

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: River East Economic  
Revitalization Corporation  
Docket No. A-06-86  
Decision No. 2087

DATE: May 30, 2007

DECISION

River East Economic Revitalization Corporation (River East, appellant) appeals a determination by the Office of Community Services (OCS) of the Administration for Children and Families (ACF), dated April 28, 2006, disallowing \$235,772 that River East claimed under a \$300,000 grant awarded pursuant to the Community Services Block Grant Act of 1981, 42 U.S.C. § 9901, et seq. OCS disallowed the funds on the ground that River East spent them to pay for expenses that were incurred before the beginning of the grant. For the reasons set forth below, we conclude that OCS did not abuse its discretion in declining to approve the pre-award costs retroactively, and we sustain the disallowance.

Applicable legal principles

The regulations at Part 74 of 45 C.F.R. set forth the uniform administrative requirements governing HHS grants awarded to nonprofit organizations. Section 74.28 of 45 C.F.R., "Period of availability of funds," states that where a funding period is specified in a grant award, "a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the HHS awarding agency pursuant to § 74.25(d)(1)." 45 C.F.R. § 74.25(d)(1) provides as follows:

(d) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section [related to changes in project scope and the need for additional funding], the HHS awarding agency is authorized, at its option, to waive cost-related and administrative prior written

approvals required by this part and its appendixes. Additional waivers may be granted authorizing recipients to do any one or more of the following:

(1) Incur pre-award costs up to 90 calendar days prior to award, or more than 90 calendar days with the prior approval of the HHS awarding agency. However, all pre-award costs are incurred at the recipient's risk: the HHS awarding agency is under no obligation to reimburse such costs if for any reason the applicant does not receive an award or if the award to the recipient is less than anticipated and inadequate to cover such costs.

Office of Management and Budget (OMB) Circular A-122, Cost Principles for Non-Profit Organizations, made applicable by 45 C.F.R. § 74.27(a), states that:

Pre-award costs are those incurred prior to the effective date of the award directly pursuant to the negotiation and in anticipation of the award where such costs are necessary to comply with the proposed delivery schedule or period of performance. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the award and only with the written approval of the awarding agency.

OMB A-122, Attachment (Att.) B, ¶ 36.<sup>1</sup>

#### Factual Background

On November 15, 1999, River East, a not-for-profit community development corporation in Toledo, Ohio, submitted to OCS a grant application seeking \$349,000 for construction related to the rehabilitation of an industrial building into commercial and retail sites. The construction was part of a venture, called the Docks Project, that aimed to build restaurants and retail space in a former river front industrial site in Toledo. Appellant's

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<sup>1</sup> This citation is to the revision of OMB A-122 that was published in 2004. 69 Fed. Reg. 25,970 (May 10, 2004). The prior revision, published in 1998, contained identical language, at paragraph 38 of Attachment B. 63 Fed. Reg. 29,794 (June 1, 1998). Effective August 31, 2005, OMB A-122 was codified at 2 C.F.R. Part 203, and Attachments A and B are now referred to as "Appendix A" and "Appendix B," respectively. 70 Fed. Reg. 51,927 (Aug. 31, 2005).

Exhibits (App. Exs.) 1, 8. River East submitted the application in response to an OCS grant announcement that was published in the Federal Register in August 1999, soliciting applications for grants under the Community Services Block Grant Act of 1981, 42 U.S.C. § 9901, et seq. OCS Ex. A. That statute authorizes the Secretary of United States Department of Health and Human Services to award grants on a competitive basis to private, nonprofit community development corporations "to provide technical and financial assistance for economic development activities designed to address the economic needs of low-income individuals and families by creating employment and business development opportunities." 42 U.S.C. § 9921(a)(2). The application reported total estimated costs of \$1,775,000 for the phase of the project for which funding was sought, a proposed period of three years beginning February 1, 2000. App. Ex. 1.

