

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

Community Action Partnership -  
Huntsville/Madison and Limestone Counties, Inc.  
Docket No. A-13-83  
Decision No. 2557  
February 4, 2014

**DECISION**

Community Action Partnership - Huntsville/Madison and Limestone Counties, Inc. (CAP) appealed the May 10, 2013 determination of the Administration for Children and Families (ACF) disallowing \$109,375 charged to American Recovery and Reinvestment Act (ARRA) funds that ACF awarded to CAP for the period July 1, 2009 through September 30, 2010. ACF disallowed the full amount paid by CAP to a contractor for repairs and renovations to portable classroom buildings used by CAP's Head Start program. ACF found that the contract award violated the requirement in 45 C.F.R. § 74.43 that a contractor be excluded from competing for a contract for which it developed the specifications.

On appeal, CAP takes the position that this regulatory requirement is not violated if the contractor's involvement in development of contract specifications is only minimal and that the involvement of the contractor in question here was minimal. As discussed below, even assuming this interpretation of the regulation is correct (and we do not decide that issue), we conclude that CAP's award of the contract to the contractor did violate section 74.43 because the contractor's involvement was more than minimal. We therefore sustain the disallowance of the payments CAP made to the contractor for the repairs and renovations.

**Legal Background**

Head Start is a national program that provides comprehensive health, educational, nutritional, social, and other services primarily to low-income children, ages three to five, and their families. 42 U.S.C. § 9831; 57 Fed. Reg. 46,718 (Oct. 9, 1992). Title VIII of ARRA, Public Law No. 111-5 (2009), provided additional funds for "activities under the Head Start Act." ACF awarded some of these funds for Head Start quality improvements, including "[e]nsuring that the physical environments of Head Start programs are conducive to providing effective program services to children and families[.]" Head Start Program Instruction 09-06, May 12, 2009, available at [http://eclkc.ohs.acf.hhs.gov/hslc/standards/PIs/2009/resour\\_pri\\_006\\_040209.html](http://eclkc.ohs.acf.hhs.gov/hslc/standards/PIs/2009/resour_pri_006_040209.html).

The terms and conditions of CAP's ARRA award expressly made applicable to the award the uniform administrative requirements for grant awards for Department of Health and Human Services grants to non-profit organizations, at 45 C.F.R. Part 74. CAP Ex. J at 13-14. Section 74.43 of 45 C.F.R., captioned "Competition," provides in part:

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft grant applications, or contract specifications, requirements, statements of work, invitations for bids, and/or requests for proposals shall be excluded from competing for such procurements. . . .

The Part 74 regulations also provide that if the recipient of a federal grant award "materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute or regulation, an assurance, an application, or a notice of award," the federal awarding agency may, among other remedies, "[d]isallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance." 45 C.F.R. § 74.62(a)(3).

The Board has consistently held that "under the applicable regulations and cost principles, a grantee bears the burden of documenting the existence and allowability of its expenditures of federal funds." *See, e.g., Suitland Family & Life Dev. Corp.*, DAB No. 2326, at 2 (2010). Thus, once ACF determined that CAP's payments were unallowable because CAP violated section 74.43, CAP had the burden of documenting that it in fact complied with the regulation.

### **Case Background**

The following facts appear from the record or were alleged by a party and are undisputed.

During the relevant period, CAP received Head Start grants from ACF and had 15 Head Start building facilities in Limestone County and Madison County, Alabama. CAP Br. at 1.<sup>1</sup>

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<sup>1</sup> Elsewhere the record indicates that CAP received grants for Early Head Start as well as Head Start. CAP Ex. G at 1. Early Head Start "provides low-income pregnant women and families with children from birth to age 3 with family-centered services that facilitate child development, support parental roles, and promote self-sufficiency." 45 C.F.R. § 1304.3(a)(8).

