statutory competence. *Id.* at 401-02.

Exercising the authority in Public Law 107-117, the Department should have ensured that the grant and its Statement of Work identified the necessary limits on the flexibility the Board had in using grant funds.²⁸ As a matter of law, a grantor agency

²⁵ The Board asked “that administrative flexibility be applied whenever amendments to this proposal are submitted for your approval.” Grant at 25 (Statement of Work).

²⁶ De Deo Letter at 2.

²⁷ *Id.*

²⁸ This could have been done either by making appropriate changes to the Board’s proposal before adopting it as the Statement of Work for the grant or by more carefully reviewing the Board’s spending proposal (Part II of the Grant). (Of the
(continued...)

may not disassociate itself from the performance of its grant. 31 U.S.C. § 7504 (a)(1) (2000). In a very similar case, an agency that had been directed by statute to make a grant argued that it had no authority to ensure proper performance of the grant. We disagreed and held that the agency was required to monitor performance.²⁹ In that case, we noted that the grant itself contained the authority to obtain records and to review the grantee's performance, which is also the case here.

In this instance the Statement of Work was not improper on its face. The Board indicated it would use about half the \$125 million for administration and the other half for mitigation.³⁰ Nevertheless, the Board's language concerning flexibility and the contingency account should have alerted the Department to question what the Board intended. The Department did not do this because it saw its role as a mere conduit for the funds.³¹ The Department also stated that it presumed that Congress intended the Board to support claims paid by other entities because it understood that the amount appropriated would be significantly greater than the Board's apparent need for funds to process workers' compensation claims.³² This position implies that the Department would not have objected even had it foreseen the Board's action.

When we apply the principles enunciated above, the Department could not properly have approved the Board's proposal, which became the Statement of Work, if the Board had indicated that a significant portion of the grant funds would be paid over to other state entities to support activities unrelated to the processing of claims for workers' compensation. It is a well-understood principle of law that what cannot be done directly cannot be done indirectly.³³ Thus, the Department lacked the capacity

(...continued)

total \$175 million appropriated, \$150 million was not identified with an object class, such as personnel or equipment, but was characterized as "other" spending.)

²⁹ 64 Comp. Gen. 582, 584 (1985). *See also* 42 Comp. Gen. 289, 294 (1962) (acceptance of a grant creates a contract between United States and grantee). Cf. *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1445, 1450 (D.C. Cir. 1996) (grant agreement includes essential elements of contract and establishes what would commonly be regarded as a contractual relationship between government and grantee).

³⁰ The authority to use funds for mitigation derives from the overarching appropriation in Pub. L. No. 107-38, which included mitigation among its purposes. See text at footnote 6, *supra*.

³¹ De Deo Letter at 2.

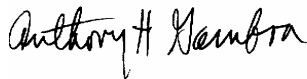
³² *Id.*

³³ *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866).

to approve the Board's use of grant funds through the indirect mechanism of a contingency account for a purpose at variance with the underlying appropriation act.

REMEDIAL ACTION

Grant funds that have been misapplied by a grantee must be recovered by the grantor agency, even when those expenditures have been incurred innocently by the grantee. 51 Comp. Gen. 162 (1971). Accordingly, the Department should seek to recover the \$44 million improperly transferred to the Crime Victims Board and the State Insurance Fund. As discussed above, both the Department and the Board seem to have contributed to the misunderstandings that resulted in the payments to the Crime Victims Board and the State Insurance Fund. In this case, if the Secretary wishes to forego recovery of the improperly expended funds, she should seek and obtain congressional ratification of the grant expenditures to date and permission to authorize use of the remaining grant funds appropriated by Public Law 107-117 for other World Trade Center-related claims and benefits. If such authority is forthcoming, the Department should modify the grant agreement accordingly. Until then, the Board should refrain from further reimbursements to other entities and the Department should monitor grant performance to ensure adherence to the grant purposes of administration and mitigation consistent with the statute.



Anthony H. Gamboa
General Counsel