DECISION

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

31381

FILE: B-203681 DATE: June 6, 1985

MATTER OF: United States Information Agency: National Endowment for Democracy grant administration

DIGEST:

United States Information Agency, in providing statutory grant funds to National Endowment for Democracy, has essentially the same oversight rights and responsibilities as any other Federal grantor agency. GAO finds that language and legislative history of authorizing legislation do not support Endowment's view that USIA was not intended to have any substantial role in seeing that grant monies are expended for authorized purposes.

This responds to a request from Thomas E. Harvey, General Counsel and Congressional Liaison, United States Information Agency (USIA), for our opinion as to USIA's role in administering grants provided to the National Endowment for Democracy under authority of the National Endowment for Democracy Act, title V of Public Law 98-164. Both USIA and the Endowment have widely divergent views as to USIA's responsibility for overseeing the Endowment's disposition of funds provided under the Act. They have, however, agreed to submit the question to GAO.

As discussed in further detail below, it is our view that USIA, in its relationship with the Endowment, has essentially the same oversight rights and responsibilities as any other Federal grantor agency. We reject the Endowment's contention that it is not required to account to the agency for its use of grant funds, or that the agency has no right of access to the Endowment's records of its activities.

BACKGROUND

The National Endowment for Democracy was established on November 18, 1983, as a private nonprofit District of Columbia corporation. It was created to promote democratic institutions abroad, particularly through the provision of assistance to third-party organizations such as the two major American political parties, labor, and business. The

existence of the Endowment was statutorily recognized 4 days after its creation in the National Endowment for Democracy Act. Pub. L. No. 98-164, tit. V, 97 Stat. 1017, 1039-42 (1983) (22 U.S.C.A. § 4411-4413 (West Supp. 1984)).

Section 503(a) of the Endowment's authorizing legislation provides as follows:

> "The Director of the United States Information Agency shall make an annual grant to the Endowment to enable the Endowment to carry out its purposes as specified in section 502(b). Such grants shall be made with funds specifically appropriated for grants to the Endowment or with funds appropriated to the Agency for the "Salaries and Expenses" account. Such grants shall be made pursuant to a grant agreement between the Director and the Endowment which requires that grant funds will only be used for activities which the Board of Directors of the Endowment determines are consistent with the purposes described in section 502(b), that the Endowment will allocate funds in accordance with subsection (e) of this section, and that the Endowment will otherwise comply with the requirements of this title. The grant agreement may not require the Endowment to comply with requirements other than those specified in this title." 22 U.S.C.A. § 4412(a) (emphasis added).

Subsection (e) of section 503 specifies earmarks for two labor and business sub-grantees. See B-214585, March 22, 1985. Other requirements specifically delineated in the Act are that: (1) the Endowment and its grantees are subject to "appropriate" Congressional oversight (§ 503(d)); (2) grants to the Endowment are conditional upon its agreement to comply with the provisions of the Act, and its use of funds must be consistent with the purposes set out in the Act (§ 504(a) and (b)(2)); (3) the Endowment may not carry out programs directly, must abide by certain restrictions on the compensation of its officers and Board of Directors, and must not issue stock or dividends (§ 504(b)(1), (c), (d)(1)); (4) the Endowment's accounts are to be audited annually by certified public accountants, with reports from such audits provided as part of an annual report to the Congress (§ 504(e)); and (5) the Endowment's financial transactions may be audited by the Comptroller General, who

is to have access to all records of the Endowment and its sub-grantees (§ 504(f)). In addition to these provisions, section 503(b) of the Act states that "otherwise applicable limitations on the purposes for which funds appropriated to the United States Information Agency may be used shall not apply to funds granted to the Endowment." 22 U.S.C.A. § 4412(b).

The Endowment has cited three principal factors in support of its view that USIA has little or no role in seeing how its grant to the Endowment is administered. First, the Endowment notes the absence in the language of its authorizing legislation of specific authority permitting review by USIA. Second, the Endowment states that nothing in the language or legislative history of the enactment indicates that USIA was intended to have such a role in administering the grant. Third (and most important) the Endowment states that the explicit language of the grant authorization--specifically the underlined portion of section 503(a) quoted above--prohibits USIA from taking on such a role in the absence of specific statutory authority.

DISCUSSION

The Federal Government uses a number of different methods to provide financial assistance to private organizations, or to State and local governments. The type of funding device chosen determines the Federal Government's relationship with the recipient.