In late 2007, CAP's maintenance coordinator and some members of CAP's Board of Directors and CAP's Head Start staff were in the process of conducting a "Facilities Needs Assessment." CAP Ex. I at 2.<sup>2</sup> On February 8, 2008, CAP entered into a "subcontract agreement" with MTA, Inc. for pressure washing and some repairs at seven Head Start centers. *Id.* at 16-19. In conjunction with this work, MTA was to assist CAP's maintenance coordinator with the ongoing needs assessment. CAP Ex. I-2. An individual we refer to as Mr. F, then an employee of MTA, "worked on the pressure-washing of the facilities to assist the grantee's team [to] better see the condition of the facilities[.]" ACF Response Br. at 9. Mr. F was also a member of CAP's Board of Directors for 10 years until his resignation in April 2009. CAP Ex. I at 3; CAP Ex. A at 1. While on the Board, Mr. F "initially participated in the Facilities Needs Assessment discussions[.]" ACF Response Br. at 9. MTA's contractual relationship with CAP ended in October 2008 after MTA performed repairs at 13 Head Start centers. CAP Ex. I at 3.<sup>3</sup>

In December 2008, at the request of CAP's Head Start Director, CAP signed a purchase requisition for \$2,500 for work by the vendor F[.] Yard Maintenance/General Repair (F. Yard Maintenance). CAP Ex. B at 1. Mr. F was the president of F. Yard Maintenance. CAP Br. at 8. The requisition states that the contractor is "to inspect portables for repairs/replacement as needed (5 year plan)" and identifies 10 Head Start centers. *Id.* A purchase order in the amount of \$2,500 for F. Yard Maintenance to do this work was signed on December 29, 2008. CAP Ex. B at 2. In February 2009, Mr. F provided to CAP's Head Start Director a "detailed analysis of a Facilities Needs Assessment prepared by MTA, in collaboration with the Maintenance Coordinator along with Head Start staff and Board Members." CAP Ex. I at 3.

In May 2009, CAP applied for fiscal year 2009 ARRA quality improvement funds and proposed that \$120,000 be awarded for "Facilities Renovations" for 15 "Head Start Classroom Buildings." CAP Ex. J at 7-10. The application states that quality improvement funds will be used to "repair and renovate Head Start facilities which have physically declined over a long period of time" and lists examples of the types of work to be performed. *Id.* at 10. In June 2009, ACF awarded CAP an ARRA grant for the budget period July 1, 2009 through September 30, 2010. The budget for the award included the repairs and renovations. *Id.* at 13.

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<sup>2</sup> CAP's Exhibit I is a May 22, 2013 letter from CAP's CEO and the President of CAP's Board of Directors to the Director, Office of Head Start.

<sup>3</sup> Although CAP Ex. I at 3 refers to 13 Head Start centers, it appears that there were 10 Head Start centers consisting of a total of 13 buildings. *See id.* at 2-5. CAP's initial agreement with MTA to perform work at seven centers was presumably amended to cover work at 10 centers, although this is not reflected in the record.

In May 2010, CAP issued a Request for Pricing to solicit contractors for its ARRA project to repair and renovate its Head Start program centers. CAP Ex. C at 1. A “Head Start Center Locations Repair List” attached to the Request for Pricing specified the work needed on a total of 13 buildings at 10 Head Start centers.<sup>4</sup> *Id.* at 2–5. F. Yard Maintenance submitted the only bid, a Quote in Response to Request for Pricing, dated June 28, 2010, signed by Mr. F. CAP Br. at 8; CAP Ex. E at 1–6. A purchase requisition for “maintenance and repair” of the 13 buildings in the amount of \$92,473.48 identifying F. Yard Maintenance as the vendor is dated June 29, 2010 and is signed by CAP’s Head Start Program Director, Chief Financial Officer, and CEO.<sup>5</sup> CAP Ex. F at 1. CAP ultimately paid F. Yard Maintenance \$109,375, the amount disallowed here. CAP Ex. G at 5; ACF Ex. 5.

