



UNITED STATES DEPARTMENT OF COMMERCE
Office of the Assistant General Counsel
Federal Assistance Law Division
Washington, DC 20230

March 22, 2007

MEMORANDUM FOR: ADDRESSEES

FROM: Michelle O. McClelland
Chief, Federal Assistance Law Division

SUBJECT: FY 2007 Guidance Regarding Noncompetitive Awards for
Discretionary Federal Assistance Programs and Projects
Under Pub.L. 110-5

This memorandum provides guidance to grant making operating units of the Department and grants administration officials concerning the authority of the Department to make noncompetitive awards for FY 2007 discretionary assistance programs and projects under Pub.L.110-5.

Background

On February 15, 2007, H.J.Res. 20, a full-year continuing resolution (CR), was signed into law as Pub.L. 110-5. The joint resolution provides appropriations for FY 2007, with a moratorium on earmarks. There is no House or Senate report accompanying Pub.L.110-5, and therefore, there are no committee earmarks for the funding it provides. In addition, Section 112 states that any "language specifying an earmark in a committee report or statement of managers accompanying an appropriations Act for fiscal year 2006 shall have no legal effect with respect to funds appropriated" under the joint resolution.

On the same date, the Office of Management and Budget issued a memorandum (M-07-10) for the heads of departments and agencies to provide guidance concerning the obligation of FY 2007 funds under the full-year CR. This memorandum provides that the "Authority and Conditions Provided" in the applicable appropriations act for FY 2006 for "Projects and Activities" referenced in Section 101(a) of Pub.L. 110-5 refer to prior statutory language only, and not to committee reports or other non-statutory earmarks. OMB's memorandum concludes that for agencies funded by Pub.L.110-5, this means that unless a project or activity is specifically identified in statutory text, agencies should not obligate funds on the basis of earmarks contained in Congressional reports or documents, or other written or oral communications regarding earmarks. The OMB memorandum also provides that: "Government-wide and agency regulations and policy governing the selection of grant recipients or contractors will be in effect."

Statutory (Hard) Earmarks

Statutory or hard earmarks are contained in legislative text. In FY 2006, Pub.L. 109-108 provided statutory earmarks for the Department in Sections 207, 208, and 209. For FY 2007, “Title II—Elimination of Earmarks, Adjustments in Funding, and Other Provisions,” “Chapter 9—Science, State, Justice, Commerce, and Related Agencies,” “Sec. 20930” of Pub.L. 110-5 provides that Sections 207, 208, and 209 of Pub.L. 109-108 shall not apply to funds appropriated under Pub.L. 110-5. Moreover, there are no statutory earmarks provided for the Department in any other provisions of Pub.L. 110-5. Accordingly, for FY 2007, the Department’s budget authority does not include any statutory earmarks under Pub.L. 110-5.

Authority to Fund Soft Earmarks Under Section F.1.b.(6) of Chapter 8 of the *Grants Manual*

Soft earmarks are contained in legislative history. The Department’s federal assistance funding policies allow for a Grants Officer to approve noncompetitive funding of a soft earmark when Congress has expressed its intent to fund a project and recipient “by including language in the House Report, the Senate Report, or the Conference Report accompanying appropriations acts.” See Section F.1.b.(6) of Chapter 8 of the *Department of Commerce Grants and Cooperative Agreements Interim Manual (Grants Manual)*. For FY 2007, a House Report (109-520) and Senate Report (109-280) were issued for Commerce, which contain soft earmarks.

As already noted above, Section 112 of Pub.L. 110-5, provides that language specifying earmarks in reports accompanying an appropriations Act for fiscal year 2006 shall have no legal effect with respect to funds appropriated under the joint resolution. Section 112 is silent with respect to earmarks contained in congressional reports for FY 2007. However, earmarks contained in the House and Senate reports prepared during the FY 2007 appropriations process have no legal effect or status vis-à-vis the full-year CR signed into law as Pub.L. 110-5. The FY 2007 Committee reports are not legislative history with respect to Pub.L. 110-5, which does not provide appropriations based on those reports. Those reports concern FY 2007 appropriations bills which were not enacted into law. Moreover, in light of the clear intent of Congress that soft earmarks shall not be given effect under Pub.L. 110-5, it would be inconsistent with that intent, and with the OMB memorandum on earmarks, for the Department to attempt to give effect to soft earmarks in Committee reports for the FY 2007 bills that Congress chose not to enact. Accordingly, the authority to fund soft earmarks noncompetitively under Section F.1.b.(6) of Chapter 8 of the *Grants Manual* is not available for soft earmarks identified in House Report 109-520 and Senate Report 109-280. Such reports are not reports “accompanying appropriations acts” for purposes of Section F.1.b.(6). We have consulted with attorneys in the General Law Division on this matter, and they agree with this conclusion.

In view of the foregoing, Grants Officers shall not approve a noncompetitive award with funds appropriated under Pub.L. 110-5 on the basis of report language from either FY 2006 or FY 2007.

Continued Funding in FY 2007 of Earmarks From Prior Years

As noted previously, OMB Memorandum (M-07-10) provides that agency regulations and policy governing the selection of grant recipients will be in effect. It is the policy of the Department that discretionary funds are awarded to recipients only after maximum practicable competition among eligible applicants. Moreover, financial assistance must be awarded through a merit-based review and selection process whenever possible. The purpose of these policies is to ensure that the Department only funds programs and activities that are meritorious.

There are instances, however, where awards are recommended for funding without full and open competition. Section F.1.b of Chapter 8 of the *Grants Manual* provides the exceptions to the policy for competition, one of which, Congressional direction based on report language, is not available in FY 2007 as discussed above. In reviewing any proposal from a recipient of an earmark award in prior years who is seeking continued funding in FY 2007, operating units and Grants Officers may consider whether any of the other exceptions to competition apply. These include: (1) only one source identified; (2) unusual and compelling urgency; (3) international agreement; (4) national security; and (5) public interest. All such determinations must be properly justified and documented. In the alternative, it may be appropriate to open the award of funding to competition such as through program funding announcements (*Grants Manual*, Chapter 19), or allotting the funds as part of a broad agency announcement. While the discretion to make these decisions is left to the appropriate operating units and Grants Officers, the goal should be to fund only those meritorious proposals that effectively support and advance the Department's missions and objectives, in accordance with applicable law, policy, and regulations.

If you have any questions concerning the application of this policy, please contact the Federal Assistance Law Division at (202) 482-8035.

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