OCS acknowledged receipt of the application in a form faxed on December 17, 1999. OCS Ex. C. The form stated that grantees "will receive written notification regarding the final decisions on applications," that notice of project approval "will be made in writing via an official award document," and that applicants should "[p]lease allow approximately six to seven months for notifications." Id. (emphasis in original). OCS informed River East that its grant application had been approved in a letter dated June 19, 2000, which enclosed the notice of award and identified two HHS specialists responsible for monitoring and assisting with the programmatic and non-programmatic aspects of the grant. The notice of grant award indicated that River East had been awarded \$300,000 for facilities/construction for the budget period of July 1, 2000 through June 30, 2003, and a project period of July 1, 2000 through June 30, 2005. OCS Ex. D.

An independent auditor reviewed River East's financial statements as of June 30, 2001. Among the findings in the audit report, forwarded with a letter from the auditor dated October 1, 2001, was that River East had issued six checks between September 26, 2000 and June 6, 2001 totaling \$235,772 for work that was completed prior to the federal award date of July 1, 2000 and was therefore ineligible for federal reimbursement.<sup>2</sup> App. Ex. 11

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<sup>2</sup> The amounts of the six checks listed in the audit report and in River East's comments on the audit report total \$235,773, one dollar more than the disallowance amount. App. Ex. 11, at 34; App. Ex. 12, at 2. Further, the amount identified in the disallowance letter was \$235,722. OCS affirms, and River East does not dispute, that the actual disallowance amount is

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(OCS Ex. 2) at 34. The HHS Office of Inspector General (OIG), in a letter dated December 28, 2001, informed River East that it believed that the audit had been conducted in accordance with federal audit requirements. An attachment to the letter summarizing the audit findings described River East's incurrence of \$235,772 of costs outside the funding period as a material weakness and an instance of noncompliance, and recommended that "procedures be implemented to ensure 1) Federal disbursements are allowable and 2) the questioned costs be returned to the granting agency." OCS Ex. F, Att. A, at 2. The OIG letter asked that River East submit a response to the findings and recommendations by writing to ACF.

River East responded to the audit findings in letters to the Federal Audit Clearinghouse and to ACF, dated February 4 and February 6, 2002, respectively. In the letter to the Federal Audit Clearinghouse, River East stated that the purpose of the grant was for "additional dollars to be added to this project from the original costs established in the beginning of the project," and that in the interval between the grant application and its approval, "much of the work submitted in the proposal was completed earlier than what was expected due to good weather conditions." App. Ex. 12, at 2. River East reported that the six checks were used to reimburse parties involved in the project for their payments for heating and air conditioning ducts, a fire sprinkler system, and completion of parking lots. Id. River East further explained that "[s]ince the organization did not have the dollars to cover the expenditures at that time of completion of the specific items that were part of the obligations of the developer, the investors paid for the completed work, with the knowledge that they would be reimbursed once the OCS grant application was approved." Id. River East further stated that the project architect-

coordinated the project to coincide with the construction work hired by the individual investors and the developer. There were times when the developer's portion of the job had to be completed before the contractor for the investor could move forward. Therefore, some of the work was completed prior to the grant approval notification.

Id. In the letter to ACF, River East responded to the audit findings that procedures be implemented to ensure that federal

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<sup>2</sup>(...continued)  
nevertheless \$235,772. OCS Brief (Br.) at 1.

disbursements are allowable and that the questioned costs be returned to the agency, with the statement that it had "addressed these issues on the Annual Report findings." OCS Ex. G, Att. A, at 2.

The next communication in the record concerning the audit finding regarding the six checks was OCS's disallowance determination letter dated April 28, 2006. The disallowance letter disallowed the questioned costs of \$235,722 stating that River East had not sought a waiver to incur pre-award costs, in violation of regulations regarding pre-award costs at 45 C.F.R. §§ 74.28 and 74.25(d)(1), and that no waiver had been given.<sup>3</sup> App. Ex. 15.

#### River East's arguments

River East argues that it spent the disallowed funds prior to the July 1, 2000 beginning of the grant and the budget period, because it had expected the grant to begin in January 2000, and the circumstances of the Docks Project required that construction proceed in the interim. River East asserts that "the consultant assisting River East with the OCS grant application" notified it of its "high ranking" in December 1999, and of an expected grant approval date of January 2000. App. Br. at 3. River East argues that prior to the grant, construction "necessarily progressed due to the importance of keeping with the construction plan so as to take advantage of the most favorable weather conditions," and because some of the work that River East was "obligated to cover needed to be completed before the investors' contractors could move forward with their scheduled completion dates." *Id.* River East reports that because it "did not have the funds to cover the necessary expenditures, the investors fronted the funds for the completed work with the expectation of reimbursement once the OCS grant funds came through." *Id.* River East asserts that the Docks Project succeeded in renovating a facility that was once a city warehouse into a 52,000 square foot five-restaurant complex, created approximately 620 new jobs, brought increases in revenues to the city and county through payroll and sales taxes, and helped spur the development of a nearby residential and commercial development.