In a December 2012 report on an April 2012 on-site monitoring review of CAP’s Head Start and Early Head Start programs, ACF found in relevant part that F. Yard Maintenance “developed the Scope of Work for facility alternations and repairs” that were subsequently performed by the same contractor pursuant to the June 2010 purchase requisition. CAP Ex. G at 11. The report also noted that CAP’s Human Resources/Purchasing Director stated in an interview that the owner of F. Yard Maintenance “worked for the grantee as an independent contractor for some time and developed several reports on the structural condition of the Head Start portables, which the grantee was able to use to help obtain the renovation money.” *Id.* The report concluded that CAP “awarded repair work of Head Start facilities to the contractor developing the specifications of the work; therefore, it was not in compliance with” section 74.43. *Id.*

By letter dated May 10, 2013, ACF advised CAP that it was disallowing \$109,374.98 paid to F. Yard Maintenance on the ground that the award to CAP violated section 74.43. ACF found that CAP paid F. Yard Maintenance “to inspect and prepare a ‘Description of Work,’ for 14 Head Start facilities and then . . . paid [F. Yard Maintenance] to do the resulting repair work[.]” 5/10/10 letter from ACF at 1.<sup>6</sup> ACF also found that CAP did

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<sup>4</sup> For example, the list includes the following 10 items for a building at one of the centers: “Paint outside of building”; “Portion of floor needs replacing”; “Repair partition wall between boys and girls bathroom”; “Prim[e] and paint ceiling to eliminate water spots”; “Replace weather stripping around floor”; “Replace inside door casing as needed”; “Replace Exhaust fans”; “Carpet needs replacing on west side of classroom”; “Roof needs to be resealed or recovered.” “Outside lights need repair or replacement”. CAP Ex. C at 2.

<sup>5</sup> There is no purchase order in the record, but it is not disputed that there was a contract based on the June 29 purchase requisition.

<sup>6</sup> The reference in the disallowance letter to 14 Head Start facilities appears to be an error, as the record elsewhere refers to 13 buildings. *See* n. 3 *infra*.

not require bids for the repair work as required by section 74.43. *Id.* During the proceedings before the Board, ACF stated that CAP did document that it had solicited competitive bids, but concluded that the disallowance was still warranted based on the first finding. ACF Response Br. at 2.

CAP filed a timely notice of appeal in which it requested an evidentiary hearing. 6/10/13 letter from CAP at 2. The Board's letter acknowledging receipt of the notice of appeal directed CAP to identify in its brief any "complex issues or material facts in dispute the resolution of which would be significantly aided by a hearing[.]" 6/24/13 letter at 3, quoting the Board's regulations at 45 C.F.R. § 16.11(a). However, neither CAP's brief nor its reply brief complied with the Board's directive. Moreover, we have not identified any disputed issue of material fact requiring an evidentiary hearing.

### **Analysis**

Section 74.43 precludes a grantee from awarding a contract to a contractor that has drafted or otherwise developed a description of the work to be performed under the contract, *e.g.*, the contract specifications.<sup>7</sup> CAP takes the position that Mr. F's involvement in developing the specifications for the contract for repairs and renovations was "minimal." CAP Reply Br. at 1. CAP notes that ACF's brief cites a Nebraska district court case as recognizing "that an extremely minor role in developing a work proposal may not necessarily disqualify the person in that role or his employer from bidding on the resulting work project." ACF Br. at 7-8, citing *ACS State Healthcare, LLC v. Heineman*, No. 4:08-cv-3021, 2008 WL 608638 (D. Neb. Feb. 29, 2008). Thus, in CAP's view, Mr. F's involvement did "not rise to the level" that required F. Yard Maintenance to be excluded from competing for the contract for repairs and renovations. CAP Reply Br. at 5-6. CAP does not dispute that the regulation would otherwise require that contractor's exclusion.

The State district court decision is not binding on the Board. *Cf. Washington State Dep't of Social & Health Servs.*, DAB No. 940, at 7 ("the Board is not bound to apply the cited District Court decision as controlling precedent because the instant appeal is from a different district"). In any event, we need not reach the issue of whether the regulation requires the exclusion of a contractor with only minimal prior involvement since, as discussed below, we find that Mr. F or his company played a major role in developing the specifications for the contract at issue.

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<sup>7</sup> We use the term "contract specifications" here to refer to the description of work in the repair list attached to CAP's bid solicitation, rather than as a term of art that might be used in more formal bidding and contracting transactions. ACF asserts, and CAP does not dispute, that although the "provision requiring exclusion from competing contains some terms of art commonly used in more formal bidding and contracting transactions," it has long been recognized that the provision "also applies to less formal, but comparable transactions[.]" ACF Br. at 3.

