APPENDIX D

CPDC RESPONSE TO DRAFT REPORT

WASHINGTON | VIRGINIA | MARYLAND

FELDESMAN
TUCKER
LEIFER
FIDELL LLP

VIA E-Mail - pompilii.daniel@oig.dol.gov
AND FEDERAL EXPRESS

Michael T. Hill
Regional Inspector General for Audit

Dan Pompilii
ARIG
Office of Inspector General
Philadelphia Regional Audit Office
Public Ledger Building, Suite 1072
150 S. Independence Mall West
Philadelphia, PA 19106

RE: *Audit of a Complaint Involving the Community Preservation and Development Corporation's H-1B Technical Skills Training Grant*, Draft Report No. 03-07-001-03-321 - Comments

Dear Messrs. Hill and Pompilii:

This firm represents the Community Preservation and Development Corporation ("CPDC"). This will serve as CPDC's response to the recommendations and findings in the above-referenced Draft Audit Report (the "Draft").

RESPONSES

Recommendation No. 1: Recover the $870,821 in questioned salary and indirect costs charged to the grant.

RESPONSE: According to the Draft, CPDC charged $870,821 in salary and indirect costs to the DOL grant that did not meet the requirements under OMB Circular A-122. We disagree.

Specifically, CPDC was found to have:

a. overstated the salary costs reported on the Financial Status Report ("FSR") by $572,709

As an initial matter, the draft report does not state an adequate basis to disallow the costs in question. It is well-settled law that in order to support a disallowance the government must allege that the grantee "misappropriated, misspent, or otherwise wasted the federal dollars which it did spend." *Home Education Livelihood Program, Inc.*, HHS

2001 L Street, N.W. | Second Floor | Washington, D.C. 20036-4910 | (202) 466-8960 | Telefax (202) 293-8103 | www.feldesmantucker.com

FELDESMAN TUCKER LEIFER FIDELL LLP

Messrs. Hill and Pompilii
March 30, 2007
Page 2

DAB No. 1598 (1996). Here, the Draft does not claim that the "contractor" costs did not benefit the H-1B program or that they were, on their face, unallowable under OMB Circular A-122. Instead, the Draft bases its recommendation to disallow a substantial amount of funds on an apparent difference of opinion about how to characterize individuals who provide services to CPDC under contract instead of as employees.

CPDC is prepared to submit documents in support of the following facts. First, in its closeout package, CPDC submitted a document entitled "Grantee's Detailed Statement of Costs" which reported $1,855,449 for Salaries and Wages (an undefined term, by the way) for a cost category entitled "Personnel Costs." CPDC submitted this statement in support of its final Financial Status Report ("FSR") for the H-1B program. CPDC is prepared to show, as your office, we believe, has confirmed, that much of these personnel costs were incurred through contractual arrangements with individual instructors and others who provided needed services on the H-1B program. These instructors often provided only a few hours per week to the program to, for example, teach a class and it simply would have made little sense to hire these individuals as employees. Nonetheless, they provided personal services to CPDC. Importantly, whether the legal relationship between the individuals was one of contract or employment made no difference to meeting grant objectives.

Despite this lack of a distinction in the services provided to the H-1B program by employees or contractors, the Draft questions $572,209 due to the fact that, according to the Draft, CPDC incurred only $1,282,739 in salary costs for its employees working on the H-1B program. OIG Draft Report at 9. Therefore, the Draft asserts that Salaries and Wages on the FSR were overstated by $572,709. While CPDC does not dispute that it could have implemented an accounting system that would have increased the transparency of its operations at the time (and has, as it believes your office has confirmed, done so now), the fact that costs for personal services contracts were accumulated under the Salaries and Wages line item of the Detailed Statement of Costs does not, in any way, support a disallowance of those costs.

Specifically, the services performed by the contractors (who, as noted above, were hired to perform the skills training and similar functions) were necessary and directly related to the grant and its purposes. The Draft report does not dispute that the grant program received a benefit from the services provided by the contractors, nor does it claim that under applicable cost principles the costs were not reasonable because they exceeded that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. OMB A-122, att. A., sec. 3.

