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DECISION

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

FILE: B-203452 DATE: December 31, 1981

MATTER OF: Federal Aviation Agency—Disallowance of Indirect Grant Costs

DIGEST: 1. Since FMC 74-4 (now OMB Circular No. A-87) is management tool that does not have the force of law, San Diego County may not rely on this circular when challenging disallowance by FAA of indirect costs in Airport Development Aid Program.

2. Secretary of Transportation has authority under 49 U.S.C. § 1720(a) to decide that indirect costs are not necessary airport development project costs and later change this policy without changing the result retroactively for indirect costs incurred prior to changed policy.

The Acting Auditor and Controller of the County of San Diego, California (the County), has submitted a claim to this office for indirect costs incurred in carrying out approved Airport Development Aid Program (ADAP) activities under grants from the Federal Aviation Agency (FAA) made prior to September 20, 1979. We deny this claim for the reasons given below.

The controversy in this case concerns a change in FAA policy that resulted in the revision of FAA's regulation in September 1979 to permit indirect costs to be charged to ADAP grants, Amendment 14 C.F.R. § 152.47 and Appendix J of Part 152, 44 Fed. Reg. 54467-8, September 20, 1979. Prior to this change FAA's regulations provided that indirect costs were not allowable. 14 C.F.R. § 152.47(c)(6) and Appendix J (1979). The changed policy did not permit retroactive allowance of the previously disallowable indirect costs. See background statement accompanying the amended regulations, 44 Fed. Reg. at 54468, id.

The County contends that the indirect costs were allowable even before the September 1979 change in regulations. The County asserts that Federal Management Circular (FMC) 74-4 (now Office of Management and Budget (OMB) Circular A-87, January 15, 1981), having the force of law, required FAA to provide for indirect costs in its grants. The County in effect contends that the changed policy is an admission by FAA that its earlier interpretation of law was wrong and that FAA should therefore be required to apply this revised view retroactively.

In explanation of the FAA's denial of pre-September 20, 1979, indirect grant costs, the FAA's Chief Counsel told the County that prior to 1979, FMC 74-4's indirect cost provisions were considered inconsistent with section 20(a) of the Airway Development Act of 1 that FAA reconsidered their position and determined that these pro sions could be read consistently; and that the change in FAA regul tions was not intended to and did not affect grant agreements that incorporated the regulation implementing this earlier view.

Status of FMC 74-4

The legal effect of management circulars such as FMC 74-4 is central to our resolution of this matter since the County relies on FMC 74-4 for its argument.

FMC 74-4 was a circular issued by the General Services Administration addressed to "Heads of Executive Departments and Est lishments" for the purposes of establishing "* * * principles and s dards for determining costs applicable to grants and contracts with State and local governments." The Circular replaced OMB Circular No. A-87 without substantive change as a result of a transfer of fu tions from OMB to GSA under Executive Order No. 11717, May 9, 1973. The functions were restored to OMB by Executive Order No. 11893, December 31, 1975, and OMB Circular No. A-87 was reissued January 1 1981.

The OMB system of management circulars where FMC 74-4 originat is described in OMB Circular No. A-1 as "instructions * * * to the ecutive departments and establishments." OMB Circular No. A-1 also provides:

> "* * *The provisions of any Circular or Bulletin, except as otherwise specifically provided in any given Circular or Bulletin, shall be observed by every such department or establishment insofar as the subject matter pertains to the affairs of such department or establishment.* * *"

Aside from those circulars that are issued under specific statutory authority (see e.g., OMB Circulars No. A-95 and A-111) OM Circulars (and GSA Circulars issued under the transferred functions) rest upon presidential authority to establish Government-wide policy See Reorganzation Plan No. 2 of 1970, 84 Stat. 2085, July 1, 1970, which created the Office of Management and Budget. Accordingly, both as described in the circulars themselves and by function, circulars such as FMC 74-4 are internal management tools. The presence of man datory sounding language such as "These principles will be applied * * *" in FMC 74-4, paragraph A 3 and "The provisions of any Circula * * * shall be observed * * *," in OMB Circular No. A-1 is appropria in a management policy directive. As we understand it, such language was not included in an attempt to make these documents legally bindi