In some cases, there may be almost no ongoing relationship between the two. Where, for example, assistance is provided through a gift or direct unconditional appropriation, funds are to be used at the discretion of the recipient, subject only to review by the Congress. See 42 Comp. Gen. 289, 293 (1962). Two more commonly-used forms of financial assistance are cooperative agreements and traditional grant agreements. Cooperative agreements are to be used when substantial involvement is expected to be required between the recipient and the applicable Federal agency; grant agreements are to be used when little involvement between the two is anticipated. See 31 U.S.C. §§ 6304-6305 (1982). Both types of funding mechanisms, however, involve the establishment of an ongoing relationship between Federal agency and recipient, with the precise terms of that relationship established by the agreement itself.

An agency must ordinarily have statutory authority to utilize a grant mechanism to further its authorized policies or functions. 59 Comp. Gen. 1, 8 (1979). That provision of statutory authority, however, may take one of many forms. In many cases, the authority simply consists of a specification that an agency head may make grants for a specified purpose. See, e.g., USIA's general authority to make grants under title II of the United States Information Educational Exchange Act of 1948, as amended, 22 U.S.C. § 1471(1) (1982). It is frequently the case that the authorizing legislation does not specifically state that the grantor agency has the right to oversee the expenditure of funds under the grant, or that the grantee must account to the grantor agency for its use of grant monies. Those requirements, however, are implicit in the creation of the grantor-grantee relationship, and are ordinarily carried out through the administration of the applicable grant agreement.[1/] Thus, we do not find it legally relevant in the present case that no specific oversight authority was specified for the USIA in its relationship to the Endowment. We find that authority to be implicit in the Congress' selection of a grant agreement as the funding mechanism to be used to support the Endowment's activities.[2/]

1/ Compare, B-203681, September 27, 1982, which described the indirect cost accounting method specified in the applicable grant agreement as a tool for fulfilling the grantee's responsibility to account for its use of grant monies. In that case, we considered the grantee's responsibilities to be inherent in the creation of the grantor-grantee relationship. There, as here, the applicable authorizing language did not specify that the grantee had to account to the grantor agency for its use of funds, or that the grantor agency had a right to oversee the grantee's use of funds.

2/ The Endowment's authorizing legislation should be contrasted with that of the Corporation for Public Broadcasting (CPB), contained in 47 U.S.C. § 396 (1982). The CPB's authorization contains many similarities with that of the Endowment. One principal difference, however, is the funding mechanism chosen by the Congress. The CPB is funded through annual appropriations made to a special fund within the Treasury. Although the CPB's use of funds so provided is subject to a number of conditions, funds are made available directly, and not through a grant agreement with any Federal agency.

The Endowment has cited the legislative history of the National Endowment for Democracy Act in support of the view that USIA was not intended to oversee the Endowment's use of grant monies and that congressional and GAO oversight provisions alone were considered sufficient to ensure accountability. On the House side, according to the Endowment, neither Congressman Fascell (floor manager of the bill) nor any other member "indicated that USIA oversight of the Endowment was among the protections included in the Act or that it should have been." We do not, however, find the record to be so clear. For example, Congressman Fascell, in responding to another member's postulation of a situation in which Endowment funding might be misused, indicates that the agency would indeed have a role in overseeing the expenditure of funds:

> "But for his scenario to actually occur, you would have to assume that the Congress has given up all oversight. You would have to assume that the executive branch, whatever administration is in power, has no concept and cares less about what is going on, because this money is not automatic. It has to be budgeted, it has to go through the agency, it has to be authorized, it has to be appropriated. And there is continual oversight. It assumes that nobody will know what is happening." 129 Cong. Rec. H3816 (daily ed. June 9, 1983) (emphasis added).

Similarly, Senator Percy, floor manager in the Senate, stated, in his explanation of the Endowment's authorization:

> "As for the boondoggle allegation, the Endowment will come under continuous and extensive scrutiny by the appropriate committees of both Houses of Congress. The additional provisions for GAO oversight, as well as the terms of the USIA grant agreement under which it will function, assure a convergence of oversight procedures virtually unique among grantees of Federal funds." 129 Cong. Rec. S12714 (daily ed. Sept. 22, 1983) (emphasis added).

This statement, although quoted by the Endowment in support of its view that an audit role for USIA was not contemplated by the drafters of the legislation, indicates instead that the USIA grant agreement was considered one of many oversight mechanisms; it could not be considered such, however, unless the USIA had the power to oversee and enforce its terms.

The Endowment's principal argument in support of its position is that USIA's role in administering its grant to the Endowment is limited by the inclusion of language in the authorization that the USIA grant agreement "may not require the Endowment to comply with requirements other than those specified" in the enactment. The question, therefore, is whether this language removes the Endowment from being subject to the ordinary oversight and financial controls implicit in the creation of a Federal grantor-grantee relationship, but not specifically delineated in the authorization. It is our conclusion that it does not.