OMB Circular A-122, Att. B, ¶ 39(a) provides that costs of consulting services are allowable when rendered by persons who are not officers or employees of the

FELDESMAN TUCKER LEIFER FIDELL LLP

Messrs. Hill and Pompilii
March 30, 2007
Page 3

organization. In determining the allowability of costs in a particular case, no single factor, or any special combination of factors, is necessarily determinative; however, OMB A-122, Att. B, ¶ 39(b) sets forth a number of relevant factors. In this regard, it is important to note that CPDC has possession of documents (which we believe your office has reviewed), including contracts and payment records that document the organization's relationship with the contractors and set forth the scope of those relationships. These records were contemporaneous with the provision of consultant services and evidence that the services provided were directly related and allocable to the grant's purposes.

In short, the sole basis for the recommendation of a disallowance is the inclusion of the personal services contractors under the salaries and wages line. As the HHS Departmental Appeals Board recognized in *Home Education Livelihood Program, Inc*., DAB No. 1598 (1996) such a form over substance distinction is not a sufficient basis to support a cost disallowance, " . . . the labels applied to a particular position are not what is relevant in determining whether a salary cost should be disallowed; the relevant consideration is the function which [the employees] were performing." Similarly, the fact that certain contractor costs were labeled "Salaries and Wages" for the purposes of reporting on the FSR does not mean that those costs should be disallowed.

For the above reasons, we ask that the $572,709 in costs originally reported as Salary and Wages not be questioned.

b. used pre-determined rates to allocate $29,915 of salary costs for employees who charged time to more than one grant or project.

OIG looked at payroll documentation for non-Career and Skills Enhancement ("CSE") employees who had time charged to the H-1B grant. For 5 of the 17 employees, CPDC had charged $29,915 in salary costs to the grant based on pre-determined, budgeted rates (rather than actual time). According to the Draft , CPDC properly used actual time for the balance of the salary costs charged to the H-1B grant for the 17 employees tested.

We believe these employees performed work directly related to the grant. As a result, CPDC requests a listing of the employees whose salaries are being questioned, including any workpapers supporting the finding that their salaries were charged using a pre-determined rate as well as an opportunity to respond as to whether there costs should be allowable.

c. could not adequately support 151 of the 155 randomly sampled payroll entities audited which represented unsupported salary costs charged to the grant totaling $92,140

FELDESMAN TUCKER LEIFER FIDELL LLP

Messrs. Hill and Pompilii
March 30, 2007
Page 4

The OIG found errors with 151 our of the 155 payroll entities tested. According to the draft Report, these errors represented differences between the supporting timesheet and the amounts CPDC charged to the grant and resulted in an overstatement of salary costs of $ 26,443. According to the Draft, the statistical projection of the errors believed to have been found showed salary costs of at least $92,140 (with a 95 percent confidence level) that CPDC charged to the grant were not adequately supported.

We request the workpapers related to the contractor costs test that resulted in the Draft's conclusion that the total value of exceptions in this category was $41,550. We further request any support for the conclusion that $35,459 was paid to a contractor for unallowable fundraising and information related to the remaining amount of $6,091 in questioned costs. To the extent that any statistical projections were made, we would also request documentation concerning those calculations.

The Draft states that testing of the same 155 randomly selected payroll entries found 10 timesheets were not in the file, 52 timesheets were not signed by the employee and 43 timesheets were not signed by the supervisor. We would ask that we be provided with copies of the working papers supporting this finding in order to fully respond. However, with respect to the issue of signatures, we would note that OMB Circular A-122, ¶ 7(m)(2)(c) requires that the reports documenting personal services, such as timesheets, "must be signed by the individual employee, or by a responsible supervisory official having first hand knowledge of the activities performed by the employee, that the distribution of activity represents a reasonable estimate of the actual work performed by the employee during the periods covered by the reports." Thus, the applicable cost principle does not require that both the employee and the supervisor sign the timesheet as long as one of them signs. As a result, 95 (52 + 43) of the timesheets should be acceptable, wholly undermining this finding.