River East also asserts that because of its inexperience with the grant process, it did not learn of the prohibition on spending grant funds on obligations incurred prior to the grant, or of the

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<sup>3</sup> The disallowance also addressed other audit findings that did not seek return of funds and are thus not at issue in this appeal.

requirement to obtain agency permission to do so, until "the commencement of these proceedings." App Br. at 6. River East cites letters it wrote to HHS seeking clarification and assistance with grant procedures. River East wrote to the Division of Payment Management in August 2000 and June 2001 seeking information on how to transfer grant funds to River East's bank account and noting that this was the first time that River East had been awarded a federal grant (App. Exs. 9, 10). River East also wrote to ACF in May 2003 and June 2005 professing a lack of knowledge of how the grant systems work (App. Ex. 14), and a lack of understanding as to "why so many different representatives from the [OCS] Division of Community Discretionary Programs have been involved since we started this program" (App. Ex. 15). The last letter also recounted difficulty in obtaining from those representatives the identity of someone to whom River East could send the balance of unused money left in its interest-bearing account. App. Ex. 15. River East asserts that it "exercised its best efforts within its lean budget to educate itself on its responsibilities as an award recipient, often struggling to get information and often being bounced between numerous contacts within the agency." App. Br. at 6.

### Discussion

1. Costs incurred outside of the grant period are subject to disallowance absent agency waiver.

Charges to federal grant awards by non-profit organizations such as River East, to be allowable, must be allocable to the federal award, i.e., of benefit to the activities for which the grant was awarded. OMB A-122, Att. A, ¶ 2.a; Delta Foundation, Inc., DAB No. 1710, at 41 (1999), aff'd 303 F.3d 551, 568-570 (5<sup>th</sup> Cir. 2002). "The term 'benefit,' as used in connection with the concept of allocability, derives from accounting principles that the costs must relate not only to cost objectives, but to funding periods as well." Delta Foundation at 41. The fact that expenditures are incurred outside their grant periods necessarily means that they are not allocable to the grants and is a sufficient basis in itself for a disallowance. Id., citing Bedford Stuyvesant Restoration Corporation, DAB No. 1404, at 15 (1993). Grantees seeking to charge pre-award costs to federal awards must accordingly obtain the permission of the awarding agency, which is authorized to grant waivers permitting recipients to charge pre-award costs to federal awards. 45 C.F.R. §§ 74.28, 74.25(d)(1); see also OMB A-122, Att. B, ¶ 36 (pre-award costs allowable "only with the written approval of the awarding agency").

River East does not dispute that it spent the disallowed funds on costs incurred before the beginning of the grant, and that it failed to seek or obtain OCS's permission to incur pre-award costs. The costs accordingly are subject to disallowance.

2. Agency denial of a waiver is discretionary and reviewable only for abuse of discretion.

During the appeal process, in response to the Board's inquiry, OCS declined to grant a retroactive waiver permitting River East to incur the pre-award costs or otherwise to approve the pre-award costs retroactively. River East argues essentially that a retroactive waiver should be granted because it spent the disallowed funds consistent with the purposes for which the grant was awarded and failed to timely request a waiver only because of its unfamiliarity with the grant process.

The regulation governing pre-award costs authorizes the agency to waive cost-related and administrative prior written approvals required by Part 74 "at its option," and further provides that additional waivers "may be granted" authorizing recipients to incur pre-award costs up to 90 calendar days prior to the award, or more than 90 calendar days with the prior approval of the HHS awarding agency. 45 C.F.R. § 74.25(d)(1). The regulation cautions, however, that all pre-award costs are incurred at the recipient's risk, and that the awarding agency is under no obligation to reimburse pre-award costs if for any reason the applicant does not receive an award or if the award is less than anticipated and inadequate to cover such costs. *Id.* The permissive nature of the regulation, which authorizes but does not require the agency to grant waivers permitting grantees to incur pre-award costs, indicates that the determination of whether to grant a waiver is a matter committed to the agency's discretion.