The provision in question, to our knowledge, is unique to the Endowment's authorization. We know of no other grant authorization that is similarly limited. The legislative history of the enactment does not provide any useful explanation for its inclusion. The original version of the bill eventually enacted as the National Endowment for Democracy Act simply had authorized USIA to make grants to the Endowment to carry out the purposes of the Act. H.R. 2915, § 610, 98th Cong., 1st Sess. (1983), set forth in 129 Cong. Rec. 3812 (daily ed. June 9, 1983). The language was contained in a comprehensive amendment to the bill during Senate consideration, offered by Senator Percy. The amendment restructured the authorization in essentially the form later enacted. See 129 Cong. Rec. S14139-44 (daily ed. Oct. 19, 1983). The only explanation of the amendment at the time was Senator Percy's statement that he was "offering a technical, perfecting amendment drafted by its sponsors

in order to guarantee the constitutional perfection of the bill."[3]/

The USIA has interpreted the language in question as meaning only that the Endowment was intended to be free of USIA's programmatic restrictions and criteria, and not that it would be without fiscal or administrative accountability to USIA for grant monies. According to USIA:

> "The usual limitations on this Agency's program activities, such as the ban on the domestic dissemination of program materials and our normal internal grant review process, would not, therefore apply to the Endowment. Nothing in the authorizing legislation or history indicates that Congress intended the Endowment to be so unique as to exempt it from the type of fiscal accountability long required by the General Accounting Office of Federal grantees and from such significant legislation as the civil rights laws and the Fly America Act."

We agree with this view.

A strict interpretation of the language of section 503 (a) is urged upon us by the Endowment. Such an interpretation would, in effect, render the grant agreement unenforceable by the grantor agency. Under this view, USIA would have no authority to review expenditures of funds under the grant, nor to enforce the terms of the grant through exercise of financial control, as the enactment does not

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[3]/ The original bill would have named two seated members of the Congress to serve as "incorporators" of the Endowment, and further specified that Congressman Fascell was to serve as chairman of the incorporators, and as interim chairman of the Endowment. H.R. 2915, § 604 (a), 98th Cong. 1st Sess. (1983), set forth in 129 Cong. Rec. H3811 (daily ed. June 9, 1983). It thus appears that the restructuring of the bill was primarily intended to forestall any allegation that this arrangement would have violated article I, section 6 of the Constitution, which prohibits any member of Congress from being appointed to civil office under authority of the United States created during the period of his tenure (and which prohibits any person holding office under the United States from being a member of Congress during his continuance in office).

specifically authorize the agency to perform these functions. In our view such an extreme limitation would be inconsistent with the Congress' selection of a grant as the device to be used to carry out the purpose of the program. The creation of a grantor-grantee relationship between the agency and the Endowment would be meaningless if the grantor's role was limited to the ministerial function of disbursing funds at the grantee's request. We therefore find USIA's interpretation of the language cited to be a reasonable one--i.e. that it was intended to prohibit the agency from specifying programmatic requirements other than those included in the act.

It is our view as well that USIA, in administering the grant in question, is responsible for seeing that all other relevant statutory restrictions are complied with by the Endowment. The Endowment's own submission recognizes that other statutory restrictions (such as Title VI of the 1964 Civil Rights Act) apply to the Endowment by their own terms, and may be included in the grant agreement, if not otherwise in conflict with the Endowment's authorizing legislation. We agree, and conclude that USIA, as administrator of grant assistance to the Endowment, has a duty to ensure the Endowment's compliance with such requirements through the exercise of appropriate financial controls. However, USIA may not, in its exercise of financial control over the Endowment, impose restrictions not specifically intended to fulfill the purposes specified in the authorizing legislation, or that are not otherwise separately applicable by statute.

We would note that, in exercising its oversight role, USIA may require the Endowment to comply with procedural mechanisms designed as tools to see that grant funds are used only to carry out authorized purposes, including Office of Management and Budget Circular A-122, July 8, 1980. See B-203681, September 27, 1982. In applying those procedures, however, the limitations described above should be kept in mind, i.e., that procedural requirements not specifically related to the Endowment's fulfillment of grant purposes--or not otherwise separately applicable by statute--should not be considered to apply.