As noted above, ACF found that CAP first paid F. Yard Maintenance to prepare a description of repairs needed on CAP's Head Start facilities and then paid F. Yard Maintenance to do the repairs it had identified. CAP disputes that F. Yard Maintenance "created the list of repairs which [it] later performed under the grant." CAP Br. at 10. CAP asserts that the Head Start Director requested the inspections described in the December 2008 purchase requisition only to determine which "action items" on the existing needs assessment, i.e., the needs assessment prepared with MTA, had already been completed. *Id.* at 10, citing CAP Ex. J (affidavit of Head Start Director). Thus, according to CAP, "any resulting report" by F. Yard Maintenance merely identified work that would not be included in later repairs. *Id.* at 10. In her affidavit, the Head Start Director states that the "crew" of F. Yard Maintenance "conducted the inspection and reported to our Purchasing Department that about 18 items had been corrected since the assessment was finished." CAP Ex. J at 2.

However, the scope of the December 2008 purchase requisition is much broader than simply identifying items on the existing needs assessment that had been completed. As already indicated, this purchase requisition requires the vendor "to inspect portables for repairs/replacement as needed (5 year plan)" at 10 Head Start centers. CAP Ex. B at 1. Thus, on its face, the purchase requisition requires a comprehensive needs assessment. CAP does not point to anything in the record indicating that F. Yard Maintenance was told by the Head Start Director or anyone else at CAP that it needed only to identify items on the existing needs assessment that had been completed. Even if the "crew" of F. Yard Maintenance reported items that had already been corrected, as the Head Start Director states, that does not necessarily mean that was the only information F. Yard Maintenance provided based on its inspection. Indeed, the purchase requisition's description of the scope of work seriously undercuts CAP's claim as to the limited nature of the information provided.

Moreover, the record contains affirmative evidence that Mr. F gave CAP a comprehensive needs assessment after his company completed the inspection. As noted above, CAP's CEO and the President of CAP's Board stated in a letter to the Director of ACF's Office of Head Start that in February 2009, Mr. F provided to CAP's Head Start Director a "detailed analysis of a Facilities Needs Assessment prepared by MTA, in collaboration with the Maintenance Coordinator along with Head Start staff and Board Members." CAP Ex. I-3. It appears from the timing and description of the "detailed analysis" that it was in fact the comprehensive needs assessment required by the December 29, 2008 purchase order, and that Mr. F prepared that comprehensive needs assessment by re-evaluating the needs assessment CAP had prepared with MTA, based on his own company's inspection.

CAP also takes the position that F. Yard Maintenance did not develop the specifications for the contract it was later awarded because the "Head Start Center Locations Repair List" attached to CAP's June 2010 Request for Pricing "had been extensively updated

from earlier versions in 2007, 2008, and 2009.” CAP Br. at 9; *see also id.* at 11 (“the list changed significantly over the years before it was finally approved and funded, due to the completion and addition of action items”). According to CAP, maintenance requests from “various facilities” would be “added to the Assessment list,” and “as maintenance inspections were performed, the Assessment list would be updated by removing action items that were no longer needed, or had been completed.” *Id.* at 9. However, CAP does not point to anything in the record showing that maintenance requests were made or inspections were performed after Mr. F provided the “detailed analysis” in February 2009, much less that any maintenance requests or inspections resulted in changes.<sup>8</sup> Moreover, neither the needs assessment CAP prepared with MTA nor the “detailed analysis” provided by Mr. F to the Head Start Director are in the record. CAP bears the burden of establishing the allowability of its costs, and it has failed to provide any evidentiary support for its assertion regarding changes to the assessment.

Even if there were some differences between the items on the repair list and those identified in the “detailed analysis,” that does not mean the prohibition in section 74.43 did not apply. Nothing in the language of section 74.43 limits its application to a contractor that was the sole developer of the contract specifications or requires that contract specifications reflect exactly (or exclusively) those developed by the contractor in question. Moreover, F. Yard Maintenance was at least the primary developer of the repair list since it provided the most recent comprehensive needs assessment. In addition, as the regulation itself indicates, its purpose is to “ensure objective contractor performance and eliminate competitive advantage[.]” This purpose is defeated when a contractor is hired to do work that contractor identified as necessary, even if the contract also requires additional work not identified by that contractor.