The Board's review of decisions committed to the federal agency's discretion is narrow, limited to determining whether the decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Wisconsin Dept. of Administration, DAB No. 1766 (2001). The Board has routinely applied this abuse of discretion standard to those waiver or prior approval decisions that are expressly authorized by agency regulations or policies. *Id.*, citing New Opportunities for Waterbury, Inc., DAB No. 1512 (1995); see also Rhode Island Substance Abuse Task Force Association, DAB No. 1742 (2000). In reviewing denials of requests for retroactive approval of actions that required prior approval, the Board has repeatedly held that a federal agency, such as ACF or OCS, has considerable though not

completely unbounded discretion to deny the request, and must state the basis for its decision and not deny retroactive approval based on unsubstantiated conclusions or on bases so insubstantial that the decision fairly can be described as capricious. Enterprise for Progress in the Community, Inc., DAB No. 1558 (1996), and authorities cited therein. The federal agency may consider all relevant factors in deciding whether ultimately to grant retroactive approval where prior approval was required but not obtained. Id.; East Bay Perinatal Council, DAB No. 1793 (2001).

In New Opportunities for Waterbury, Inc., the Board elaborated on the applicable standard as follows:

The standard of judicial review under the Administrative Procedure Act, when ruling on a challenge to informal agency action, is whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The "arbitrary and capricious" standard of review has been stated to be a highly deferential one, which presumes the agency action to be valid. The standard is also a narrow one, which forbids a court from substituting its judgment for that of the agency; it mandates judicial affirmance if a rational basis for the agency's decision is presented, even though the court might otherwise disagree. Environmental Defense Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981).

DAB No. 1512, at 12, n.7. The Board has applied that standard in reviewing agency decisions denying permission to use funds outside the grant period, as in the denial of a request for a no-cost extension of the grant. Rhode Island Substance Abuse Task Force Association; New Opportunities for Waterbury, Inc.; Bedford Stuyvesant Restoration Corporation; Oakwood Child Development Center, Inc., DAB No. 1092 (1989).<sup>4</sup>

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<sup>4</sup> Decisions applying the abuse-of-discretion standard to agency denials of no-cost extensions were based on provisions of the former HHS Grants Administration Manual (GAM) stating that the grants officer "may" noncompetitively extend the project for a limited time and "may also extend" any budget period for a few months for administrative reasons. The applicable GAM language, the Board held, "clearly indicated that extensions were discretionary." Oakwood Child Development Center, Inc., DAB No.

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Accordingly, in reviewing OCS's denial of a waiver for the pre-award costs, we will not substitute our judgment for that of OCS, and instead ask only whether the agency has articulated a reasonable basis for its decision, not whether it was the only reasonable decision.

3. OCS's denial of a retroactive waiver here was not arbitrary and capricious.

As noted above, the Board asked OCS whether a timely request for a waiver of the prohibition on pre-award costs would have been granted for the costs in question and, if so, whether such a waiver could be granted retroactively. OCS stated in response that ACF had determined that River East's incurrence of substantial costs prior to being notified that it had been awarded the grant was a highly unusual circumstance, particularly in light of the fact that grantees agree, as part of their grant application, to refrain from incurring pre-award costs. Letter from OCS Counsel, July 18, 2006. OCS reported that in some cases ACF had approved other grantees' pre-award costs where the grantees had requested approval at the outset of the grant or immediately thereafter, and that approved pre-award costs typically constitute a very small percentage of the overall award. OCS also reported that ACF was disinclined to grant a retroactive waiver for pre-award costs more than six years after the grantee incurred the pre-award costs and that, "[u]pon information and belief," ACF had never awarded a retroactive waiver in such a circumstance. Id.

