DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

600714
OCT 21 1975

FILE: B-183442 DATE: 97802

MATTER OF: National Endowment for the Humanities - Legality of matching pledge with Federal funds.

DIGEST: Pledge of money to National Endowment for the Humanities (NEH) from Curriculum Development Associates (CDA) restricted to support of Educational Development Center (EDC), and treated by CDA as reduction of accrued liability in fulfillment of contractual obligation to EDC for services rendered to CDA is not donation and, hence, may not be matched by NEH with Federal funds and paid over to EDC, since statutory language and legislative history indicate that only gifts may be matched and payment in satisfaction of debt may not be considered gift. Moreover, if pledge is considered to come from EDC from monies owed it, it is not eligible for matching since EDC would merely be generating additional funds for itself in contravention of the statutory scheme and NEH guidelines.

This is in response to a letter of July 14, 1975, from Ronald S. Berman, Chairman, National Endowment for the Humanities (NEH) wherein he requests our decision as to whether NEH may lawfully accept a $30,000 pledge made by John N. Gentry, Executive Director of Curriculum Development Associates, Inc. (CDA) which is restricted to the support of the People and Technology project of the Educational Development Center, Inc. (EDC), and match it with an equal amount of Federal funds pursuant to the National Foundation on the Arts and the Humanities Act of 1965, as amended, Pub. L. No. 89-209, §§ 10(a)(2), 11(b), 79 Stat. 845, 852-853, 20 U.S.C. §§ 959(a)(2), 960(a)(2) (Supp. III, 1973).

From the Chairman's letter and other information available to us, it appears that EDC is a nonprofit Delaware corporation based in Newton and Cambridge, Massachusetts, engaged in the development of educational materials. Through a series of grants from the National Science Foundation (NSF), EDC developed a fifth grade course entitled "Man: A Course of Study" (MACOS).

After completing development of the course, EDC entered into a contract with CDA for the purpose of its dissemination. In accordance with the NSF grant agreement, the publication contract provided that

EDC would receive from CDA 3 percent of the net receipts (defined as gross sales less returns and allowances) from sales of the commercial edition of MACOS on all materials other than films, as a royalty. Different arrangements not pertinent here were made for payment of royalties on film editions of MACOS. All royalties received by EDC were to be placed in a royalty account on the books of EDC pursuant to a provision in the original grant document between NSF and EDC.

At the same time that the publication contract was executed, EDC and CDA entered into a "services contract," under which EDC was obligated to use its best efforts to assist CDA in dissemination of MACOS. In return, CDA became obligated to pay EDC one-half of its dissemination budget, which was to be no less than the norm for dissemination of multi-media educational materials. Subsequent correspondence appears to indicate that this amount was to be equal to 15 percent of the gross revenues from sales of MACOS materials. Amounts payable under the services contract were actually computed and paid in this manner.

It appears that in or about October 1972, EDC and CDA modified the services agreement to provide for payment of $100,000 by CDA to NEH out of monies which would otherwise have been payable to EDC, to be earmarked for matching and subsequent use in EDC's "People and Technology" program. This payment was subsequently made and matched. As of June 30, 1975, CDA had pledged and made payments of $175,000 to NEH which were then matched by NEH. We understand the subject $30,000 pledge arose in the same manner and that the National Council on the Humanities has recommended acceptance and matching of this pledge.

CDA's pledge to NEH was made pursuant to section 10(a)(2) of Pub. L. No. 89-209, as amended, supra, 20 U.S.C. § 959(a)(2) (Supp. III. 1973), which provides in pertinent part that the Chairman of NEH shall have the authority:

> "* * * after receiving the recommendation of the National Council of that Endowment, to receive money and other property donated, bequeathed, or devised to that Endowment with or without a condition or restriction, including a condition that the Chairman use other funds of that Endowment for the purposes of the gift, * * *."

Section 11(b) of the Act, as amended, 20 U.S.C. § 960(a)(2), authorizes in addition to other appropriations, no-year appropriations in an

amount equal to the total amount donated, bequeathed and devised to NEH (subject to a total aggregate amount) for matching grants received pursuant to 20 U.S.C. § 959(a)(2).

The fact that CDA's pledges were restricted to the support of EDC's People and Technology program would not, in and of itself, make this pledge unavailable for NEH matching, because the statute, by its terms, specifically provides that monies donated to NEH may be restricted for particular purposes. The fact that restricted monies can be accepted by NEH and matched, however, does not end our inquiry into whether the pledge in question was available for matching, because as noted above, only money donated, bequeathed, or devised is available for matching. The question arises, therefore, whether these payments were "donated" to NEH within the meaning of the statute.

The legislative history of both acts indicates that only funds received as gifts would be available for matching. S. Rep. No. 300, 89th Cong., 1st Sess. 3 (June 8, 1965) indicates in part that:

> "A major objective of this legislation [the original act] is to stimulate private philanthropy for cultural endeavors and State activities to benefit the arts." (Emphasis supplied.)