Finally, USIA has requested that we review its standard list of general grant conditions to see which, under the analysis presented above, would be applicable to the Endowment. We have briefly summarized our views below:

I. Entertainment (grantee agrees not to use grant monies for the purpose of entertainment). In our view, this provision would be applicable, but is derived from (and should be interpreted in the context of) the requirement that grant monies be used only for purposes specified in the authorization. Compare, for example, inclusion of entertainment costs as unallowable in OMB Circular A-122, July 8, 1980. To the extent that entertainment expenses may be justified as necessary to carry out the purposes of the grant, they may be allowable. See B-196690, March 14, 1980 (grant to American Samoan Judiciary may be used to entertain foreign dignitaries if in furtherance of official purposes).

II. Documentation (requires grantee to maintain its files and financial records to facilitate documentation of allowable costs). This provision is intended to permit verification that expenses incurred are for authorized grant purposes, and would therefore be applicable.

III. Amendments (permits amendments as necessary). This provision would be applicable to the extent that amendments are for the purpose of furthering (or overseeing) authorized grant purposes.

IV. Reassignment of Funds (prohibits reassignment without prior approval of the agency's contracting officer "except when authorized above"). This provision is unnecessary, as both the authorization and grant agreement specifically authorize the Endowment to provide grant monies to other private-sector organizations.

V. Examination of Records (permits USIA and GAO access to records of the grantee or its subcontractors). This provision also permits verification that expenses incurred are for authorized grant purposes, and thus may be applicable.

VI. Officials not to Benefit (prohibits Members of Congress, Delegates, or resident commissioners from benefiting from the grant). The inclusion of this restriction would ordinarily be advisable to protect against any appearance of impropriety (and may in fact be applicable to some or all of the categories of individuals named, under some independent authority). Nonetheless, grants (or subgrants) to the individuals listed would not, per se, be contrary to the purposes specified in the authorizing legislation. Thus, as the restriction reflects a policy not specifically related to delineated grant purposes or specified in the authorization, it may not be required by USIA unless applicable to the Endowment under separate statutory authority.

VII. Covenant Against Contingent Fees (grantee warrants that grant was not solicited under an agreement for later compensation). This provision is unnecessary, as the Endowment is a statutory grantee.

VIII. Disputes (establishes procedures for resolving factual questions arising during the course of the grant). This provision facilitates grant administration, and may be included as applicable to the Endowment.

IX. Equal Opportunity (requires the grantee to agree not to discriminate, and to take certain steps to that end). This provision is applicable to the extent it is consistent with the requirements imposed on the Endowment by the Civil Rights Act of 1964, or other statutory authority.

X. Compliance with Federal and State Laws (grantee agrees to comply with applicable employment laws and regulations). This provision also reflects policies to which the Endowment is separately subject, and thus may be required by USIA.

XI. Termination (both grantor and grantee may terminate after 30 days' written notice). This provision, although applicable, should be read in the context of the authorizing legislation. The Endowment clearly has the right to refuse to accept grant monies and thus may at any time choose to exercise its right to terminate the grant agreement. The USIA, because this is a statutory grant, may only terminate under limited circumstances.

XII. Termination for Convenience of the Government (Agreement may be terminated whenever contracting officer determines it is in best interest of the Government). This provision is not applicable, because of the Endowment's position as a statutory grantee. The grantor agency may not terminate for convenience, only for cause (i.e. if the grantee violates the grant agreement, or otherwise fails to comply with its statutory responsibilities).

XIII. Interest and Refunds (interest on advances, unexpended funds, and refunds to be returned to the U.S. Government). These requirements are applicable to the Endowment. They are based on the principle that a federal grantee may use funds only for the purposes authorized; grantees may not utilize unused grant monies to build cash reserves. See B-203681, September 27, 1982.

XIV. Non-Discrimination. See item IX.

XV. (Deleted by USIA.)

XVI. Employment of the Handicapped. This provision may be applicable to the extent it is consistent with the requirements imposed on the Endowment by 29 U.S.C. § 794, or other statutory authority.

XVII. Preference for U.S. Flag Carriers. This provision may be applicable to the extent it is consistent with the requirements of 49 U.S.C. § 1517, or other statutory authority.

XVIII. Convict Labor. This provision, not specified in the authorizing legislation, may not be included by USIA unless applicable to the Endowment under separate statutory authority.

31381

XIX. Listing of Employment Openings. Section 2012 of Title 38, from which this requirement is derived, applies to procurement contracts, and does not appear applicable to the Endowment.

XX. Payment of Interest on Contractors' Claims (provides for interest on disallowed cost allowances overturned on appeal under the disputes clause). This provision may be included by USIA to the extent that agency considers it necessary to facilitate grant administration. Such a clause, however, may also be more appropriate for procurement-type contracts. E.g. 41 U.S.C. §§ 601-13 (1982).

for Milton J. Socolar
Comptroller General
of the United States