With its brief, OCS submitted a declaration of the Director of the Division of Discretionary Grants in the ACF Office of Grants Management (OGM), who had been involved with the River East case, elaborating on ACF's reasons for declining to grant a retroactive

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<sup>4</sup>(...continued)

1092, at 9-10 (1989). The Board has similarly found that the permissive wording of GAM language providing that a transaction that required prior approval may be approved retroactively by the agency if the transaction would have been approved had the organization requested approval in advance, meant that it was a decision committed to agency discretion that the Board will review only under the standard discussed above. Inter-Tribal Council of California, DAB No. 1418 (1993); Economic Opportunity Council of Suffolk, Inc., DAB No. 714 (1985). The pre-award cost waiver provision in section 74.25(d)(1) is couched in similarly permissive terms and is thus a matter within the agency's discretion.

waiver. OCS Ex. I. She stated that her office would not have approved a request to incur \$235,772 in pre-award costs out of a grant of \$300,000, even if River East had made such a request timely, and would not have approved a waiver to charge the pre-award costs after they had been incurred. OCS Ex. I. Typically, she stated, a grantee requesting permission to incur pre-award costs seeks to incur only a very small percentage of the overall grant award, and the costs OGM would typically approve are minimal start-up costs that a grantee requires to initiate a project. She further stated that the OGM "is not in the practice of giving permission or providing a waiver to a grantee that wishes to incur significant pre-award costs," and that OGM does not regard favorable weather conditions as "a persuasive reason to incur significant and unauthorized pre-award costs several months before being notified that a grant has been funded for a construction project." Id. She further stated that to the best of her knowledge OGM has never awarded a waiver "in circumstances similar to this case." Id.

ACF's concern about the relatively large proportion of River East's total grant award that was expended for costs incurred prior to the grant award, prior, even, to the time that River East was notified of the award, is reasonable and provides a basis for its decision that is not arbitrary or capricious. As OCS noted, the grant announcement called for applicants to submit a business plan showing how the project objectives would be accomplished during the allowable project period, and stated clearly that funds are not awarded to grantees to provide reimbursement for projects that have been substantially completed prior to the funding of the grant or for costs incurred before a decision to fund a project has been made. OCS Br. at 10, n.7, citing 64 Fed. Reg. 45,302, at 45,309 (Aug. 19, 1999) (OCS Ex. A). By spending more than three-quarters of its total grant for construction work undertaken prior to the time that it received the grant, River East, in essence, treated its request for a grant award pursuant to the announcement as a request for reimbursement of already existing debts. The agency could reasonably conclude that providing a retroactive waiver here might have the unwelcome effect of encouraging grantees to speculatively incur substantial costs prior to being notified that their grant applications are successful, leaving successful applicants with little funding to be applied during the actual grant or budget period, and unsuccessful applicants with substantial debts.<sup>5</sup> The agency's concern that River East spent

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<sup>5</sup> Neither party addressed the effect or applicability  
(continued...)

the large majority of its grant on costs incurred prior to being notified of the award suffices to uphold the decision to deny a retroactive waiver permitting pre-award costs. Accordingly, we conclude that OCS's denial of a retroactive waiver for the pre-award costs was not arbitrary and capricious.

4. River East's other arguments for reversing the disallowance are without merit.

River East makes a variety of arguments and assertions about why, in its view, it should not be required to return the disputed funds. As noted above, River East asserts that the construction costs that it paid with the disallowed funds furthered the purpose of the grant and that the construction took place prior to the grant to comply with a fast construction schedule made possible by favorable weather conditions.<sup>6</sup> River East asserts that it would have sought a waiver to incur the pre-award costs,

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<sup>5</sup>(...continued)

here of the distinction in the regulation between pre-award costs incurred up to 90 days prior to the award (for which the agency may grant waivers authorizing recipients to incur the costs) and more than 90 days prior to the award (for which the agency may grant waivers authorizing recipients to incur the costs with the agency's prior approval). 45 C.F.R. § 74.25(d)(1). Here, two of the six invoices reflecting the work for which River East made the disallowed payments are dated February 8 and March 8, 2000, more than 90 days prior to the start of the grant on July 1, 2000. App. Ex. 2-7 (invoices); App. Ex. 12 (comments on audit report); App. Br. at 4. Since there is no allegation that OCS ever granted a waiver permitting pre-award costs or that River East ever sought one during the time that the grant was in place, we need not determine whether, if OCS had decided to allow the costs at this late date, it would need to grant only a retroactive waiver permitting the pre-award costs, or a retroactive waiver *and* retroactive prior approval. Both determinations are matters committed to agency discretion.