We would ask that this finding be removed or that the working papers be provided so that we may fully respond.

d. failed to have obtained a required indirect cost rate

The Draft questions $176,057 in costs that CPDC charged to the grant because CPDC did not have an indirect cost rate. According to the Draft (and according to the stated interpretation of OMB Circular A-122), CPDC should have submitted its indirect cost proposal immediately after the organization was advised that an award would be made or no later than 3 months after the effective date of the award.

We do not believe the Department of Labor ("DOL") has interpreted OMB Circular A-122 to require that every grantee obtain an indirect cost rate. For example,

FELDESMAN TUCKER LEIFER FIDELL LLP

Messrs. Hill and Pompilii
March 30, 2007
Page 5

DOL's One-Stop Comprehensive Financial Management Technical Assistance Guide ("TAG") (July 2002) provides numerous methods for allocating costs to DOL grants. More to the point, it states on page II-5-7, indirect costs are "usually recaptured" through an indirect cost rate. Clearly, if having an indirect cost rate was mandatory, then the TAG would not have contained this qualified language.[1]

Moreover, CPDC's grant agreement included at Part IV entitled Special Clauses and Conditions a clause addressing "Indirect Cost Rate and Allocation Plan." This clause noted that CPDC did not have an approved cost allocation plan. The clause further described as "not applicable" the fact that CPDC had an indirect cost rate and had a temporary billing rate approved for the first 90 days of the grant period. Given this language, if CPDC was required to have an indirect cost rate, DOL should not have approved CPDC's grant application in the first instance.

In short, the failure to have an indirect cost rate is not a sufficient basis to disallow $176,057 in costs. We ask that your office withdraw its finding and that the costs charged be viewed under the standards for allowability articulated in OMB Circular A-122 and implementing DOL guidance.

Recommendation No. 2: Require CPDC to re-submit the final grant close-out package with revise outcomes.

RESPONSE: CPDC is willing to accept the recommendation in the Draft that CPDC re-submit the final grant close-out package in order to report revised outcomes.

Recommendation No. 3: Prior to awarding future grants to CPDC, perform a review to ensure:

- **CPDC has implemented a financial accounting system sufficient to track costs and meet Federal accounting and reporting standards;**
- **CPDC has in place adequate internal accounting controls to ensure the integrity and accuracy of financial data**
- **CPDC has a Federally approved indirect cost plan; and**
- **CPDC has implemented a management information system to ensure that reported performance data is accurate, supportable and reliable.**

RESPONSE: CPDC strongly disagrees. CPDC has already taken the following steps:

[1] Similarly, DOL's "A Guide for Indirect Cost Rate Determination" states in the Preface that reimbursement of indirect costs on DOL programs "will generally" be through an indirect cost rate, again making clear that a rate is not mandatory.

FELDESMAN TUCKER LEIFER FIDELL LLP

Messrs. Hill and Pompilii
March 30, 2007
Page 6

- Installed and tested an entirely new fund accounting system
- Replaced the accountant and Controller who were responsible for the accounting records during the grant period with new, well-qualified staff
- Created and filled the new 'Chief Financial Officer' position
- Adopted a Web-based timesheet system with actual time allocations to programs and mandatory supervisory timesheet approvals before the payroll process is initiated
- Requested and received an approval of its indirect cost rate for a current U.S. Department of Commerce grant
- Developed and utilized cost centers for each of its community development programs and sites
- Developed and utilized a sophisticated program for improved management reports and in-depth project cost accounting, allocations, and forecasting.

Given the breadth and depth of these changes to CPDC's internal controls and financial management systems and operations, the review described in the OIG's recommendation would be an unnecessary diversion of CPDC's resources.

Conclusion

Thank you for the opportunity to provide this response. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

FELDESMAN TUCKER LEIFER FIDELL LLP

By: Kathy S. Ghiladi

Edward T. Waters
Kathy S. Ghiladi

cc: David Seabrook, CPDC