Moreover, the legislative history of Pub. L. No. 90-348, indicates very strongly that by using the terms "* * * donated, bequeathed, or devised * * *," the Congress understood that only outright gifts could be received for matching. Congressman Brademas, in supporting the 1968 amendment (ultimately enacted as Pub. L. No. 90-348, § 5, 82 Stat. 184, 186) which would permit acceptance of restricted as well as unrestricted gifts for matching, said in pertinent part:

> "The reason for the amendment is a simple one. The endowments have found that many potential private donors do not feel disposed to give an unrestricted gift to another granting agency. * * *
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> "* * * This amendment should greatly improve the ability of both Endowments to attract private gifts * * *." (Emphasis supplied.) 114 Cong. Rec. H1409 (daily ed. February 27, 1968).

In discussing the effect of the amendment, S. Rep. No. 1103, 90th Cong., 2d Sess. 6 (May 3, 1968), stated in pertinent part:

> "* * * While the matching gift program has been successful (since the passage of the act $2.5 million has been donated), it is felt that more funds could be attracted to each Endowment if the donor could specify the area in which his gift is to be utilized. However, before such restricted gifts are accepted, the Endowment Council must make a recommendation on the gift and the Endowment Chairman must approve the matching of the gift." (Emphasis supplied.)

Senator Pell also remarked on the $2.5 million received for matching. He said in pertinent part:

> "Under the act there is also a provision for the matching of Federal funds upon receipt of private, donated funds. To date approximately $2.5 million has been donated by the public to the Endowments under this provision." (Emphasis supplied.) 114 Cong. Rec. S5015 (daily ed. May 7, 1968).

It would appear, therefore, that the Congress used "gift" and "donated" interchangeably in referring to the subject provisions. Moreover, 20 U.S.C. § 959(a)(2), by its own terms, after referring to monies "* * * donated, bequeathed, or devised * * *," later refers to all such monies received as "gifts."

It would appear, therefore, that it was intended that only gifts (and bequests and devises) received and accepted by NEH could be matched with Federal funds.

The determination of whether or not this pledge was a gift requires a further explication of the factual circumstances. It appears that CDA's position is that it waived EDC's obligation to perform under the services agreement to the extent of monies therefrom which were paid to NEH. However, CDA states that EDC never waived its rights to receive those monies, and that CDA was at all times legally obligated to pay them to EDC. Moreover, CDA treated the NEH payments for accounting purposes as a reduction of accrued liability to EDC under the services contract. On its income tax return it treats the payments as a business expense, rather than as a gift or donation. EDC takes the position that these monies were only obligated if the parties to the services contract agreed on a dissemination plan each year, but the contract does not condition CDA's payment obligation upon such an agreement. In any event it is clear that CDA believed it was legally obligated to pay these amounts to EDC and that the payments to NEH

restricted for use in matching with Federal funds in support of EDC's People and Technology program were in satisfaction of that obligation. Officials at NEH informally advised us that, inasmuch as it had not reviewed the EDC-CDA services contract, NEH interpreted the CDA pledges to indicate that CDA was not obligated to pay the intended "gift" funds to EDC were they not paid to NEH and, hence, that the pledges were bona fide donations. NEH's concern was to insure that CDA would not receive special consideration from EDC when the People and Technology program was offered for publication.

It is clear that if there is a contractual obligation to pay a sum of money, and a payment is made in discharge of it, then there is no gift. Robertson v. United States, 343 U.S. 711, 713 (1952); Tomlinson v. Hine, 329 F.2d 462 (5th Cr. 1964). It is the essence of any gift that there is no consideration. Pacific Magnesium, Inc. v. Westover, 86 F. Supp. 644 (S.D. Calif. 1949), aff'd, 183 F.2d 584 (9th Cir. 1950).

From the present record, it appears to us that by making this pledge CDA felt it was merely fulfilling its contractual obligation to EDC. It seems clear that CDA did not intend to make a gift since it entered the transactions on its books as a reduction of accrued liability and, on its income tax return, as a business expense and not a donation. Cf. Simpson v. United States, 261 F.2d 497, 501 (7th Cir. 1958), cert den. 359 U.S. 944 (1959). The fact that the payment was made to a third party, NEH, at EDC's request does not change the nature of the payment, since such payment was in satisfaction of a debt and was not made with donative intent. Cf. Welch v. Davidson, 102 F.2d 100, 102 (1st Cir. 1939). The agreement between CDA and EDC merely constituted an assignment to NEH of EDC's right to receive some payments from CDA. Therefore, the pledge cannot be considered as a gift from CDA available for matching.

Further, we understand that NEH Circular "Gifts and Matching, Background Information for Institutions and Organizations" provides in pertinent part:

> "The Endowment will not match a restricted gift from the institution conducting the project for which the gift is intended, nor from persons or other institutions involved in the project; the Endowment will not match a restricted gift from federal funds nor from current or pending recipients of Endowment grants."

Therefore, if the pledges involved here are considered gifts from EDC to NEH, rather than from CDA to NEH, of monies otherwise payable to EDC, such payments would not be available for matching, according to NEH's own circular. Moreover, we are of the view that the policy expressed in this circular is clearly consistent with the statute here involved, because the "gift" from the donor-grantee would merely be returned to it by NEH after matching, pursuant to the restriction in the pledge. Hence, to allow the "gift" to be matched would permit any grantee to generate funds for itself by making donations to NEH, a result clearly outside the intent of Congress, which was to promote private philanthropy in support of NEH-sponsored projects.

Accordingly, in our opinion the $30,000 pledge to NEH from CDA is not available for matching by NEH pursuant to 20 U.S.C. § 960(a)(2).

R.F. KELLER

Deputy Comptroller General
of the United States