<sup>6</sup> In support of its argument that the pre-award costs supported grant goals, River East submitted invoices from vendors and subcontractors. OCS determined that these materials "reflect the underlying work for which the investors paid," and show "payment for work completed for a variety of construction-related projects." App. Exs. 2-7; OCS Br. at 4, and n.3. OCS did not argue that the disputed costs were not in furtherance of the overall purpose of the grant, and that was not the basis of the disallowance.

had it known of the regulatory requirements. River East asserts that its failure to obtain the requisite waiver was excusable neglect and that it had no bad intention in paying the pre-award costs with federal funds. App. Br. at 6-9, App. Reply Br. at 3-5.

River East argues that the purpose behind the waiver and prior approval requirements is to ensure proper oversight and to allow the agency to examine whether certain expenditures are justified given the particular circumstances of the grantee.<sup>7</sup> In that context, River East asserts that the equities of the case justify granting a retroactive waiver.

River East recognizes the applicable standard of review in its briefs, but nevertheless makes arguments that effectively ask the Board to substitute its judgment for the agency's. OCS's and ACF's bases for denying retroactive approval here clearly are reasonable and substantiated by the record. River East's arguments appear to rely on a general claim of "equity" which is not available as a basis for dispensing federal funds. The Board does not have the authority to grant the kind of equitable relief requested here. The Board is bound by all applicable laws and regulations and has no authority to waive a disallowance. 45 C.F.R. 16.14; Bedford Stuyvesant Restoration Corporation at 34. A party's good faith, honest efforts, or financial hardship do not provide a legal basis for the Board to overturn a disallowance. New Century Development Corporation, DAB 1438, at 11 (1993).

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<sup>7</sup> River East cites Economic Opportunity Council of Suffolk, Inc. and Alabama Dept. of Human Resources, DAB No. 939 (1988). In those decisions, the Board observed that a provision in the version of Part 74 that was in effect until 1994, which permitted the agency to waive or conditionally waive the requirement for its prior approval of costs, was intended to enable an awarding agency to waive in advance for a particular grantee the general requirement to obtain prior approval whenever incurring a cost in a category for which such approval is specified. In Economic Opportunity Council of Suffolk, Inc., the Board observed that waiver of a requirement for prior approval of capital expenditures and building costs is normally given only to grantees that have established their own internal procedures "which obviate the need for close oversight by the awarding agency." DAB No. 714, at 2. River East failed to show that the provision applied here, that it received such a waiver, or that it had such internal procedures.

River East's argument that it did not incur costs inconsistent with the general aims of the grant and has not been accused of fraud or self-enrichment is not a basis to conclude that the agency's denial of a waiver was unreasonable. The applicable provisions do not provide for automatic approval of whatever pre-award costs are consistent with grant purposes. OMB A-122 provides that pre-award costs are allowable "only to the extent that they would have been allowable if incurred after the date of the award and only with the written approval of the awarding agency," and any expenditures that are not reasonable and necessary for the performance of the grant award are unallowable, regardless of when they are incurred. OMB A-122, Att. B, ¶ 36 (emphasis added); Att. A, ¶¶ A.2.a, A.3.a. A determination that River East had spent funds on costs unrelated to the purpose for which the grant was awarded would have provided a separate basis for a disallowance, regardless of when the expenditures occurred. Disallowance of funds spent in a manner inconsistent with legal requirements governing a grant award does not necessarily imply any fraud or self-enrichment. A disallowance is a matter of grants management, and is not in the nature of punishment.

