



It's The Law

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Obligation of Federal Assistance Funds

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At what point has funding for a grant or cooperative agreement been obligated so that there is an underlying legal duty to disburse those funds? Perhaps not surprisingly, the answer to this question depends on the procedure utilized in executing the award.

The basic statutory provision which governs obligation of funds is 31 U.S.C. § 1501, which provides:

“(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of –

(5) a grant or subsidy payable –

(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;

(B) under an agreement authorized by law; or

(C) under plans approved consistent with and authorized by law.”

In Principles of Federal Appropriations Law, 2nd Ed. (the Red Book), the GAO/OGC notes:

“In order to properly obligate an appropriation for an assistance program, some action creating a definitely liability against the appropriation must occur during the period of the obligational availability of the appropriation. In the case of grants, the obligating action will usually be the execution of a grant agreement. The particular document will vary and may be in the form of an agency’s approval of a grant application or a letter of commitment.” (Page 7-32) (citations omitted)

The Red Book then quotes Title 2, Appendix I §G10.03 (1984), of GAO’s Policy and Procedural Manual for Guidance of Federal Agencies which states:

“Accounting for a federal assistance award begins with the execution of an agreement or the approval of an application or similar document in which the amount and purposes of the grant,

the performance periods, the obligations of the parties to the award, and other terms are set out. A legal obligation to disburse the assistance funds, in accordance with the terms of the agreement, generally occurs with an executed agreement or an approved application or similar document.” (Page 7-33)) (emphasis supplied)

Thus, when grant execution is completed, a legal obligation to disburse the funds is created, but when is execution completed?

GAO has also provided clear guidance as to what actions must be accomplished to execute a valid grant. In general, in order for a grant obligation to arise: (1) the United States must take action to establish a firm commitment; (2) that commitment must be unconditional; (3) documentary evidence of the commitment must exist; (4) the official grantee must have the award terms communicated to it and, if there are any prerequisites, it must comply with the prerequisites during the period of availability of the appropriation. Red Book at 7-33.

Most Department programs require that the Grants Officer sign the award, CD-450, and that the Recipient sign and return the award documents within 15 days. Once this has occurred, an obligation is recorded and a legally enforceable agreement exists. This holds true, even if there are special award conditions, *e.g.*, submission of some additional documentation, before funds may be drawn down. Compliance with special award conditions generally are not a prerequisite to the creation of an obligation. A recipient has accepted

those conditions by signing and returning the agreement.

The Economic Development Administration (EDA), however, utilizes a slightly different procedure. For EDA awards, the obligation occurs when the **agency** signs the agreement with a requirement, under the terms of the award, that recipient return a signed copy within a specific time period. This procedure was approved by the General Accounting Office in an unpublished decision of the Comptroller General (B-126652, August 30, 1977).

The contrast between the EDA procedure and that of the rest of the Department may be instructive in understanding GAO’s above cited four requirements. Under the procedure approved in the 1977 Comp. Gen. decision, EDA, in response to a proposal, sent an “Offer of Grant” to the recipient which included the specific purpose, amount of funding and all terms and conditions. EDA explained that “at the time of such ‘grant offer’ the specific purpose, the amount of funding, and all terms and conditions for utilizing the funds are settled and that the ‘Offer of Grant’ is in no sense an invitation for future negotiation.” (emphasis supplied) The document provided “This approval and award of grant, subject to the Special Conditions, and the Standard Terms and Conditions shall constitute an obligation to make such grant. Such obligation may be terminated without further cause, however, if the grantee shall fail to affirm its timely utilization of the grant by signing and returning to the Economic Development Administration within 30 days its affirmation of intent as set forth below.”

GAO concluded that this document could be used as the basis for recording an obligation under 31 U.S.C. §1501. Although it required subsequent action by the recipient, the Comptroller General stated “[t]his document reflects the Administration’s acceptance of a grant application; specifies the project approved and the amount of funding; and imposes a deadline for affirmation by the grantee.” [This last proviso can create interesting complications when the award is made at the end of the fiscal year and the funding availability expires at the end of that year, but, as they say, that is the topic for another day.] In contrast, the Department’s procedure imposes a condition antecedent by expressly requiring the recipient to return a signed award **before** the funds are obligated.

The key points to note are that under the EDA procedure the government is **accepting** a grant application, and that there is no further room for negotiation. The applicant is presented with a “take it or leave it” situation. In contrast, under the Department’s procedure the government is making an **offer** which the applicant can accept, reject, or respond to with a counter offer.

Both procedures have their advantages. The EDA procedure allows for the recording of obligations at an earlier time, which can be vital in end of year rush situations when appropriations availability is expiring. The Department’s procedure eliminates any ambiguity about whether the award will proceed during the time the recipient has not yet signed and returned the award. There is no award until the signed copy is returned.

The Department’s procedure could be changed to create an obligation upon the signature of the Grants Officer so long as the application complies with applicable statutes and regulations, adequately describes the project, the amount of funding is specified, the terms and conditions are settled, and the transmittal clearly indicates that it is an “award”. These requirements reinforce the importance of having the applicant agree to all conditions of the award before processing is completed.

As a final point, it should be noted that failure to comply with any required conditions of valid award (e.g. compliance with special award conditions, or, for EDA, failure to return a signed copy of the award) does not void the award or affect the validity of the obligation, rather it is a violation of the terms of the agreement that would authorize the government to take remedial action, including the possible institution of termination for default procedures. See *e.g.* Subpart C, paragraphs __.60 - __.62 of OMB Circular A-110, “Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals and Other Non-Profit Organizations”. Only after such procedures are completed would the funds be deobligated. Even if an award is terminated for default the government may, under certain circumstances, be required to pay for costs incurred by the grantee prior to termination.