CAP argues in addition that F. Yard Maintenance was not prohibited from competing for the contract for repairs and renovations because Mr. F. did not “make the ultimate decision on the Assessment items[.]” CAP Reply Br. at 6. Instead, CAP asserts, “the Assessment list was maintained by” the Head Start Director and was “regularly reviewed and approved by . . . [the] CEO of CAP.” *Id.*; CAP Br. at 9. However, CAP does not explain why the fact that Mr. F did not maintain CAP’s official list of needed repairs and renovations or have the ultimate authority to decide what would be included in the repair

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<sup>8</sup> The Head Start Director’s affidavit does not provide specific information about the alleged changes, but merely states:

[W]e added other items that had been requested by the Center Managers and Content Managers. Between November 2008 and May 2010, the Purchasing Department continued to solicit quotes for items on the list as well as items that were submitted from the centers. Several contractors were engaged to complete the work. Thus, the list was altered many times over.

list is material to determining whether there has been a violation of section 74.43. The regulation on its face applies to any contractor who participated in developing or drafting the contract specifications; it does not state that the contractor must also have had authority to approve the contract specifications. In any event, one would not expect a contractor to have final approval authority. Moreover, as indicated above, there is no evidence that the CEO's review resulted in any changes to the comprehensive needs assessment Mr. F gave to the Head Start Director. To the extent CAP's CEO considered any changes to the assessment list, Mr. F's previous service on CAP's Board of Directors and his work on the MTA contract arguably would have made the CEO less likely to question any items on the comprehensive needs assessment developed by F. Yard Maintenance.

CAP further argues that regardless of whether Mr. F had previously participated in developing the needs assessment, the contract with F. Yard Maintenance was "justified" due to the fact that it was the sole bidder and "there cannot be any advantage gained by the sole bidder over other, non-existent competitors." CAP Reply Br. at 3. This argument has no merit. The prohibition in section 74.43 is not qualified in this manner. Indeed, the regulation unequivocally mandates that a contractor that develops the contract specifications "shall be excluded from competing" for the work (emphasis added). In addition, there are reasons why an award even to a sole bidder could be problematic. As ACF states, "[a]n insider in developing the work requirements of a bid solicitation . . . also may well be tempted to propose cheaper, quicker (but shorter-lasting) types of repairs that might save him money, and to recommend eliminating needed repair items that may be less financially advantageous for him[.]" ACF Response Br. at 10. CAP objects to this statement as "completely speculative" and asserts that "there is no indication that [Mr. F] began assisting with any assessment with the intention that he was molding such specifications to benefit himself." CAP Reply Br. at 6. However, ACF's point is not that Mr. F or his company did so, but rather that this possibility further justifies the absolute prohibition in the regulation. CAP also misconstrues *Iowa Dep't of Human Servs.*, DAB No. 1340 (1992), which CAP says supports its position that the payments in question here are allowable because F. Yard Maintenance was the sole bidder. CAP Reply Br. at 3, citing DAB No. 1340. That Board decision is not on point because it involves a regulatory provision other than section 74.43—a requirement for prior approval of a sole source contract—and there is no indication that the contractor developed the specifications for the contract at issue in that case.

CAP also observes that "ACF has never asserted that any of the funds were unreasonable in nature or otherwise unallowable[.]" CAP Reply Br. at 7. This is not a basis for reversing the disallowance, however. As already noted, section 74.62(a)(3) authorizes a grantor agency to disallow all or part of the cost of an activity or action if the grantee materially fails to comply with the terms and conditions of the grant with respect to that activity or action. Thus, even if the payments made to F. Yard Maintenance for the

repairs and renovations were otherwise allowable, ACF was authorized to disallow the full amount of those payments because CAP materially failed to comply with section 74.43, made applicable by the grant terms and conditions, when it awarded the contract for repairs and renovations to F. Yard Maintenance.

**Conclusion**

For the foregoing reasons, we uphold the disallowance of \$109,375 CAP paid for repairs and renovations to Head Start building facilities in 2010.

/s/

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Judith A. Ballard

/s/

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Leslie A. Sussan

/s/

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Sheila Ann Hegy  
Presiding Board Member