Furthermore, we find River East's claims of ignorance of grant requirements both disturbing and less than credible. River East asserts that its status as a non-profit community development corporation with a "lean budget" meant that it "did not have the luxury of having advisors to inform them of the necessity of a waiver." App. Br. at 7. As part of the grant application and award process, River East was informed of, and agreed to abide by, the governing regulations and conditions applicable to the award. The OCS grant announcement in the Federal Register soliciting applications stated that an applicant, by signing and submitting the grant application, was certifying that it would comply with HHS regulations referenced in Attachment I of the announcement, which included 45 C.F.R. Part 74. 64 Fed. Reg. 45,302, at 45,314, 45,329 (OCS Ex. A); see also OCS Ex. E (statement of standard terms and conditions for discretionary grants, incorporating 45 C.F.R. Part 74). The assurances signed by River East's Executive Director and submitted with the grant application certified that the applicant has "the institutional, managerial and financial capability" to, among other things, ensure proper management of the project. These assurances included the express certification that the applicant "[w]ill initiate and complete the work within the applicable time frame **after receipt of approval of the awarding agency.**" OCS Ex. B (emphasis added).

River East's professed failure to apprise itself of the requirements applicable to its grant award violated its

assurances in applying for the grant and cannot excuse its failure to abide by those requirements. See, e.g., Delta Foundation, Inc. at 3-4. The letters that River East points to as showing that it communicated to OCS its unfamiliarity with the process applicable to its grant were dated May 14, 2003 and June 7, 2005, well into or after the budget period involved here, and demonstrate no effort to seek training or assistance. App. Exs. 14, 15. River East in its grant application depicted itself as experienced in the administration of federally-funded projects, reporting that it had previously obtained funding, including for construction, from the U.S. Department of Housing and Urban Development and the federal Economic Development Administration. OCS Ex. H at 13-14.

River East also asserts that its expenditure of grant funds for costs incurred prior to the budget and project period arose because River East "naively did not anticipate the six month delay in grant approval." App. Br. at 7. River East's claims that the grant award was "delayed" and that it believed it would receive the grant earlier are not supported by the record, however. River East asserts that a "consultant" assisting with the grant application told River East that the grant would be awarded in January 2000. App. Br. at 3. River East did not identify the consultant and did not claim that this individual was associated with ACF. That allegation, moreover, conflicts with OCS's written advice to River East in December 1999 that River East should allow approximately six to seven months for notification, via an official award document, of whether its application was successful. OCS Ex. C. OCS's letter of June 19, 2000 informing River East that its grant application had been approved was consistent with that instruction. OCS Ex. D.

River East also argues that its delay in seeking a retroactive waiver resulted from HHS's failure to take action to recover the questioned costs until ACF issued the disallowance letter in 2006. River East notes that it informed ACF of the reasons for incurring pre-award costs in its letter of February 4, 2002 responding to the audit findings, and had received from HHS a "partial no further action letter" on July 3, 2002 stating that River East's response was sufficient to close out some of the audit findings. App. Br. at 5; App. Ex. 13. River East reports that it then had no further communication from HHS regarding the pre-award costs until almost four years later when River East received the disallowance letter demanding repayment.

We stated above that OCS's and ACF's concern that River East had spent the large majority of its grant award on costs incurred prior to River East being notified of the award provided was a

sufficient ground to uphold the decision to deny a retroactive waiver permitting pre-award costs. Therefore, we need not address whether ACF's concern over the passage of time since the grant ended is also a reasonable basis for the agency's decision. We note, however, that any delay in River East's request for a waiver resulted primarily from River East's own failure to familiarize itself with the requirements applicable to its federal award, which forbade incurring pre-award costs in the absence of a waiver. Additionally, River East was aware since receipt of the October 1, 2001 auditor's report and the December 28, 2001 letter from the OIG adopting the audit findings that the pre-award costs were unallowable and of the recommendation that the funds be returned to the awarding agency. App. Ex. 11; OCS Ex. F. In light of this information, the "partial no action letter" dated July 3, 2002 that River East received from HHS, which addressed two numbered audit findings that are unrelated to the finding at issue here, provided no reasonable basis for River East to conclude that the agency was not pursuing the auditor's recommendation that River East return the funds spent on pre-award costs. App. Ex. 13.

### Conclusion

For the reasons discussed above, we conclude that OCS's determination not to grant a retroactive waiver allowing River East to incur the disallowed pre-award costs was not arbitrary, capricious or an abuse of discretion. Accordingly, we sustain the disallowance in full.

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/s/  
Donald F. Garrett

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/s/  
Sheila Ann Hegy

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/s/  
Leslie A. Sussan  
Presiding Board Member