Since these Circulars are management tools, it is GSA's or OMB's job to enforce them through the use of management techniques. To conclude that these circulars can be asserted by third parties against agencies as having the binding effect of law would place third parties in the inappropriate position of assuming management authority over agencies. For a discussion of a similar issue concerning OMB Circular No. A-76, see 58 Comp. Gen. 451, 461-464 (1979). Since FMC 74-4 does not have the force of law, FAA's actions in disallowing indirect cost can only be judged within the context of FAA authorities. FAA was not required as a matter of law to obtain GSA's permission to deviate from its management circular, as the County Counsel suggests in material submitted to us on behalf of the county. The propriety of its failure to follow GSA guidance is an issue between FAA and GSA, and has no bearing on the county's claim. Accordingly, the County cannot rely on FMC 74-4 as creating any enforceable claim for reimbursement for indirect costs.

FAA's Authority to Disallow Costs

In order to allow the County's claim, we would have to conclude that the Secretary of Transportation exceeded his authority under the program in issuing regulations denying all indirect costs in ADAP grants.

Section 20(a) of the Airport and Airways Development Act of 1970, 49 U.S.C. § 1720(a)(1976), provides as follows:

"(a) Allowable project costs; regulations

"Except as provided in section 1721 of this title, the United States may not pay, or be obligated to pay, from amounts appropriated to carry out the provisions of this subchapter, any portion of a project cost incurred in carrying out a project for airport development unless the Secretary has first determined that the cost is allowable. A project cost is allowable if—

"(1) it was a necessary cost incurred in accomplishing airport development in conformity with approved plans and specifications for an approved airport development project and with the terms and conditions of the grant agreement entered into in connection with the project;

* * * * *

"The Secretary is authorized to prescribe such regulations, including regulations with respect

to the auditing of project costs, as he considers necessary to effectuate the purposes of this section." (Emphasis added.)

This statute provides the Secretary of Transportation not only the authority to determine allowable costs within the standards provided by paragraph (1), but also to prescribe regulations to carry out the purpose of section 20.

We give great deference to an agency's interpretation of the statutes it is responsible for administering. Accordingly, unless FAA's interpretation of its authority is clearly unreasonable, we will accept its interpretation. The Chief Counsel of FAA has explained the pre-September 20, 1979, denial of indirect cost as follows:

"We have concluded * * * that it was a reasonable use of the FAA's judgment to determine that [indirect] costs that were 'not readily assignable to the cost objective benefited' did not meet the specific allowability criteria in Section 20(a) of the Act, and a proper use of its regulatory authority in 1974 to codify this judgment in Part 152 * * *."

The Chief Counsel goes on to explain why the indirect costs were not paid retroactively when the regulations were amended as follows:

"First, it should be pointed out that each grant offer provides that the grant agreement incorporates the regulations as they existed at the time the grant offer is accepted by the sponsor. In addition, the standard grant offer states that 'the allowable costs of the project shall not include any costs determined by the FAA to be ineligible for consideration as to allowability under the regulations' * * * (Emphasis added.)

* * * * *

"This 1979 amendment of Part 152 reflected a change in FAA judgment concerning the degree to which the formulae for allocating indirect costs to airport development projects assured conformity to the allowability criteria in section 20(a) of the Act. Once the technical judgment was made that such conformity could be assured, action was taken to amend Part 152 to conform to the indirect cost policies in the Circular and to achieve consistency with the allowance of indirect costs in airport planning grants."

We believe that section 20(a), which gives the Secretary of Transportation the authority to make the determination that costs are necessary, does not require that he always maintain the same position

over a period of years or that given new information he may not revise his policy as long as he is not arbitrary or unreasonable. Where the Secretary does make a change of policy based on legitimate considerations, he is not required to revise all preceding determinations that were valid when made so that they conform to the later judgment. While this could be required in some cases wherein the Secretary determines that the prior policy was based on an improper interpretation of the law, retroactive application of a new policy is never required when the old policy is also in compliance with the law. Accordingly, we conclude that FAA is within its authority in not making its new policy on indirect costs retroactive.

For these reasons, the claim of the County is denied.

Harry R. Van Cleve

For the Comptroller General
of the United States